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NO. 68732-8-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SOLID GROUND FINANCIAL, LLC, RUBEN MACHEARON,
SCOTT HAICK AND DAVID SMITH,
PETITIONERS
v.
VICKY BOMSTA,
RESPONDENT.

APPELLANT'S REPLY
BRIEF
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APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
KING COUNTY CAUSE NO. 11-2-16754-2 KNT

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

As the Plaintiff attempting to avoid arbitration, Plaintiff has the burden to establish either substantive or procedural unconscionability. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). *Townsend v. Quadrant Corp.*, 153 Wn.App. 870, 878, 224 P.3d 818, 824 (2009). Courts must indulge every presumption “in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d at 301, 103 P.3d at 759 (2004)(citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

The Federal Arbitration Act (“FAA”) reflects “a liberal federal policy favoring arbitration” and requires federal courts to compel arbitration of any claim covered by a written and enforceable arbitration agreement. *AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1745–47, 179 L.Ed.2d 742 (2011). In ruling on a motion to compel arbitration, the court's role is limited to determining whether: (1) there is an agreement between the parties to arbitrate; (2) the claims at issue fall within the scope of the agreement; and (3) the agreement is valid and enforceable. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir.2004). If those questions are answered in the

affirmative, the court must compel the parties to arbitrate their claims. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (“By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration”). Agreements to arbitrate are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. See also *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 836 (N.D.Cal.,2012).

The Court must indulge every presumption “in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d at 301, 103 P.3d at 759 (2004)(citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). The standard for a finding of arbitrability is “not high.” *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 719, 721 (9th Cir.1999) (explaining that to require arbitration, plaintiff’s “factual allegations need only ‘touch matters’ covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability”).

In *CompuCredit Corp. v. Greenwood*, __ US __, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012), the United States Supreme Court upheld an arbitration provision, relying in part, on the liberal policy favoring arbitration. In *CompuCredit*, the Plaintiffs filed a class action asserting violations of Federal credit laws for alleged impermissible fees and charges on a credit card. The Plaintiffs alleged, “Credit Providers charged a \$29 finance charge, a monthly \$6.50 account maintenance fee, and a \$150 annual fee, assessed immediately against the \$300 limit before the consumer received the card. In aggregate, the card had \$257 in fees the first year.” *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1205 (9th Cir. 2010). Despite the small damage claims, the United States Supreme Court upheld the arbitration provision and compelled the Plaintiff Class to arbitrate. *CompuCredit Corp.*, 132 S.Ct. at 669.

A. No Procedural Unconscionability Exists

Despite this strong presumption in favor of arbitrability, Plaintiff argues procedural unconscionability. In determining whether an arbitration agreement is procedurally unconscionable the Court examines: (1) the manner in which the contract was entered, (2) whether Bomsta had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print. *Zuver v.*

Airtouch Communications, Inc., 153 Wn.2d at 304, 103 P.3d at 760 (2004).

First, Bomsta asserts that the arbitration agreement is an adhesion contract, which she contends justifies a finding of procedural unconscionability. But that fact, alone, does not amount to procedural unconscionability. *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 393, 858 P.2d 245 (1993). *See also Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 459, 45 P.3d 594 (2002); *Luna v. Household Fin. Corp.*, 236 F.Supp.2d 1166, 1175 (W.D.Wash.2002); *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn.App. 354, 362, 85 P.3d 389 (2004).

Instead, the enforceability of adhesion contract terms turns on whether meaningful choice existed; the existence of unequal bargaining power will not, standing alone, justify a finding of procedural unconscionability. *See Yakima County Fire Prot. Dist.*, 122 Wn.2d at 392–93, 858 P.2d 245. *See also Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 28 P.3d 823 (2001); *Pub. Employees Mut. Ins. Co. v. Hertz Corp.*, 59 Wn.App. 641, 650, 800 P.2d 831 (1990), *review denied*, 116 Wn.2d 1013, 807 P.2d 884 (1991); *Mendez*, 111 Wn.App. at 459, 45 P.3d 594.

Here, no question exists that Bomsta could have selected any number of debt advising services. The document was faxed to Bomsta

and she had ample opportunity to review it. CP 78. Bomsta was not required to sign the contract immediately; in fact her declaration avers that she "filled out and executed the paperwork necessary to participate in the program." CP 78.

Despite this language, Bomsta claims that she had no knowledge of the arbitration provision, and "did not specifically agree" to the provision. CP 79. Bomsta states that nothing was done to specifically draw her attention to the arbitration agreement. CP 79.

But this ignores long-standing Washington law that a party that signs a contract is presumed to have read the terms of the contract, "[a] fundamental principle of Washington contract law is 'that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.'" *Washington Federal Sav. & Loan Ass'n v. Alsager*, 165 Wn.App. 10, 14, 266 P.3d 905, 907 (2011), citing *Nat'l Bank of Wn. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) Further, no Washington authority exists supporting the contention that an arbitration provision has to be in special type. See *Luna*, 236 F.Supp.2d at 1176 (holding that one-page long arbitration agreement with terms in newspaper size typeface did not support a finding that the agreement was procedurally unconscionable).

Here, nothing in the arbitration provision is hidden. The language is plain, simple, and understandable. The arbitration provision is not procedurally unconscionable. In essence, Plaintiff read the contract, agreed to its express terms, and should be held to the terms of the contract she knowingly, intelligently, and voluntarily entered into. As a result, the arbitration agreement is not procedurally unconscionable and should be enforced.

B. Substantive Unconscionability Does Not Exist

As Bomsta cannot establish procedural unconscionability, Bomsta next argues substantively unconscionability. As the Washington Supreme Court has explained, “[s]ubstantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. ‘Shocking to the conscience’, ‘monstrously harsh’, and ‘exceedingly calloused’ are terms sometimes used to define substantive unconscionability.” *Zuver*, 153 Wn.2d at 303, 103 P.3d at 759 (quotation marks and citations omitted); *see also Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004). More restrictive arbitration provisions have been enforced by Washington courts.

For example, the court in *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn. 2d 568, 571, 998 P.2d 305, 307 (2000), was confronted with an issue of first impression, namely, whether a limitation

on consequential damages that was part of a “shrinkwrap” software license accompanying computer software was enforceable against the purchaser of the software. The court held that the terms of the license were part of the contract, and that the plaintiff’s use of the software constituted assent to the agreement. *Id.* at 584, 998 P.2d at 313. The court reached this conclusion, noting that RCW 62A.2-204 allows for contract formation, including “layered contracts,” “in any manner sufficient to show agreement ... even if the moment of its making is undetermined...” *Id.*

The *M.A. Mortenson* court was guided by and expressly adopted the approach of the Seventh Circuit in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). *Mortenson*, 140 Wn. 2d at 583-84, 998 P.2d at 313. In *Hill*, the issue before the court was whether an arbitration agreement included with the product was enforceable. 105 F.3d at 1148. There, the plaintiff purchased a computer over the telephone, and when the computer arrived, the box contained a list of terms, including an arbitration clause, that the customer was deemed to accept by not returning the product within the 30-day return period. *Id.* In determining whether that arbitration clause was enforceable, the court first observed that “(p)ayment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors.” *Id.* at 1149.

In fact, the *Hill* court noted that in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), the Supreme Court enforced a forum selection clause that was included in the three pages of terms that was attached to the cruise ticket. *Hill*, 105 F.3d at 1148. After discussing the benefits to consumer and vendors in allowing vendors to contract in this matter, and finding that “[p]ractical considerations support allowing vendors to enclose the full legal terms with their products,” the court ordered the plaintiffs to submit to arbitration. *Id.* at 1149, 1151.

Plaintiff contends that she has an inability to pay the arbitration fees and the travel fees necessary to prosecute the arbitration in Florida, as required by the arbitration provision. CP 79. While ability to pay is one element of the test, the corresponding element is the size of the claims being asserted. *See Adler*, 153 Wn. 2d at 353, 103 P.3d at 785; *Zuver*, 153 Wn. 2d at 309-10, 103 P.3d at 763. *See also Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-92, 121 S.Ct. 513, 522-23 (U.S.Ala.,2000)(Holding the costs of arbitration are only part of the analysis).

Note, further, that *Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184, 1186 (Alaska 1983) holds, “Arbitration is not so clearly more or less fair than litigation that it is unconscionable to

give one party the right of forum selection.” *Cited with Approval in Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 816, 225 P.3d 213, 232 (2009).

As neither procedural or substantive conscionability exists, the Court should reverse the trial court, compel the arbitration of this matter in Florida, per the terms of the parties’ contract, and dismiss this lawsuit. This result is required under both Washington State and Federal Law; Bomsta knowingly, intelligently, and voluntarily entered into a contractual arrangement with a company in Florida. As part and parcel of that contract was a forum selection clause requiring any and all disputes be brought in arbitration in Florida.

C. Attorneys’ Fees Should be Awarded

Washington's long-arm statute states that attorneys' fees and costs are appropriate for a “defendant [who] is personally served outside the state on causes of action enumerated in this section, and prevails in the action.” RCW 4.28.185(5). Prevailing in an action pursuant to RCW 4.28.185(5) includes securing a procedural dismissal on venue based grounds such as a forum selection clause. *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 627 (1997) (awarding attorneys' fees to a defendant obtaining a dismissal in Washington because of a forum

selection clause requiring litigation in Nevada). A defendant “need not prevail on the merits” of the underlying claims to obtain such fees. *Id.*

Here, the Defendants have shown both a valid arbitration provision and a valid forum selection clause exist, thus precluding this lawsuit.

Attorneys’ fees incurred in defending against this lawsuit and prosecuting this appeal, should be awarded.

RESPECTFULLY SUBMITTED this 26th day of December, 2012.

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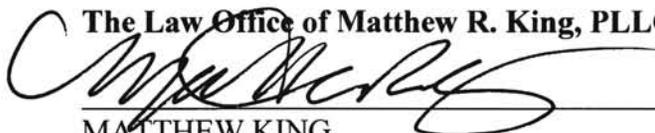
Declaration of Mailing

I, Matthew King, hereby declare under penalty of perjury under the laws of the State of Washington, that I caused a copy of this document to be mailed on December 26, 2012, via US Mail, postage prepaid to:

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I also caused a copy of this brief to be e-mailed to Mack Mayo, pursuant to stipulation between the parties.

Dated this 26th day of December, 2012 at Seattle, Washington..

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