71625-5

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No. 71625-5 - I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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MICHAEL ROMNEY; FARON BAUER; and KRISTEN CHILDRESS,
individually and on behalf of all others similarly situated,

Respondents,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation;
FRANCISCAN HEALTH SYSTEM, a Washington Corporation;
FRANCISCAN HEALTH VENTURES, a Washington Corporation;
FRANCISCAN NORTHWEST PHYSICIANS HEALTH NETWORK,
LLC, a Washington Corporation; and CATHOLIC HEALTH
INITIATIVES, a Colorado Corporation,

Appellants.

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# BRIEF OF RESPONDENTS

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THE BLANKENSHIP LAW FIRM, P.S.
Scott C. G. Blankenship, WSBA No. 21431
Paul S. Woods, WSBA No. 42976
1000 Second Avenue, Suite 3250
Seattle, Washington 98104
Telephone: (206) 343-2700
*Attorneys for Respondents*

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## I. INTRODUCTION

The trial court properly voided the unconscionable Arbitration Addendum of Defendants Franciscan Medical Group ("FMG"), Franciscan Health Systems ("FHS"), and their affiliates—an Addendum Defendants forced their employees to sign. FMG threatened to fire employees and go after them for previously earned wages if the employees would not quickly sign the grossly one-sided, harsh Addendum. Under the shadow of these threats, Plaintiffs had no choice but to sign the Addendum, which significantly limited their remedies, relief, and rights. Defendants, however, in no way bound themselves to this harsh and one-sided arbitration agreement, and left themselves the option to litigate all legal and equitable claims in "state or federal court."

While Washington law will enforce properly drafted arbitration agreements, one-sided unconscionable agreements like this one must be voided. The Addendum in this case contains at least six provisions that are unconscionable under numerous recent holdings of the Washington Supreme Court. These six provisions include the following: (1) Defendants' employees (including Plaintiffs) must arbitrate claims against Defendants, while Defendants may sue employees in court for any and all equitable and legal relief related to their employment, which is unconscionable under the Supreme Court's holding in *Zuver v. Airtouch Communications*, 153 Wn.2d 293, 103 P.3d 753 (2004); (2) Employees are prohibited from collecting damages they may otherwise recover under

the law, while Defendants may collect all equitable and legal relief from their employees, which is unconscionable under the Supreme Court's holdings in *Zuver* and *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013); (3) Employees are prohibited from collecting attorney fees they may otherwise recover, while Defendants may collect attorney fees and any other relief from their employees, which is unconscionable under the Supreme Court's holdings in *Hill* and *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004); (4) Employees are forced to shoulder half the cost of an expensive private arbitration when they would otherwise be entitled to a public and practically free judicial forum for their claims, which is unconscionable under the Supreme Court's holding in *Hill*; (5) Employees are forced to arbitrate their claims against Defendants confidentially (even though Plaintiff's claims are matters of public concern relating to patient care that impacts Washington citizens), while Defendants may publically sue employees in court for alleged bad acts, which is unconscionable under the Supreme Court's holdings in *Zuver* and *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008); (6) Employees are forced to arbitrate any disputes they have with each other, even though they never entered into an agreement with each other to arbitrate disputes, which is unconscionable under *Hill*.

Under these Supreme Court holdings, these provisions are grossly one-sided, substantively unconscionable, and void. Moreover, because these void provisions pervade the Arbitration Addendum, under the

Supreme Court's holdings in *Hill* and *McKee*, the entire Addendum is unconscionable and void. Indeed, in *Hill* the Court held that the presence of only three unconscionable provisions pervaded the arbitration agreement and rendered the entire agreement void, whereas in this case there are at least six unconscionable provisions that pervade the entire Addendum. Therefore, the Superior Court followed this Supreme Court precedent and ruled that the Addendum is substantively unconscionable—as well as procedurally unconscionable given that Plaintiffs were forced to sign the Addendum. For both these reasons, the Superior Court properly ruled that the Addendum is void and unenforceable.

## II. ASSIGNMENT OF ERROR

Respondents assign no error to the rulings of the Superior Court.

## III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Did the Superior Court properly strike Defendants' Arbitration Addendum as unconscionable, when the Addendum contains numerous provisions the Washington Supreme Court has already struck as substantively unconscionable, including provisions that (1) force Plaintiffs to arbitrate their claims while allowing Defendants to sue Plaintiffs in court, (2) limit Plaintiffs' right to damages and attorney fees while allowing Defendants to recover all equitable and legal remedies, (3) force employees to share the cost of arbitration, (4) force Plaintiffs to arbitrate their claims confidentially while allowing

Defendants to publically sue Plaintiffs, and (5) force Plaintiffs to arbitrate claims against non-parties to the Addendum? Answer: YES.

2. Did the Superior properly rule that Defendants' Arbitration Addendum is void and Plaintiffs need not arbitrate their claims, given that the Addendum is unconscionable under Washington Supreme Court precedent? Answer: YES.

## IV. STATEMENT OF THE CASE

### A. Defendants fired Dr. Romney and Dr. Bauer for reporting unsafe clinical practices and for requesting payment of wages owed to themselves and other employees.

Dr. Romney, Dr. Bauer, and Dr. Childress provided medical services at Defendants' Prompt Care facility. *CP 39, 75, 111.*[1] Plaintiffs excelled at their jobs, receiving no discipline, write-ups, or counseling, while being regarded by their peers and patients as outstanding medical providers. *CP 39-40, 75-76, 111.*

During their employment, Dr. Romney and Dr. Bauer expressed serious concerns about another doctor's unsafe clinical practices. *CP 39-40, 75-76.* They complained that the doctor's treatment of patients was impaired and was harming and jeopardizing patients' health and safety. *Id.* Dr. Romney and Dr. Bauer adhered to Defendants' guidelines by reporting their concerns, but Defendants delayed remedying the problem and patient safety remained at risk. *Id.*

[1] The Clerk's Papers are cited herein as "CP ___" and the Report of Proceedings as "RP ___."

Dr. Romney and Dr. Bauer also complained about Defendants not paying wages owed to themselves and to other physicians and medical providers. *CP 39, 75, 148.* Dr. Romney's and Dr. Bauer's employment was governed by a June 2011 "FMG Physician Employment Agreement," which said they would be compensated between $100 and $109.34 per hour worked at any clinic location in excess of 423 hours on a per quarter basis. *CP 39, 58, 73, 75, 94, 109.* Similarly, Dr. Childress's employment was governed by a January 2012 "FMG Professional Provider Agreement," which said she would be compensated $75 per hour worked at any clinic location in excess of 423 hours on a per quarter basis. *CP 111, 133.* Although the Plaintiffs worked in excess of 423 hours per quarter, Defendants failed to credit Plaintiffs for all hours worked or to pay them all wages owed in breach of their Employment Agreements. *CP 39, 75, 111, 148.*

When Defendants failed to address the numerous complaints, Dr. Romney and Dr. Bauer escalated their complaints and were told by Defendants' Human Resources that they would discuss their ongoing concerns regarding patient safety and unpaid compensation at an upcoming meeting. *CP 39-40, 76.* Two days before the meeting was to occur, however, Dr. Romney and Dr. Bauer were retaliatorily and preemptively fired for allegedly being "unable to form an effective and collegial relationship with other members of our Prompt Care Team." *CP 156.* This was a false reason. In fact, prior to their terminations, Dr. Romney and Dr. Bauer had never been counseled for any performance

issues or issues relating to their ability to interact with colleagues. *CP 40, 76.* Defendants also vindictively revoked Dr. Romney's and Dr. Bauer's hospital/medical staff privileges. *Id.* The unwarranted terminations have damaged their reputations as physicians and limited their ability to find future employment. *Id.*

Therefore, Dr. Romney and Dr. Bauer sued Defendants for retaliation and wrongful discharge in violation of Washington public policy and wage statutes, and all three Plaintiffs sued for unpaid wages under RCW 49.48 *et seq.* and 49.52 *et seq.*, individually and on behalf of a class of all other similarly situated physicians, physician assistants, ARNPs, and nurse-midwifes. *CP 145.*

**B. Defendants forced Plaintiffs to sign one-sided Arbitration Addendums filled with unconscionable provisions, which force employees to arbitrate their claims yet allow Defendants to sue employees for unlimited relief in court.**

Defendants are improperly trying to force Plaintiffs to arbitrate their claims under the terms of a blatantly one-sided Arbitration Addendum,[2] which Defendants forced Plaintiffs to sign during their employment under threat of being fired. *CP 215-216, 224, 228-229.* The Arbitration Addendum would unilaterally force Plaintiffs to arbitrate their claims while limiting Plaintiffs' rights to damages, to attorney fees, and to a public forum. Defendants, however, are not similarly bound and can pursue unlimited equitable and legal relief against Plaintiffs in a public

[2] Plaintiffs were forced to sign identical Arbitration Addendums which are therefore referred to in the singular throughout this brief. See Appellants' Opening Brief at 3, n.3.

court of law. *CP 63-64, 99-100, 135-136.* Thus, as explained below, the Addendum is both substantively and procedurally unconscionable and is therefore void.

### 1. Defendants forced Plaintiffs to sign one-sided Arbitration Addendums under threat of termination.

As noted above, Plaintiffs were employed by Defendants under the terms of substantially identical Employment Agreements, which were renewed during their employment. Each Plaintiff's Employment Agreement contained an identical Arbitration Addendum. Contrary to Defendants' claims, Plaintiffs never "agreed" to the Arbitration Addendum, but rather were *required* to sign the Addendum in order to remain employed. Plaintiffs never intended to waive their right to an affordable forum and never intended to waive their substantive rights and remedies should any disputes against their employers arise. *CP 40, 77, 112.*

Rather, all three Plaintiffs were informed by Defendants' management (Medical Director Jeff Harrison or HR Director Cheree Green) that they were *required* to sign the Employment Agreements and Arbitration Addendums if they wanted to continue working as FMG employees. *CP 215-216, 224, 228-229.* Plaintiffs were pressured to sign the documents quickly, with Defendants going as far as threatening to retroactively seek reimbursement of Dr. Romney's and Dr. Bauer's earned wages for work they performed prior to the Employment Agreements being executed. *Id.*

None of the Plaintiffs were told that they could negotiate the Employment Agreements. The Agreements (including the Arbitration Addendums) were presented as non-negotiable and submitted to Plaintiffs on a take it or leave it basis. *Id.* When Dr. Childress attempted to negotiate parts of the Employment Agreement, she was informed it was a "standard contract," which could not be modified for individual providers. *CP 224.* Similarly, when another FMG physician, Dr. Christine Lomotan attempted to negotiate a more favorable non-compete clause in her Employment Agreement, she was unsuccessful and her employment ultimately severed. *CP 215, 229.* In fact, Plaintiffs are not aware of any physicians or professional providers that were allowed to forego or negotiate the arbitration provision in any way. *CP 216, 224, 228.*[3] Thus, Plaintiffs were never given chance to negotiate or forego the Arbitration Addendums.

Because their only option was to sign the Addendums or find alternative work, Plaintiffs strongly refute Defendants' claim that Plaintiffs ever "agreed" to Defendants' take-it-or-leave-it Arbitration Addendums, which contain grossly one-sided provisions that would eliminate Plaintiffs' rights to certain damages, attorney fees, and a public forum, all while allowing Defendants to sue their employees for any and all equitable and legal relief in a public court.

[3] Plaintiffs are confident that all FMG physicians and nurse practitioners are subject to the same arbitration provision, though presently, Plaintiffs lack the benefit of discovery.

**2. Defendants' one-sided Arbitration Addendums force Plaintiffs to arbitrate all claims against Defendants, while allowing Defendants the unilateral option to publically sue their employees in court.**

The Addendums and accompanying provisions in the Employment Agreements unilaterally allow Defendants to sue Plaintiffs and other employees in court, while forcing Plaintiffs and other employees to arbitrate any and all claims they have against Defendants. Specifically, the Arbitration Addendums provide:

> This Addendum requires You and FMG to arbitrate all Claims (as defined below) between You and FMG...
>
> "Claims" means all disputes arising out of or related to the Employment Agreement, your employment by FMG, and/or your separation from employment with FMG...

*CP 63, 99, 135.* However, the "FMG Specific Provisions" of Dr. Romney's and Dr. Bauer's Employment Agreements expressly allows Defendants to initiate lawsuits against its employees for both "injunctive relief" and for any "such other remedies as may exist at law" relating to Plaintiffs' employment:

> The parties acknowledge and agree that, since a remedy at law for any breach or attempted breach of all the provisions of this [Employment] Agreement shall be inadequate, **FMG shall be entitled to injunctive and other equitable relief**, including specific performance, in case of any such breach or attempted breach, **in addition to such other remedies as may exist at law** . . . **The parties consent to exclusive jurisdiction and venue in the state and federal courts** sitting in County of Pierce, State of Washington and waive any objection to the jurisdiction of, or the venue of any action instituted in, such courts.

*CP 67,103.* (emphasis added).

Likewise, Exhibit F ("Non-Competition and Non-Solicitation") of Dr. Romney's and Dr. Bauer's Agreements allows Defendants to seek injunctive relief against their employees "in addition to any other remedy it may have in law or equity" in any "court of competent jurisdiction." *CP 66, 102.* Similarly, FMG is also able to unilaterally bring claims for broad relief against Dr. Childress in a "court of competent jurisdiction." *CP 123.* There are no equivalent provisions allowing Plaintiffs the ability to initiate a lawsuit in court, making the Addendums completely one-sided. *CP 45-71, 81-107, 116-136.* Thus, employees (including Plaintiffs) are forced to arbitrate their claims against Defendants, but Defendants may unilaterally pursue any equitable or legal relief against their employees in court.

Finally, the Addendum unilaterally allows Defendants to litigate third party claims against employees in Court:

> "Claims" also does not include, **at the option of FMG, any claim by FMG against You** based upon Your actions arising out of any claim against FMG by a third party brought in another legal proceeding and as to which FMG desires to join its claim against You into that third party proceeding...

*CP 63, 99, 135.* (emphasis added). Again, there is no equivalent language permitting Plaintiffs to join Defendants in court in the event of a third party claim. Once again, Defendants can pick and choose the forum while limiting Plaintiffs to arbitration. The Addendum severely limits employees' ability to recover damages and fees, while letting Defendants seek any equitable relief and "remedies as may exist at law."

Beyond forcing their employees to submit to one-way arbitration, Defendants' Arbitration Addendum unilaterally strips Plaintiffs and their fellow employees of damages and attorney fees and costs they are entitled to under Washington law, while simultaneously allowing Defendants to seek any and all equitable and legal relief against their employees.

In violation of RCW 49.48, 49.52, Washington common law, and public policy, the Addendum prohibits awarding employees exemplary, consequential, or incidental damages unless such damages are ***required*** by law (as opposed to the more permissive "provided by law"):

> No arbitrator shall have the power to alter your at-will employment status or to impose any limit on FMG's discretion to discipline or discharge any employee, except as *provided* by law. Unless otherwise *required* by law, the Arbitrator shall not have the authority to award You or FMG any punitive, exemplary, consequential or incidental damages...

*CP 63, 99.* (emphasis added). Similarly violating RCW 49.48, 49.52, and common law and public policy, the Addendum only allows employees to recover attorney fees and costs if such an award is *required* by law (whereas FMG can seek relief "provided by law"—a lesser standard):

> Except as otherwise *required* by law, each party shall bear his/her own attorneys' fees and other costs associated with any Claims between the parties.

*CP 63, 99.* (emphasis added).

In contrast, as discussed above, accompanying provisions in the Employment Agreements unilaterally permit Defendants to seek any and all "injunctive relief," "other equitable relief," "such other remedies as

may exist at law," and "all remedies available to it under this Agreement or applicable law" in court. *See supra*. Thus, unlike their employees, Defendants may obtain any equitable or legal relief "available" by law—even if such relief is not "required" by law.

Likewise, Dr. Childress' Employment Agreement repeatedly states that Defendants may seek full equitable and legal relief in claims against Dr. Childress. The Agreement says that "Upon termination of this Agreement, FMG shall have all remedies available to it under this Agreement or applicable law ... " *CP 122.* Meanwhile, "in addition to any other remedy it may have in law or equity, FMG shall be entitled to an immediate injunction or other appropriate order" for violations of non-compete and non-solicitation clauses. *CP 123.* For any violations of FMG's confidentiality provisions, "FMG shall be entitled to injunctive relief and other equitable relief ... in addition to other remedies that exist at law or in equity." *CP 125.* Again, Defendants are allowed to seek all equitable and legal relief "allowed" by law, even if such relief if not "required" by law.

**3. The Arbitration Addendums force employees to pay for arbitration.**

The Addendum also forces employees to bear the costs of arbitration—an expense that far exceeds any costs the employees would pay to pursue their claims in court:

> You and FMG shall equally share all costs of arbitration, including the fees of the American Arbitration Association and the appointed Arbitrator, unless you prove to the

> arbitrator that the costs of the arbitration would effectively prevent you from pursuing your claim.

*CP 63, 99, 135*. These costs, which would easily reach six figures, would significantly deter Plaintiffs from pursuing their claims. *CP 41, 77, 112, 140*.[4]

#### 4. The Arbitration Addendum also subjects individuals to arbitration who are not parties to the Agreement.

Under Section 2 of the Arbitration Addendum, any and all claims between Plaintiffs and other FMG employees must be arbitrated even if such claims are unrelated to employment at FMG:

> By signing this Addendum, You and FMG each agree that all Claims between you and FMG, *including all Claims You have against any employee of FMG and all Claims any employee of FMG has against You,* shall be exclusively decided by arbitration...

*CP 63, 99, 135.* (emphasis added). Notably, however, Plaintiffs and other FMG employees have never entered into agreements with each other that require them to arbitrate any claims against each other. *CP 63-64, 99-100, 135-136.* Yet, as written, any disputes between Defendants' employees would have to be arbitrated, even if unrelated to their employment (for example, a car accident between two FMG employees). Thus, the provision is greatly overbroad and overreaching.

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[4] The only way Plaintiffs can avoid paying half the cost of arbitration is if they "prove" it would "effectively prevent" them from pursing their claims—vague terms that are prone to mischief and thus unconscionable under the Washington Supreme Court's recent holding in *Hill v. Garda*, as explained in detail below. 176 Wn.2d 47, 56 n.4 (2013).

### 5. The Addendum incorporates a confidentiality provision, which does not apply to Defendants if they file claims in court as allowed by the Agreements.

The Arbitration Addendum states: "In all cases, such arbitration shall be final and binding and conducted under the most current version of the American Arbitration Association's National Rules for the Resolution of Employment Disputes." *CP 63, 99, 135.* By expressly adopting the AAA's Rules, the Addendum imposes confidentiality on issues of public concern that would otherwise be open to the public if litigated in court. Specifically, Rule 23 of the AAA Employment Rules provides that "[t]he arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." *CP 160.* Similarly allowing for closed hearings, Rule 22 provides that "[t]he arbitrator shall also have the authority to decide whether any person who is not a witness may attend the hearing." *Id.* Defendants, however, may file public lawsuits against their employees in court, as explained above. Thus, the Addendum allows Defendants to force confidentiality on employees who sue Defendants, while simultaneously allowing Defendants to publically sue their employees.

## C. The Superior Court properly ruled the Arbitration Addendum is unconscionable and thus void.

At the start of this lawsuit, Plaintiffs moved the Superior Court to strike the Arbitration Addendum as unconscionable, and Defendants cross-moved to compel arbitration. *CP 12-37, 169-189.* In briefing and at oral argument, Plaintiffs explained how they were forced to sign the one-

sided Arbitration Addendums, and how the Addendums were blatantly one-sided, lacking any modicum of mutuality. *CP 195-96*; *RP 10:24-11:10*. Plaintiffs' briefing also explained that one-sided arbitration agreements, which unilaterally limit one party's damages and only force one party to arbitrate, are unconscionable and void under numerous holdings by the Washington Supreme Court, including *Hill v. Garda*, *Gandee v. LDL Freedom Enters.*, *McKee v. AT & T Corp.*, and *Zuver v. Airtouch Communications*. *CP 12-37, 193-213*. Plaintiffs further explained how the Supreme Court's holdings in *Hill*, *Gandee*, and *McKee* required the Addendum to be stricken in its entirety because the numerous one-sided, unconscionable provisions pervaded the entire arbitration agreement. *Id*.

On January 24, 2014, the Superior Court issued an oral ruling striking down the Arbitration Addendum as unconscionable. *RP 31:16-32:4*. The Superior Court explained that it "looked at the totality of the circumstances" and weighed the arguments of both parties. *RP 28:11-13*. The Court followed the clear holdings of the Washington Supreme Court and struck the Arbitration Addendum as unconscionable and thus void for multiple reasons, including that "the plaintiffs were not able to negotiate and that the contract is overly one-sided ... patently unfair and harsh." *RP 31:17-19*. Consistent with *Hill*, *Gandee*, and *McKee*, the Superior Court also found that the unconscionable provisions in the Addendum could not be severed and therefore the Addendum as a whole was unconscionable and void. *RP 31:23-32:4*.

## V. ARGUMENT

### A. Public policy does not favor arbitration when there is no valid arbitration agreement.

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013). Therefore, contrary to Defendants' claim in their Opening Brief, there is no liberal policy favoring arbitration when a valid arbitration agreement does not exist in the first place. *Digital Control Inc. v. Radiodetection Corp.*, 294 F. Supp. 2d 1199, 1202 (W.D. Wash. 2003).

Indeed, the Federal Arbitration Act ("FAA") itself states that arbitration agreements are invalidated on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Therefore, the Washington Supreme Court has invalidated numerous arbitration agreements as "unconscionable" under basic Washington contract law, *despite* the existence of strong federal and state policy favoring arbitration. *See e.g., Hill*, 179 Wn.2d 47; *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 293 P.3d 1197 (2013); *McKee v. AT & T Corp.*, 164 Wn.2d 372, 404, 191 P.3d 845 (2008).

Indeed, despite the U.S. Supreme Court case *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) being interpreted as preempting state law unfavorable to arbitration, in *Gandee* the Washington Supreme Court unanimously rejected the argument that the FAA preempted a finding of unconscionability based on Washington contract law, stating:

> [T]he arbitration clause at issue here contained numerous unconscionable provisions based on the specific facts at issue in the current case. *Concepcion* provides no basis for preempting our relevant case law nor does it require the enforcement of [defendant's] arbitration clause.

176 Wn.2d at 610. Thus, as illustrated by *Gandee, Hill,* and *McKee,* when arbitration provisions are unfair, one-sided, or otherwise undermine a party's ability to vindicate his or her statutory rights, they are unconscionable and must be voided by Washington courts. Defendants' overreliance on FAA policy is a red herring. It is black letter law that because the Arbitration Addendum is invalid under Washington contract law, the FAA has no relevance to this dispute.

**B. Under numerous binding Supreme Court holdings, the Arbitration Addendum is one-sided and thus substantively unconscionable.**

In the context of arbitration agreements, the Washington Supreme Court has clearly stated that "[e]ither substantive or procedural unconscionability is enough to void a contract." *Hill*, 179 Wn.2d at 55; *see also Gandee*, 176 Wn.2d at 603 (same). Washington does not require both substantive and procedural unconscionability—either one, on its own, requires invalidating an arbitration agreement. *Id.* Moreover, where substantively unconscionable terms "'pervade' an arbitration agreement, [the Courts] 'refuse to sever those provisions and declare the entire agreement void.'" *Gandee*, 176 Wn.2d at 603, *quoting Adler v. Fred Lind Manor*, 153 Wn.2d 331, 358, 103 P.3d 773 (2004); *Hill*, 179 Wn.2d at 57-58.

As explained below, Defendants' Arbitration Addendum is substantively unconscionable because it is grossly one-sided and contains numerous provisions that the Washington Supreme Court has previously struck down as substantively unconscionable. Indeed, the Addendum is entirely one-sided, as it forces Plaintiffs to arbitrate their claims against Defendants while simultaneously allowing Defendants to bring any and all claims against Plaintiffs in court. Moreover, the Addendum contains purely one-sided limitations on Plaintiffs' right to recover certain damages and attorney fees, while allowing Defendants to recover any and all equitable and legal remedies from Plaintiffs. These unconscionable provisions pervade the entire agreement, and therefore, the Superior Court properly struck down the Addendum as substantively unconscionable.

**1. The Arbitration Addendum is unconscionably one-sided because it forces employees to arbitrate their claims while allowing Defendants to sue employees in court.**

The Washington Supreme Court has repeatedly held that a term in an arbitration agreement "is substantively unconscionable where it is 'one-sided or overly harsh ... '" *Gandee*, 176 Wn.2d at 603, *quoting Adler*, 153 Wn.2d at 344-45; *see also Hill*, 179 Wn.2d at 55 (same). In fact, in *Zuver v. Airtouch Communications*, the Supreme Court held that arbitration provisions that appear on their face to be bilateral are in fact unconscionable if they would have the impermissible *effect* of being overly one-sided. *Zuver,* 153 Wn.2d 293, 318, 103 P.3d 753 (2004).

Defendants attempt to circumvent this clear, binding precedent by citing a Court of Appeals opinion, *Walters v. A.A.A. Waterproofing, Inc.,*

for the proposition that arbitration provisions do not need to impose perfectly mutual or identical obligations on both parties. 120 Wn. App. 354, 360, 85 P.3d 389 (2004) ("*Walters I*"). However, on review, *Walters I* was remanded to the Court of Appeals in light of the holding in *Zuver*. *Walters v. A.A.A. Waterproofing, Inc.*, 153 Wn.2d 1023, 108 P.3d 1227 (2005).

In fact, *Zuver* (which supersedes *Walters I*) rejected this argument. In response to the argument that a "complete mutuality of remedies is not required in arbitration agreements," the *Zuver* Court stated:

> Zuver, however, *does not* simply argue that the arbitration agreement here lacks mutuality ... Rather, she contends that the *effect* of this provision is so one-sided and harsh that it is substantively unconscionable. We agree ... it bars Zuver from collecting any punitive or exemplary damages for her common law claims but permits Airtouch to claim these damages for the only type of suit it would likely ever bring against Zuver, that is, for breach of her duty of nondisclosure of Airtouch's confidential information ... this provision is substantively unconscionable in these circumstances.

153 Wn. 2d at 317-319. The *Zuver* Court further clarified that it was "not concerned here with whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so 'one-sided' as to render it patently 'overly harsh' in this case." *Id.* at FN 16.

Given this clear law, courts hold that arbitration provisions are unfairly one-sided and unenforceable if the employer can institute lawsuits, but the employee is limited to arbitration as a forum. For example, in *Ingle v. Circuit City Stores, Inc.*, the Ninth Circuit held that "it is unfairly one-sided for an employer with superior bargaining power to

impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee." 328 F.3d 1165, 1173 (9th Cir. 2003).

Likewise, in *Luna v. Household Fin. Corp. III*, the Court found that an arbitration agreement between a lending company and borrowers was overly one-sided because it allowed the parties to sue in court to protect or foreclose on property involved in a loan—a claim the only type of claim the lending company would ever bring. 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002). This effectively exempted the lending company from the obligation to arbitrate any claim it would bring, while the borrowers were forced to arbitrate many types of claims they might bring. The Court thus struck down this provision as effectively imposing a one-sided arbitration obligation. *Id.*

Thus, in this case, the issue is not whether Plaintiffs and Defendants have exact "mirror obligations" under the Arbitration Addendum. Rather, the issue is that the Addendum imposes "one-sided" obligations on Plaintiffs and other employees while exempting Defendants from those obligations altogether. *See Zuver*, 153 Wn. 2d at 317-319; *Hill*, 179 Wn.2d at 55. Indeed, it is difficult to image a more one-sided arbitration agreement than the Addendum at issue in this case, which forces Plaintiffs to arbitrate their claims against Defendants while simultaneously exempting Defendants from the obligation to arbitrate their claims against Plaintiffs.

As explained in the Statement of Facts above, a clause in the Arbitration Addendum "requires You and FMG to arbitrate all Claims," but a clause in another portion of the exact same employment contract exempts Defendants—and only Defendants—from this arbitration requirement, stating that the "exclusive jurisdiction" for Defendants' claims lies "in the state and federal courts." *CP 63, 67, 99, 103* (emphasis added). Defendants' claims must therefore be brought in court, including any allegation that Plaintiffs committed a "breach or attempted breach of **all** provisions" of the Employment Agreement. *Id.* No similar clause exempts Plaintiffs or other employees from the arbitration obligation.

The Employment Agreements reiterate that Defendants are exempt from the arbitration obligation anytime Defendants claim their employees violated non-competition and non-solicitation provisions of the Employment Agreements. *CP 66, 102.* Similarly, a clause in the Addendum itself unilaterally allows Defendants to litigate third party claims against employees in Court. *CP 63, 99.* Again, there are no exemptions for claims made by Plaintiffs or other employees.

Defendants even admit in their Opening Brief that Defendants are allowed to sue Plaintiffs in court for any claims related to their Employment Agreements. Appellants' Opening Brief at 20. Contrary to Defendants' argument, this is not a "limited situation." In fact it is the opposite—Defendants are allowed to sue Plaintiffs for any claimed violation of the terms and conditions of their employment, which in an employment relationship includes any claim that Defendants could

conceivably bring against Plaintiffs and other employees (including non-competition and non-solicitation claims). Mutuality is illusory.

Thus, by Defendants' own admission the Addendum seeks to impose a one-way arbitration obligation that only applies to Plaintiffs, while the "exclusive jurisdiction" for Defendants' claims lies in the state and federal courts. Under the legal standard set forth by the Supreme Court in *Gandee*, *Adler*, *Hill*, and *Zuver*, and under the holdings in *Zuver*, *Luna*, and *Ingle*, this is patently one-sided and unconscionable.

a. Under the Supreme Court's holding in *McKee*, courts consider the effect that provisions located outside an arbitration agreement have on the parties' arbitration obligations: Defendants ask this Court to ignore the fact that they may unilaterally sue Plaintiffs in court because Defendants—who drafted the Employment Agreements—chose to put the clauses exempting themselves from the arbitration obligation in a different section of the Employment Agreements. *CP 215-16, 219-20, 224*. This argument is contrary to the Washington Supreme Court's holding in *McKee v. AT & T Corp.*, in which the Court struck down an arbitration agreement in part because a clause in the contract ***outside of the arbitration agreement*** granted AT&T a one-sided right to recover attorney fees. 164 Wn.2d at 400. The *McKee* Court held that this unilateral right to collect fees was unconscionable and, combined with three other

unconscionable provisions, this led the *McKee* Court to strike the arbitration agreement altogether. *Id.* at 400, 402-03.[5]

Numerous other courts hold that contract provisions effecting one or more parties' arbitration obligations must be considered as part of the arbitration agreement—even if those provisions happen to be located outside of the "arbitration" portion of the contract. In *R & L Ltd. Investments, Inc. v. Cabot Inv. Properties, LLC*, the plaintiff argued that a purchasing agreement and other documents separate from the arbitration provision made the arbitration agreement unconscionably one-sided. 729 F.Supp.2d 1110, 1117-1118 (D.Ariz. 2010). The "outside provisions" gave the defendants the ability to seek equitable relief and obtain money from the plaintiff "without resorting to arbitration," while limiting the plaintiff to the sole remedy of arbitration. *Id.* The defendants asked the court to ignore the provisions outside the arbitration clause and uphold arbitration because the language within the arbitration clause itself appeared mutual. The court rejected this argument, stating:

> [I]f Defendants have broad-ranging remedies for claims they may have (arbitration plus), while Plaintiff has the sole remedy of arbitration, it is fair to say that the parties lack mutuality with respect to arbitration. In such a setting, there is a clear overall imbalance in the rights imposed by this bargain ... Accordingly, the lack of mutuality with respect to the arbitration clauses is an alternative basis for holding that they are substantively unconscionable.

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[5] The provision at issue was contained in Section 3 of the contract, entitled "INDEMNIFICATION," whereas the arbitration provision was contained in Section 7 of the contract. 164 Wn.2d at 400.

*Id.* at 1118 (internal citations omitted). Thus, the *Cabot* court found the arbitration clauses were unfairly unilateral, even though the provisions exempting the defendants from arbitration were not contained within the arbitration clause itself. Since the *Cabot* defendants had the option of avoiding arbitration, this lack of mutuality made the arbitration provision unconscionable.

The same is true here. The Employment Agreements provide Defendants "broad-ranging remedies for claims they may have (arbitration plus), while Plaintiff[s] [have] the sole remedy of arbitration." This is substantively unconscionable. It would be contrary to Washington law and public policy to require this Court to disregard provisions that unilaterally grant Defendants the right to seek broad, judicial relief against Plaintiffs, merely because such provisions are strategically placed in separate sections of the Employment Agreement. *See also In re Checking Account Overdraft Litig.,* 685 F.3d 1269 (11th Cir. 2012) (finding a cost-and-fee-shifting provision unconscionable even though it and the arbitration provision were "located in entirely separate portions of the contract"); *Jackson v. S.A.W. Entertainment Ltd.*, 629 F.Supp.2d 1018, 1024-25 (N.D.Cal.,2009) (examining the substantive conscionability of two provisions despite them "not formally part of the arbitration provision" because "they clearly relate to the arbitration provision as they define the scope of the arbitration").

b. Even the cases that Defendants cite hold that provisions outside an arbitration agreement must be considered when

those provisions impact the arbitration obligation: The cases cited by Defendants for the proposition that this Court is "restricted" from looking at "outside provisions" actually hold the opposite—they hold that companies cannot circumvent a finding of unconscionability by selectively placing the provisions granting Defendants unilateral relief outside of the Arbitration Addendums. For example, in *AT&T Mobility II v. Pestano,* 2008 WL 682523 (N.D.Cal. Mar. 7, 2008), a dealer challenged an arbitration agreement with AT&T as unconscionable, in part because of a provision outside the arbitration agreement requiring the dealer to give AT&T notice of a dispute within 120 days or else forfeit its claims. This provision, however, did not apply to AT&T. AT&T argued that because the notice provision was separate from the arbitration clause, the validity of the notice provision was for the arbitrator to decide, not the court. The district court rejected this proposition:

> It is true that the notice provision is located one paragraph above the arbitration subsection of the contract . . . But because the notice provision profoundly affects the terms in the arbitration subsection—it can operate as a complete bar to arbitration—this order concludes that the notice provision is an inherent part of the arbitration agreement and therefore properly within this Court's review. **A contrary conclusion would allow parties to avoid judicial scrutiny merely through clever placement of objectionable arbitration terms.**

*Id.* at *5 (emphasis added). The court refused to allow creative placement by drafters to make an end-run around basic contract and fairness principals. Indeed, clearly if parties could avoid a finding of unconscionability simply by placing terms granting unilateral relief

outside the arbitration provision, arbitration agreements would never be found to be unconscionable. Such a result would not only undermine Washington law and public policy, but would defy common sense, placing form over substance and inviting "clever placement" and trickery.

It is difficult to imagine an "outside provision" in a contract that more profoundly affects arbitration obligations than the provisions scattered throughout the Employment Agreements in this case, which **nullify** the arbitration requirement for Defendants altogether—as Defendants admit in their Opening Brief. Appellants' Opening Brief at 20. Moreover, as explained below, those same "outside provisions" also exempt Defendants from various limitations on damages contained within the Arbitration Addendum, which therefore apply only to Plaintiffs and other employees. These "outside provisions" clearly have a profound effect on the parties' arbitration obligations in this case, as they unilaterally nullify the arbitration requirement and damages limitations for Defendants, turning the Arbitration Addendum into a grossly one-sided obligation.

The other cases cited by Defendants likewise hold that companies cannot circumvent a finding of unconscionability by placing the provisions granting Defendants unilateral relief outside the arbitration agreement. For example, in *Newton v. American Debt Services, Inc.*, the court considered two provisions that were part of the overall contract, but not part of the specific arbitration clause. 2012 WL 3155719, 84-5 (N.D.Cal. 2012). The first provision limited liability, disallowing

exemplary and punitive damages. The second provision shifted fees to the prevailing party. Despite the two provisions being located outside the arbitration clause, the court still considered the provisions in evaluating whether the arbitration clause itself was unconscionable. *Id.* On review, the Ninth Circuit upheld this decision, holding that the provisions' location "outside of the specific arbitration clause does not mean those provisions cannot be considered when determining unconscionability of the arbitration agreement." *Newton v. American Debt Services, Inc.*, 549 Fed. Appx. 692, 964 n. 2 (9th Cir. 2013). They must be considered.

In *Kristian v. Comcast Corp.*, the court likewise considered provisions that were not part of the arbitration provision when determining the threshold issue of arbitrability. 446 F.3d 25 (1st Cir. 2006). In *Kristian*, the defendant argued that because a provision that limited damages "appears in a separate section of the Policies & Practices from the arbitration agreement, the damages limitation does not apply to disputes resolved in arbitration." *Id.* at 47. The First Circuit disagreed, noting that "it would be nonsensical for [the defendant] to create a mandatory alternate resolution system to resolve disputes with its subscribers, and then include a damages limitation that—under the theory [the defendant] offers here—would never apply because all cases would go to arbitration." *Id.* As in *Kristian*, it would be "nonsensical" to pretend that the provisions included in the Employment Agreements are unrelated to the Arbitration Addendum, especially given that Defendants admit that outside provisions in the Agreements allow Defendants to sue Plaintiffs in

court—meaning Defendants admit they have exempted themselves from the Arbitration Addendum. Appellants' Opening Brief at 20.

Additionally, in *Rent-A-Center, West Inc. v. Jackson*, the U.S. Supreme Court held that provisions outside an arbitration clause may be considered in determining whether an arbitration clause is unconscionable under Nevada law, if those provisions "as applied" to the arbitration clause render it unconscionable. 561 U.S. 63, 74 (2010). Contrary to Defendants' incorrect claim, *Rent-A-Center* does ***not*** say that the outside provisions must have an effect on the specific claims raised by Plaintiffs in this case. If that was true, Defendants could alter arbitration obligations for themselves as much as they wanted via outside provisions, so long as they left Plaintiffs' arbitration obligations alone. But that only begs the issue—Defendants cannot selectively alter their own obligations to the point that they are exempt from arbitrating their claims, while simultaneously imposing arbitration on Plaintiffs. It is this difference in treatment that makes the Arbitration Addendum one-sided and unconscionable under Washington law. *See Gandee, Adler, Hill, Zuver, supra*.

Moreover, none of the three Washington Supreme Court cases cited by Defendants for the proposition that this Court is "restricted" from looking at "outside provisions" actually support this proposition. *See Hill*, 179 Wn.2d at 57-58, *Gandee,* 176 Wn. 2d at 603-9, and *Zuver*, 153 Wn.2d at 307-19. Indeed, there is no such holding in *Hill, Gandee,* or *Zuver*. In all three cases, the provisions examined just happened to be contained

within the arbitration clauses. A court's ability to examine outside provisions was simply not addressed. *Id.*

Most importantly, recently the Washington Supreme Court ***did*** look at "outside provisions" in determining that the *McKee* arbitration agreement was substantively unconscionable. Thus, there is no legal basis for this Court to disregard the provisions at issue. Rather, as supported by the above case law, to the extent the application of other outside provisions make an arbitration provision unconscionable, Washington courts, must consider such provisions under basic contract law.

Finally, to the extent Defendants claim that there even is a specific "arbitration" portion of the Employment Agreements, that claim is false, because the Employment Agreements state that captions and titles in the Employment Agreements "are not a part of this Agreement," are "only for the convenience of the parties," and "do not modify or amplify any of the terms, covenants, or conditions of this Agreement." *CP 67, 103.* Thus, under the terms of the contracts that Defendants themselves drafted, they cannot claim that one particular portion of the Employment Agreements is labeled as the exclusive "arbitration portion" of the Agreements.

Rather, by the terms of the Employment Agreements, and under Washington law, any and all provisions effecting the parties' arbitration obligations must be considered by this Court. As explained above, and as Defendants admit, the Employment Agreements are completely one-sided and only impose the arbitration obligation on Plaintiffs. This, without

more, is enough to render the arbitration provisions substantively unconscionable and thus void.

**2. The Arbitration Addendum is unconscionably one-sided because it limits employees' right to collect damages and attorney fees while allowing Defendants to recover all equitable and legal relief in court.**

a. The Addendums unconscionably limit Plaintiffs' rights to exemplary damages and attorney fees: Defendants concede that "a provision will be invalidated where it 'significantly curb[s] what an employee would recover against [an employer] compared to what the employee could recover under a statutory . . . claim." Under the terms of the Arbitration Addendum, Plaintiffs are unable to recover "punitive, exemplary, consequential or incidental damages" *unless* awarding such damages is "***required***" by law. *CP 63, 99, 135.* Similarly, "each party *shall* bear his/her own attorneys' fees and other costs" "except as otherwise ***required*** by law." *Id.*

Under the Supreme Court's recent holding in *Hill*, these limitations on recovering damages and attorney fees are both substantively unconscionable with virtually identical language to this Addendum. *Hill* holds that denying plaintiffs damages they would otherwise be entitled to unless those damages are "specifically ***mandated*** by federal or state statute or law," "curb[s] what an employee could recover" and is therefore unconscionable. 179 Wn.2d at 56. The language struck down in *Hill* is synonymous to the prohibition against receiving damages in the present case. Both in *Hill* and in this case, the arbitration provisions prohibit

awarding certain damages unless the law "requires," or "mandates," that those damages be awarded—synonymous terms according to Miriam Webster's dictionary, which in fact defines "mandate" as "to officially require").[6] Thus, under the holding in *Hill*, the limitations on damages and attorney fees in the present case are both substantively unconscionable.

In fact, *Hill* is only the latest in a long line of Washington Supreme Court decisions that prohibit this type of limitation on a plaintiff's ability to recover damages and attorney fees. For example, in *Zuver*, the Court struck down an arbitration provision that required an employee to release all rights to recover punitive or exemplary damages against her employer. The Court found this provision to be substantively unconscionable because it was unilateral and "blatantly and excessively favor[ed] the employer." *Zuver,* 153 Wn.2d at 318. Likewise, in *Adler*, the Court stated that arbitration provisions requiring parties to "bear their own respective costs and attorneys fees" undermine plaintiffs' statutory right to collect fees, and are therefore "substantively unconscionable." *Adler*, 153 Wn.2d at 355.

Defendants, however, ask this Court to ignore the binding holdings from *Hill*, *Zuver*, and *Adler*, and instead ask this Court to adopt the same argument that *Hill* rejected. Defendants claim that the limitations on damages and fees do not limit Plaintiffs' rights and misstate that the

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[6] See http://www.merriam-webster.com/dictionary/mandate, defining the verb "mandate" as "to officially require "something." See also *Bellevue School Dist. No. 405 v. Bentley*, 38 Wn. App. 152, 158, 684 P.2d 793 (1984) (terms in contracts are given their ordinary dictionary definition).

arbitrator may "still award damages allowed by law." First, Defendants' assertion is contrary to the plain language of the Arbitration Addendum, which only allows for an award of damages if damages are *required* by law, which is very different than allowing for an award of damages *permitted* by law.[7] Moreover, Defendants' claim completely ignores *Hill*, which found that this same language is substantively unconscionable since is relies on the arbitrator's subjective interpretation, which could be "prone to mischief."

*Hill* makes this distinction clear. In *Hill*—also a wage and hour class action—the arbitration provision similarly limited damages unless "specifically *mandated* by federal or state statute or law." 179 Wn.2d at 56, n. 4. Despite the *Hill* defendant arguing that the provision limiting an award of backpay was not a true limitation because pursuant to the agreement, the terms of the provision could be disregarded by the arbitrator if "mandated" by law, the Court nonetheless found the provision substantively unconscionable, noting that the provision nonetheless "curbed" the employee's ability to recover against the employer. *Id.* The provision could not be saved by the language allowing for full damages if "specifically mandated by federal or state statute or law," because the Court recognized such language was too equivocal and "prone to mischief." *Id.*

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[7]Moreover, any dispute or ambiguity as to the meaning of language in the Employment Agreement is construed against Defendants—the **drafters of the Agreements—who** are presumed to have be in a better position to prevent ambiguities and mistakes. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002).

The same is true here. Barring Plaintiffs from recovering "punitive, exemplary, consequential or incidental damages" unless "required" by law deprives Plaintiffs of double (or exemplary) damages that would otherwise be available under RCW 49.52.070. Likewise, barring Plaintiffs from recovering attorney's fees and cost "except as otherwise required by law," similarly deprives Plaintiffs remedies that they would be entitled to under RCW 49.52.070, RCW 49.48.030, and under the tort of wrongful discharge. *See Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 451, 815 P.2d 1362 (1991) ("attorney's fees are recoverable in actions for wrongful discharge where back pay or front pay is recovered as lost wages"). Simply put, the Arbitration Addendums limit Plaintiffs' right and ability to recover damages that would otherwise be available under Washington law.

Defendants' attempt to distinguish *Hill* is unavailing. Both *Hill* and this case involve a wage statute that has almost identical language. Specifically, RCW 49.46.090 – the statute at issue in *Hill* states:

> [a]ny employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, **<u>shall</u>** be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer, and for costs and such reasonable attorney's fees as may be allowed by the court.

Similarly, RCW 49.52.070, the statute at issue here, states:

> [a]ny employer. . . who shall violate any of the provisions of RCW 49.52.050 (1) and (2) **<u>shall</u>** be liable in a civil action by the aggrieved employee or his or her assignee to

> judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

Both cases involve arbitration provisions only allowing the plaintiffs to recover under such statutes if "mandated" or "required" by law. Yet despite RCW 49.46.090 providing that the employer "shall" be liable for backpay if a violation is found, the *Hill* Court still rejected the defendant-employer's argument that the limitation was saved because the arbitration provision allowed for damages if "specifically *mandated* by federal or state statute or law."

Thus, applying *Hill*, it is evident that the Arbitration Addendums contain unconscionable limitations on the exemplary damages and attorney's fees that would otherwise be available if Plaintiffs' wage claims were litigated before this Court. As in *Hill*, RCW 49.52.070's statement that employers "shall be liable ... to a judgment for twice the amount of wages" does not save Defendants' argument. The Arbitration Addendums still contain language "prone to mischief" that may nonetheless be interpreted to deny Plaintiffs and Class Members the relief they are entitled to under Washington law. This is especially true, given that the preceding sentence of the Arbitration Addendums state that "no arbitrator shall have the power to alter your at-will employment ... except as ***provided*** by law," thus, highlighting that "punitive, exemplary, consequential or incidental damages" and attorney's fees and costs should not be awarded

unless "*required*" by law." This is unconscionable. *Hill,* 179 Wn.2d at 55-58; *Zuver,* 153 Wn.2d at 318; *Alder*, 153 Wn. 2d at 355.

In fact, the possibility that an arbitrator could limit a plaintiff's recovery of fees was cited by the Supreme Court as a reason to invalidate the arbitration agreement in *McKee*. The *McKee* Court explained that "the risk [is] too great to make relief meaningfully available" when there is even the possibility that an arbitrator could deny a plaintiff attorney fees. *McKee*, 164 Wn.2d at 400. Therefore, just like in *Hill*, the limitations on damages and fees in this case are "prone to mischief" and unconscionable.

b. Unlike Plaintiffs, Defendants face no limitation on their rights to exemplary damages, fees, or any other legal relief: The provisions limiting remedies are only made more egregious by the fact that they are one-sided. Indeed, while Plaintiffs are unable to recover exemplary damages or attorney's fees in arbitration, in separate provisions, Defendants are allowed to recover "injunctive relief," "other equitable relief," and "***such other remedies as may exist at law***." *CP 66-67, 102-103, 125.* As discussed above, Defendants cannot conceal these provisions granting unilateral and broad relief from the Court's review by clever placement outside of the Arbitration Addendums. *See AT&T Mobility II v. Pestano,* 2008 WL 682523 (N.D.Cal. Mar. 7, 2008); *Cabot*, 729 F.Supp at 1117. Under Washington law, arbitration provisions providing for such one-sided remedies are substantively unconscionable and cannot be enforced. *Zuver,* 153 Wn.2d at 319.

### 3. The Arbitration Addendum is unconscionable under *Hill v. Garda* because it forces employees to pay half the costs of arbitration.

Requiring Plaintiffs and Class Members to split the arbitration costs and fees is substantively unconscionable under numerous holdings of the Washington Supreme Court. *See Hill*, 179 Wn.2d at 56-57; *Adler,* 153 Wn.2d at 353; *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d at 605. *See also Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1261 (9th Cir. 2005) (under Washington law, arbitration provision requiring customer to split arbitration fees was unconscionable); *Luna*, 236 F. Supp. 2d at 1171-72 (arbitration fee-splitting provision weighed "heavily in favor of a finding of unconscionability" because it was likely to "drastically ... exceed the costs of pursuing the claims in court"). Under *Hill*, such a requirement is unconscionable when the plaintiff produces information explaining how the possibility of paying arbitration costs would prohibit her from pursuing her claims. *Hill*, 179 Wn.2d at 57.

Here, Plaintiffs have produced this information. As briefed at the Superior Court (without opposition or dispute from Defendants), a ten-day arbitration plus pre-arbitration with motion practice and hearings would carry an estimated cost in the six figures. *CP 139-140.* As outlined in Counsel's declaration, this would include costs for an arbitrator's time (at $500 per/hour) for discovery, motion practice, pre-arbitration hearings, arbitrator fees, and other costs. *Id.* Requiring Plaintiffs to absorb half of such costs would likely prohibit numerous Class Members from bringing wage claims, and would absolutely deter the three named Plaintiffs from

bringing claims against Defendants. *CP 41, 77, 112, 140*. It is simply unconscionable to require Plaintiffs to pay for an arbitrator's services when they would not have to pay for a judge's services, and when such costs would significantly discourage victims of Defendants' unlawful practices from seeking relief.

Nor may Defendants save this unconscionable provision by arguing that an arbitrator *could* ultimately order Defendants to pay all the costs of the arbitration. Defendants cannot and do not dispute that the Arbitration Addendum only allows an arbitrator to shift the expenses of arbitration onto Defendants if Plaintiffs can prove to the arbitrator that the cost of arbitration would "effectively prevent" Plaintiffs from bringing their claims—the same type of fuzzy language that is "prone to mischief" under *Hill*. *Hill*, 179 Wn.2d at 56 n.4. Accordingly, the cost-splitting provision is also unconscionable.

#### 4. The Arbitration Addendum is unconscionable under *McKee* and *Zuver* because it forces employees to arbitrate their claims confidentially.

Despite *Zuver* finding a confidentiality provision to be substantively unconscionable, 153 Wn.2d at 314, Defendants cite to *Zuver* for the proposition that "in Washington . . . many arbitration agreements containing confidentiality provisions have been enforced." Appellants' Opening Brief at 28. In fact, *Zuver* explained that this was an argument the defendants made, but ***Zuver* then rejected this argument** and held that it is substantively unconscionable for an employer to require confidentiality in an arbitration agreement with its employees because such a provision

"hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations." *Zuver*, 153 Wn.2d at 315. The *Zuver* Court further explained that "keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim." Therefore, the Washington Supreme Court found that the effect of such a confidentiality provision is one-sided and substantively unconscionable. *Id.*

The Supreme Court reiterated that contracts requiring secrecy violate Washington public policy in *McKee*, explaining that confidentiality blatantly benefits defendant-corporations while hampering plaintiffs:

> Secrecy conceals any patterns of illegal or abusive practices. It hampers plaintiffs in learning about potentially meritorious claims and serves no purpose other than to tilt the scales in favor of [the corporation]. It ensures that [the corporation] will accumulate a wealth of knowledge about arbitrators, legal issues, and tactics. Meanwhile, [individuals] are prevented from sharing discovery, fact patterns, or even work product, such as briefing, forcing them to reinvent the wheel in each and every claim, no matter how similar.

*McKee*, 164 Wn.2d at 398-399. Accordingly, just like in *Zuver*, the *McKee* Court held that confidentiality provisions in arbitration agreements were substantively unconscionable because they "systematically favor[ed] companies over individuals." *Id.* at 398.

The same rationale in *Zuver* and *McKee* applies here, rendering the confidentiality requirement—which is mandated by AAA Rules adopted in the Arbitration Addendum—substantively unconscionable. Indeed,

because other intentional acts by Defendants are relevant and "admissible to show motive or intent" in Dr. Romney's and Dr. Bauer's wrongful discharge claims and to prove the intentional withholding of wages,[8] it would be unconscionable to cloak such information in confidential proceedings. *Zuver*, 153 Wn.2d at 314. This case goes to the heart of important public policy like paying for wages earned and safe medical care. Moreover, the public has a right to know if Defendants jeopardized public health and safety, violated Washington wage statutes, or retaliated against their employees. Under *Zuver* and *McKee,* the confidentiality requirement is substantively unconscionable.

Such a provision is especially unconscionable where, as here, Defendants have granted themselves the unilateral right to sue their employees in a public court of law. *See supra*. Thus, Defendants have drafted an agreement that forces one-way confidentiality on their employees, meaning claims against Defendants are kept confidential, while Defendants can publically accuse their employees of anything. This is substantively unconscionable. *Zuver*, 153 Wn.2d at 315.

Defendants try to avoid the binding holdings in *Zuver* and *McKee* by claiming this issue is "moot." Defendants claim, however, is simply wrong. Defendants disingenuously argue that the Addendum allows the

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[8] *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 445-446, 191 P.3d 879 (2008)(holding that "[i]n the context of wrongful discharge in violation of public policy, evidence of an employer's motive or intent to retaliate is relevant to assertions that the employee's actions caused the discharge (the "causation" element) and that the employer does not have a legitimate justification for the discharge (the "absence of justification" element))."

parties "to arbitrate without confidentiality" if the "parties agree otherwise." Appellants' Opening Brief at 28-29. Defendants, however, have ***never*** offered to waive the confidentiality provision in the Arbitration Addendum. Rather, Defendants told the Superior Court that they "prefer[] confidentiality," and only said that they would arbitrate openly "if required to do so by the Court." *CP 187.*

This was not an offer by Defendants to arbitrate openly; rather, this was the opposite: Defendants asked the Court to uphold the Addendum's confidentiality provisions. At most, Defendants acknowledged that they are bound by the Court's order either way, which is not an offer to waive confidentiality. In fact, the Supreme Court in *Gandee* squarely ruled that such an "offer" to waive arbitration provisions that have already been found unconscionable is not an "offer" to waive anything, because at this point, the provisions are unenforceable and "[the defendant] has no choice but to 'waive' them." *Gandee*, 176 Wn.2d at 608.

Even if Defendants now offer to waive confidentiality before this Appellate Court, *Gandee* held that it is too late to offer to waive provisions on appeal, after the provisions were already stricken at the trial court level. *Id. Gandee* explained that "Strong reasons exist for encouraging contracts to be conscionable at the time they are written," rather than letting companies waive unconscionable provisions after-the-fact in an attempt to moot a challenge to the arbitration agreement. *Id. Gandee* explained:

> Parties should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver. This would

> encourage rather than discourage one-sided agreements and would lead to increased litigation. Any other approach is inconsistent with the principle that contracts—especially the adhesion contracts common today—should be conscionable and fairly drafted.

*Id.* at 608-09. Thus, the confidentiality provisions in the Arbitration Addendum are unconscionable under *Zuver* and *McKee*, and Defendants cannot somehow "moot" this issue by "offering" to comply with a court order that strikes the confidentiality provision.

#### 5. The Arbitration Addendum is unconscionable because it forces employees to arbitrate claims with coworkers who are not parties to the Addendum.

Again, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Hill*, 179 Wn.2d at 53. As such, requiring Plaintiffs and Class Members to submit any and all claims they may have against any of Defendants employees, and vice-a-versa, regardless of whether such claims even relate to their employment with Defendants, is unconscionable. These employees never signed any contract with each other to arbitrate disputes. No such agreement was made. Defendants have no legitimate interest in forcing their employees to arbitrate claims against each other. This provision is unconscionable and cannot be enforced.

### C. Under numerous binding Supreme Court holdings, the Arbitration Addendum must be voided in its entirety because the unconscionable provisions pervade the Addendum.

As made clear by the Washington Supreme Court in *Gandee,* where severing unconscionable clauses would "significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated

by the clause," severance is improper and the entire arbitration provision should be deemed void. 176 Wn.2d at 607. *See also Adler,* 153 Wn.2d at 358 (where unconscionable terms "pervade" an arbitration agreement, Washington courts regularly "refuse to sever those provisions and declare the entire agreement void."); *McKee*, 164 Wn.2d at 402-403; *Hill*, 179 Wn.2d at 55-58.

In *Hill,* the Court found only three provisions substantively unconscionable: (1) a provision shortening the statute of limitations; (2) a provision restricting the ability to recover back pay damages; and (3) a provision forcing employees to pay half the costs of arbitration. *Hill*, 179 Wn.2d at 53-57. The Court found that "severing these clauses significantly alters both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause," and accordingly invalidated the entire arbitration clause. *Id.* at 58, *quoting Gandee,* 176 Wn.2d at 607.

Likewise, in *McKee*, the Court invalidated an entire arbitration agreement based on only four unconscionable provisions, which limited the statute of limitations, limited availability of attorney's fees, imposed confidentiality on the proceedings, and waived class actions. *McKee*, 164 Wn.2d at 402-403. The Court stated that "each provision ... magnifies the exculpatory effect of the arbitration agreement ... such that severance would essentially require us to rewrite the dispute resolution agreement." *Id.* Moreover, the *McKee* Court emphasized that allowing severability when a contract is permeated with unconscionable provisions promotes future abusive, one-sided practices:

> 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.

*Id.* In short, and as evidenced by the unanimous decisions in *Hill, McKee, and Gandee,* the Washington Supreme Court will invalidate arbitration agreements that are unfair, one-sided, or that undermine a party's ability to vindicate his or her statutory rights. Severing the unconscionable provisions only encourages the inclusion of overreaching, offensive, one-sided provisions.

Here, like *Hill, Gandee,* and *McKee*, the unconscionable provisions are interrelated and each serves to magnify the one-sidedness of the others, making severance impossible. Applying the provisions together, there are at least six unconscionable provisions within the Addendum—far more than the three clauses that warranted voiding the entire arbitration agreement in *Hill.*

In this case, the Addendum and related clauses in the Employment Agreements contain the following unconscionable provisions: (1) employees are forced to arbitrate claims against Defendants while Defendants can sue employees in court, (2) employees' right to recover exemplary damages is limited while Defendants face no such limitations, (3) employees' right to recover fees is limited while Defendants face no such limitations, (4) employees are forced to pay half of the arbitration costs, (5) employees are forced to confidentially arbitrate claims while

Defendants can file public lawsuits against employees, and (6) employees are forced to arbitrate claims against each other. These provisions relate to the damages that are available, confidentiality, and the one-sided imposition of arbitration altogether. This Court cannot sever these provisions without "alter[ing] both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause." *Hill*, 179 Wn.2d at 58. Moreover, as cautioned in *McKee*, Defendants should not be rewarded for overreaching by having the unconscionable provisions severed. As such, the Addendum must be invalidated in its entirety.

**D. The Superior Court correctly found that the Addendum lacked proper consideration, because the Supreme Court requires bilateral arbitration obligations, but the Addendum only contains one-sided arbitration obligations.**

For the reasons explained above, the Arbitration Addendum is grossly one-sided and thus substantively unconscionable. The Superior Court recognized this as one basis for striking the entire Addendum as unconscionable. *RP 31:16-18.* This alone is enough to support the Superior Court's ruling, and therefore, Defendants' arguments about "consideration" are an irrelevant red herring. *Hill*, 179 Wn.2d at 55 ("Either substantive or procedural unconscionability is enough to void a contract.").

Nevertheless, Defendants are also wrong when they claim the Superior Court erred by *additionally* finding that the Addendum lacked proper consideration. As explained above, the Washington Supreme Court has repeatedly held that one-sided arbitration agreements are invalid. *See*

*Gandee*, 176 Wn.2d at 603, *Adler*, 153 Wn.2d at 344-45; *Hill*, 179 Wn.2d at 55 *Zuver,* 153 Wn.2d at 318. Thus, to be valid, an arbitration agreement must not only contain mutual promises between parties, or "consideration," but must specifically contain consideration that is not overly one-sided. *Id.* For all the reasons explained above, the "consideration" provided by Defendants in the Addendum is in fact illusory, as Defendants need not arbitrate any of their claims at all. Defendants also maintain the right to seek unlimited damages and fees while restricting Plaintiffs' rights. This one-sided "consideration" is improper under *Gandee*, *Adler*, *Hill*, and *Zuver*, and thus the Superior Court did not err by characterizing it as lacking proper consideration.

### E. The Arbitration Addendum is also procedurally unconscionable and thus void, as reflected by the parties' briefing and oral argument.

Likewise, the Courts need not find that the Arbitration Addendum is procedurally unconscionable because it is void as substantively unconscionable. *Hill*, 179 Wn.2d at 55. Nevertheless, the Superior Court properly found that procedurally unconscionability is an additional basis for voiding the Addendum.

Procedural unconscionability occurs when one party to a contract lacks "meaningful choice" in the negotiation and formation of that contract. *Zuver*, 153 Wn.2d at 304. This lack of choice may be revealed by the "manner in which the contract was entered," whether a party had "a reasonable opportunity to understand the terms of the contract," and when important contract terms are hidden (like in "a maze of fine print"). *Id.*

Even when these three factors do not reveal a lack of "meaningful choice," however, an arbitration agreement may still be procedurally unconscionable if it contains "procedural surprise," meaning the drafting party structured the contract in an unclear and deceptive manner. *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 267, 306 P.3d 948 (2013). Thus, in *Brown*, the Supreme Court found an arbitration agreement procedurally unconscionable despite the fact that the plaintiffs were highly educated and had time to read and consider the agreement before signing it. *Id.* This is because the agreement was unclear as to what rules would govern arbitration, which amounted to "procedural surprise." *Id.*

The present Arbitration Addendum is procedurally unconscionable under all of these theories. As explained in the Statement of Facts, Plaintiffs were never given a chance to negotiate the terms of the Employment Agreements (including the Arbitration Addendum), and in fact, Dr. Childress was specifically told that she could ***not*** negotiate these terms. *CP 215-216, 224, 228-229.* Moreover, Dr. Romney and Dr. Bauer were threatened that Defendants would fire them and seek money from them if they did not quickly sign the Agreements. *Id.* Under these circumstances, Plaintiffs had no meaningful choice. Moreover, the Agreements contain "procedural surprise," as key terms that nullify Defendants' arbitration obligations are hidden throughout the Agreements, outside of the section labeled "Arbitration Addendum." Thus, under *Zuver*

and *Brown*, the Addendums are procedurally unconscionable, which is an additional basis to invalidate the Addendums.[9]

### F. Because the Arbitration Addendum is void, Plaintiffs cannot be compelled to arbitrate against non-signatory Defendants.

The Arbitration Addendum is void because it is pervaded with substantively unconscionable terms. *Hill*, 179 Wn.2d at 55-58. It is also void because it is procedurally unconscionable. Therefore, contrary to Defendants' argument, Plaintiffs need not arbitrate claims with Defendants who are not parties to the Addendum. The Addendum itself is void, and this issue is therefore moot.

## VI. CONCLUSION

For all of the reasons stated above, the Superior Court properly ruled that Defendants' Arbitration Addendum is both substantively and procedurally unconscionable, and is therefore void. The decisions of the Supreme Court in *Hill*, *Gandee*, *McKee*, *Adler*, and *Zuver* are directly on point and mandate that this Court uphold the ruling of the Superior Court and find that Defendants' grossly one-sided Addendum, which unilaterally forces Plaintiffs to arbitrate their claims and limits their right to damages and fees, is unconscionable, void, and be stricken as unenforceable.

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[9] Contrary to Defendants' claim, the Superior Court was fully briefed on the way in which Defendants denied Plaintiffs a meaningful choice in negotiating and forming the Agreements. All three Plaintiffs submitted declarations with this information, and Defendants responded with their own declarations on this topic as well. *CP 215-216, 224, 228-229, 266-267.*

DATED this 27th day of August, 2014.

THE BLANKENSHIP LAW FIRM, P.S.

By: s/ Scott C. G. Blankenship
Scott C. G. Blankenship, WSBA No. 21431
Paul S. Woods, WSBA No. 42976
The Blankenship Law Firm, P.S.
1000 Second Avenue, Suite 3250
Seattle, WA 98104
Telephone: (206) 343-2700
Fax: (206) 343-2704
Email: sblankenship@blankenshiplawfirm.com
pwoods@blankenshiplawfirm.com
Attorneys for Respondents

## DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that, on the below date, I caused delivery of a true copy of this document to the following:

*Via Hand Delivery:*

Michael Madden, Esq.
Bennett Bigelow & Leedom, P.S.
601 Union Street, Suite 1500
Seattle, WA 98101

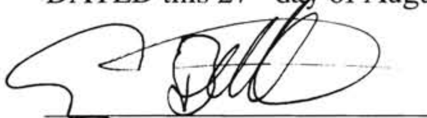
*Attorneys for Appellants*

*Via U.S. Mail:*

Karen R. Glickstein, Esq.
Christopher L. Johnson, Esq.
Polsinelli PC
900 W 48th Place, Suite 900
Kansas City, MO 64112

*Attorneys for Appellants*

DATED this 27th day of August, 2014, at Seattle, Washington.



ERICA BRUNETTE
Paralegal

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