Supreme Court No. 102538-6
Court of Appeals, Division III No. 388425
Spokane Co. Superior Court Cause No. 21-2-03272-32

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SUPREME COURT OF THE STATE OF WASHINGTON

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EARNEST L. RAAB, D.C., et al.,

*Plaintiffs-Respondents,*

vs.

NU SKIN ENTERPRISES. INC., et al.

*Defendants-Petitioners.*

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# RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**

**Rules**



**Constitutional Provisions**

## INTRODUCTION

A party cannot enforce an unconscionable contract, and the Court of Appeals decision below simply honors this well-established principle. "Unconscionability is a 'gateway dispute' that courts must resolve because a party cannot be required to fulfill a bargain that should be voided." *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013). This principle applies to contracts containing forum-selection provisions to the same extent as any other contract. On discretionary review, the appellate panel below reversed in part and remanded for further proceedings to determine the enforceability and severability of a forum selection clause embedded within a contract that contains multiple dispute resolution provisions that this Court has previously held to be unconscionable and un-severable, including elimination of all damage remedies, shortening the applicable statute of limitations, preclusion of class actions, imposition of extreme confidentiality, among other one-sided and overly harsh provisions.

Rather than returning to the superior court for a final (and appealable) decision on the enforceability of the contract, Nu Skin tries to sidestep the Court of Appeals' thoroughly reasoned decision by arguing that the issues were not raised in the superior court in the first instance, but this is simply incorrect, as the Court of Appeals recognized. Plaintiffs-Respondents pled unconscionability the complaint, CP 55, they argued unconscionability in response to Nu Skin's motion to dismiss based on allegedly improper venue, CP 231, they incorporated briefing on unconscionability from a related proceeding filed by Nu Skin in Utah federal court, CP 261-76, and they briefed the issue of unconscionability on appeal, Resp. Br. at 31-48. For its part, Nu Skin responded to these arguments about unconscionability in the superior court, CP 208-10, RP 14, and on appeal, Reply Br. at 6-11, 16-17, 20-21, 25-37. This Court should deny discretionary review, allow the record to be fully developed, and further allow the superior court to make a decision in the first instance regarding the enforceability of the

contract containing the forum selection clause precisely because unconscionability is a "gateway dispute."

## IDENTITY OF RESPONDENTS

Respondents are lower-level distributors for a multi-level marketing scheme promoted by Nu Skin. They were hired by Nu Skin as independent contractors to serve as distributors and derive income by enlisting other distributors and selling Nu Skin products.

## ISSUES PRESENTED

1. Do the dispute resolution provisions incorporated into Nu Skin's Distributor Agreement and Policies and Procedures apply to Respondent's Complaint?

2. Are Nu Skin's dispute resolution provisions enforceable?

3. Is the forum selection clause contained in Nu Skin's dispute resolution provisions severable from the other provisions in which it is embedded?

## RESTATEMENT OF THE CASE

Respondents filed suit against Nu Skin and ten of its higher-level distributors and recruiters in Spokane County Superior Court, based on the illegitimacy of Nu Skin's business

model, misrepresentations regarding the financial potential of distributorships, and conduct that unfairly advantaged higher-level distributors at the expense of lower-level distributors. (Claims against the individual defendants are not part of this review.) The Complaint alleges that Nu Skin transacts business in Spokane County, and that the events giving rise to the claims occurred in substantial part in Spokane County. The Complaint asserts claims against Nu Skin for violation of Washington Consumer Protection Act (CPA), RCW Ch. 19.86; violation of Washington's Antipyramid Promotional Scheme Act, RCW Ch. 19.275; violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*; and common law claims for tortious interference with business expectancy, negligence, and negligent misrepresentation. These claims are asserted on behalf of all Respondents against Nu Skin. Four of the Respondents are residents of Washington and two reside in Spokane County. The remaining Respondents are from Utah, California, and Oklahoma.

When they were recruited as distributors, Respondents signed a 3-page "Distributor Agreement." CP 135-37. The Distributor Agreement incorporates certain "Policies and Procedures," which are made available on-line and must be consented to before they can be viewed. CP 136-37. Nu Skin reserves the right to modify the Policies and Procedures unilaterally on 30 days' notice. CP 54 (§ 1.1); CP 89. The dispute resolution provisions of the Distributor Agreement and Policies and Procedures include the following provisions

***One-sided elimination of damage remedies against Nu Skin***. Normally, the plaintiff can recover damages for injury to their business or property and treble damages under the CPA and the Antipyramid Promotional Scheme Act along with the full complement of tort damages for their common law claims. RCW 19.86.090. However, in its Policies and Procedures, Nu Skin purports to take away any damage remedy for its distributors, even if it is determined that Nu Skin wrongfully terminated their contract or otherwise acted improperly:

> NEITHER ANY PARTICIPANT NOR THE COMPANY, NOR ANY OF THE COMPANY'S RELATED ENTITIES, OFFICERS, DIRECTORS, EMPLOYEES, INVESTORS, OR VENDORS, WILL HAVE ANY LIABILITY FOR ANY PUNITIVE, INCIDENTAL CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES, INCLUDING LOSS OF FUTURE REVENUE OR INCOME, OR LOSS OF BUSINESS REPUTATION OR OPPORTUNITY RELATING TO THE BREACH OR ALLEGED BREACH OF THE CONTRACT OR FOR ANY ACT, OMISSION, OR OTHER CONDUCT ARISING OUT OF THE PARTICIPANT'S STATUS AS AN INDEPENDENT CONTRACTOR AND BRAND AFFILIATE OF THE COMPANY'S PRODUCTS.

CP 52 (§ 6.8(b)). The limitation on Nu Skin's damage remedies is illusory because the Policies and Procedures already purport to give it the sole right and discretion to terminate a distributor's contract, suspend their rights under the contract, reduce payments, and take other adverse action before any dispute resolution process occurs. CP 49-50 (§§ 3.4-3.9).

***One-sided reduction of limitations period.*** The statute of limitations for violations of the CPA and the Antipyramid Promotional Scheme Act is four years. RCW 19.86.120. The

statute of limitations for the common law claims alleged in the Complaint is three years, subject to accrual based on the discovery rule and statutory and equitable tolling. RCW 4.16.080. The Policies and Procedures do not impose any time limit on actions by Nu Skin against a distributor. However, the Policies and Procedures purport to impose a two-year time limit on actions by a distributor against Nu Skin:

> IN ORDER TO PREVENT STALE CLAIMS FROM DISRUPTING THE BUSINESS ACTIVITIES OF BRAND AFFILIATE ACCOUNTS AND THE COMPANY, THE COMPANY WILL NOT TAKE ACTION ON ANY ALLEGED VIOLATION OF THE TERMS AND CONDITIONS OF THE CONTRACT NOT SUBMITTED IN WRITING TO THE COMPANY'S [COMPLIANCE REVIEW COMMITTEE]. WITHIN TWO YEARS OF THE FIRST OCCURRENCE OF THE ALLEGED VIOLATION. ALLEGED VIOLATIONS WILL BE REFERRED TO AS "DISPUTES," WHICH ARE FURTHER DEFINED IN THE GLOSSARY OF DEFINED TERMS IN ADDENDUM A.

CP 49 (§ 3.2). While this provision appears to be limited to contract claims, the definition of "Disputes" incorporated into the provision includes "ANY AND ALL PAST, PRESENT, OR

FUTURE CLAIMS, DISPUTES, CAUSES OF ACTION OR COMPLAINTS, WHETHER BASED IN CONTRACT, TORT, STATUTE, LAW, PRODUCT LIABILITY, EQUITY, OR ANY OTHER CAUSE OF ACTION … BETWEEN YOU AND THE COMPANY." CP 36 & 51.

***Elimination of class actions.*** Class relief was requested in the Complaint, CP 62 (¶ 6.53); and class relief is available for the claims alleged in the Complaint, CR 23. However, the Nu Skin Policies and Procedures purport to eliminate class relief: "No Dispute will be adjudicated, in arbitration or any other judicial proceeding, as a class action." CP 52 (§ 6.5).

***One-sided Confidentiality.*** Normally, judicial proceedings are open to the public. Wash. Const. Art. I, § 10. However, the Policies and Procedures purport to impose confidentiality except to the extent Nu Skin may use the result of proceedings as precedent or Nu Skin otherwise consents:

> All arbitration proceedings will be closed to the public and confidential. Except as may be required by law and the Company's use of an arbitration award as precedence for

> deciding future Disputes, neither a Participant nor the arbitrator may disclose the existence, content, or results of any arbitration without the prior written consent of all the Participants.

CP 52 (§ 6.9); *see also* CP 52 (§ 6.6, limiting those who may attend).

***One-sided choice of arbitrator.*** Normally, the choice of an arbitrator or arbitrators is a matter of agreement between the parties. RCW 7.04A.110(1). If the parties cannot agree, they can petition the court to appoint an arbitrator. *Id.* However, the Nu Skin Policies and Procedures require a distributor to choose from "a list of potential arbitrators" provided by Nu Skin. CP 51 (§ 5).

***One-sided severability clause.*** Normally, the CPA and Antipyramid Promotional Scheme Act have extraterritorial reach and effect. *Thornell v. Seattle Service Bureau*, 184 Wn.2d 793, 803-04, 363 P.3d 587 (2015) (holding out-of-state plaintiff may bring CPA claim against out-of-state defendant for the acts of its in-state agent); *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 501 P.2d 290 (1972) (holding Washington plaintiff has CPA

claim against out-of-state defendant). However, the Nu Skin Policies and Procedures purport to limit the extraterritorial effect of any proceeding:

> Any provision of the Contract that is prohibited, judicially invalidated, or otherwise rendered unenforceable in any jurisdiction is ineffective only to the extent of the prohibition, invalidation, or unenforceability in that jurisdiction, ***and only within that jurisdiction. Any prohibited judicially invalidated or unenforceable provision of the contract will not invalidate or render unenforceable any other provision of the Contract, nor will that provision of the Contract be invalidated or rendered unenforceable in any other jurisdiction.***

CP 54 (§ 1.4, emphasis added).

Embedded within the foregoing dispute-resolution provisions are clauses requiring all disputes to be resolved by arbitration in Salt Lake City, Utah, under Utah law, without regard for the location where the dispute arise, the burden or expense of a Utah forum, or the remedies available under Utah law. CP 45, 51 & 54. These provisions were all imposed by Nu Skin without any opportunity or ability to negotiate different provisions.

In the Complaint, Respondents alleged that these dispute resolution provisions were part of a "classic contract of adhesion," "facially unconscionable," "void," and "unenforceable." CP 53-55. Nonetheless, on the basis of these dispute resolution provisions, Nu Skin initially filed a petition in the Utah federal court to compel arbitration in the State of Utah. Next, Nu Skin filed a motion to dismiss the Complaint pursuant to CR 12(b)(3) on grounds of improper venue, alternatively asking the superior court to stay proceedings pending a decision by the Utah federal court.

In opposing Nu Skin's motion to dismiss, Respondents argued that their Complaint did not present a "dispute" subject to arbitration in Utah under the contract. They also argued that a Utah forum would contravene strong Washington public policy reflected in the CPA and Antipyramid Promotional Scheme Act. Lastly, they argued that the contract provisions on which Nu Skin relied were unconscionable. CP 231. Respondents incorporated briefing regarding the issue of unconscionability that was

submitted to the Utah federal court because there was "a substantial amount of overlap" between Nu Skin's motion to dismiss the Complaint and the Utah federal proceeding. CP 231, 267-75. Nu Skin did not disagree, but rather offered to make its own pleadings submitted to the Utah federal court available to the superior court. RP 14.

The superior court denied Nu Skin's motion to dismiss on grounds that the Complaint did not present a "dispute" subject to arbitration in Utah under the terms of the Distributor Agreement and Policies and Procedures. CP 345. Nu Skin sought discretionary review. While the motion for discretionary review was pending, the Utah federal court denied Nu Skin's petition to compel arbitration based on the preclusive effect of the superior court's order. *Nu Skin Enters., Inc. v. Raab*, 2022 WL 2118223 (D. Utah June 13, 2022).

On discretionary review, the Court of Appeals held that venue was proper in Spokane County, and that the issue of arbitrability was properly decided by the court rather than the

arbitrator or the Utah federal court. The court disagreed with the superior court's ruling that the Complaint did not present a dispute within the meaning of the Nu Skin Distributor Agreement and Policies and Procedures. However, because the superior court had based its decision on these grounds, the appellate court remanded for a determination under Washington law whether the dispute resolution provisions of Nu Skin's Distributor Agreement and Policies and Procedures were enforceable.

From this decision of the Court of Appeals, Nu Skin seeks further review by this Court.

## ARGUMENT

### A. This Court should deny Nu Skin's petition for review because the superior court should decide in the first instance whether the dispute resolution provisions of its Distributor Agreement and Policies and Procedures are enforceable, and whether the forum-selection clause embedded in those provisions is severable.

Nu Skin gives lip service to the criteria for review in RAP 13.4, but then proceeds to ignore them and instead re-argue the issues decided by the Court of Appeals. The Court of Appeals decision involves application of settled law to the facts of the

case and affects only the parties to this dispute. Because the superior court based its decision on the *applicability* of Nu Skin's dispute resolution provisions rather than the *enforceability* of those provisions, the Court of Appeals properly exercised its discretion to remand the case to the superior court to decide issues of enforceability in the first instance. RAP 12.2 ("The appellate court may reverse, affirm, or modify the decision being reviewed and *take any other action as the merits of the case and the interest of justice may require*"; emphasis added); *Hay v. Chehalis Mill Co.*, 172 Wash. 102, 110, 19 P.2d 397 (1933) (remanding to trial court to consider material issue where it appeared the trial court did not consider the issue at all and instead rested its judgment on an erroneous legal ground, observing, "We do not think that we are called upon, or that it is proper for us, to pass upon that issue without first giving the trial court an opportunity of doing so"); *In re Estate of Gillespie*, 12 Wn. App. 2d 154, 176, 456 P.3d 1210, *rev. denied*, 196 Wn.2d 1009 (2020) (remanding to give trial court opportunity to decide

issue in the first instance). Remand will not be futile because there is already substantial evidence that Nu Skin's dispute resolution provisions, including the forum selection clause contained therein, are neither enforceable nor severable.

### 1. Nu Skin's dispute resolution provisions are substantively unconscionable.

"[E]ither substantive *or* procedural unconscionability is sufficient to void a contract." *Gandee v. LDL Freedom Enters.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013) (emphasis in original). A term is substantively unconscionable where it is "one-sided or overly harsh." *Id.*, 176 Wn.2d at 603. In this case, many of Nu Skin's dispute resolution provisions have already been determined by this Court to be substantively unconscionable. Specifically:

- Elimination of damage remedies is substantively unconscionable because it effectively exculpates a party like Nu Skin for violations of the CPA. *Hill,* 179 Wn.2d at 55-56 (limitation on employees' ability to recover back pay held unconscionable); *Zuver v. Airtouch Commc'ns,* 153 Wn.2d 293, 103 P.3d 753 (2004) (limitation of punitive damages held unconscionable).

- Shortening the statute of limitations for CPA claims by half, from four to two years, is substantively unconscionable because it provides inadequate time to remedy violations of the CPA. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 399, 191 P.3d 845 (2008) (2-year limitations period held unconscionable).

- Elimination of class actions is substantively unconscionable because class remedies "not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the community as a whole." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 852, 161 P.3d 1000 (2007) (prohibition of class actions held unconscionable).

- A one-sided confidentiality provision is substantively unconscionable because secrecy "unreasonably favors repeat players" such as Nu Skin, "conceals any patterns of illegal or abusive practices," "hampers plaintiffs in learning about potentially meritorious claims," hinders proof of public interest under the CPA, RCW 19.86.093, and "serves no purpose other than to tilt the scales" in favor of parties like Nu Skin. *McKee*, 164 Wn.2d at 398 (confidentiality provision held unconscionable).

- A one-sided choice of arbitrator is substantively unconscionable because it is incompatible with the voluntary agreement-based nature of arbitration in general and choice of arbitrator in particular. RCW 7.04A.110(1).

- Limitations on the extraterritorial reach of the CPA and Antipyramid Promotional Scheme Act are

substantively unconscionable because they undermine the purpose of the CPA, which is liberally construed "to protect the public and foster fair and honest competition." RCW 19.86.920; *see also* RCW 19.275.040 (Antipyramid Promotional Scheme Act involves "matters vitally affecting the public interest for purpose of applying [the CPA]").

- Choice of foreign law is substantively unconscionable when Washington law would otherwise apply, the foreign law violates a fundamental public policy of Washington, and Washington's interest in determining the issue outweighs the interests of the foreign jurisdiction. *McKee,* 164 Wn.2d at 384.[1]

- Choice of a foreign forum is substantively unconscionable when it entails prohibitive costs or deprives the plaintiff of a remedy. *Adler v. Fred Lind Manor,* 153 Wn.2d 331, 353-54, 103 P.3d 773 (2004); *see also Dix v. ICT Group,* 60 Wn.2d 826, 834, 161 P.3d 1016 (2007) (forum selection clause unenforceable if it is "so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or of its day in court," or "enforcement would contravene a strong public policy of the State where the action is filed").

[1] Washington law governs substantive unconscionability, despite the forum selection clause contained in Nu Skin's dispute resolution provisions, not least because the analysis of unconscionability implicates the "fundamental public policy" of the State of Washington. *Raab v. Nu Skin Enters.,* — Wn. App. 2d —, 536 P.3d 695, 713-18 (2023).

Where necessary, remand is appropriate for discovery, fact finding, and a final decision on these issues. *Adler,* 153 W.2d at 353-54 (involving cost of forum).

### 2. Nu Skin's forum selection clause cannot be saved by severance of the other unconscionable dispute resolution provisions in which it is embedded.

When unconscionable provisions "permeate" an agreement, the court must strike the entire affected section, if not the entire contract. *McKee*, 164 Wn.2d at 402. The rationale for refusing to sever was explained in *McKee*:

> Permitting severability ... in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.

164 Wn.2d at 403.

While Nu Skin understandably wants to focus on its forum selection clause in isolation from the rest of the dispute resolution provisions, the issue of severance must be viewed in context. In *McKee*, the Court found that unconscionability permeated a contract and declined to sever where there were *four*

unconscionable provisions. *Id.* In *Gandee,* 176 Wn.2d at 607, and *Hill,* 179 Wn.2d at 55-57, the Court found that unconscionability permeated a contract and declined to sever where there were *three* unconscionable provisions. 176 Wn.2d at 607. In this case, there are as many as *eight* unconscionable provisions that permeate Nu Skin's agreement, precluding severance. It is difficult to imagine a more compelling case for unconscionability.

## CONCLUSION

Based on the foregoing, this Court should deny Nu Skin's Petition for Review.

## CERTIFICATE OF COMPLIANCE

This document contains 3,198 words, excluding the parts of the documents exempted from the word court by RAP 18.17.

Respectfully submitted this 22nd day of December, 2023.

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