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COURT OF APPEALS

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COURT OF APPEALS

No. 42523-8-II

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**WASHINGTON STATE COURT OF APPEALS  
DIVISION II**

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PATTY J. GANDEE, individually and on behalf of a Class of similarly  
situated Washington residents,

Respondents,

v.

LDL FREEDOM ENTERPRISES, INC. a/k/a LDL FREEDOM, INC.  
d/b/a FINANCIAL CROSSROADS, a California corporation; DALE  
LYONS, individually; BETTE J. BAKER a/k/a LIZ BAKER,  
individually; NATIONWIDE SUPPORT SERVICES, INC., a California  
corporation; and JOHN AND JANE DOES 1-5,

Appellants.

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REPLY BRIEF OF APPELLANTS LDL FREEDOM ENTERPRISES,  
INC. and NATIONWIDE SUPPORT SERVICES, INC.

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## I. INTRODUCTION

This is an appeal from an order denying a motion to compel arbitration. The Gandeeds opposed enforcement of the arbitration clause to which they agreed, but do not dispute that the question of arbitrability is controlled by both state and federal law. Indeed, the Gandeeds do not dispute, for they cannot, that the role of the court on a motion to compel arbitration is quite narrow. The court may only decide the question whether the Gandeeds agreed to arbitration; it may not decide the merits of the underlying dispute.

The Gandeeds opposed arbitration on two grounds. First, they point out that the clause states that a dispute arising under the Contract or related thereto, shall be submitted to arbitration within thirty days. The Gandeeds claim that because Appellants did not seek arbitration within thirty days, the arbitration agreement is forfeit. However, the Gandeeds do not even cite the controlling case, *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn.App. 400, 200 P.3d 54 (2009), a case holding that this very question is for the arbitrator, not the courts. Many other cases support this principled division of responsibilities.

The Gandeeds also claim that certain provisions of the arbitration clause are unconscionable. The Gandeeds cannot claim procedural

unconscionability, because the Contract containing the arbitration clause was mailed to them, for their signature at their own leisure, and the arbitration clause is set apart from the rest of the text by type face and font; the clause itself appears right on the signature page of the Contract, right above their signatures. Evidence submitted by the Gandeeds of substantive unconscionability is minimal, and does not support their claim.

But more importantly for purposes of this appeal, in which the court reviews *de novo* the question of substantive arbitrability, Appellants waive all provisions to which the Gandeeds object. This waiver renders this appeal moot. The Gandeeds remain free to seek a favorable decision on the merits from the arbitrator.

Arbitration is favored in the law, both at the state and the federal levels. Indeed, the presumption favoring arbitration is so strong that the courts indulge in *every* presumption favoring arbitration. Especially where, as here, the Agreement contains a severability clause, it was error for the trial court to agree with the Gandeeds' insistence upon a judicial forum for resolution of their dispute with Appellants. As many cases hold, offending provisions can be severed from the rest of the arbitration clause, and enforced as the parties agreed.

## II. BRIEF RE-STATEMENT OF THE CASE

### A. Re-Statement of Facts

On May 6, 2008, Gary and Patty Gandee signed a Debt Settlement Agreement (the “Contract”) with Financial Crossroads (“Financial”), a dba of defendant LDL Freedom Enterprises, Inc. (“Freedom”). CP 7-10. The Contract was part of a packet sent to the Gandeess at their home. They read the packet, signed the Contract, and returned it. CP 68. There is no evidence that the Gandeess were pressured into signing the Contract.<sup>1</sup>

Directly above the Gandeess’ signatures are the two clauses at issue on this appeal. The first is Paragraph 11, the arbitration clause. It states the following:

**11. Arbitration.** All disputes or claims between the parties related to this Agreement shall be submitted to binding arbitration in accordance with the rules of American Arbitration Association within 30 days from the dispute date or claim. Any arbitration proceedings brought by Client shall take place in Orange County, California. Judgment upon the decision of the arbitrator may be entered into any court having jurisdiction thereof. The prevailing party in any action or proceeding related to this Agreement shall be entitled to recover reasonable legal fees and costs, including attorney’s fees which may be incurred.

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<sup>1</sup> Even the Gandeess do not claim procedural unconscionability.

CP 75. The second clause is the severability clause, which states:

**15. Severability.** If any of the above provisions are held to be invalid or unenforceable, the remaining provisions will not be affected.

*Id.* The Gandeas became disenchanted with their Contract with Freedom, and brought the instant lawsuit, claiming that Freedom violated the Consumer Protection Act and the Debt Adjustment Act, ch. 18.28 RCW. The merits of the Gandeas' claims are not at issue on this appeal.

**B. Procedures Below.**

After the Complaint was filed, Freedom moved the trial court for an order compelling arbitration and to stay proceedings pending the outcome thereof. CP 13-17. The Gandeas submitted a brief, CP 25, and a declaration, CP 67. The Declaration of Patty J. Gandee attached a printout purporting to show hotel and airplane costs associated with arbitration in Orange County, California. The brief and declaration do not attempt to show the cost *savings* associated with arbitration. *See* CP 25, CP 67.

The Gandeas argued that the arbitration agreement was invalid and unenforceable, making several arguments. First, they argued, Appellants did not act with sufficient alacrity to invoke the arbitration agreement.

CP 28. Second, they asserted that the venue provision was too expensive; a plane ticket and a hotel room were alleged to be too expensive, notwithstanding the Gandeeds' claim of treble damages, "total damages [of] ... less than \$75,000." CP 8; CP 31. (This is not the kind of \$500 consumer claim sometimes seen in unconscionability cases; the Gandeeds are suing for a great deal of money.)

Third, the Gandeeds claimed that the prevailing party term of the agreement is inconsistent with Washington consumer law. CP 34.

Finally, they argued that the unconscionable provisions were "pervasive" and thus could not be severed, even though there are many Washington decisions upholding severability clauses and severing the offending terms from arbitration agreements. CP 34-35.

In court, at hearing, counsel for Freedom offered to waive the offending clauses.<sup>2</sup> That offer is renewed here.<sup>3</sup>

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<sup>2</sup> RP.17.

<sup>3</sup> See *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004). Appellants do not admit unconscionability and do not waive the right to arbitrate any dispute "related to" their Contract. But they do waive any provision of the arbitration clause this Court finds inappropriate.

The trial court agreed with the Gandeess, and denied Freedom's motion. This appeal followed.

### III. ARGUMENT

#### A. Summary of Argument.

The Gandeess overlook the appropriate relationship between trial court and arbitrator, and so did the trial court. In their opening Brief on this appeal, Appellants pointed out that the trial court's task is limited to deciding whether the parties agreed to arbitrate the dispute in question. As the leading case on this issue states, "if the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end." *Heights at Issaquah Ridge, supra*, 148 Wn.App. 400, 403 (emphasis added). This reflects a "strong public policy favoring arbitration of disputes." *Id.* at 403-404. *Verbeek Properties, LLC v. Greenco Environmental, Inc.*, 159 Wn.App. 82, 87, 246 P.3d 205 (2010). There is no question that the arbitration clause is broad enough to cover the claims made by plaintiffs. *See* CP 75 (claims "related to this Agreement").

This division of responsibility is not just a good idea, it is federal and state law. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), discussing 9 U.S.C. §§ 1-2, *et seq.* (Federal Arbitration Act (“FAA”)) and the separability doctrine, discussed at length in Appellants’ Opening Brief but not repeated here); RCW 7.04A.090. *Verbeek* teaches that whether parties complied with an initiation-of-arbitration provision is for the arbitrator under ch. 7.04A RCW; *Heights at Issaquah Ridge* teaches that a time-for-initiation of arbitration provision is likewise for the arbitrator. The Gandeas ignore these teachings; the trial court overlooked them.<sup>4</sup>

The Gandeas instead try to lump the clear requirements of *Heights at Issaquah Ridge* and *Verbeek* into a new form of “substantive

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<sup>4</sup> It has been held as long ago as 1995 that the question whether a party complied with the initiation of arbitration provision was for the arbitrator, as is the question whether there should be any sanction for doing so. *Munsey v. Walla Walla College*, 80 Wn.App. 92, 906 P.2d 988 (1995). The Court reversed the trial court for deciding issues that should have been referred to the arbitrator, like these. One can imagine an arbitrator imposing the sanction of filing fees on Appellants for not demanding arbitration quickly, thus causing the Gandeas to file the lawsuit in court; one can also imagine an arbitrator deciding that the initiation-of-arbitration provision is a mutual obligation; the Gandeas could have demanded arbitration too, and they should have done so.

arbitrability.” But they cite no case for the proposition that a party may avoid her own agreement to arbitrate by showing that *the contract* is unconscionable. *Prima Paint* and similar cases reject that notion.<sup>5</sup>

As the Washington Supreme Court held, the net effect of the FAA is to create a federal substantive law of arbitrability.<sup>6</sup> The trial court was not free to disregard this body of substantive law.<sup>7</sup> In a very recent decision, Division Three of the Court of Appeals held that such matters as “time limits” are for the arbitrator, while the question “whether a dispute is encompassed by an agreement to arbitrate” is for the courts.<sup>8</sup>

Thus there is overwhelming authority, including an appellate decision handed down just last month, to demonstrate that the trial court was incorrect in deciding the time limits, initiation-of-arbitration question.

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<sup>5</sup> See also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

<sup>6</sup> *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P. 3d 213 (2009); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004).

<sup>7</sup> *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004).

<sup>8</sup> *River House Development Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289, 296 (March 15, 2012) (citing several cases), under RCW 7.04A.060(2) and (3).

The Gandeess' effort to characterize the time limits issue as one of "substantive arbitrability" must be rejected.<sup>9</sup>

Thus unless this Court finds that *both* (1) one or more provisions of the arbitration clause is unconscionable, *and* (2) the severability clause should not apply, this Court must reverse. *Further*, (3) *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004), stands for the proposition that an allegedly-unconscionable provision in an arbitration clause becomes moot if waived by the party seeking arbitration. 153 Wn.2d at 310.

Appellants have fully briefed the unconscionability arguments, both in terms of the merits and in terms on the FAA's pre-emptive force. A state cannot create a defense, like unconscionability, making it easier for one class of litigants to use as a defense to a motion to compel

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<sup>9</sup> The Gandeess seem to say that the time limits issue is "substantive" because they only agreed to arbitrate cases in which one party or the other demands arbitration within 30 days. This argument conflates substantive and procedural arbitrability, and if carried to its logical conclusion, would eviscerate the concept of procedural arbitrability. Such a result would be clearly contrary to *Prima Paint*, RCW 7.04A.090, and the Washington cases cited above. No case transforms a "time limits" issue into a substantive one.

arbitration, consistently with the FAA. In other words, if *other* litigants are required to show *both* procedural and substantive unconscionability to avoid *their* agreements, state case law allowing consumers to avoid arbitration by showing *either* is inconsistent with the FAA.<sup>10</sup>

It is not clear from the precedents whether Washington would typically require, for example, a buyer of goods to show both procedural and substantive unconscionability to avoid having to pay for them. The Supreme Court has held that it is unclear whether both are required; but the court declined to decide the matter. *Zuver v. Airtouch Communications, Inc., supra*, 153 Wn.2d at 303 fn.4. If this Court finds that consumers trying to avoid arbitration have an easier burden than would any other plaintiffs asserting unconscionability, there is a violation of the FAA and *Concepcion*.

However, this Court need not reach the *Concepcion* issue; in a very recent decision, the Washington Supreme Court held that the question of

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<sup>10</sup> *AT&T Mobility LLC v. Concepcion*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740 (2011); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004), is to the same effect.

procedural unconscionability is for the arbitrator, not the courts. *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (January 5, 2012). Thus together with Appellants' waiver of any defective provisions in the arbitration agreement, the severability clause, and the doubts regarding substantive unconscionability of the provisions attacked by the Gandeas, this court should hold that this case is fully arbitrable and issues regarding the validity of the contract as a whole may be decided in a nonjudicial forum.

**B. Scope of Review.**

On review of a trial court's denial of a motion to compel arbitration, the party opposing arbitration has the burden of showing that the arbitration clause is unenforceable or inapplicable. *Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). Appellate review is conducted *de novo*. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007), citing *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). This Court may reach any decision the trial court could have reached on this record.

**C. Questions Concerning Conditions Precedent to Arbitration, Such as the Time for Initiation of Arbitration Provision, are for the Arbitrator.**

The Gandeess overlook overwhelming authority under both state and federal authorities to argue that alleged noncompliance with the thirty-day provision in the arbitration clause is an issue for the court to decide. The most recent case on this issue was decided again (against the Gandeess) last month, citing RCW 7.04A.060 and .090. *River House Development Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289, 296 (March 15, 2012); see also *Verbeek Properties, LLC v. Greenco Environmental, Inc.*, *supra*, 159 Wn.App. 82, 246 P.3d 205 (2010); *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, *supra*, 148 Wn.App. 400, 200 P.3d 54 (2009).

While the Gandeess' counsel could be applauded for a creative effort, it is simply too late in the day for this argument. The role of the trial court is narrow, and does not extend to the question whether a party perfectly complied with a time limit for initiating arbitration. That is a question for the arbitrator, not the courts.

The trial court committed error by deciding this question.

**D. The Question Whether One or Two Clauses in the Arbitration Agreement Might Be Unconscionable is Moot and is Severable Even if not Moot.**

Appellants have offered to waive the provisions in the arbitration clause of which the Gandeas complain. Under these circumstances, and because the Contract contains a severability clause, the issue is moot.

*Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004); *see also* 153 Wn.2d at 310 n. 7.

Other courts have found objections based on unconscionability arguments moot when the party seeking arbitration waived the offending provision. For example, in *Dobbins v. Hawk's Enterprises*, 198 F.3d 715 (8<sup>th</sup> Cir. 1999), a mobile home seller offered *at oral argument* to waive some allegedly-unconscionable fees related to arbitration. The court found that, “in an effort to foster the policy in favor of arbitration,” it would remand with instructions to make sure the fees in question were “lowered to a reasonable amount.” 198 F.3d at 717.

Likewise, in *In re Currency Conversion Fee Antitrust Litigation*, 265 F.Supp.2d 385 (S.D.N.Y. 2003), the court held that prohibitive expense, including the expense of travel and the expense of a “prevailing

party” clause allowing for the possibility of a fee award, cannot prevent arbitration if the party seeking arbitration agrees to forego those costs. *See also Howard v. Anderson*, 36 F.Supp.2d 183, 187 (S.D.N.Y. 1999) (where fees render an arbitration clause unenforceable, “courts have either refused to enforce the arbitration agreement *or ordered the defendant to pay the fees*”).

Here, of course, there is no prohibitive expense that Appellants have not offered to forego. They are willing to waive the forum selection clause and the prevailing party fee-shifting clause, and any other provision that causes this Court great concern or which this Court might find “monstrously harsh.”

There is nothing inherently wrong with arbitration; indeed, it is often cheaper and more effective as a vehicle for dispute resolution than the courts. Likewise, there is nothing inherently wrong with any of the terms of the arbitration clause. Plaintiff’s Complaint acknowledges that Orange County, California (the venue-selection clause) is the principal place of business of Freedom. It is perfectly appropriate for a party to seek a convenient forum for dispute resolution, as long as it is related to the case. *Schnall v. AT & T Wireless Services, Inc.*, 171 Wn.2d 260 (2011).

Indeed, the one Washington Supreme Court decision holding that the unconscionable portions of the arbitration clause could not be severed, *McKee v. AT & T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008) is clearly distinguishable. The Court found (as had the trial court in that case) both procedural and substantive unconscionability—the McKees had not been given a copy of the dispute resolution portion of their contract—and there were four different unconscionable portions of the agreement to arbitrate. *McKee*, 164 Wn.2d at 402. The Court found unconscionability “pervasive” and simply refused to enforce the arbitration agreement.

Here, as in *Adler, Zuver*, and other cases, the allegedly unconscionable provisions are discrete. Unlike the plaintiffs in *McKee*, the Gandeas had a perfect opportunity to read the clause and decide in advance whether they wanted to be bound by it.

In this case, the trial court failed to sever the allegedly-unconscionable provisions from the rest of the arbitration agreement, and enforce the agreement without the unconscionable provision. This was error.

Thus even if, for some reason, this Court finds that the issue is not moot, it can sever the parts of the arbitration clause it finds unenforceable and enforce the agreement as modified. This is not an unusual result where unconscionability is concerned. *Cf.* RCW 62A. 2-302(3).

**E. Alternatively, the Arbitration Clause in this Contract is Not Unconscionable.**

Unconscionability is a question of law for the courts. *Zuver*, *supra*, 153 Wn.2d at 302-303. The court added:

It is black letter law of contracts that the parties to a contract shall be bound by its terms. *See Nat'l Bank of Wash. v. Equity Investors, L.P.*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973). *Zuver* argues that she should be exempt from the terms of the contract with her employer here because it is both procedurally and substantively unconscionable. "The existence of an unconscionable bargain is a question of law for the courts." *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995) (citing *Mieske v. Bartell Drug Co.*, 92 Wn. 2d 40, 50, 593 P.2d 1308 (1979)). In Washington, we have recognized two categories of unconscionability, substantive and procedural. *Id.* (citing *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). "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, 544 P.2d 20. "**'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability.**" *Nelson*, 127 Wn.2d at 131, 896 P.2d 1258 (quoting *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 16 Wn.App. 439, 444, 556 P.2d 552 (1976)). Procedural unconscionability is "the lack of meaningful choice, considering all the circumstances surrounding the transaction including "[t]he 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.""*Id.* at 131, 896 P.2d 1258 (quoting *Schroeder*, 86 Wn.2d at 260, 544 P.2d 20 445, 449 (D.C.Cir.1965))) [sic]. We have cautioned that "these three factors [should] not be applied mechanically

without regard to whether in truth a meaningful choice existed.” *Id.*

153 Wn.2d at 302-303 (emphasis supplied).

The courts indulge every presumption in favor of the enforceability of an arbitration provision. *Walters v. A.A.A. Waterproofing, Inc., supra*, 151 Wn.App. 316 (2009); *Verbeek Properties, LLC v. Greenco Environmental, Inc., supra*, 159 Wn.App. 82, 87 (2010). The Gandeas thus are faced with a heavy burden to show that this arbitration clause was substantively (monstrously harsh) and procedurally (lack of meaningful choice) unconscionable. They cannot do so.

**Beginning with procedural unconscionability:** The record is undisputed that the Gandeas had a very reasonable opportunity to understand the terms of the Agreement; it was mailed to them, they signed it a few days later and sent it back. The arbitration provision is **not** buried in a maze of fine print—it is in the same type face as the rest of the Agreement, the word “ARBITRATION” is clearly denoted, in bold face type and capital letters, and it appears on the signature page, a short

distance above the Gandeeds' signatures.<sup>11</sup> The trial court did not find procedural unconscionability, nor could it have done so on this record.

**Substantive unconscionability:** A clause in an agreement is substantively unconscionable when it is “**monstrously harsh**” or “shocking to the conscience.” *Zuver, supra*, 153 Wn.2d at 303. In the *Zuver* case, the Court looked at the allegedly unconscionable provisions in context; it required proof that the provision in question was *at least* “overly harsh” in order to find unconscionability. *See* 153 Wn.2d at 309, declining to find a fee-splitting provision, like the one at issue here, unconscionable absent evidence (comparable to the affidavits and information produced by the plaintiff in *Mendez, supra*) that *Zuver*, the plaintiff, could not afford it.

This is a big case. It is not a case in which a consumer must pay thousands in fees for a claim half that size. Indeed, the requirement of arbitration under A.A.A. *rules* does not require the parties to pay A.A.A. *fees*. Arbitration is a reasonable form of dispute resolution here.

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<sup>11</sup> Parties to a contract have a duty to read it. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.app. 841, 158 P.3d 1265 (2007).

The trial court erred by holding otherwise. The Gandeeds do not claim procedural unconscionability, and submitted insufficient proof of substantive unconscionability. *See Townsend, supra; Zuver, supra; Adler, supra.* But even if this Court finds the minimal evidence (plane fare and hotel costs) sufficiently “monstrous,” this Court can sever any provision it finds unconscionable, and enforce the clause. (Not even that much is required; if this Court finds a provision offensive, Freedom waives it.)

#### IV. CONCLUSION

Appellants have not waived the right to see arbitration. That issue has been fully briefed and under *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 45 P.3d 594 (2002) and its progeny, Appellants’ actions were not inconsistent with an intent to arbitrate. The Gandeeds do not claim otherwise.

At the end of the day, the trial court failed to pay sufficient heed to the courts’ repeated admonition to indulge in every presumption favoring arbitration. It should have granted Appellants’ motion.

Based upon the foregoing, Appellants respectfully request this Court to reverse, with directions to the trial court to order the arbitration of the disputes raised herein.

RESPECTFULLY SUBMITTED this 19th day of April, 2012.

FOSTER PEPPER PLLC

A handwritten signature in black ink, reading "Milton G. Rowland". The signature is written in a cursive style and is positioned above a horizontal line.

Milton G. Rowland, WSBA #15625  
Attorneys for Appellants LDL Freedom  
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Services, Inc.



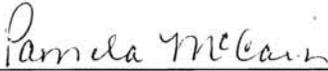
I, Pamela McCain, declare that I am employed by the firm of Foster Pepper PLLC, I am over the age of 18 years, am not a party to the above-entitled litigation, and I am competent to be a witness herein.

On April 20, 2012, I hand delivered a true and correct copy of the Reply Brief of Appellants and this Certificate of Service in the above-captioned case upon the following counsel for the parties of record in this action:

Boyd McFadden Mayo  
Darrell W. Scott  
The Scott Law Group PS  
926 W. Sprague Ave., Ste. 680  
Spokane, WA 99201-5071

I declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Executed at Spokane, Washington on April 20, 2012.

  
\_\_\_\_\_  
Pamela McCain