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FILED
OCT 03 2012

NO. 68732-8-I

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

SOLID GROUND FINANCIAL, LLC, RUBEN MCEACHRON, SCOTT HAICK, AND DAVID SMITH,

PETITIONERS,

v.

VICKI BOMSTA, individually and on behalf of a Class of similarly situated Washington residents,

RESPONDENT.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The trial court's decision should be affirmed. Appellants have failed to show that the trial court erred in finding Defendants waived their improper forum/venue defense and in exercising its discretion to refuse an amendment to insert that waived defense into subsequent pleadings. Appellants' argument regarding waiver and forum/venue, in any event, is moot because the trial court's decision denying Defendants' Motion to Stay Proceedings Pending Arbitration—essentially a Motion to Compel Arbitration—was proper and should be affirmed. The Defendants' arbitration clause was procedurally unconscionable and was permeated with substantively unconscionable terms such that enforcement was impossible and inappropriate. Respondent respectfully requests this Honorable Court affirm in all three respects.

II. STATEMENT OF THE CASE

The uncontested evidence below showed that Vicki Bomsta ("Bomsta") is a financially destitute single mother residing in King County. **CP 34**. As the evidence showed, her monthly income (amounting to less than $1,000.00 per month in federal disability assistance income and food stamps) was substantially consumed by necessities, such as food and rent. *Id.* As the evidence further showed,

she has been rendered incapable of gainful employment due to a chronic, genetic disorder (known as Adiposis Dolorosa) that causes painful, non-cancerous tumors to grow on her body and renders travel exceedingly difficult. *Id.*

Bomsta suffered financial distress and was solicited by Solid Ground Financial, LLC ("Solid Ground") for participation in a debt-adjusting program.[1] In this regard, a Solid Ground representative, employee, agent, or officer transmitted into Washington State standardized solicitation materials, including Solid Ground's standard "Client Service Agreement" ("Agreement") for debt adjusting services that listed Solid Ground as the contracting party. **CP 34 (Ex A)**. Solid Ground thus holds itself out as engaged in debt adjusting for-profit and is a front-end lead generation company that advertises to and contracts with debt settlement companies, including but not limited to co-Defendant JIO Reserves, Inc. ("JIO"), for purposes of soliciting and retaining consumers' participation in subject debt settlement programs. **CP 34 (Ex A)**.

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[1] In Washington, debt adjusting is "the managing, counseling, settling, adjusting, prorating, or liquidating of the indebtedness of a debtor, or receiving funds for the purpose of distributing said funds among creditors in payment or partial payment of obligations of a debtor." RCW 18.28.010(1). Debt adjuster, "which includes any person known as a debt pooler, debt manager, debt consolidator, debt prorater, or credit counselor, is any person engaging in or holding himself or herself out as engaging in the business of debt adjusting for compensation." RCW 18.28.010(2).

The uncontroverted evidence below also showed that Solid Ground engaged in such activities under the control of and at the direction of its three principal moving agents, David J. Smith ("Smith"), Scott D. Haick ("Haick"), and Ruben McEachron ("McEachron"). **CP 74 (Ex A).** These individuals have been the only shareholders during times pertinent to the present case. *Id.* Smith, Haick, and McEachron are respectively the Chief Executive Officer, Chief Financial Officer, and Chief Operating Officer of Solid Ground. *Id.* Each identified himself as the only agent of Solid Ground having supervisory and/or managerial duties during the relevant time period. *Id.* Each, finally, had exclusive authority to approve the Solid Ground contract and thus the terms therein. *Id.*

Bomsta enrolled approximately $5,643.00 of unsecured debt into the program. **CP 34 (Ex A).** The Agreement called for payment of debt settlement fees, including an administration fee equal to ten percent of the total debt listed on the Agreement (approximately $564.30), which the Agreement described as "fully earned . . . and non-refundable." *Id.* Pursuant to the Agreement, and as the evidence showed below, Bomsta made monthly debt settlement payments of $120.00, which were largely consumed by fees in clear and indisputable violation of Washington consumer protection statutes. *Id.*

Bomsta subsequently terminated the program and filed a Class Action Complaint against Defendants Solid Ground, Smith, Haick, McEachron, JIO, and Stephen Detata ("Detata"),[2] alleging violations of the Washington Debt Adjusting Act, chapter 18.28 RCW ("DAA"), and the Washington Consumer Protection Act, chapter 19.86 RCW ("CPA"), and seeking actual damages, treble damages, attorney's fees and litigation costs, and injunctive relief barring Defendants' collective illegal conduct. **CP 1.**[3]

All Defendants were served in May, 2011, and no Defendant disputed service of process. On September 14, 2011, Bomsta moved for an Order of Default as to Defendants. **CP 19.** Defendants, in response, filed a late Answer on September 27, 2011, one day before the Court heard Bomsta's motion without oral argument. **CP 22.** The Answer, however, was served on Plaintiff's counsel via e-mail at nearly 5 p.m. on September 28, 2011—the day of the hearing. **CP 65 (Ex A)**. The Answer was drafted by Mr. Matthew R. King and provided to the Defendants for filing. **CP 56.**

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[2] JIO and Detata are currently in default at the trial level and are not parties to this appeal.

[3] Solid Ground, Smith, Haick and McEachron filed a Motion for Enlargement of Time to file an Answer. **CP 16**. The trial court never decided the motion, presumably because it was either filed or noted for hearing improperly.

Solid Ground, Smith, Haick, and McEachron's Answer raised twenty-nine (29) discrete affirmative defenses, yet omitted reference to an arbitration agreement (alternatively referred to throughout Appellant's Opening Brief as a "forum selection clause" as well as "arbitration agreement") or a CR 12(b)(3) improper venue defense. **CP 22.** After engaging in discovery and proceeding with the litigation, Solid Ground, Smith, Haick, and McEachron filed a second pleading nearly four months later styled a "Motion to Dismiss Pursuant to Forum Selection Clause," raising the CR 12(b)(3) defense for the first time. **CP 29.** Bomsta opposed the Motion for, *inter alia*, waiver of such defenses and unconscionability. **CP 32.**

Ten Months after Bomsta originally filed the Complaint, approximately eight months after filing a motion for enlargement of time to answer the complaint (which was never granted), approximately six months after belatedly answering the Complaint, and roughly two months after filing a Motion to Dismiss Pursuant to a Forum Selection Clause, Solid Ground, Smith, Haick, and McEachron moved to vacate the Order of Default and amend the belated Answer. **CP 36**. The trial court appropriately set aside the Order of Default and denied Defendants' Motion to Amend and to Dismiss Pursuant to Forum Selection Clause. **CP 47.**

The Court found Solid Ground, Smith, Haick, and McEachron waived the affirmative defense and denied Defendants' Motion to Dismiss Pursuant to Forum Selection Clause based on the Court's denial of Defendants' Motion to Amend Answer. **CP 46.** On April 10, 2012, Defendants moved the Court to reconsider its Order denying the motion to amend. **CP 49.** The Court, appropriately exercising its discretion, denied the motion for reconsideration on May 7, 2012, reiterating that Defendants had waived the defense of improper venue pursuant to CR 12(h), 12(b), and 15(a). **CP 50.**

Prior to the hearing on Defendants' Motion for Discretionary Review, on June 5, 2012, Defendants moved to compel arbitration (on the basis of the *same* arbitration clause), stylizing the motion as a Motion to Stay Litigation Pending Arbitration or In the Alternative, Place Matter into King County Mandatory Arbitration. **CP 62.** Bomsta again opposed the Motion on the grounds that the arbitration clause is unconscionable and unenforceable and because the matter in controversy exceeds $50,000.00—the jurisdictional ceiling for compulsory arbitration pursuant to local rule. **CP 66.** On July 6, 2012, the trial court denied Defendants' Motion. **CP 69**. On July 27, 2012, consequently, Defendants filed a Notice of Appeal with the trial court of the trial court's July 6, 2012 Order. **CP 70.** Bomsta hereby submits this Answering Brief in opposition to

Appellant's Opening Brief, and requests this Honorable Court affirm the trial court's multiple decisions.

III. STANDARD OF REVIEW

A trial court's decision whether to grant leave to amend the pleadings is reviewed for an abuse of discretion. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 617-18, 94 P.3d 961 (2004). A trial court abuses its discretion if its discretionary decision is manifestly unreasonable, or the trial court based its decision on untenable grounds, or made its decision for untenable reasons. *Id.* Arbitrability is a question of law that Washington Courts of Appeal review de novo. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009).

IV. ARGUMENTS & ANALYSIS

A. The Trial Court Did Not Err in Denying Solid Ground, Smith, Haick, and McEachron's Motion to Stay Litigation Pending Arbitration or in the Alternative, Place Matter into King County Mandatory Arbitration.

A "question of arbitrability" is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). "[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of

arbitrability' for a court to decide." *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

"[W]hen a plaintiff argues that an arbitration clause, standing alone, is unenforceable—for reasons independent of any reasons the remainder of the contract might be invalid—that is a question to be decided by the court." *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010).

"[O]ur case law makes clear that courts properly exercise jurisdiction over claims raising (1) defenses existing at law or in equity for the revocation of (2) the arbitration clause itself." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1120 (9th Cir. 2008). *See Winter v. Window Fashions Prof'ls, Inc.*, 166 Cal. App. 4th 943, 83 Cal. Rptr. 3d 89, 93 (Ct. Capp. 2008) (distinguishing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), and *Nagrampa v. MailCoups Inc.*, 469 F.3d 1257 (9th Cir. 2006), and explaining that courts decide the issue of arbitrability where the plaintiff's specific "challenge to the arbitration clause was [raised] in response to [a] petition to compel arbitration" as opposed to the Complaint). *See also* RCW 7.04A.070(1) (Where one party moves to compel arbitration and the other party refuses arbitration, "the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to

arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.").

The Federal Arbitration Act ("FAA"), further, makes arbitration agreements "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. The FAA puts arbitration agreements "upon the same footing as other contracts," *Volt Info Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248; 103 L. Ed. 2d 488 (1989), and "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478.

Since agreements to arbitrate are on the same, not superior, footing to other contracts, "[s]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (emphasis in original). Courts simply cannot "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions," thereby placing them on an inferior footing. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996) (emphasis in original). Washington law invalidates arbitration clauses that are ***either*** procedurally ***or*** substantively unconscionable. *See Luna v. Household Fin. Corp. III,*

236 F. Supp. 2d 1166, 1174 (W.D. Wash. 2002). The trial court's decision should be affirmed because the arbitration provision is both procedurally and substantively unconscionable.

1. The Arbitration Provision is Procedurally Unconscionable and Therefore Unenforceable.

"Procedural unconscionability 'relates to impropriety during the process of forming a contract' and refers to 'blatant unfairness in the bargaining process and a lack of meaningful choice.'" *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 388, 238 P.3d 505 (2010) (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975). "Procedural unconscionability is determined in light of the totality of the circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were 'hidden in a maze of fine print.'" *Mattingly*, 157 Wn. App. at 388 (citation omitted).

The arbitration clause here is plainly procedurally unconscionable. The arbitration clause is found deep within the contract that was presented on a "take it or leave it" basis. Consequently, the purported agreement to arbitrate is a contract of adhesion. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004); *Yakima County (W. Valley) Fire Prot.*

Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993) (factors used to determine whether an adhesion contract exists are: "(1) whether the contract is a standard form printed contract, (2) whether it was 'prepared by one party and submitted to the other on a 'take it or leave it' basis', and (3) whether there was 'no true equality of bargaining power' between the parties.").

Bomsta did not have a reasonable opportunity to understand the terms of this contract of adhesion and the arbitration clause therein because she was not properly alerted to its existence. In this regard, there was no negotiation between the parties as to the terms of the agreement and there is no evidence the parties ever discussed arbitration prior to presenting Bomsta with the contract. Bomsta is an extremely financially distressed Washington consumer who was solicited for participation in a debt settlement program, and was encouraged to execute and return the contract so that she could become debt free as soon as possible. Moreover, it was listed on page four, without any highlighting and in normal font, of many pages that were transmitted from Solid Ground, Smith, Haick, and McEachron to Bomsta in Washington State. **CP 34 (Ex A).** Consequently, the arbitration agreement is procedurally unconscionable and unenforceable for this reason *alone*.

2. The Arbitration Provision is Substantively Unconscionable and Therefore Unenforceable.

Substantive unconscionability "involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh . . ." *Schroeder*, 86 Wn.2d at 260). A clause "unilaterally and severely" limiting one side's remedies is substantively unconscionable because it denies "any meaningful remedy." *Lowden v. T-Mobile USA, Inc.,* 512 F.3d 1213, 1219 (9th Cir. 2008) (citing *Scott v. Cingular Wireless*, 160 Wn.2d 843, 857, 161 P.3d 1000 (2007)). Arbitration clauses, in this regard, are enforceable only where they permit a plaintiff to effectively vindicate her rights. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

Where arbitration costs make the arbitration prohibitively expensive, a party is effectively denied a forum to vindicate his or her claim and the arbitration clause, as a consequence, may be deemed substantively unconscionable. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 307, 103 P.3d 753 (2004); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 467-68, 45 P.3d 594 (2002). An arbitration clause is substantively unconscionable if it triggers costs effectively depriving a plaintiff of limited pecuniary means

of a forum for vindication of claims. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 883, 224 P.3d 818 (2009).

i. The Venue Provision of the Arbitration Agreement is Unreasonable, Substantively Unconscionable, and Unenforceable.

The uncontroverted evidence below showed the logistical costs of arbitrating small consumer claims in Broward County, Florida, renders the arbitration agreement unenforceable. The evidence showed the average cost of flights from Seattle-Tacoma Airport to Fort Lauderdale-Hollywood International Airport, if booked in advance, was approximately $500.00. **CP 65 (Ex B).**[4] Conservative governmental per diem hotel costs are $101 per room and meal and incidentals costs are $71 per day for Broward County. **CP 42 (Ex E).** The logistical costs of arbitrating and/or litigating Bomsta's damage claim in Broward County, Florida would exceed the value of her actual damages claim, rendering the arbitral forum illusory. *Id.*

Bomsta produced undisputed evidence that she and her teenage daughter survive on a fixed, federally subsidized income, receiving less

[4] In March, 2012, when Bomsta originally submitted her Declaration in opposition to the Defendants' Motion to Dismiss Pursuant to Forum Selection Clause, the average price for a plane ticket, if bought several months in advance, was approximately the same: $517.05. **CP 42 (Ex C).**

than $1,000 total per month in assistance, which money is used to care for both herself and her teenage daughter. **CP 42.** This money is consumed monthly by necessary expenditures (not including food), such as rent (approximately $133.00 per month), power (approximately $125.00 per month), home phone service ($50.00 per month), and her daughter's cell phone service ($80.00) per month. Since it would be impossible for Bomsta to foot the necessary bills (flight, hotels, and daily incidentals) to arbitrate her claim in accordance with the arbitration clause, it is unreasonable to enforce the unconscionable provision. *Id.* In this regard, the subject venue provision was patently unreasonable and an object of overreaching at the time Solid Ground offered its engagement Agreement to Plaintiff, owing to the known extreme financial hardship it imposed on Plaintiff. *See id.*

In addition to the practical financial reality that would prohibit Bomsta from vindicating her statutory, remedial rights, enforcement of the venue provision would be unreasonable in light of Bomsta's physical state. The uncontroverted evidence above showed that Bomsta is morbidly obese and suffers from a chronic, rare genetic disorder called "Adiposis dolorosa." *Id.* It causes Bomsta to suffer from non-cancerous tumor-like growths all over her body, causing her extreme discomfort and chronic pain. *Id.* This disease severely limits Bomsta's ability to travel, and

would effectively prohibit her from meeting the terms of the arbitration agreement. *Id.* Consequently, the venue provision in the arbitration agreement is unreasonable, unconscionable, and unenforceable.[5]

The contract provision found in a debt settlement company's contract that purported to compel a Washington consumer to adjudicate his Consumer Protection claim in Orange County, in this regard, was recently found substantively unconscionable and unenforceable. *See Bradley v. Morgan Drexen, Inc.*, 2009 WL 2870508, at *2, 2009 U.S. Dist. LEXIS 86880, at *10 (E.D. Wash., Aug. 31, 2009), attached hereto as Appendix 1. *See also Bersante v. Noteworld, LLC*, Spokane County Case Number 11-2-01145-8, at p. 2, attached hereto as Appendix 2; *see generally Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 256 P.3d 321 (2011). The same result should be found here.

ii. The Governing Law Provision of the Arbitration Agreement is Unreasonable, Unconscionable, and Unenforceable.

Washington courts void a governing law provision where enforcement "would be contrary to a fundamental policy of [Washington]."

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[5] Defendants assert that Bomsta's claim is worth up to $5,000,000.00 based upon an *allegation* made in the Complaint and therefore the value of the claim relative to the cost of arbitrating in a remote forum should be considered. (App. Brief, p. 10). However, that is merely a jurisdictional allegation made by Plaintiff pursuant to the jurisdictional ceiling included in the Class Action Fairness Act, 28 U.S.C. § 1332(d).

Schnall v. AT&T Wireless Servs., Inc. 171 Wn.2d 260, 267, 259 P.3d 129 (2011) (citing *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 698, 586 P.2d 830 (1978), *adhered to on recons.*, 93 Wn.2d 51, 605 P.2d 779 (1980)).

Here, the "governing law" provision within the greater arbitration agreement purportedly requiring a Washington consumer to resolve disputes pursuant to Florida law renders the arbitration agreement further unconscionable. Enforcement would deprive a financially distressed and disabled Washington consumer, with whom Solid Ground, Smith, Haick, and McEachron purposefully contracted for debt adjusting services, of the strong financial protections offered by the Washington DAA and CPA. **CP 1**. Indeed, the function of the governing law provision is to ensure that Solid Ground, Smith, Haick, and McEachron's conduct does not fall under the enforcement reach of state laws regulating their behavior.

Enforcement of the governing law provision would thus specifically contravene strong Washington public policy. The seriousness with which Washington asserts its public policy of protecting Washington residents from predatory debt adjuster practices is reflected in multiple provisions of its statute, as well as the only Washington Supreme Court case to interpret the Washington DAA. Violation of the statute is a crime. RCW 18.28.190. Contracts providing for illegal fees are void. RCW

18.28.090. Violations of the Act are a *per se* unfair or deceptive practice under chapter 19.86 RCW, creating civil liability, and subjecting the wrongdoer to exemplary damages. RCW 18.28.185. The Attorneys General and prosecuting attorneys are granted authority to bring restraining actions to stop violations of the Act. RCW 18.28.200. All payments made by Washington debtors are to be maintained in Washington, as are records regarding disbursements, and these records are to be open at all times for inspection by Washington's Attorney General's office. RCW 18.28.110.

Washington's statute, thus, manifests a strong public policy of regulating debt adjusters' activities in Washington and of aggressively enforcing those regulations through public and private means. The governing law provision at issue here is, in its entirety, unreasonable and unenforceable because the provision, by its design and through its effect, improperly affords Solid Ground, Smith, Haick, and McEachron sanctuary from Washington's strong public policy prohibiting predatory debt adjuster practices. *See, e.g.*, *Morgan Drexen*, Appendix 1, at 10-11.

Recent Washington Supreme Court jurisprudence interpreting the DAA bolsters the propriety of enforcement of Washington law in this instance. Not only did the Court hold that aiding and abetting a violation of the DAA constitutes a *per se* unfair and deceptive business practice in

violation of the Washington CPA, Justice Tom Chambers issued his own concurring opinion, in which he criticized the industry and stated "the chronic and systemic abuses in the Washington debt adjusting industry deserve the attention of the Washington State Legislature." *Carlsen*, 171 Wn.2d at 502. Thus, enforcement of the unconscionable governing law provision is unreasonable.

iii. The Entire Agreement is Unenforceable.

An arbitration agreement is entirely unenforceable where unconscionable provisions are pervasive. *See Adler,* 153 Wn.2d at 359 (where a defendant engages in an "insidious pattern" of seeking to tip the scales in its favor by inserting numerous unconscionable provisions in an arbitration agreement, courts may decline to sever the unconscionable provisions).

Solid Ground's arbitration agreement is the result of an attempt to systemically insulate Solid Ground, Smith, Haick, and McEachron from liability by making Solid Ground's customers' vindication of their rights a practical nightmare and fiscal impossibility. Severance, therefore, is neither possible nor appropriate, *see Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003), and the entire agreement is therefore unenforceable. *See Al-Safin v. Circuit City,* 394 F.3d 1254, 1262 (9th Cir.

2005) (citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003)) ("Any earnest attempt to ameliorate the unconscionable aspects of [Defendant's] arbitration agreement would require this court to assume the role of contract author rather than interpreter."). *See also Omstead v. Dell, Inc.*, 594 F.3d 1081, 1087 (9th Cir. 2010).

For similar reasons, the Appellants' after-the-fact offer to waive the venue provision (or any other unconscionable provision), further, should be declined by this Court, as it has no bearing on the term's substantive unconscionability, which is determined at the moment of contracting, not the time of enforcement.

The purpose of the CPA, moreover, is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032 (1987). The CPA is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). As explained in *Lightfoot v. MacDonald,* 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976):

> We think the evidence purpose of the legislature in providing a private remedy in RCW 19.86.170, was much the same as that which Congress expressed in providing for

> treble damage actions under the antitrust laws. Its purpose was to enlist the aid of private individuals damaged by acts or practices which were forbidden in the acts, to assist in the enforcement of such laws. Such assistance is desirable only if it serves the public interest and implements the purpose of the statute.

In order to preserve the rights afforded under the CPA and further the policy therein, the entire clause must be stricken in this case.

Waiver of the offending terms to make the arbitration clause enforceable conflicts with the public policy underlying the CPA. Even where the requirement is successfully challenged in court, an offending Defendant can waive the provision (or seek severance) although the deterrent effect of the illegal term already adversely affected other consumers' decision-making process on whether to bring a claim. *See McKee v. AT&T Corp.*, 164 Wn.2d 372, 403, 191 P.3d 845 (2008) ("Permitting severability as requested by AT&T 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 balanced enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.").

Such adverse effects are especially distressing here, where the injured class is composed of financially destitute Washington consumers

and where the corporate defendant has only sought to waive certain provisions (where they are found illegal) from Bomsta's contract alone. Defendants would simultaneously benefit from an illegal contract and from the perpetual deterrent effect on other consumers contemplating bringing a claim. To ensure the remedial purposes of the CPA are achieved, Defendants offer to waive unconscionable provisions should be declined and the entire clause stricken.

B. The Trial Court Was Correct in Finding that Defendants Waived their Improper Forum/Venue Defense.

CR 12(b) requires that most affirmative defenses be raised in the Answer or other first responsive pleading. If they are not affirmatively pleaded or asserted in the first responsive pleading, most affirmative defenses, including the defense of improper venue, are deemed to be waived under CR 12(h)(1), which states: "A defense of . . . improper venue . . . is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course." *See, e.g.*, *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 62 n. 8, 937 P.2d 1158 (1997) ("CR 12(h)(1) indicates that the defense of improper

venue must be raised in either a pre-answer motion or in the answer, or it is waived.").

Washington law, moreover, is clear that a motion to dismiss upon a "forum selection clause" is treated as a 12(b)(3) improper venue defense. *See, e.g.*, *Voicelink Data Servs., Inc.*, 36 Wn. App. at 624. In the present case, Solid Ground, Smith, Haick, and McEachron waived the affirmative 12(b)(3) improper venue defense by omitting it from their first responsive pleading—the Answer. **CP 22.** Solid Ground, Smith, Haick, and McEachron's Motion was thus properly denied by the trial court, which has broad discretion to decide such issues. **CP 47.** *See, e.g. Kahclamat v. Yakima County*, 31 Wn. App. 464, 467, 643 P.2d 453 (1982). ("The civil rules of procedure were not designed to permit a defendant to make repeated motions attacking a pleading over such an extended period of time. Under the facts and circumstances presented here, the defendant's motion for a change of venue, coming 1 year after the action was filed, will be deemed to have been waived.") (internal citation omitted).

Solid Ground, Smith, Haick, and McEachron's criticism of this outcome is premised on their inaccurate reading of CR 12(h)(1). Solid Ground, Smith, Haick, and McEachron argue: "The plain language of CR 12(h)(1)(B) allows amendment of an answer to raise venue if the Court grants amendment under CR 15." (App. Brief, p. 8). This statement is

incorrect. CR 12(h)(1)(B) does not preserve an otherwise waived defense if the court grants leave to amend, as Solid Ground, Smith, Haick, and McEachron suggest.

Rather, CR 12(h)(1)(B) preserves an otherwise waived defense only when it is ". . . included in a responsive pleading or an amendment thereof permitted by rule 15(a) **to be made as a matter of course.**" (Emphasis added). This highlighted language creates a critical distinction. CR 15(a) clearly distinguishes between amendments made "as a matter of course," which is permissible when the amendment is made before a responsive pleading is served, or within twenty days after it is served, and amendments requested after this time period has passed, which require either consent of the adverse party or leave of court. CR 12(h)(1) plainly recognizes this distinction when it allows defenses to be preserved through pleadings amended as a matter of course and conspicuously makes no such provision allowing defenses to be preserved through amendment granted by leave of court. Thus, under CR 12(h)(1), the defense of improper venue would have been waived even if the trial court had granted Solid Ground, Smith, Haick, and McEachron leave to amend their Answer.

This reading of the rule is dictated by the rule's unambiguous language and is consistent with the purpose and intent of the rules as well

as case law. If CR 12(h)(1) were to be interpreted as Solid Ground, Smith, Haick, and McEachron suggest, it would render meaningless the rule's limitation to amendments "made as a matter of course." It would also render the rule itself superfluous, as the rule is clearly intended to be a strict mandate to plead affirmative defenses in initial pleadings or else the defenses are waived. *See, e.g.*, *Kahclamat*, 31 Wn. App. at 465. *See generally Geroux v. Fleck*, 33 Wn. App. 424, 655 P.2d 254 (1982). If the rule were to permit these previously waived defenses to be revived in all amended pleadings, with such amendment liberally granted, it would no longer be at all strict, but rather broadly permissive.

This permissive approach is not found in case law. Solid Ground, Smith, Haick, and McEachron cite several cases in which amendment was permitted to add new claims *by the respective plaintiffs*, but does not cite a single case in which a party was given leave to amend an answer in order to revive a previously waived defense. Given that Solid Ground, Smith, Haick, and McEachron can offer no case law supporting their argument, the Superior Court's decision cannot be deemed to be error.

C. The Trial Court Did Not Abuse Its Discretion in Denying Solid Ground, Smith, Haick, and McEachron's Motion to Amend.

For the same reasons, Solid Ground, Smith, Haick, and McEachron have failed to show that the trial court abused its discretion by denying

Solid Ground, Smith, Haick, and McEachron's Motion to Amend. "The disposition of motions to amend the pleadings is discretionary with the trial court, and its refusal to permit such an amendment will not be overturned except for manifest abuse of discretion." *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 577, 573 P.2d 1316 (1978).

As discussed above, it is settled Washington law that a defendant waives the affirmative defense of improper venue unless asserted in an initial responsive pleading or one amended as a matter of course under CR 15(a). CR 12(h)(1). Since the only reason given to amend the Answer was to add an additional affirmative defense, and given that the rules do not permit such a result, the Superior Court was entirely correct in denying the Motion to Amend.

While the rule "should be interpreted with "extreme liberality, leave to amend is not to be granted automatically." (internal citation omitted). *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). The decision whether to grant leave to amend the pleadings is within the discretion of the trial court. *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 763, 709 P.2d 1200 (1985). Courts consider several factors in determining whether to deny a motion to amend, including undue delay, unfair surprise, and confusion. *Wilson v. Horsley*, 137 Wn.2d 500, 505-06, 974 P.2d 316 (1999).

Nearly eleven months after Bomsta originally filed her Complaint (May 5, 2011), approximately eight months after belatedly answering Bomsta's Complaint (September 27, 2011), and roughly two months after filing a Motion to Dismiss Pursuant to a Forum Selection Clause (January 9, 2012), Solid Ground, Smith, Haick, and McEachron, on March 20, 2012, moved to vacate the Order of Default and amend the belated Answer (and to shorten the time on the hearing of such motion to March 30, 2012).

Justice, in the present case, required that the trial court deny Solid Ground, Smith, Haick, and McEachron's Motion to Amend their late Answer. Solid Ground, Smith, Haick, and McEachron did not properly raise the 12(b) defenses in their Answer, which was untimely, and did not bring it in a CR 12(b) motion (first) as required by CR 12(h)(1). Their right to amend the Answer as a matter of course had expired. *See, e.g.*, *Voicelink Data Servs., Inc.*, 86 Wn. App. at 625, n.8 ("CR 12(h)(1) indicates that **the defense of improper venue must be raised in either a pre-answer motion or in the answer, or it is waived**.")

The fact that Solid Ground, Smith, Haick, and McEachron were arguably *pro se* litigants at the time of filing the Answer is of no consequence and that fact, without more, cannot excuse their omission. In any event, it is clear that attorney Matthew R. King drafted and provided Solid Ground, Smith, Haick, and McEachron with a copy of the first

Answer, which omitted the defense. **CP 56.** The six-month period between the filing of their late Answer and the Motion to Amend constitutes undue delay, such that denial of the motion is warranted. The purported right to assert an improper venue defense was well within the minds of Solid Ground, Smith, Haick, and McEachron and their attorney at the time they filed their untimely Answer. Solid Ground, Smith, Haick, and McEachron knew since May, 2011 that Bomsta had filed a Complaint based upon the illegal fee terms in the debt-adjusting contract, in which the Solid Ground, Smith, Haick, and McEachron's agreement to arbitrate—albeit illegal and unenforceable under generally applicable Washington law—was included. Solid Ground, Smith, Haick, and McEachron lost their right to insert them at such a late date. *See Voicelink Data Servs., Inc.*, 86 Wn. App. at 625 n.8.

Bomsta would be prejudiced if the trial court granted the Motion because she would have been forced to endure hardship by having to completely shift all of her claims into another forum for their resolution (despite the matter proceeding substantially in King County Superior Court), incur further attorney's fees and costs, as well as further delay in the resolution of her important public interest claims under the Washington CPA, as a direct result of Solid Ground, Smith, Haick, and McEachron's conduct. *See, e.g., Brown v. Dillard's, Inc.,* 430 F.3d 1004,

1012-13 (9th Cir. 2005) (holding that, in an *analogous* situation for purposes of determining prejudice to plaintiff in a waiver of defendant's right to arbitrate analysis, potentially incurring further attorney's fees and costs constitutes prejudice).

Furthermore, *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn. 2d 343, 670 P.2d 240 (1983), supports, if anyone, Plaintiff. There, a plaintiff sought to amend a timely and properly filed Complaint. *Id.* at 347. Plaintiff did not include, specifically, a claim for defamation in his original Complaint. *Id.* However, the plaintiff *specifically* included the allegations that the defendants published articles that were false and "were published by [petitioner] with knowledge of their falsity or with reckless disregard for their truth or falsity," which the Court acknowledged was commonly used in conjunction with defamation actions, and thus the defendants "had notice of a possible issue of defamation at the time of the original complaint." *Id.* at 349.

The facts of the present case are, in any event, entirely distinguishable from those of *Caruso* in that here Solid Ground, Smith, Haick, and McEachron answered the Complaint knowing they were going to raise an improper venue defense and yet failed to include it—or any indication that they were going to raise the defense—in their first responsive pleading. The 12(h)(1) rule exists for good reason—it requires

litigants to raise their 12(b) defenses, such as for improper venue or forum, in the first responsive pleading, or lose them forever.

Tagliana v. Colwell, 10 Wn. App. 227, 517 P.2d 207 (1973) also supports Bomsta's position. There, the entire case revolved around the importance of affording *plaintiffs*, not defendants, great latitude in amending pleadings to assert new causes of action against not only the then named defendant, but also newly discovered defendants who may have also been liable. *Id.* at 232-33. Additionally, that case is procedurally distinguishable from the instant case, as the real issue was whether the trial court properly found that pleadings could not be amended after the court orally ruled upon a motion for summary judgment, but had not yet entered such an order. *Id.*

Solid Ground, Smith, Haick, and McEachron's reliance on *Ennis v. Ring*, 56 Wn.2d 465, 470, 353 P.2d 950 (1959) is misplaced, as the Court specifically limited the holding to its facts because the case was not remanded for retrial of specific issues and there was nothing to suggest that retrial was limited. Moreover, the court was simply affirming the trial court's decision to permit the amendment, specifically noting "[t]he

granting of amendments to the pleadings is largely within the sound discretion of the trial judge." *Id.*[6]

Defendants, in this case, failed to abide by 12(h)(1), and the trial court appropriately exercised its discretion not to permit amendment of the answer to insert additional affirmative defenses (in addition to twenty-nine already inserted) such that their Motion is properly denied.

V. CONCLUSION

Bomsta, therefore, respectfully requests that this Court affirm the trial court's decisions in all three respects.

RESPECTFULLY SUBMITTED this 3 day of December, 2012.

THE SCOTT LAW GROUP, P.S.

By _____
BOYD M. MAYO, WSBA # 43752
ANDREW S. BIVIANO, WSBA # 38086
Attorneys for Respondent/Bomsta

[6] Similarly, *Territory of Alaska v. Tewkesbury*, 52 Wn.2d 502, 326 P.2d 1011 (1958) is inapposite here and peculiarly limited to the facts of that case as well. There, the court specifically stated that: "[O]rdinarily, a party cannot claim error based upon his own wrong. In the instant case, however, it appears from the uncontradicted affidavit of appellant . . . Tewkesbury . . . that the answer 'contains admissions specifically contrary to affiant's instructions to his said counsel,' so that the verification could not have been amended, over appellants' objection, during the trial of the case." *Id.* at 506.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 3rd day of December, 2012, I caused this Brief of Respondent to be filed with the Court of Appeals of the State of Washington, Division I, by submitting the same to Division III for submittal to Division I pursuant to RAP 18.23 and I further caused the same to be served, via email (per stipulation of the parties) and U.S. Mail, to the following:

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APPENDIX 1

BRIEF OF RESPONDENT

SHARON P. BRADLEY and SAMUEL A BRADLEY, husband and wife, individually and on behalf of a Class of similarly situated Washington families, Plaintiffs, v. MORGAN DREXEN, INC. a Nevada corporation, MORGAN DREXEN, LLC; THE MORGAN DREXEN GROUP, an association; WALTER LEDDA a California resident; JOHN DOES 1-10; and JANE DOES 1-10, Defendants.

NO. CV-09-109-RHW

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

2009 U.S. Dist. LEXIS 86880

August 31, 2009, Decided
August 31, 2009, Filed

COUNSEL: [*1] For Sharon P Bradley, wife and husband individually and on behalf of a Class of similarly situated Washington families, Samuel A Bradley, husband and wife individually and on behalf of a Class of similarly situated Washington families, Plaintiffs: Darrell W Scott, LEAD ATTORNEY, Scott Law Group PS, Spokane, WA; Matthew John Zuchetto, LEAD ATTORNEY, The Scott Law Group, Spokane, WA; Timothy W Durkop, LEAD ATTORNEY, Timothy Durkop Law Office, Spokane Valley, WA.

For Morgan Drexen, a Nevada Corporation, Walter Ledda, a California resident, Defendants: Glenn D Dassoff, Jay C Gandhi, LEAD ATTORNEYS, PRO HAC VICE, Paul Hastings Janofsky & Walker LLP, Costa Mesa, CA; Todd Reuter, LEAD ATTORNEY, K&L Gates LLP, Spokane, WA.

For Morgan Drexen LLC, Morgan Drexen Group, an association, John 1-10 Does, Jane Does 1-10, Defendants: Todd Reuter, K&L Gates LLP, Spokane, WA.

JUDGES: ROBERT H. WHALEY, Senior United States District Judge.

OPINION BY: ROBERT H. WHALEY

OPINION

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE; DENYING WITH LEAVE TO RENEW DEFENDANT LEDDA'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Before the Court is Defendants' Motion to Dismiss for Improper Venue (Ct. Rec. 8); Motion to Dismiss for [*2] Lack of Personal Jurisdiction; and Motion to Strike (Ct. Rec. 25). A hearing on the motions was held on August 5, 2009, in Spokane, Washington. Plaintiff was represented by Darrell Scott and Timothy Durkop. Defendants were represented by Glenn Dassoff and Tom Bassett.

BACKGROUND

Plaintiffs Sharon and Samuel Bradley have brought suit on behalf of a class of similarly situated Washington families against Morgan Drexen, a Nevada Corporation, the Morgan Drexen Group, Morgan Drexen, LLC, Walter Ledda, the founder and principal officer of Morgan Drexen, and several unnamed Defendants. Plaintiffs claim that Defendants have charged them excessive fees as part of a debt consolidation agreement in violation of the Washington Debt Adjustment Act, *RCW 18.28.080* and the Washington Consumer Protection Act (CPA).

In their Complaint, Plaintiffs allege that Defendants engage in a scheme where the class members enter into Defendants' Debt Recovery Program by signing a stand-

ardized Contract for Debt Negotiation Services and Authorization for Credit/Automated Clearing House (ACH) Handling. Defendants then set up and maintained individual accounts to hold each Class member's funds for the supposed purpose [*3] of paying Class members' debt upon settlement with creditors. Pursuant to the contract, Defendants then first pay themselves excessive program fees and charges from these individual account, in violation of Washington law.

In Plaintiffs' case, Sharon Bradley received an unsolicited telephone call from Defendant Morgan Drexen in which it offered her services to assist in reducing her debt, which was approximately $ 7,200. Morgan Drexen sent an application form for their program along with a written agreement. Plaintiffs' completed the paperwork and sent it back to Morgan Drexen. The agreement stated that Plaintiffs would pay Morgan Drexen $ 169.12 month. They were told that they would be debt free in 36 months if the $ 169.12 payment was made. The payment was automatically deducted from Plaintiffs' checking account.

Plaintiffs were charged an initial fee of $ 675.00, which was paid from the $ 169.12 monthly payments. In addition, Morgan Drexel charged a $ 45 monthly maintenance fee, which equaled 26.6% of the monthly payment. In addition to these fees, Morgan Drexel charged a settlement fee, which was 25% of the difference that was owed to the creditor and what they were settled from, [*4] plus a $ 10.00 check handling fee.

According to Plaintiffs, they paid over $ 2,300 to Morgan Drexen. Yet, only one debt was settled for $ 767.00. During this time, Plaintiff was sued by Capital One Bank. Morgan Drexen instructed Plaintiff to send a copy of the Complaint to them, which Plaintiff did. Morgan Drexen then had the law firm of Haward & Nassiri send Plaintiff an answer to the Complaint with an instruction sheet telling her how to file the Answer and send a copy to Capital One's attorneys.

Plaintiffs allege that the debt adjustment contract entered into by the Plaintiffs and Defendants violates the Washington statutes for the following reasons: 1) Defendants' standardized authorization for Credit/ACH Handling agreements provided for transfer of Class member's moneys to accounts held outside the state of Washington, in violation of *RCW 18.28.110*; 2) Defendants failed to keep and maintain permanent records of all payments by Class members and all disbursements to Class members' creditors in the state of Washington, as required by *RCW 18.28.110*; 3) the contract charged a total fee for debt adjusting services in excess of fifteen percent of the total debt listed on the contract, [*5] thereby violating *RCW 18.28.080*; and 4) the contract provided for fees exceeding fifteen percent of the individual payments made by Class members, in violation of *RCW 18.28.080*.

Defendants now move for dismissal of the complaint, asserting that the forum selection clause contained in the contract requires that Plaintiffs litigate their claims in Orange County, California, and that this Court does not have personal jurisdiction over Defendant Walter Ledda.

I. Defendant's Motion to Dismiss for Improper Venue

The parties have framed the issue from two different perspectives. Defendants are seeking to enforce the forum selection clause contained within the contract at issue. The Forum Selection Clause states:

> This agreement is entered into in California upon acceptance by MDG in California, and the law of California governs this entire agreement. The Courts of Orange County, California have exclusive venue and jurisdiction in any controversy relating to or arising out of this agreement. All parties waive any objections to venue in Orange County, California.

(Ct. Rec. 11).

Plaintiffs attack the contract on its face and argue that because it violates Washington law, the entire contract is void, [*6] including the forum selection clause.

Here, the question the Court must first answer does not begin with the interpretation of the contract or the forum selection clause. The contract is clear. Any dispute between the parties relating to or arising out of the contract must be heard in the state courts of Orange County, California.

Instead, the answer to the question lies with the complaint. In bringing this action, Plaintiffs are not seeking to enforce the contract; rather, Plaintiffs are asserting a claim under the Washington Debt Adjustment Act and the Washington Consumer Protection Act. In doing so, Plaintiffs are stepping into the shoes of the Attorney General and enforcing the rights that the state of Washington has provided for its citizens, which should not be impeded by a forum selection clause. Moreover, the Washington Legislature has made it a crime to violate the Washington Debt Adjustment Act. *See Wash. Rev. Code ß 18.28.190.* [1] It is inconceivable that a victim of a Washington crime would have to seek redress in the California courts, or would have to forgo vindicating their rights because of a forum selection clause. Because the Court concludes that the nature and scope [*7] of the

complaint does not involve the contract at issue, the Court has diversity jurisdiction to hear the case.

> 1 Any person who violates any provision of this chapter or aids or abets such violation, or any rule lawfully adopted under this chapter or any order made under this chapter, is guilty of a misdemeanor.

Additionally, a motion to enforce a forum-selection clause is treated as a motion pursuant to *Federal Rule of Civil Procedure 12(b)(3). Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996).* Consequently, the pleadings need not be accepted as true, and facts outside the pleadings properly may be considered. [2] *Id.* "[I]n the context of a *Rule 12(b)(3)* motion based upon a forum selection clause, the trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party." *Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1138 (9th Cir. 2004)* (finding rule for viewing facts under *Rule 56* summary judgment motion applies in *Rule 12(b)(3)* case). "If the facts asserted by the non-moving party are sufficient to preclude enforcement of the forum selection clause, the non-moving party is entitled to remain [*8] in the forum it chose for suit unless and until the district court has resolved any material factual issues that are in genuine dispute." *Id. at 1139.*

> 2 Both parties agree that an evidentiary hearing should be held if the court has any concerns regarding the factual basis underlying the motions.

Under *Murphy,* the Court must draw all reasonable inferences in favor of Plaintiff. Here, when looking at the Complaint, Plaintiff has alleged facts, which, if true, assert violations of the Washington Debt Adjustment Act. [3] The Act provides:

> If a debt adjuster contracts for, receives or makes any charge in excess of the maximums permitted by this chapter, except as the result of an accidental and bona fide error, the debt adjuster's contract with the debtor shall be void and the debt adjuster shall return to the debtor the amount of all payments received from the debtor or on the debtor's behalf and not distributed to creditors.

Wash. Rev. Code ß 18.28.090.

> 3 Defendants have not denied these allegations, nor has Defendant challenged the terms of the contract as set forth in Plaintiff's complaint.

The Court infers that Defendants have violated the Washington Debt Adjustment Act, the contract is void, [*9] and the forum selection clause is unenforceable. There is nothing in the record that would suggest an accident or a bona fide error.

To the extent an argument can be made that a claim under the Washington Debt Adjustment Act should be considered a controversy that relates to or arises out of the contract entered into between Plaintiff and Defendant, the Court finds that enforcement of the forum selection clause in this case would be unreasonable.

The state of Washington has a strong public policy interest in seeing that its citizens are able to enforce its consumer protection laws. *See Dix v. ICT Group, Inc., 160 Wash.2d 826, 837, 161 P.3d 1016 (2007).* There are no reported cases enforcing the Washington Debt Adjustment Act. Nevertheless, the Washington legislature has determined that a violation of the Washington Debt Adjustment Act constitutes an unfair or deceptive act or practice under the Consumer Protection Act. *See Wash. Rev. Code ß 18.28.185.*

Washington courts have invalidated forum selection clauses that contravene "the strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision." *Dix, 160 Wash.2d at 835 (quoting M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)).* [*10] In *Dix* court held that:

> Given the importance of the private right of action to enforce the [Consumer Protection Act] for the protection of all the citizens of the state, we conclude that a forum selection clause that seriously impairs a plaintiff's ability to bring suit to enforce the CPA violates the public policy of this state. It follows, therefore, that a forum selection clause that seriously impairs the plaintiff's ability to go forward on a claim of small value by eliminating class suits in circumstances where there is no feasible alternative for seeking relief violates public policy and is unenforceable.

Id. at 837.

The state of Washington also has a strong interest in protecting its citizens from predatory debt adjuster practices. Defendant's business directly targets those individuals who are in financially-dire circumstances, and thus, would be financially unable to litigate their relatively small claims outside their local jurisdiction. Under these

circumstances, the contract closely resembles an adhesion contract that was entered into by a sophisticated and predatory company with a vulnerable consumer with very limited financial resources. In effect, Defendant can violate [*11] state consumer laws with impunity knowing that it is highly unlikely that its customers would be able to pursue any legal action against them if the lawsuit would have to be pursued in the state of California. *See e,g, Scott v. Cingular Wireless, 160 Wash. 2d 843, 855, 161 P.3d 1000 (2007)* (holding an arbitration agreement substantively unconscionable because it effectively exculpated the defendant for potentially widespread misconduct). Given the amount of available damages and the already impoverished state of Defendant's customers, the result would be that a cause of action to enforce the Washington statute would never be initiated if it had to be brought in the state of California.

For these reasons, the Court denies Defendant's Motion to Dismiss.

II. Defendant's Motion to Dismiss for Lack of Personal Jurisdiction

Defendant Walter Ledda asserts the Court does not have personal jurisdiction over him. In *Grayson v. Nordic Const. Co., Inc.*, the Washington Supreme Court held that if a corporate officer participates in wrongful conduct or with knowledge approves the conduct, then the officer, as well as the corporation, is liable for penalties. *92 Wash.2d 548, 554, 599 P.2d 1271 (1979)*. Deceptive practices in violation [*12] of the Consumer Protection Act are the type of wrongful conduct that justifies imposing personal liability on a participating corporate officer. *Id.*

In determining whether the plaintiff has set forth a prima facie case for jurisdiction, the Court must treat the allegations in the complaint as true. *Lewis v. Bours, 119 Wash.2d 667, 670, 835 P.2d 221 (1992)*. Here, in their complaint, Plaintiffs allege that Defendant Ledda directed the business affairs of the corporation and established, directed, and/or ratified the unfair and deceptive business practices alleged in the Complaint. Plaintiffs have met their burden of establishing a prima facie case to survive a motion to dismiss.

The Court will reserve ruling on the motion to permit Plaintiffs to promptly conduct discovery on the question of personal jurisdiction. After discovery, Defendant Ledda can renew his motion. An evidentiary hearing can then be held, or written submissions can be filed with the Court in order to permit the Court to resolve the question of personal jurisdiction.

III. Motion to Strike

Defendants move to strike portions of the declarations of Darrell Scott and Sharon Bradley, and exhibits attached to those declarations. Defendants [*13] ask the Court not to consider these portions when ruling on the Defendants' respective motions. Their fifty-seven evidentiary objections include inadmissible hearsay, conclusory statements, improper opinion testimony, speculation, improper character evidence, extrinsic credibility evidence, irrelevance, and ER 403 objections. Plaintiffs have not challenged the objections raised as to Sharon Bradley's declaration, but have defended Darrell Scott's declaration and attached documentation.

Plaintiffs have not relied on the objected to portions of the declarations. Thus, Defendant's motion to strike is moot. *See Keith v. CUNA Mut. Ins. Agency, Inc., 2009 U.S. Dist. LEXIS 58173, 2009 WL 1793675 *7 n.3 (W.D. Wash. 2009)* (denying motion to strike as moot where Court did not consider objected to declaration).

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants' Motion to Dismiss for Improper Venue (Ct. Rec. 8) is **DENIED.**

2. Defendant Ledda's Motion to Dismiss for Lack of Personal Jurisdiction (Ct. Rec. 13) is **DENIED,** with leave to renew.

3. Defendant's Motion to Strike (Ct. Rec. 25) is **DENIED,** as moot.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and to provide copies to counsel.

DATED this 31st [*14] day of August, 2009.

/s/ Robert H. Whaley

ROBERT H. WHALEY

Senior United States District Court

APPENDIX 2

BRIEF OF RESPONDENT

WORKING COPY

RECEIVED
JUL 28 2011
DEPT. 10

FILED
JUL 28 2011
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

KARLA BERSANTE and BRAND BERSANTE, together and as the marital community which they together comprise Plaintiffs, v. NOTEWORLD, LLC, d/b/a NoteWorld Servicing Center, a Delaware limited liability company; FREEDOM DEBT CENTER, a California corporation Defendants.	NO: 11-2-01145-8 ORDER

I. BASIS

Defendant Freedom Debt Center moved the Court for a Motion to Compel Arbitration and Stay Proceedings.

II. FINDING

After reviewing the case record to date, and the basis for the Motion, the Court finds that while arbitration is a preferred avenue for resolving dispute agreements and to facilitate streamlined proceedings, it is inapplicable "upon such grounds as exist at law or in equity for the revocation of any contract." In their complaint, the Plaintiffs did not make any claims arising

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under a breach of the contract, rather their claims were made under Washington State Civil and Criminal statutes, therefore this issue is not covered by the four corners of the contract.

Freedom Debt Center is a debt adjuster within the meaning of RCW 18.28.et al and under the exceptions to 9 U.S.C. § 2, specifically "grounds that exist at law" the Plaintiffs have provided justification to apply the Washington State statute. The arbitration clause does not mandate arbitration of violations of Washington statutes and to do so would be overly burdensome to the Plaintiffs by forcing them to go to California, in front of a California arbitrator, and decide violations of Washington statutory law on this matter. Furthermore, such action would be inconsistent with the goal of arbitration to streamline proceedings in a less costly manner under the statute.

III. ORDER

IT IS ORDERED that Defendants motion to compel arbitration and stay proceedings has been denied.

DONE IN OPEN COURT this 28th day of July, 2011.

JUDGE LINDA G. TOMPKINS

Presented by:

UNIVERSITY LEGAL ASSISTANCE

T. SCOTT DOWELL, WSBA # 9123263
Legal Intern for Plaintiffs

ALAN MCNEIL, WSBA # 7930
Attorney for Plaintiffs

Approved for entry:

Notice of presentment and presentment waived, John Ray Nelson
Attorney for Defendants

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