

70648-9

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No. 70648-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

JAMES A. FRIEL and DEBORAH L. FRIEL, a marital community,  
individually and on behalf of all others similarly situated,

Respondents,

v.

LEGAL HELPERS DEBT RESOLUTION, LLC, a Nevada limited liability company; THE MORTGAGE LAW GROUP, LLP, a Washington limited liability partnership; MACEY, ALEMAN, HYSLIP & SEARNS, also known as MACEY, ALEMAN & SEARNS, an Illinois law firm; THOMAS G. MACEY, individually and on behalf of the marital community of THOMAS G. MACEY and JANE DOE MACEY; JEFFREY J. ALEMAN, individually and on behalf of the marital community of JEFFREY J. ALEMAN and JANE DOE ALEMAN; JEFFREY HYSLIP, individually and on behalf of the marital community of JEFFREY HYSLIP and JANE DOE HYSLIP; JASON SEARNS, individually and on behalf of the marital community of JASON SEARNS and JANE DOE SEARNS,

Appellants,

and

AMERICAN PLATINUM FINANCIAL SERVICES, INC., an Arizona corporation; JOSEPH COMPRONE, individually and on behalf of the marital community of JOSEPH COMPRONE and JANE DOE COMPRONE; CHRISTOPHER SAUER, individually and on behalf of the marital community of CHRISTOPHER SAUER and JANE DOE SAUER,

Defendants.

**OPENING BRIEF OF APPELLANTS**

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COURT OF APPEALS, DIVISION I

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## I. INTRODUCTION

Respondents (the “Friels”) sued Appellants (collectively, the “LHDR Defendants”) and others, asserting claims relating to a Retainer Agreement containing an arbitration clause and services performed thereunder. The LHDR Defendants requested that the claims be submitted to arbitration. When the Friels refused, the LHDR Defendants brought a Motion to Compel Arbitration. The trial court denied the motion. The LHDR Defendants now appeal the trial court’s denial of their Motion to Compel Arbitration.

The Friels argue that the arbitration clause is procedurally unconscionable, relying upon attorney ethics opinions and claiming the LHDR Defendants had a fiduciary duty to fully disclose all ramifications of the arbitration clause contained in the Retainer Agreement, including limited rights to discovery, unavailability of a jury trial, and limitations on appeal. The alleged duties of disclosure relied upon by the Friels arise only when an arbitration provision is at issue. No such alleged duties are mandated to enforce forum selection clauses providing for the resolution of disputes outside of arbitration.

The ethics opinions relied upon by the Friels and the trial court below, however well-intended, are a reflection continuing judicial distrust and hostility toward arbitration. Under well-established state and

federal law, such defenses that uniquely apply to arbitration, or that have a disproportionate impact on arbitration, cannot be used to invalidate an agreement to arbitrate. Defenses that disproportionately impact arbitration violate the liberal policy favoring arbitration and are inconsistent with the Federal Arbitration Act (“FAA”). Here, the Friels’ procedural unconscionability challenge applies uniquely in the context of an arbitration clause, disproportionately impacts arbitration, and cannot be used to invalidate the agreement to arbitrate.

The Friels also argued to the trial court that the arbitration clause is substantively unconscionable because arbitration would be prohibitively expensive for them. The Friels’ substantive unconscionability argument fails because the LHDR Defendants promptly agreed to waive the provision providing that “[t]he parties shall bear their own legal fees” to the extent it could be interpreted to undermine a successful claimant’s statutory right to an award of fees under Washington’s Consumer Protection Act, ch. 19.86 RCW (“CPA”). The LHDR Defendants also agreed to pay the costs of arbitration. Washington law is clear that the Friels’ substantive unconscionability argument was, therefore, rendered moot.

Finally, the Friels argued and the trial court held that the non-signatory defendants may not enforce the arbitration clause. Equitable

estoppel permits a non-signatory to enforce an arbitration agreement, however, where, as here, the claims are founded upon and intertwined with the contract, and the claimant's allegations depend upon interdependent and concerted alleged misconduct among signatory and non-signatory defendants.

The law demands enforcement of the arbitration clause. The LHDR Defendants request that this Court reverse the trial court's denial of their Motion to Compel Arbitration so that this dispute can be resolved in arbitration as required by the Retainer Agreement.

## **II. ASSIGNMENT OF ERROR**

The trial court erred by denying the Appellants' Motion to Compel Arbitration.

## **III. STATEMENT OF THE CASE**

The Friels filed this putative class action on February 22, 2013. CP 1. They seek to represent a class comprised of "All Washington residents who executed a Retainer Agreement with Defendants for residential mortgage loan modification services, an exemplar of which is attached as Appendix A" to the Friels' Class Action Complaint for Damages and Injunctive Relief. CP 10, 45. The referenced Retainer Agreement, to which Mr. Friel agreed and affixed his signature on December 6, 2010, contains a

clause entitled “Arbitration” in bold font above the parties’ signature lines.

CP 32. It provides:

**XVII. Arbitration:** In the event of any claim or dispute between Client and LHDR related to the Agreement or related to any performance of any services related to this Agreement, such claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request. The parties shall initially agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or be born [sic] by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.

CP 32.

This case and the Friels’ claims are encompassed within the scope of the arbitration clause. CP 36-59. The Friels complain, for example, that defendants, acting in concert with LHDR, charged “an advance ‘Processing Flat Fee’ of \$1,400 and a ‘Mitigation Flat Fee’ of \$1,423” pursuant to the Retainer Agreement that allegedly violates statutory fee limitations. CP 44 at ¶ 4.8. The Friels claim these allegations form the basis of multiple causes of action, including statutory claims under the CPA, Mortgage Broker Practices Act (“MBPA”), Consumer Loan Act (“CLA”), and the

Mortgage Lending and Homeownership Act (“MLHA”), as well as common law claims. CP 45, 49, 51, 54-55. The Friels allege the Retainer Agreement “did not disclose that Defendants were not licensed to practice law in the State of Washington,” did not disclose that “Defendants were not licensed as a “Loan Originator,” and that the defendants breached fiduciary duties by not making such disclosures. CP 44 at ¶¶ 4.6-4.7, 53-54. The Friels further allege that this case involves all the following issues:

- Whether services that Defendants offered, contracted for, or performed pursuant to the Retainer Agreement constitute residential mortgage loan modification services within the meaning of RCW 19.146 and RCW 31.04;
- Whether Defendants, pursuant to the Retainer Agreement, acted as mortgage brokers or loan originators;
- Whether Defendants, pursuant to the Retainer Agreement, contracted for or charged fees prohibited under RCW 19.146.355(1)(b) and RCW 31.04.297; and
- Whether the Retainer Agreement satisfies alleged disclosure requirements under RCW 19.146.355.

CP 46-47. The action is related to the Retainer Agreement and to services rendered thereunder and, accordingly, falls within the scope of the arbitration clause set forth above. CP 32.

The LHDR Defendants asked the Friels to submit their claims to binding arbitration in accordance with the arbitration clause. CP 83-84. The LHDR Defendants waived the term of the arbitration clause providing

“[t]he parties shall bear their own legal fees,” to the extent interpreted to undermine a successful CPA claimant’s statutory right to an award of fees, confirming this waiver by letter dated April 26, 2013. *Id.* In addition, the LHDR Defendants also agreed to pay the costs of arbitration, exclusive of legal fees, notwithstanding the language of the arbitration clause providing that “[t]he costs of arbitration, excluding legal fees, will be split equally or be born [sic] by the losing party, as determined by the arbitrator.” CP 183; CP 83-84. The Friels rejected the LHDR Defendants’ request for arbitration. CP 86.

On May 6, 2013, the LHDR Defendants moved to compel arbitration pursuant to RCW 7.04A.070 and the arbitration clause contained within the Retainer Agreement. CP 60–71. The Friels contested the motion, contending that the arbitration clause was unconscionable (procedurally and substantively) and unenforceable. CP 161-79. The Friels also argued that non-signatories to the Retainer Agreement could not enforce the arbitration provision. CP 176-78.

On June 21, 2013, the trial court denied the LHDR Defendants’ Motion. CP 191-92; RP 30-35. The trial court concluded “as a matter of law, that the arbitration provision and the defendants’ conduct with regard to ethical and professional disclosures regarding that material terms were not met.” RP 34:11-15. It further ruled that “under this Court’s inherent

supervisory authority, the Court invalidates that [arbitration] provision and finds that it violates the ethical rules of the state of Washington.” RP 34:15-18. Additionally, while the trial court found certain of the Friels’ assertions and allegations to be “intimately connected” with the obligations of the Retainer Agreement, the trial court declined to allow non-signatory defendants to enforce the arbitration agreement. RP 35:3-14. The LHDR Defendants filed their Notice of Appeal to this Court on July 18, 2013. CP 193-97.

#### **IV. ARGUMENT**

##### **A. Standard of review.**

This Court engages in *de novo* review of a trial court’s decision to grant or deny a motion to compel or deny arbitration. *Zuver v. Airtouch Commc 'ns*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004); *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 320, 211 P.3d 454 (2009).

##### **B. Applicable standards governing arbitration.**

““There is a strong public policy in Washington State favoring arbitration of disputes.”” *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002) (quoting *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997)). “Washington’s policy favoring arbitration is grounded on the proposition that arbitration

allows litigants to avoid the formalities, expense, and delays inherent in the court system.” *Mendez*, 111 Wn. App. at 464. Pursuant to RCW 7.04A.060(1), agreements to arbitrate are “valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.”

“When the validity of an agreement to arbitrate is challenged, courts apply ordinary state contract law.” *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008). Generally applicable contract defenses, including fraud, duress, or unconscionability may apply, but courts cannot “refuse to enforce arbitration agreements under state laws that apply only to such agreements, or ‘rely on the uniqueness of an agreement to arbitrate’” as justification for imposing special requirements. *Zuver*, 153 Wn.2d at 302 (internal citations omitted; quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9, 107 S. Ct. 2520 (1987)). “The party opposing arbitration bears the burden of showing that the agreement is not enforceable.” *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 455, 268 P.3d 917 (2012) (quoting *Zuver*, 153 Wn.2d at 302).

**C. The Court should reverse the trial court’s finding of procedural unconscionability.**

1. The Friels did not lack meaningful choice.

Arbitration provisions may be held unenforceable if they are

procedurally or substantively unconscionable. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004). Procedural unconscionability requires “lack of meaningful choice, considering all the circumstances surrounding the transaction including ‘the manner in which the contract was entered,’ whether each party had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms were hidden in a maze of fine print.’” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 814, 225 P.3d 213 (2009) (quoting *Zuver*, 153 Wn.2d at 303).

Here, the initial “Welcome Email” sent to the Friels stated “I have attached the checklist you will be receiving in the mail, so we can go through it and I can answer any questions you may have.” CP 151-53, 159-60. The document checklist that followed, executed by defendant Jason E. Searns, a Partner of LHDR, communicated to the Friels that “[w]e wish to ensure that you ... have decided to move forward with the modification after becoming thoroughly informed on the process.... Please do not hesitate to contact our offices with any questions or concerns.” CP 189-90. The Friels executed it on December 20, 2010, attesting that they “read and understood” the information provided and gave their “informed consent to continue with the modification process.” *Id.* The Friels further agreed that they had an opportunity to consult an

attorney of their choosing” regarding its contents. *Id.*

The Friels presented no evidence to the trial court that the LHDR Defendants pressured them in any way, or deprived them of sufficient time to meaningfully review or consider the terms of the Retainer Agreement. The Friels also presented no evidence that the LHDR Defendants failed or refused to respond to any of their questions or concerns. In fact, the Friels presented no evidence that they had any questions or concerns, or that they did not understand the arbitration clause or any other terms of the Retainer Agreement. Rather, the documentary evidence showed that LHDR invited questions, did not place any undue pressure on the Friels, and that the Friels had the opportunity to consult independent counsel of their choosing with any questions or concerns, to the extent they had any. CP 189-90.

Moreover, as multiple courts have recognized, LHDR’s arbitration clause is not hidden in fine print. Here, it was labeled in bold typeface and located on the same page as signatures. CP 32. The court enforced a materially identical arbitration clause in *Guidotti v. Legal Helpers Debt Resolution, LLC*, 866 F. Supp. 2d 315 (D.N.J. 2011), stating “[t]he arbitration clause was plainly written, contained within the main body of the contract rather than hidden in fine print, bore a bolded

paragraph heading, and was mere inches away from Plaintiff's signature line." *Guidotti*, 866 F. Supp. at 331.

In *Smith v. Legal Helpers Debt Resolution, LLC*, No. 11-5510, 2012 U.S. Dist. LEXIS 80330 (D.N.J. June 11, 2012), the court found the arbitration clause "sufficiently clear, unambiguously worded, and set off in [its] own paragraph[] in the agreement[] with a bolded heading, such that the provision[] [was] not hidden and would be reasonably understood by a party entering the agreement." *Id.* at \*10.

Similarly, in *Whitman v. Legal Helpers Debt Resolution, LLC*, No. 4:12-cv-00144-RBH, 2012 U.S. Dist. LEXIS 176480 (D.S.C. Dec. 13, 2012), the court enforced an identical provision, noting "the arbitration provision was not hidden...; [it] was in a paragraph titled 'Arbitration,' the title appeared to be in bold print, and the provision was placed near the signature block." The same is true here and the same result should follow. *See Zuver*, 153 Wn.2d at 306-07 (recognizing that typeface considerations, clear labeling, and the use of plain language are factors considered by Washington courts). The arbitration provision is not procedurally unconscionable and the Court should reverse the trial court's contrary holding.

2. The procedural unconscionability justification argued by the Friels and accepted by the trial court disproportionately affects agreements to arbitrate and cannot stand.

Section 2 of the FAA, 9 U.S.C. § 2, sets forth ““a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”” *Zuver*, 153 Wn.2d at 301 (quoting *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 purpose of the FAA is to ensure that private arbitration agreements are enforced. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 179 L. Ed. 2d 742 (2011).

Purported defenses that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue” cannot be relied upon to invalidate an agreement to arbitrate. *Concepcion*, 131 S. Ct. at 1746; *Zuver*, 153 Wn.2d at 302.<sup>1</sup> The Ninth Circuit Court of Appeals recently expounded upon the issue in *Mortensen v. Bresnan Commc'ns., LLC*, 722 F.3d 1151 (9th Cir. 2013), stating “[w]e take *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or

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<sup>1</sup> “The United States Supreme Court ... has expressly stated that courts may not rely on the uniqueness of agreements to arbitrate as justification for imposing special requirements.” *Zuver*, 153 Wn.2d at 315 n.12 (citing *Perry*, 482 U.S. at 492 n.9).

otherwise, that has a *disproportionate effect* on arbitration is displaced by the FAA.” *Mortensen*, 722 F. 3d at 1159 (emphasis added).

Here, the Friels argued and the trial court found that the arbitration clause in the Retainer Agreement was invalid and unenforceable because LHDR did not make specific disclosures concerning arbitration. RP 32:19-34:18; CP 44 at ¶ 4.9, 171-74. More specifically, the Friels relied upon Washington State Bar Association (“WSBA”) Advisory Opinion 1670, and American Bar Association (“ABA”) Formal Opinion 02-425 to argue that arbitration clauses in attorney retainer agreements cannot be enforced in the absence of “full disclosure” of all the “advantages and disadvantages” of arbitration, including disclosures regarding the forfeiture of rights to a jury, limitations on discovery and appeal, and the pursuit of class litigation.<sup>2</sup> CP 169, 171-74.

The ethics opinions and disclosure requirements relied upon to invalidate the arbitration provision apply if and only if arbitration is at issue.<sup>3</sup> On the other hand, forum selection clauses providing for disputes

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<sup>2</sup> Ethics opinions, such as WSBA Advisory Opinion 1670 and ABA Formal Opinion 02-425, are advisory only and do not carry the force of law. See *In re Discipline of DeRuiz*, 152 Wn.2d 558, 571, 99 P.3d 881 (2004). Advisory Opinion 1670 expressly states it does not even “reflect the official position” of the WSBA. While such opinions may assist lawyers in interpreting ethical obligations, but they do not dictate the legal rights or obligations of contracting citizens who agree to arbitrate.

<sup>3</sup> In its oral ruling, the trial court also cited RPC 1.4(b), 1.5(a)(9) and 1.8. RP 33:2-34:5. RPC 1.4(b) provides that a lawyer shall explain a matter to the extent reasonably

to be resolved in court are not rendered invalid if an attorney does not first explain the alternative benefits that arbitration could provide. Similarly, while there are procedural differences from court to court, such as court rules that may also limit discovery,<sup>4</sup> neither these ethics opinions nor any other Washington authority invalidates parties' agreements to resolve disputes in court unless all procedural differences are fully disclosed.

In *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 890 P.2d 466 (1995), this Court rejected an argument similar to that made by Respondents here. In *McClure*, the court affirmed an order in favor of Davis Wright Tremaine ("DWT") compelling arbitration. The plaintiff in *McClure* argued, as do the Friels here, that the arbitration clause was void and could not be enforced by DWT, a nonsignatory, because DWT's "failure to explain to him the full import of the arbitration clause constituted a breach of its fiduciary duty which required that the arbitration clause be voided." *McClure*, 77 Wn. App. at 318. Noting that

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necessary to permit the client to make informed decisions regarding the representation." It does not purport to require additional disclosures regarding arbitration, or subsequent oral discussions to further explain contractual terms that are plainly written and unambiguous. RPC 1.4(b); see *Guidotti*, 866 F. Supp. 2d at 331; *Smith*, 2012 U.S. Dist. LEXIS 80330 at \*10. RPC 1.5(a)(9) simply identifies one factor considered in determining the reasonableness of a lawyer's fees. The trial court's reference to RPC 1.8 concerned the prohibition in RPC 1.8(h)(1) against "prospectively limiting the lawyer's liability to a client." RP 33:2-6. The arbitration clause here, however, in no way limits LHDR's liability, it provides for resolution of disputes in arbitration. CP 32.  
<sup>4</sup> See, e.g., Fed. R. Civ. P. 30(a)(2)(A)(i), 33(a)(1); Rule 26(b) of the Local Rules of the Superior Court of King County, Washington.

the plaintiff “did not recall any conversations” with the DWT lawyer concerning the matter – similar to the Friels’ contention here that LHDR “failed to make any disclosures” – the court found that plaintiff failed to show reliance upon DWT’s review of the agreement that contained the arbitration clause. *McClure*, 77 Wn. App. at 318. The court further noted that the “hypothetical duty” of disclosure that plaintiff urged upon DWT “would create an almost infinite duty to warn of every possibility no matter how obvious or unlikely.” *McClure*, 77 Wn. App. at 318.

If specific, heightened disclosures of all procedural variations unique to arbitration must be fully discussed at the risk of invalidating the parties’ arbitration agreement, arbitration agreements are not treated equally.<sup>5</sup> The law does not allow such a result. At a minimum, “courts must place arbitration agreements on an equal footing with other contracts.” *Concepcion*, 131 S. Ct. at 1742. The Ninth Circuit recently concluded that “*Concepcion* crystalized the directive ... that the FAA’s purpose is to give preference (instead of mere equality) to arbitration provisions.” *Mortensen*, 722 F.3d at 1160. *Concepcion* outlaws

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<sup>5</sup> The Friels argued to the trial court that fiduciary duties of disclosure apply to all material elements of a fee agreement, breaches of which render the Retainer Agreement, as a whole, unenforceable. CP 171. Challenges to the validity of an entire contract, however, must be determined in arbitration. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) (“[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”). Accordingly, the Friels’ challenge to the enforceability of the entire Retainer Agreement is for an arbitrator to determine. *Townsend*, 173 Wn.2d at 459-60; see RCW 7.04A.060(3).

discrimination in state policy that is unfavorable and has a disproportionate effect on arbitration. *Id.* at 1159. Claimed defenses that derive meaning only if an arbitration agreement is at issue cannot invalidate that agreement. Arguments that come into play or are relevant only in the context of arbitration cannot be used to defeat arbitration.

Here, the basis relied by the Friels and the trial court to find procedural unconscionability is unique to arbitration and being applied in a fashion that disfavors arbitration. The Friels' argument that the arbitration clause required special disclosures simply in order to be enforceable is precisely the type of argument which cannot defeat an arbitration clause, because it subjects an agreement to arbitrate to higher scrutiny than other contracts. This is exactly what is forbidden by *Concepcion* and its progeny.

3. The trial court impermissibly relied on equitable grounds to invalidate the arbitration agreement.

The Washington Supreme Court recently made it unmistakably clear that a court may not invalidate an otherwise valid arbitration agreement on equitable grounds. *Weidert v. Hanson*, No. 88293-2, 2013 Wash. LEXIS 748, at \*3-4 (Wash. Sept. 12, 2013). The case involved a farmer who brought a claim against his insurance agent when his crop failed, alleging that the agent had misrepresented the amount of

insurance coverage available. *Id.* at \*1-2. The plaintiff also initiated arbitration with his crop insurer, but failed to complete the process and then amended his complaint to add the insurer as an additional defendant in his lawsuit against the insurance agent. *Id.* at \*2.

The insurer moved to compel arbitration under the terms of the insurance policy and plaintiff opposed arbitration, arguing that it would result in piecemeal litigation of his claims. *Id.* The superior court agreed and refused to compel arbitration, and the Court of Appeals affirmed, holding that a court may equitably refuse to compel arbitration in the interest of judicial efficiency. *Id.* The Supreme Court reversed, holding “[t]here is no support for the notion that a court may ignore an otherwise valid arbitration agreement on equitable grounds.” *Weidert*, 2013 Wash. LEXIS 748, at \*4.

Here, the trial court ran afoul of this prohibition and invalidated the arbitration provision under its “inherent supervisory authority.” RP 34:15-18; *see TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 206, 165 P.3d 1271 (equity jurisdiction gives rise to inherent authority of court). The trial court noted that there are two competing public policies presented by the LHDR Defendants’ Motion to Compel, the first being the strong public policy in favor of arbitration and the second being the Court’s inherent

supervisory power over attorney conduct. RP 32:11-23. The trial court favored its own equitable, inherent power and invalidated the arbitration agreement. RP 34:15-18 (“[U]nder this Court’s inherent supervisory authority, the Court invalidates [the arbitration] provision and finds that it violates the ethical rules of the state of Washington.”). As recently stated by our Supreme Court, an arbitration provision cannot be invalidated on such equitable grounds. This Court should reverse the trial court’s denial of the LHDR Defendants’ Motion to Compel Arbitration.

**D. The arbitration clause is not unenforceable for substantive unconscionability.**

1. The Friels’ claims of substantive unconscionability are moot.

The Friels objected to two terms of the arbitration clause arguing they were substantively unconscionable. First, the arbitration clause states “[t]he parties shall bear their own legal fees.” CP 32. There is nothing substantively unconscionable about an agreement to the general “American Rule,” whereby each party bears its own attorneys’ fees, provided it does not overrule a successful claimant’s statutory right to an award of fees. *See Adler* 153 Wn.2d at 355. Moreover, the LHDR Defendants waived that term so it is not inconsistent with an attorney fee award if the Friels succeed on their CPA claims. CP 83-84. Since this

term has been waived, the Friels' argument that it is unconscionable is moot. *See, e.g. Zuver*, 153 Wn. 2d at 310.

Second, the Friels objected to the arbitration clause provision stating that “[t]he costs of arbitration, excluding legal fees, will be split equally or be born [sic] by the losing party, as determined by the arbitrator.” CP 32. This is not an “overly harsh” term. The arbitrator decides who is responsible for costs, if they are not shared. Substantive unconscionability requires the clause or term be “shocking to the conscience,” “monstrously harsh,” or “exceedingly calloused.” *Adler*, 153 Wn.2d at 344-45; *see Walters*, 151 Wn. App. at 321. In any event, the LHDR Defendants also agreed to pay the costs, excluding legal fees, of arbitration. CP 83-84, 183. The Friels' claims of substantive unconscionability are moot and should be rejected.

2. If the Court found either or both of these provisions substantively unconscionable, it should sever one or both, and enforce the remainder of the arbitration agreement.

“Courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties.” *Zuver*, 153 Wn.2d at 320. Even if a court finds terms within an arbitration clause unconscionable, the court should enforce the remainder of the clause so long as the unconscionable terms do not pervade the entire agreement. *Walters*, 151 Wn. App. at 329-30; *see McKee*, 164 Wn.2d at 402-03;

*Zuver*, 153 Wn.2d at 320. “[W]hen parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending unconscionable provisions to preserve the contract’s essential term of arbitration.” *Zuver*, 153 Wn. 2d at 320.

Accordingly, even if the Court were to accept the Friels’ claims of substantive unconscionability and find that they are not moot, severance of the challenged provisions is the appropriate remedy, particularly in light of the Retainer Agreement’s severability clause. CP 32.

**E. Non-signatories are entitled to enforce the arbitration provision.**

The trial court erred when it found that the non-signatories to the Retainer Agreement were not entitled to enforce the arbitration provision. CP 176-78; RP 34:19-35:14. All of the LHDR Defendants are entitled to enforce the arbitration provision pursuant to the doctrine of equitable estoppel. *See Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-29 (9th Cir. 2013); *Townsend*, 173 Wn.2d at 461. Equitable estoppel applies here because the Friels’ claims are intimately founded upon and intertwined with the Retainer Agreement, and their allegations depend upon interdependent and concerted misconduct with LHDR. CP 36-59.

Although the general rule is that nonsignatories are not allowed to enforce an arbitration agreement, there are exceptions to this rule. *See, e.g., Townsend*, 173 Wn.2d at 460-61. One recognized exception is the doctrine of equitable estoppel. *Id.* at 461; *see also Kramer*, 705 F.3d at 1128-29. In *Kramer*, the Ninth Circuit described the circumstances under which equitable estoppel is applied:

Where a nonsignatory seeks to enforce an arbitration clause, the doctrine of equitable estoppel applies in two circumstances: (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are “intimately founded in and intertwined with” the underlying contract, and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and “the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement.”

*Id.* (internal citations omitted).

Each test is met in this case. First, the Friels’ claims are intimately founded upon and intertwined with the Retainer Agreement. The Friels allege that, pursuant to the Retainer Agreement, “Defendants” charged “an advance ‘Processing Flat Fee’ of \$1,400 and a ‘Mitigation Flat Fee’ of \$1,423.” CP 44 at ¶ 4.8. They claim these charges violate statutory fee limitations and form the basis of claims under the CPA, MBPA, CLA, and MLHA. CP 45, 49, 51, 54-55. The Friels further

allege the Retainer Agreement “did not disclose that Defendants were not licensed to practice law in the State of Washington,” did not disclose that “Defendants were not licensed as a “Loan Originator,” and the “Defendants” breached fiduciary duties by not making such disclosures. CP 44 at ¶¶ 4.6-4.7, 53-54. Additional issues raised by the Friels include: (1) whether Defendants’ services, pursuant to the Retainer Agreement, constitute residential mortgage loan modification services under RCW 19.146 and RCW 31.04; (2) whether Defendants, pursuant to the Retainer Agreement, acted as mortgage brokers or loan originators; (3) whether Defendants, pursuant to the Retainer Agreement, contracted for or charged fees prohibited by RCW 19.146.355(1)(b) and RCW 31.04.297; and (4) whether the Retainer Agreement satisfies alleged disclosure requirements of RCW 19.146.355. CP 46-47. The Friels’ claims are founded in and intimately connected with the Retainer Agreement.<sup>6</sup>

Second, the Friels allegations against the LHDR Defendants depend upon purported interdependent and concerted misconduct with LHDR, the signatory to the Retainer Agreement. CP 38 at ¶ 3.2, 39-41 at

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<sup>6</sup> It does not matter that the Friels have not asserted a breach of contract claim. The “duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

¶¶ 3.4-3.9, CP 43-44 at ¶¶ 4.4-4.8, 4.12, CP 55-56 at ¶¶ 6.56-6.65. The Friels allege that LHDR “served as the contracting party for residential mortgage loan modification services, acting in concert with co-Defendants.” CP 39 at ¶ 3.2. They allege LHDR, Searns, Aleman, Macey, and Hyslip “also operate under the trade name Macey, Aleman, Hyslip & Searns,” and that LHDR is but “one corporate face of an Illinois law firm” managed by these defendants. CP 38-39. TMLG, the Friels allege, also “does business as the law firm of Macey, Aleman, Hyslip & Searns or Macey, Aleman & Searns,” and “acted in concert with co-Defendants for the purported purpose of providing residential mortgage loan modification services.” CP 39 at ¶ 3.4. The LHDR Defendants are each alleged to have acted in concert with the others. CP 38-42 at ¶¶ 3.2, 3.4-3.9. The Friels’ substantive allegations are against all “Defendants” and they claim the LHDR Defendants “aided and abetted” other co-Defendants, including LHDR, and that all Defendants engaged in a civil conspiracy. CP 55-56. But for the allegations of interdependent and concerted misconduct, the Friels would have no claims against the nonsignatories. The Friels’ allegations of concerted activity intertwined with the Retainer Agreement entitle all LHDR Defendants to enforce the arbitration provision it contains.

## V. CONCLUSION

Requiring the Friels to arbitrate does not leave them without recourse. To the contrary, requiring arbitration preserves the precise dispute resolution process upon which the Friels agreed. They will have ample opportunity to pursue their claims in arbitration.

The trial court erred when it invalidated the arbitration agreement on procedural unconscionability and equitable grounds citing its inherent supervisory authority. The trial court relied upon impermissible grounds and state policies that disproportionately impact arbitration and that are displaced by the FAA.

The Friels' substantive unconscionability argument is moot and would not invalidate the arbitration clause because any potentially substantively unconscionable provisions in the agreement can and should be severed.

Finally, equitable estoppel applies here to allow all of the LHDR Defendants to enforce the arbitration agreement because the Friels' claims are founded upon and intertwined with the Retainer Agreement, and the Friels' allegations depend upon interdependent and concerted misconduct with LHDR.

This Court should reverse the trial court's denial of the LHDR  
Defendants' Motion to Compel Arbitration.

DATED this 4th day of October, 2013.

RYAN, SWANSON & CLEVELAND,  
PLLC

By 

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## DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 4th day of October, 2013, I caused to be served the foregoing document on counsel for Respondents, as noted, at the following addresses:

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Susan Smith, Legal Assistant

Dated: October 4, 2013

Place: Seattle, WA



Neutral

As of: October 4, 2013 2:16 PM EDT

## Weidert v. Hanson

Supreme Court of Washington  
September 4, 2013, Considered ; September 12, 2013, Filed  
No. 88293-2

**Reporter:** 2013 Wash. LEXIS 748; 2013 WL 4857674

TIMOTHY WEIDERT ET AL., *RESPONDENTS*, v. JERALD A. HANSON ET AL., *DEFENDANTS*, PRODUCERS AGRICULTURE INSURANCE COMPANY, *PETITIONER*.

**Prior History:** Appeal from Walla Walla County Superior Court. 10-2-00284-8. Honorable John W. Lohrmann. *Weidert v. Hanson*, 172 Wn. App. 106, 288 P.3d 1165, 2012 Wash. App. LEXIS 2766 (2012)

### Core Terms

arbitrate, federal crop insurance, arbitration clause, compel arbitration, crop, arbitration agreement, federal arbitration, federal mandate, superior court, coverage, federal regulation, equitable grounds, general contract, insurance policy, unconscionability, irrevocable, invalidate, revocation

### Headnotes/Syllabus

#### Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

**Nature of Action:** A farmer who suffered a crop loss following a drought sought relief against his crop insurer and the agent who sold him the crop insurance policy. The policy was reinsured by the Federal Crop Insurance Corporation as established by the Federal Crop Insurance Act. The farmer's basic complaint was that the crop insurer, after it issued its initial estimated amount of insurance coverage available, determined that the farmer's yields had changed and lowered the amount of coverage available. According to the farmer, he overplanted on the basis of the initial information, which he claimed was negligently provided.

**Superior Court:** The Superior Court for Walla Walla County, No. 10-2-00284-8, John W. Lohrmann, J., on September 27, 2011, denied the insurer's motion to compel arbitration under an arbitration clause in the crop insurance policy.

**Court of Appeals:** The court *affirmed* the denial order at 172 Wn. App. 106 (2012), holding that a trial court had the equitable power to refuse to compel arbitration un-

der the otherwise valid arbitration clause in the interest of judicial efficiency.

**Supreme Court:** Holding that the courts could not ignore the valid, federally mandated arbitration clause in the crop insurance policy on equitable grounds, the court *reverses* the decision of the Court of Appeals and *remands* the case to the trial court for further proceedings.

#### Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

#### WA[1] [1]

Crops > Insurance > Crop Damage > Coverage > Policy > Federal Regulation > Applicability.

Crop insurance policies reinsured by the Federal Crop Insurance Corporation as established by the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524) are subject to federal regulations governing the terms, issuance, and sales of such policies.

#### WA[2] [2]

Arbitration > Contractual Agreement > Enforcement > Statutory Provisions > State and Federal > Scope > Effect.

Under RCW 7.04A.061(1) and 9 U.S.C. § 2 of the Federal Arbitration Act, an agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable except on grounds as exist at law or in equity for the revocation of a contract. The term "as exist at law or in equity" refers to general contract defenses such as fraud, duress, or unconscionability.

#### WA[3] [3]

Arbitration > Contractual Agreement > Federal Mandate > Avoidance > Equity > Validity.

The Federal Arbitration Act (9 U.S.C. §§ 1-14) prohibits state courts from ignoring valid federally mandated arbitration clauses on equitable grounds.

#### WA[4] [4]

Crops > Insurance > Crop Damage > Coverage > Policy > Arbitration Clause > Enforceability.

A superior court, purporting to act in equity, may not refuse to enforce a valid arbitration clause mandated by

7 C.F.R. § 457.8 in a crop insurance policy underwritten by the Federal Crop Insurance Corporation.

### Headnotes

The court delivered a per curiam opinion.

**Counsel:** Brendan Monahan and Sarah Lynn Clarke Wixson (of *Stokes Lawrence Velikanje Moore & Shore*), for petitioner.

*Kenneth A. Miller (of Miller Mertens Comfort Wagar & Kreutz PLLC), for respondents.*

*Leonard J. Feldman and Hunter O. Ferguson on behalf of National Crop Insurance Services, amicus curiae.*

**Judges:** Chief Justice Barbara A. Madsen, Justice Charles W. Johnson, Justice Susan Owens, Justice Mary E. Fairhurst, Justice James M. Johnson, Justice Debra L. Stephens, Justice Charles K. Wiggins, Justice Stephen C. González, and Justice Sheryl Gordon McCloud.

### Opinion

[\*1]

EN BANC

¶1 PER CURIAM — A superior court purporting to act in equity refused to compel arbitration pursuant to a valid arbitration clause in a federally mandated crop insurance contract. The Court of Appeals affirmed. *Weidert v. Hanson*, 172 Wn. App. 106, 288 P.3d 1165 (2012). For the reasons discussed below, we grant review and reverse.

**WA[1]** [1] ¶2 Through a private agent, Tim Weidert and L.W. Weidert Farms (collectively Weidert) bought a multiperil crop insurance policy for the 2009 crop year. The policy was issued by Producers Agriculture Insurance Company and reinsured by the Federal Crop Insurance Corporation as established by the Federal Crop Insurance Act, 7 U.S.C. § 1501. Policies issued under the federal act are subject to federal regulations governing the terms, issuance, and sales of such policies.

¶3 The standard policy issued to Weidert expressly provided that any disagreement over a determination made by the insurer was to be resolved through arbitration, and that if the insured failed to either initiate arbitration or complete the arbitration process, judicial review would not be available. Weidert suffered a loss from drought and sued the private insurance agent, alleging that the agent [\*2] misrepresented the amount of insurance coverage available. Weidert had also initiated arbitration with Producers Agriculture but failed to complete the process. Weidert then amended the complaint to name Producers Agriculture as an additional defendant. Weidert's basic complaint was that Producers Agriculture, after it issued its initial estimated amount of insurance coverage

available, determined that the insured's yields had changed and lowered the amount of coverage available. According to Weidert, he overplanted on the basis of the initial information, which he claims was negligently provided.

¶4 After Weidert amended the complaint to add Producers Agriculture as a defendant, Producers Agriculture moved to compel arbitration under the terms of the federal crop insurance policy. Weidert opposed arbitration, arguing that it would result in piecemeal litigation of the claims against the insurer and the agent. The superior court agreed and refused to compel arbitration.

¶5 The Court of Appeals affirmed, holding that a trial court sitting in equity may refuse to compel arbitration under an otherwise valid arbitration clause in the interest of judicial efficiency. Producers Agriculture petitioned [\*3] for this court's review.

**WA[2]** [2] ¶6 An agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable "except upon a ground that exists at law or in equity for the revocation of a contract." RCW 7.04A.060(1). The Federal Arbitration Act provides the same. See 9 U.S.C. § 2 (an agreement in writing to submit a controversy to arbitration arising out of a contract evidencing a transaction involving commerce shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract). The term "'as exist at law or in equity'" refers to general contract defenses such as fraud, duress, or unconscionability, which may be applied to invalidate arbitration agreements without violating the federal arbitration mandate. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 813-14, 225 P.3d 213 (2009) (emphasis omitted) (quoting 9 U.S.C. § 2). Washington law provides substantially the same. *Salteemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008) (general contract defenses such as unconscionability may invalidate an arbitration agreement). There is no [\*4] support for the notion that a court may ignore an otherwise valid arbitration agreement on equitable grounds.

**WA[3,4]** [3, 4] ¶7 The arbitration clause here is federally mandated. Crop insurance is underwritten by the Federal Crop Insurance Corporation. See 7 C.F.R. § 457.8 (required insurance policy). The federal regulation specifically requires arbitration of disputes arising under the policy. We agree with Producers Agriculture that the Federal Arbitration Act prohibits a state court from ignoring a valid federally mandated arbitration clause on equitable grounds.

¶8 We therefore grant the petition for review, reverse the Court of Appeals, and remand to the superior court for further proceedings consistent with this opinion.

### References

2013 Wash. LEXIS 748, \*4

Annotated Revised Code of Washington by LexisNexis      United States Code Service (USCS)

## Smith v. Legal Helpers Debt Resolution LLC

United States District Court for the District of New Jersey  
June 11, 2012, Decided; June 11, 2012, Filed  
Civil Action No. 11-5510 (JAP)

**Reporter:** 2012 U.S. Dist. LEXIS 80330; 2012 WL 2118132

DORA SMITH, on behalf of herself and others similarly situated, Plaintiff, v. LEGAL HELPERS DEBT RESOLUTION LLC, et al., Defendants.

### Core Terms

arbitration, arbitration provision, arbitration clause, compel arbitration, unenforceable, arbitration agreement, special purpose, statutory claim

**Counsel:** [\*1] For DORA SMITH, on behalf of herself and others similarly situated, Plaintiff: EDWARD G. HANRATTY, THE TOME LAW FIRM, EAST BRUNSWICK, NJ.

For LEGAL HELPERS DEBT RESOLUTION, LLC, GLOBAL CLIENT SOLUTIONS, LLC, Defendants: KATHLEEN J. COLLINS, NICOLE LYNN STRAUSS-RUSSO, LITCHFIELD CAVO, LLP, CHERRY HILL, NJ.

For MACEY & ALEMAN HYSLIP & SEARNS, Defendant: NICOLE LYNN STRAUSS-RUSSO, LEAD ATTORNEY, LITCHFIELD CAVO, LLP, CHERRY HILL, NJ.

**Judges:** JOEL A. PISANO, United States District Judge.

**Opinion by:** JOEL A. PISANO

### Opinion

PISANO, District Judge.

This is putative class action brought by Dora Smith ("Plaintiff") against defendants Legal Helpers Debt Resolution LLC ("Legal Helpers") a/k/a Macey, Aleman Hyslip and Searns, and Global Client Solutions, LLC ("Global") (collectively "Defendants") that arises in connection with Plaintiff's engagement of Defendants for debt settlement services. Presently before the Court is Defendants' motion to compel arbitration. The Court decides the motion without oral argument pursuant to *Federal Rule of Civil Procedure 78*. For the reasons below, Defendants' motion is granted.

### I. FACTUAL BACKGROUND

In March 2010, Plaintiff retained Legal Helpers (which, according to the agreement between the [\*2] parties, is "also known as the law firm of Macey, Aleman, Hyslip & Searns") to "review [Plaintiff's] current unsecured debt burden and thereafter negotiate and attempt to enter into settlements with creditors of [Plaintiff] in an effort to modify and/or restructure [Plaintiff's] unsecured debt." Compl., Ex. 1 at 1. In connection with the engagement, the parties executed, among other things, an Attorney Retainer Agreement (the "ARA") on March 17, 2010. According to the ARA, in consideration for Legal Helpers' services, Plaintiff agreed to pay an initial flat fee retainer, a monthly maintenance fee, and a contingency fee based upon the amount of debt reduction Legal Helpers would be able to achieve. As relevant to the instant motion, the ARA contained the following provision:

**XVII. Arbitration:** In the event of any claim or dispute between Client and LHDR related to the Agreement or related to any performance of any services related to this Agreement, such claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request. The parties shall initially agree on a single arbitrator to resolve the dispute. The matter may be arbitrated [\*3] either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which the Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or born by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.

Compl., Ex. 1 at 4.

As part of her debt settlement program with Legal Helpers, Plaintiff established a special purpose bank account through Global "for the purpose of accumulating funds to repay [her] debts." See Special Purpose Account Application, attached as part of Ex. 1 to Certification of Rebecca Bratter ("Bratter Cert."). Plaintiff began making monthly deposits of \$807.09 into her special purpose account on April 19, 2010, from which various fees were deducted, and these deposits and deductions [\*4] continued until January 2011. See Account Activity Statement, attached as Ex. C to Bratter Cert.

The application for the special purpose bank account, signed by Plaintiff March 17, 2010, incorporates by reference an Account Agreement and Disclosure Statement ("AADS") with the following language:

I understand that the Special Purpose Account's features, terms conditions and rules are further described in an Account Agreement and Disclosure Statement that accompanies this Application (the "Agreement") . I acknowledge that I have received a copy of the Agreement; that I have read and understand it; that the Agreement is fully incorporated into this Application by reference; and that I am bound by all of its terms and conditions.

*Id.* (emphasis in original). The AADS contains an arbitration provision as follows:

**Arbitration and Application of Law:**

[\*5] In the event of a dispute or claim relating in any way to this Agreement or our services, you agree that such dispute shall be resolved by binding arbitration in Tulsa Oklahoma utilizing a qualified independent arbitrator of Global's choosing. The decision of the arbitrator will be final and subject to enforcement in a court of competent jurisdiction.

Account Agreement and Disclosure Statement, attached as part of Ex. 1 to Bratter Cert.

On August 2, 2011, Plaintiff commenced the instant lawsuit in the Superior Court of the State of New Jersey. Defendants subsequently removed the matter to this Court. Although the complaint in this matter contains five designated "counts," the Court can discern only three of the five that purport to contain any cause of action.

<sup>1</sup> In Count II, Plaintiff alleges that Defendants failed to "comply with debt relief agency restrictions of the United States Bankruptcy Code" because Defendants allegedly provided bankruptcy advice to Plaintiff absent a timely re-

tainer agreement. Count III alleges that Defendants engaged in deception and unconscionable business practices that violated New Jersey's Consumer Fraud Act, 56:8-1 *et seq.* Finally, Count IV alleges various [\*6] violations of New Jersey's Debt Adjuster Act, *N.J.S.A. 17:16G-1, et seq.*

Based on the arbitration provisions in the agreements described above, all of the Defendants have moved to compel arbitration.

### III. ANALYSIS

#### A. Legal Standard

The Federal Arbitration Act ("FAA") provides that a written arbitration agreement "shall be 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 goal of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gay v. CreditInform*, 511 F.3d 369, 378 (3d Cir. 2007) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).

There are two threshold questions that a court examines when addressing a motion to compel arbitration. The Court must first determine whether the agreement to arbitrate is valid, and then decide whether the dispute falls within the [\*7] agreement's scope. *Gay v. CreditInform*, 511 F.3d 369, 386 (3d Cir. 2007). An agreement to arbitrate "shall be 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 requires a court to stay a proceeding in favor of arbitration "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration." 9 *U.S.C. § 3*. "[T]he [Federal Arbitration Act] establishes a strong federal policy in favor of the resolution of disputes through arbitration," and such agreements are presumptively enforceable. *Brennan v. Cigna Corp.*, 282 Fed. Appx. 132, 135 (3d Cir. 2008). See also *Great Western Mortg. Corp. v. Peacock*, 110 F.3d 222 n. 25 (3d Cir. 1997). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622, 625 (3d Cir. 2003) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

#### B. Discussion

Defendants assert that arbitration must be compelled in this case based upon the arbitration provisions in the ARA

<sup>1</sup> Count I contains only a statement of facts, and Count V contains class action allegations.

and AADS. Plaintiff [\*8] does not deny she entered into these agreements but instead makes two arguments against enforcement of the provisions. First, Plaintiff argues that the arbitration clauses are unenforceable because they lack specificity in that they do not contain express waivers of "the right to bring a suit in court on the statutory claims set forth in the complaint." Pl. Brf. at 8. Second, Plaintiff argues that "the contract containing the arbitration clause is itself illegal." Pl. Brf. at 9. Specifically, Plaintiff alleges that the "contract seeks to engage in activities" that violate New Jersey criminal laws relating to debt settlement activities. In making her arguments, Plaintiff essentially treats both arbitration clauses as one, or, at least, is making the exact same arguments as to each without distinction. Both arguments are without merit, and the Court finds the arbitration clauses to be valid and enforceable.

The Court turns first to Plaintiff's contention that the arbitration clauses in the ARA and the AADS are unenforceable because they do not contain an express waiver of a judicial forum and an express statement that the arbitration provision encompasses statutory claims. Defendants [\*9] respond that the arbitration clauses are clear, conspicuous, and provide sufficient notice to consumers of what claims they encompass. Defendants further argue that Plaintiff's argument that the arbitration provisions are unenforceable has been rejected by *AT&T Mobility LLC v. Concepcion*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011). In *Concepcion*, the Supreme Court noted that under the FAA, arbitration agreements may be found to be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." *Concepcion*, 131 S.Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011). Agreements to arbitrate may "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (quoting *Doctor's Associates, Inc. v. Casa-rotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)).

However, as pointed out in a recent case in this district examining the same arbitration clauses at issue as in this case, *Concepcion* recognized that "states remain free to take steps addressing concerns that attend contracts [\*10] of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted." See *Guidotti v. Legal Helpers Debt Resolution, LLC*, 2011 U.S. Dist. LEXIS 146655, 2011 WL 6720936, \*11 (D.N.J. Dec. 20, 2011) (quoting *Concepcion*, 116 S.Ct. at 1750, n.6). In *NAACP v. Foulke management Corp.*, 421 N.J. Super. 404, 428, 24 A.3d 777 (App. Div. 2011), the court noted that even after *Concepcion*, as part of assessing "whether there was mutual assent to the arbitration provisions in the ... contract documents," state courts "must examine whether the terms of the provisions were stated with sufficient clarity and consistency to be reasonably understood by the

consumer who is being charged with waiving her right to litigate a dispute in court."

Here, as in *Guidotti*, the Court finds that the arbitration provisions at issue are sufficiently clear, unambiguously worded, and set off in their own paragraphs in the agreements with a bolded heading, such that the provisions were not hidden and would be reasonably understood by a party entering the agreement. While the provisions do not, as Plaintiff points out, expressly state that Plaintiff agreed to waive a judicial forum, the provisions are clear that any [\*11] "dispute" would be "submitted to binding arbitration" (ARA) or "resolved by binding arbitration" (AADS). The Court finds such language to be sufficient. See *Guidotti*, 2011 U.S. Dist. LEXIS 146655, 2011 WL 6720936 at \*12 (finding similar language sufficient to support finding that plaintiff waived any right to try her dispute in a court of law).

Contrary to Plaintiff's arguments, the Court also does not find the lack of express reference to statutory claims to be fatal to Defendants motion. In fact, recent New Jersey decisions have upheld arbitration provisions in the absence of such language. See *Kho v. Cambridge Management Group, LLC*, 2010 N.J. Super. Unpub. LEXIS 1884, 2010 WL 4056858, \*5 (N.J. Super. Ct. App. Div. 2010); *Epix Holding Corp. v. Marsh & McLennan Cos., Inc.*, 410 N.J. Super. 453, 476, 982 A.2d 1194 (App. Div. 2009). Plaintiff relies upon *Garfinkel v. Morristown Obstetrics & Gynecology Associates*, 168 N.J. 124, 773 A.2d 665 (2001) (finding that because New Jersey's Law Against Discrimination expressly grants a plaintiff a right to a jury trial, to pass muster, "a waiver of rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination.") and *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 800 A.2d 872 (2002) [\*12] (applying *Garfinkel*), for the proposition that the arbitration provisions at issue here are unenforceable because they do not expressly include statutory claims within their scope. These cases cited by Plaintiff, however, arise in the employment context, and New Jersey's Appellate Division has noted in distinguishing *Garfinkel* that "articulated limits to otherwise broadly-worded arbitration clauses do not apply outside 'the special area' of a 'plaintiff's enforcement of statutory employment claims.'" *Epix Holding Corp.*, 410 N.J. Super. at 476. The Appellate Division has also noted that only "if a statute or its legislative history evidences an intention to preclude alternate forms of dispute resolution, will arbitration be an unenforceable option." *Kho*, 2010 N.J. Super. Unpub. LEXIS 1884, 2010 WL 4056858 at \*5 (quoting *Alamo Rent A Car, Inc., v. Galarza*, 306 N.J. Super. 384, 389, 703 A.2d 961 (App. Div.1997). Plaintiff points to no such intention here.

Finally, with respect to Plaintiff's argument that the subject matter of the ARA and the AADS is illegal, the Court notes that an attack on a contract as a whole does not present a question of arbitrability and, therefore, is

one for the arbitrator, not the Court, to decide. [\*13] See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”). Similar to the instant case, the plaintiffs in *Buckeye* alleged that the contract as a whole was illegal and the Supreme Court explained that “because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract.” *Id.* at 446. Consequently, the Court grants Defendants’ motion to compel arbitration.

### III. CONCLUSION

For the reasons above, Defendants’ motion to compel arbitration is granted. An appropriate Order accompanies this Opinion.

/s/ JOEL A. PISANO

United States District Judge

Dated: June 11, 2012



Positive

As of: October 4, 2013 2:22 PM EDT

## Whitman v. Legal Helpers Debt Resolution, LLC

United States District Court for the District of South Carolina, Florence Division  
December 13, 2012, Decided; December 13, 2012, Filed  
Civil Action No.: 4:12-cv-00144-RBH

**Reporter:** 2012 U.S. Dist. LEXIS 176480; 2012 WL 6210591

Jeanne Whitman, Plaintiff, v. Legal Helpers Debt Resolution, LLC; Global Client Solutions, LLC; and Macey, Aleman, Hyslip & Searns, Defendants.

### Core Terms

arbitrate, arbitration provision, unconscionable, arbitration agreement, arbitration clause, sentence, legal fees, unenforceable, invalidate

**Counsel:** [\*1] For Jeanne Whitman, Plaintiff: Penny Hays Cauley, LEAD ATTORNEY, Hays Cauley, Florence, SC.

For Legal Helpers Debt Resolution LLC, Global Client Solutions LLC, Macey Bankruptcy Law PC, formerly known as Macey Aleman Hyslip & Searns, Macey Aleman Hyslip & Searns, Defendants: Arthur E Justice, Jr, LEAD ATTORNEY, Florence, SC; Rebecca F Bratter, PRO HAC VICE, Greenspoon Marder PA, Fort Lauderdale, FL; Richard W Epstein, PRO HAC VICE, Greenspoon Marder, Fort Lauderdale, FL.

**Judges:** R. Bryan Harwell, United States District Judge.

**Opinion by:** R. Bryan Harwell

### Opinion

#### ORDER

This lawsuit arises from a dispute between Plaintiff Jeanne Whitman ("Plaintiff") and Defendants, who are in the debt resolution and credit counseling business, regarding supposedly unfair business practices on the part of Defendants. Currently pending before the Court is Defendants' Motion to Compel Arbitration. [Doc. # 28.] For the forgoing reasons, the Motion is granted.

#### Background

In April 2012, Plaintiff, who had amassed a significant amount of credit card debt, received a solicitation from Defendants offering to assist her in settling her debt. [See Am. Compl., Doc. # 21, at ¶¶ 9-11; Mot. to Compel, Doc. # 28, at 3-4.] Based upon that offer, Plaintiff, [\*2] along with her husband, chose to enter into a contract with Defendants (the "Agreement"). [Id.] The Agreement contained the following arbitration provision, which was located above Plaintiff's signature:

**XVI. Arbitration:** In the event of any claim or dispute between Client and "LHDR," related to the Agreement or related to any performance of any services related to this Agreement, such claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request. The parties shall initially agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split [\*3] equally or be borne by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.

[Mot. to Compel, Doc. # 28, at 4; Resp., Doc. # 30, at 3.]

According to Plaintiff, Defendants failed to honor certain obligations under the Agreement, while the Agreement itself failed to disclose certain key information to Plaintiff. [Am. Compl., Doc. # 21, at ¶¶ 50-56.] Plaintiff filed suit against Defendants on January 13, 2012, and filed her Amended Complaint on April 18, 2012. Defendants responded by filing the Motion to Compel Arbi-

tration at issue.

### **Legal Standard**

The parties do not dispute that this contract is governed by the Federal Arbitration Act ("FAA"). The FAA serves as "a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Am. General Life and Acc. Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)). The Fourth Circuit has therefore instructed that district courts should "resolve 'any doubts concerning the scope of arbitrable issues in favor of arbitration.'" *Id.* (quoting *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005)). [\*4] In a recent per curiam opinion, the U.S. Supreme Court reiterated the federal policy favoring arbitration, and explained that "it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court." *Nitro-Lift Techs, L.L.C. v. Howard*, 133 S.Ct. 500, 184 L. Ed. 2d 328 (2012).

*Section 2 of the FAA* provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (quoting *9 U.S.C. § 2*). Thus, although federal law governs the arbitrability of disputes, ordinary state-law principles<sup>1</sup> resolve issues regarding the formation of contracts. *Id.* Specifically, "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)). For instance, "generally applicable contract defenses, such as [\*5] fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). If, however, only some of an arbitration agreement's provisions are invalid or unenforceable, the severability of the offending provisions - rather than invalidation of the arbitration agreement - would be the appropriate remedy. *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 292 (4th Cir. 2007).

### **Discussion**

Plaintiff argues that the Motion to Compel Arbitration should be denied because the Agreement's [\*6] arbitration provision was unconscionable under South Carolina law. The Court disagrees.

South Carolina law recognizes "[u]nconscionability . . . as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

*Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) (citation omitted). When analyzing whether an arbitration agreement is unconscionable, the Fourth Circuit instructs courts "to focus generally on whether the arbitration clause is geared towards achieving [\*7] an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir.1999)). "Plaintiff bears the burden of showing that the arbitration provisions in the agreements at issue are unenforceable." *Smalls v. Advance Am.*, No. 2:07-3240-TLW, 2008 U.S. Dist. LEXIS 67899, 2008 WL 4177297, at \*14 (D.S.C. Sept. 5, 2008) (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)).

#### **I. The final two sentences of the arbitration provision should be stricken**

The vast majority of Plaintiff's unconscionability arguments focus on the final two sentences of the arbitration provision: "The costs of arbitration, excluding legal fees, will be split equally or be borne by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees." [Mot. to Compel, Doc. # 28, at 4;

<sup>1</sup> In this case, the Court looks to the substantive law of South Carolina. A federal court sitting in diversity must apply the conflict of law provisions of the forum state. *Thornton v. Cessna Aircraft Co.*, 886 F.2d 85, 87 (4th Cir. 1989). Under the South Carolina choice of law rules governing contract actions, a contract is governed by the laws of the state in which the contract was made. *Livingston v. Atl. Coast Line R. Co.*, 176 S.C. 385, 391, 180 S.E. 343 (1935). Here, there is no dispute that the contract was made in South Carolina, and the parties both apply South Carolina law when discussing unconscionability..

Resp., Doc. # 30, at 3.] According to Plaintiff, this clause is unconscionable because (1) the clause is cost prohibitive because it requires Plaintiff to bear her own legal fees and to pay at least half of the costs of arbitration; and (2) the clause limits Plaintiff's ability to obtain damages, including her costs and attorneys fees, which [\*8] are specifically available under the statutory provisions under which Plaintiff filed suit. [Resp., Doc. # 30, at 9, 13.]

Plaintiff's argument that the clause would subject her to prohibitively high fees is without merit. In a recent North Carolina federal case, *Stewart v. Legal Helpers Debt Resolution, LLC*, No. 2:11cv26, 2012 U.S. Dist. LEXIS 76168, 2012 WL 1969624, at \*6 (W.D.N.C. June 1, 2012), a district court applying similar North Carolina law ruled that an identical arbitration clause was not unconscionable.

The Plaintiff's argument that arbitration would subject him to prohibitively high fees, however, is simply speculative. First, the ARA calls for arbitration through either the Judicial Arbitration Mediation Service (JAMS) or the American Arbitration Association (AAA), two well-known arbitration forums, both of which are consumer friendly and affordable. Under JAMS, the consumer's fees for arbitration is only \$250. Under the AAA, individual consumers with claims under \$10,000 are responsible for one-half of the arbitrator fees up to a maximum of \$125; for claims not exceeding \$75,000, the maximum fee for which an individual consumer is responsible is \$375. Further, while each party is required to bear [\*9] their own attorney's fees, the Plaintiff has not shown that the costs of retaining counsel for the purposes of arbitration would be any more cost prohibitive than retaining counsel for the purposes of maintaining this action in federal court.

*Id.* (internal citations and footnotes omitted).

However, *Stewart* did not address whether the clause limited a plaintiff's ability to obtain statutorily authorized damages. Courts that have examined arbitration clauses that limit a plaintiff's statutory right to damages or attorney's fees generally find those clauses unenforceable. *See, e.g., In re Cotton Yarn*, 505 F.3d at 293 (finding arbitration provision acceptable after concluding that terms "do not prevent the plaintiffs from effectively vindicating their statutory rights"); *Paladino v. Avnet Com-*

*puter Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that language in arbitration agreement contained language "fundamentally at odds with the purposes of Title VII because it completely proscribes an arbitral award of Title VII damages."); *Hooters of Am., Inc.*, 39 F.Supp.2d 582, 621-22 (D.S.C. 1998) (examining with approval "[s]everal . . . cases" in which courts have refused to enforce [\*10] arbitration agreements or portions of agreements because they deprived a party of statutorily mandated rights).

Perhaps sensing an issue with the clause's language, Defendants argue in their Motion that "each party bears its own fees, except where statutory claims are being arbitrated and such statutes provide for an award of fees." [Mot. to Compel, Doc. # 28, at 21.] This is simply not a reasonable interpretation of the clause at issue, which plainly states, "The parties shall bear their own legal fees." Given this limitation, the Court finds that the final two sentences of the arbitration provision unduly limit Plaintiff's statutory rights to damages and attorney's fees, and are thus unenforceable.

However, this does not require that the Court invalidate the entire arbitration provision. As the Fourth Circuit has instructed, "the district court must . . . consider whether severance of the [unenforceable provision], rather than invalidation of the arbitration agreement[], would be the appropriate remedy." *In re Cotton Yarn*, 505 F.3d at 292. Here, the final two sentences of the arbitration provision are easily severable, and actually make the Agreement and the arbitration provision itself [\*11] internally consistent.<sup>2</sup> Additionally, Plaintiff argued that the sentences could be severed from the agreement, while Defendants conceded that the Court "is free to [sever terms from the arbitration provision] if it finds such terms troubling." [See Resp., Doc. # 30, at 14-15; Reply, Doc. # 33, at 16-17.]

## **II. The remaining arbitration provision is not unconscionable**

Even with the final two sentences severed from the arbitration provision, Plaintiff argues that the provision was unconscionable because (1) her debt load has increased as a result of the Agreement; (2) the Agreement and arbitration provision were presented as "take-it-or-leave-it"; and (3) the arbitration provision was not conspicuous. The Court finds these arguments without merit.

First, to the extent [\*12] Plaintiff attacks the Agreement as a whole, the U.S. Supreme Court has clearly held that such an attack should be "considered by the arbitra-

<sup>2</sup> Plaintiff argued that the clause is inconsistent with a prior provision in the Agreement which states that "[i]f any legal action is brought regarding this Agreement, the prevailing party shall be entitled to legal fees and courts cost." [Resp., Doc. # 30, at 8.] In light of this Court's finding that the clause should be stricken because it limits Plaintiff's statutory rights, the Court has eliminated any potential inconsistency.

tor in the first instance.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); see also *Nitro-Lift Techs. L.L.C. v. Howard*, 133 S.Ct. 500, 184 L. Ed. 2d 328 (2012).

Second, Plaintiff fails to argue that she lacked a choice when she entered into the Agreement. Even if the Agreement was presented in a “take-it-or-leave-it” basis, such a contract is “not *per se* unconscionable.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669. Here, Plaintiff was not required to employ the services of a debt reduction company, nor do Defendants have a monopoly on the debt resolution industry. “Thus, if Plaintiff did not want to be limited to arbitration, Plaintiff did not have to enter into the Agreement with [Defendants].” *Thomas v. Matrix Sys. Aut. Finishes, LLC*, No. 6:09-2169-HFF, 2010 U.S. Dist. LEXIS 2930, 2010 WL 147956, at \*6 (D.S.C. Jan. 14, 2010) (applying similar unconscionability law).

Third, the arbitration provision was not hidden. In fact, the provision was in a paragraph titled “Arbitration,” the title appeared to be in bold print, and the provision was placed near the signature block. [\*13] See *Thomas*, 2010 U.S. Dist. LEXIS 2930, 2010 WL 147956, at \*6 n.3 (“In this case, the arbitration clause appears on the signature page of a five-page agreement in a clearly enumerated and delineated paragraph with the bold-faced heading “Arbitration.” Thus, the placement of the arbitration clause within the contract fails to render it procedurally unconscionable.”).

Considering the Fourth Circuit’s admonition to focus on whether the arbitration agreement is “geared towards achieving an unbiased decision by a neutral decision-maker,” coupled with Plaintiff’s burden of proof, the Court cannot say that the arbitration provision is unconscionable.

### **III. All of Plaintiff’s claims are subject to arbitration**

Defendants also contend that all of Plaintiff’s claims are subject to arbitration. [See Mot. to Compel, Doc. # 28, at 1, 5.] As her Response focuses on the appropriateness of the arbitration provision, Plaintiff does not appear to disagree with Defendants’ contention. Further, the arbitration provision governs “any claim or dispute between [Plaintiff] and [Defendants] related to the Agreement or related to any performance of any services related to this Agreement . . . .” [Mot. to Compel, Doc. # 28, at 4; Resp., Doc. [\*14] # 30, at 3.] Each claim of Plaintiff’s stems directly from Defendants performance under the Agreement, failure to perform under the Agreement, or some bad conduct relating to the Agreement. [See

Am. Compl., Doc. # 21, at ¶¶ 57-104.]

Additionally, the Fourth Circuit has explained that a disputed issue is arbitrable “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 381 (4th Cir. 1998) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). This “heavy [federal] presumption of arbitrability” dictates that any ambiguity in the scope of the Agreement’s arbitration clause be resolved in favor of arbitration. *Id.* “Consequently, because it can fairly be said that [Plaintiff’s claims] fall within the ‘scope of the Agreement,’ those [claims] must be submitted to arbitration.” *Id.*; see also *Hinson v. Jusco Co., Ltd.*, 868 F. Supp. 145 (D.S.C. 1994) (finding that fraud, negligent misrepresentation, and civil conspiracy claims were subject to arbitration because they ultimately arose out of a violation [\*15] of the contract at issue); *Partain v. Upstate Auto. Group*, 378 S.C. 152, 662 S.E.2d 426 (2008) (holding that South Carolina Unfair Trade Practices Act was subject to arbitration as there was a significant relationship between the plaintiff’s claim and the underlying agreement).

Thus, the Court concludes that the arbitration clause is enforceable and governs all the claims asserted in Plaintiff’s Complaint.

### **Conclusion**

Based on the foregoing, **IT IS THEREFORE ORDERED** that Defendants’ Motion to Compel Arbitration [Doc. # 28] is **GRANTED**, and the parties are ordered to submit the underlying claims to arbitration in accordance with the Agreement’s arbitration provision (as modified by this Court to delete the last two sentences).

**IT IS FURTHER ORDERED** that the case is hereby stayed for a period of one year.<sup>3</sup> The parties shall make a filing on the docket immediately upon the conclusion of arbitration.

### **IT IS SO ORDERED.**

/s/ R. Bryan Harwell

R. Bryan Harwell

United States District Judge

Florence, [\*16] South Carolina

December 13, 2012

<sup>3</sup> The parties in this case have already conducted a great deal of discovery and should be well prepared for arbitration. Additionally, this will ensure that the parties are diligent in timely completing arbitration.