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NO. 53286-7-II

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

ZURIXX, LLC d/b/a Rules of Renovation, a Utah limited liability
company,

Appellant,

vs.

LYNNE A. DELORIEA and STEPHEN E. DELORIEA, a married
couple,

Respondents.

APPELLANT'S BRIEF

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I. INTRODUCTION

This appeal concerns the trial court’s erroneous refusal to enforce an arbitration agreement.

Respondents Lynne A. DeLoriea and Stephen E. DeLoriea (the “DeLorieas”) purchased real estate investment education services from Appellant Zurixx, LLC d/b/a Rules of Renovation (“Zurixx”) by way of two substantively identical contracts. Both of those short two-page agreements include a bolded “DISPUTE RESOLUTION AGREEMENT” term that provides for mediation and then arbitration of all disputes between the DeLorieas and Zurixx, except for small claims which may be pursued in court (the “Arbitration Agreement”).¹

Unsatisfied with their purchases, the DeLorieas sued Zurixx in Cowlitz County Superior Court—and alleged damages in excess of \$100,000. In response, Zurixx filed a motion to compel arbitration asking the trial court to enforce the parties’ Arbitration Agreement (“Motion”).

The DeLorieas do not dispute that their asserted claims fall within the scope of the Arbitration Agreement. Rather, they argue that the Arbitration Agreement is substantively and procedurally unconscionable. Under black-letter Washington authority, it is neither.

¹ CP 61 at ¶ 3, CP 64-67.

The Arbitration Agreement does not contain one-sided provisions or overly harsh terms. It is a straight-forward dispute resolution provision that is structured to facilitate fair access and prompt resolution. Thus, for example, Zurixx is obligated to pay the AAA filing fee and the agreement provides that small claims may be pursued in court. And the DeLorieas had meaningful choice: the Arbitration Agreement is clearly set forth and the two-page contract expressly advises that the DeLorieas could cancel the transaction any time within three (3) business days of signing. The contract also provides a customer service number for questions.

The DeLorieas argue that the Arbitration Agreement is substantively unconscionable because they would incur additional attorneys' fees to pursue a separate lawsuit against a third party if they arbitrate their claims against Zurixx. No authority supports invalidating the Arbitration Agreement between Zurixx and the DeLorieas on this basis. Moreover, the evidence the DeLorieas submitted below demonstrates that access to the arbitral forum here is not cost prohibitive.

The DeLorieas also argue that they lacked meaningful choice to enter into the Arbitration Agreement because "high pressure sales tactics" encouraged them to buy the real estate education packages and they failed to completely read either of the two-page purchase agreement. These

facts, even if true, do not establish procedural unconscionability under controlling Washington law.

In denying Zurixx’s Motion, the trial court stated that it not grant the Motion because there was only a declaration “from counsel, which obviously I can’t consider, saying, by golly, we’ve got this arbitration agreement that needs to be enforced.”² But the record reflects that the contracts containing the Arbitration Agreement were before the court and authenticated by the DeLorieas.

With respect to unconscionability, the trial court found that the “important goodies” of the two-page contracts were on the second page, and that this was “unusual.”³ The trial court then ruled that Zurixx could bring a further motion to compel arbitration or summary judgment at a later date or seek a trial on arbitrability, and ordered limited discovery.

The Arbitration Agreement is enforceable and the trial court erred by not granting Zurixx’s Motion. This Court should reverse and remand with direction that Zurixx’s Motion be granted.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by ruling that it did not have “information [it] should consider” regarding Zurixx’s Motion where: (1)

² RP 19:2-5.

³ RP 19:8-13.

the Arbitration Agreement was in the record and authenticated by the DeLorieas; and (2) the DeLorieas submitted evidence to support their arguments regarding unconscionability. RP 19:5-7.

B. The trial court erred by ruling that it did not have “information [it] should consider” regarding Zurixx’s Motion where: (1) the Arbitration Agreement was in the record and authenticated by the DeLorieas; and (2) the DeLorieas submitted evidence to support their arguments regarding unconscionability. RP 19:5-7.

C. The trial court should have granted Zurixx’s Motion because the Arbitration Agreement is an enforceable agreement to arbitrate and it is undisputed that the DeLorieas’ claims asserted in this lawsuit are within the scope of that agreement.

D. The trial court erred because the DeLorieas did not meet their burden to show the Arbitration Agreement is unenforceable as substantively or procedurally unconscionable.

III. STATEMENT OF THE CASE

A. The DeLorieas’ Purchase of Real Estate Education Services.

Zurixx develops and sells real estate and financial programs that include education, mentorship, coaching, and related resources. Zurixx does business under the trade name “Rules of Renovation.” CP 1 at ¶ 1.3.

This case concerns the DeLorieas' relationship with Zurixx through their purchase of real estate education packages from Zurixx in 2018. CP 2-27.

1. The Portland Workshop and Purchase Agreement.

In February 2018, the DeLorieas purchased a three-day real estate education workshop from Zurixx (the "Portland Workshop"). CP 3 at ¶ 3.9, CP 15-16; CP 61 at ¶¶ 2-3; CP 64-65. They bought the Portland Workshop package by executing a two-page purchase order agreement. *Id.* (the "Portland Contract"). The Portland Workshop consisted of a three-day training course, and related course materials and resources. *Id.*

The Portland Contract is a two-page document that states easy-to-understand information and terms. CP 61 at ¶¶ 2-3; CP 64-65. Text at the bottom of the first page, directly above the signature line, notifies a buyer that there are terms and conditions on the reverse side:

By signing below, I acknowledge that I have received the physical materials referenced above and that I have read and agree to the terms and conditions described in the ... Dispute Resolution on the reverse side of this Purchase Order.

CP 64. Zurixx's customer service number is also listed and a buyer is encouraged to call "[i]f you have any questions." *Id.*

On the second page of the Portland Contract is the Dispute Resolution Agreement (the Arbitration Agreement), which is designated in

bold type and all-caps. CP 65. In relevant part, the Arbitration Agreement states as follows:

DISPUTE RESOLUTION AGREEMENT: You and the Company hereby agree that all disputes, controversies or claims that arise between you concerning any aspect of this Purchase Order or the relationship between you, shall be decided exclusively in binding arbitration in a reasonably convenient location. The arbitration shall be conducted on a confidential basis and administered by the American Arbitration Association (“AAA”) pursuant to its Commercial Arbitration Rules; provided, however, that before resorting to arbitration, the parties agree to endeavor first to settle the dispute by mediation administered by the AAA pursuant to its Commercial Mediation Procedures. The Company agrees to pay the AAA filing fee, but all other fees incurred in connection with the arbitration proceeding shall be shared equally. Notwithstanding the foregoing, you may bring an individual action in the small claims court of your state or municipality if the action is within that court’s jurisdiction and is pending only in that court. *Id.*

CP 65.

Finally, immediately above the signature line, the Portland

Contract states in bold-print:

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation for an explanation of this right.

CP 64.

The DeLorieas attended the Portland Workshop. CP 62 at ¶ 9.

Afterward, they rated the program as “excellent” and as having provided them with valuable information. CP 45-46.

2. The Diamond Package and the Purchase Agreement.

At the close of the Portland Workshop, the DeLorieas decided to buy further real estate education services. CP 61 at ¶¶ 2-3, CP 66-67. The DeLorieas purchased a “Diamond Package” of training and education services and related materials, again by executing a two-page purchase order agreement (the “Diamond Contract”). *Id.* Like the Portland Contract, the Diamond Contract states the terms of the DeLorieas’ purchase in an easily understandable format. CP 66-67. And again, at the bottom of the first page, just above the signature line, the agreement contains Zurixx’s customer service number, points out that there are terms on the second page—including the Arbitration Agreement—and notes the buyer’s three-day cancellation right. CP 66. As in the Portland Contract, the cancellation right is stated in bold and in the largest font of any term in the Diamond Contract. *Id.*

There is no evidence that the DeLorieas asked questions about or discussed any terms of the Portland Contract or the Diamond Contract, or that they called Zurixx’s customer service line, or that they ever sought to cancel either contract. CP 53-71.

3. Additional Coaching Services.

After receiving training and services through the Portland Workshop and the Diamond Package, the DeLorieas extended and

continued their relationship with Zurixx. CP 27. The DeLorieas signed up for more real estate education services through a coaching program. CP 27. The DeLorieas allege they received coaching and real estate finder software products as part of this purchase, but then a few months later “realized they had made a mistake”. CP 7 at ¶ 3.38.

B. The Lawsuit.

The DeLorieas then filed this lawsuit against Zurixx. CP 1-27. The Portland Contract and the Diamond Contract are exhibits to the Complaint. CP 15-16; CP 18.⁴

The Complaint asserts six claims: (1) Unconscionability, (2) Breach of Contract, (3) Unjust Enrichment, (4) Negligent Misrepresentation, (5) Fraudulent Misrepresentation, and (6) Consumer Protection Act Violation.⁵ CP 8 at ¶ 4.1- CP 12 at ¶ 9.2. The DeLorieas

⁴ The DeLorieas omitted the second page of the Diamond Contract from their Complaint. CP 18. In support of its Motion to Compel Arbitration, Zurixx submitted a complete copy of the Diamond Contract from its files and records. CP 39 at ¶ 2, CP 42-43. Lynne DeLoriea also submitted a copy of the complete Diamond Contract with her declaration in opposition to Zurixx’s Motion. CP 61 at ¶ 3; CP 66-67.

⁵ Under Washington law, “unjust enrichment” is not an independent cause of action. Rather, it is a remedy for a species of quasi-contract claim, *i.e.*, a contract implied in law, one that “arises from an implied duty of the parties but is not based on a contract, or on any consent or agreement.” *Heaton v. Imus*, 93 Wn.2d 249, 252, 608 P.2d 631 (1980) (citations omitted, emphasis supplied). “Unjust enrichment is the method of recovering the value of the benefit conferred absent any contractual relationship because notions of justice and fairness require it.” *Young v.*

allege that “[a]s a result of their dealings with Zurixx, [they] have suffered losses exceeding \$100,000 and their credit has been irreparably damaged.” CP 8 at ¶ 3.42.

The asserted claims and related fact allegations supporting them concern the real estate training services and products that the DeLorieas purchased from Zurixx, or representations Zurixx allegedly made to the DeLorieas. CP 2 at ¶ 3.7 – CP 4 at ¶ 3.18 (allegations regarding Portland Workshop); CP 4 at ¶ 3.18 – CP 6 at ¶ 3.26 (allegations regarding the Diamond Package training); and CP 7 at ¶ 3.33-3.35, 3.37-3.38 (allegations regarding additional coaching program).⁶

The DeLorieas seek judgment: (i) regarding “the agreements that Defendant had Plaintiffs sign” (CP 12 at ¶10.1) and Zurixx’s “contractual obligations to Plaintiffs” (*id.* at ¶10.2); (ii) finding Zurixx was “unjustly enriched by Plaintiffs” (*id.* at ¶10.3) and that Zurixx “misrepresented the nature of the services that it would provide to Plaintiffs in order to induce

Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). Where there is an express contract that governs parties’ rights and obligations, as is the case here, there can be no implied contract. Likewise, “unconscionability” is not an independent cause of action; rather, it is a defense to a contract claim. See *Weidert v. Hanson*, 178 Wn.2d 462, 465, 309 P.3d 435 (2013) (unconscionability is a general contract defense).

⁶ The DeLorieas erroneously allege that Foundation Funding Group is a d/b/a of Zurixx and make allegations regarding Foundation Funding’s conduct. CP 6 at ¶ 3.27 – CP 7 at ¶ 3.36.

Plaintiffs to purchase those services” (*id.*); and (iii) for violation of Washington’s Consumer Protection Act (*id.* at ¶10.4).

C. Zurixx’s Motion to Compel Arbitration.

Zurixx filed a motion to compel arbitration (the Motion). CP 28-36. In response, the DeLorieas did not dispute that their asserted claims are subject to the Arbitration Agreement. CP 53-71. And they did not dispute the fact or authenticity of the Portland Contract or the Diamond Contract, both of which contain the Arbitration Agreement. *Id.* Lynne DeLoriea re-submitted and authenticated those agreements. CP 61 at ¶ 3; CP 64-67.

The DeLorieas opposed the Motion, however, arguing the Arbitration Agreement is both substantively and procedurally unconscionable. CP 53-71.

First, the DeLorieas argued the Arbitration Agreement is substantively unconscionable because: (1) the agreement requires the arbitration take place in a “reasonably convenient location” and the arbitration could end up in Utah because Zurixx is a Utah-based company; and (2) requiring them to arbitrate with Zurixx would increase their attorneys’ fees if they elect to pursue a separate action against a third party, Foundation Funding. CP 56-57.

Second, the DeLorieas argued that the Arbitration Agreement is procedurally unconscionable because they “lacked meaningful choice”. CP 57-59. The DeLorieas claimed they did not know either of the two-page contracts they signed contained an arbitration agreement. *Id.*; CP 61-62. The DeLorieas also argued they did not have a reasonable opportunity to consider the contracts or consult with counsel because “high pressure sales tactics” made them feel as though they must sign the Portland Contract and the Diamond Contract or they “would be missing out on an amazing opportunity to make money” if they didn’t. CP 59; CP 61 at ¶ 5.

In reply, Zurixx argued that none of the arguments or evidence presented by the DeLorieas showed that the Arbitration Agreement was unenforceable under Washington law:

- The Arbitration Agreement requires the arbitration to take place in a location reasonably convenient for the DeLorieas; *i.e.*, not Utah;
- The costs of arbitration were not “prohibitive”;
- The DeLorieas had three (3) business days after signing the agreement to read it, consider its terms, and consult with counsel if they wished; and
- The DeLorieas’ decision to not read the second page of a two-page contract does not render the Arbitration Agreement unenforceable.

CP 72-82. In it, Zurixx

D. The Trial Court’s Denial of Zurixx’s Motion.

The trial court denied Zurixx’s Motion. CP 86-88; RP 18:22-19:14. In doing so, the court ruled that it had “initial problems” with the Motion because it did not have the information it “should consider because it’s coming from counsel.” RP 18:22-19:7. The court, however, disregarded that the contracts containing the Arbitration Agreement were in the record and authenticated by the DeLorieas. CP 3 at ¶ 3.9, CP 15-16, CP 6 at ¶ 3.26, CP 18 (verified complaint); CP 61 at ¶ 3, CP 64-67 (Declaration of Lynne DeLoriea).

Regarding unconscionability, the court ruled that the two-page purchase order contracts were “pretty unusual” because the signature line was on the first page, and, in the court’s view, “all the important goodies are on Page 2.” RP 19:8-13.

In denying Zurixx’s Motion, the court observed that Zurixx could bring a future summary judgment motion or seek a trial regarding arbitrability. RP 19:19-20:1. The court also ruled that there should be discovery on arbitrability given Plaintiffs’ “allegations” regarding what went on factually in the formation of the contracts as a whole. *Id.* at 19:16-24. But the DeLorieas had submitted evidence on this issue, the

enforceability of contracts as a whole is a question for the arbitrator, not the court,⁷ and neither party had requested discovery. CP 61-67.

Zurixx timely appealed. CP 89-94.

IV. ARGUMENT

A. The Trial Court's Order is Immediately Appealable.

A trial court's denial of a motion to compel arbitration is immediately appealable. RCW 7.04A.280(1)(a); RAP 2.2(a)(3); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Hldgs., Inc.*, 190 Wn.2d 281, 287, 413 P.3d 1 (2018) (“an order declining to compel arbitration is immediately appealable”); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 43-45, 17 P.3d 1266 (2001) (same); *Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 783 P.2d 1124 (1989) (same).

The right to arbitration is a “substantial right” and a motion requesting a court to compel arbitration seeks to immediately stop court proceedings and initiate a separate action in the arbitral forum. *Stein*, 105 Wn. App. at 44.

[I]f a trial court does not compel arbitration and there is no immediate right to appeal, the party seeking arbitration must proceed through costly and lengthy litigation before having the opportunity to appeal, by which time such an appeal is too late to be effective.

⁷ RCW 7.04A.060(3); *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 460, 268 P.3d 917 (2012).

FutureSelect Portfolio Mgmt., Inc., 190 Wn.2d at 287 (quotation omitted).
“This result would frustrate strong public policy favoring arbitration as well as the parties’ own arbitration agreement. *Stein*, 105 Wn. App. at 44.

The Washington Supreme Court has recognized that parties should not be forced to continue litigating in court where they have asserted a right to proceed in arbitration instead. *FutureSelect Portfolio Mgmt., Inc.*, 190 Wn.2d at 287.

Here, Zurixx filed a motion to compel arbitration. CP 28-36 (the Motion). Zurixx asserted it has a right to proceed in arbitration instead of court under the parties’ Arbitration Agreement. *Id.* The trial court denied Zurixx’s Motion. CP 92-93 (the Order) (“NOW, THEREFORE, Defendant Zurixx, LLC’s Motion to Compel Arbitration is DENIED.”). Zurixx therefore has a right to immediate appeal of the trial court’s Order. RCW 7.04A.280(1)(a); RAP 2.2(a)(3); *FutureSelect Portfolio Mgmt., Inc.*, 190 Wn.2d at 287; *Stein*, 105 Wn. App. at 43-45.

B. Standard of Review.

This Court reviews Zurixx’s Motion *de novo*. *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 455, 268 P.3d 917 (2012); *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009).

In considering Zurixx’s Motion, the Court must determine two things: (a) whether the parties entered into an agreement to arbitrate; and

(b) whether the agreement includes this dispute within its scope. RCW 7.04A.060(2); *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 878-81, 224 P.3d 818 (2009), *aff'd Townsend*, 173 Wn.2d 451. “If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration.” *Townsend*, 153 Wn. App. at 881 (citing RCW 7.04A.060(2), (3)).

Challenges to the enforceability of the contract as a whole are determined by the arbitrator—not the court. RCW 7.04A.060(3); *Townsend*, 173 Wn.2d at 455-60.

C. The Trial Court Should Have Granted Zurixx’s Motion.

1. Washington Favors Enforcement of Arbitration Agreements.

Washington law, like federal law, recognizes a “strong public policy favoring arbitration” and the use of contractual alternative dispute resolution. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009); RCW 7.04A.060(1); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (the Federal Arbitration Act reflects “both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract.”).

2. The Arbitration Agreement is Enforceable.

“An arbitration clause is a matter of contract and is enforceable as a contract term.” *Raven Offshore Yacht, Shipping, LLP v. F.T. Hldgs., LLC*, 199 Wn. App. 534, 537, 400 P.3d 347 (2017); RCW 7.04A.060(1). As the party opposing arbitration, the DeLorieas have the burden of showing the Arbitration Agreement is not enforceable. *Satomi Owners Ass’n*, 167 Wn.2d at 797. The DeLorieas failed to meet their burden.⁸ The Arbitration Agreement is neither substantively nor procedurally unconscionable.

3. The Arbitration Agreement is Not Substantively Unconscionable.

a. The Arbitration Agreement Does Not Contain Unfair Terms.

“Substantive unconscionability involves those cases where a clause or term in the contract is one-sided or overly harsh.” *Townsend*, 153 Wn. App. at 882. “‘Shocking to the conscience’, ‘monstrously harsh’ and ‘exceedingly calloused’” terms are substantively unconscionable, and if

⁸ Lynne DeLoriea signed the Portland Contract and the Diamond Contract. CP 61 at ¶ 3; CP 64; CP 66. The DeLorieas do not dispute that the Arbitration Agreement is also enforceable as to Stephen DeLoriea. *Townsend*, 173 Wn.2d at 460-62 (non-signatory children of homeowners who signed purchase contracts were required to arbitrate their claims which were based on those purchases); CP 35 at n. 6; CP 53-60; CP 61 at ¶¶ 2-3; CP 61 at ¶ 9 - 62 at ¶ 13.

those terms cannot be severed from the arbitration agreement, render it unenforceable. *Burnett v. Pagliacci Pizza, Inc.*, --Wn. App.--, 442 P.3d 1267, 2019 WL 2498721, at *9-12 (June 17, 2019).

Provisions that provide unfair advantages through a contractual limitations period, limitations on damages, venue requirements, “loser pays” obligations, and fee-shifting are substantively unconscionable terms. *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 53-56, 308 P.3d 635 (2013); *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 293 P.3d 1197 (2013); *Zuver v. Airtouch Comm’ns, Inc.*, 153 Wn.2d 293, 307-22, 103 P.3d 753 (2004).

The Arbitration Agreement contains no term that confers unfair advantage. CP 65, CP 67. Among other things, it expressly exempts small claims from its scope, obligates Zurixx to pay the AAA filing fee, and requires the arbitration to take place in a “reasonably convenient” location. *Id.*

b. The Arbitral Forum is Not Inaccessible.

Under Washington law, if the cost of arbitration is “so high relative to” (1) plaintiff’s financial condition and (2) the small size of plaintiff’s claim are such that “prohibitive costs are likely to render the arbitral forum inaccessible,” the arbitration agreement is substantively unconscionable.

Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 461-71, 45 P.3d 594 (2002); *Townsend*, 153 Wn. App. at 883.

In *Mendez*, for example, a plaintiff who faced financial hardship would have been required to spend \$2,000 in up-front arbitration costs to pursue a \$1,500 contract claim and then proceed before a 3-arbitrator panel. 111 Wn. App. at 461-71. In that context, the court found that the costs of arbitration rendered the arbitral forum effectively inaccessible—it was cost prohibitive for that plaintiff to spend over \$2,000 just to initiate an arbitration for his \$1,500 claim. *Id.*; see also *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 325-29, 211 P.3d 454 (2009) (arbitration agreement that required arbitration in Denver was cost prohibitive given Washington plaintiff’s financial circumstances and travel and other costs required to arbitrate in a different state).

Here, in contrast, the costs of arbitration do not render the arbitral forum inaccessible for the DeLorieas to assert their claims against Zurixx. CP 61-71. Zurixx must pay the initial AAA filing fee of \$1,925. CP 65; CP 67; CP 71. And the arbitration must take place in a location that is reasonably convenient. *Id.* The only cost evidence the DeLorieas submitted shows that the AAA final fee for the arbitration of their claims would be \$1,375. CP 71. Under the Arbitration Agreement, Zurixx and the DeLorieas will share that fee. CP 65; CP 67; CP 69 at ¶ 5.

Further, the DeLorieas seek actual damages in excess of \$100,000, as well as exemplary damages, and a statutory attorney’s fee award if they prevail. CP 8 at ¶ 3.42; CP 12 at ¶¶ 9.2, 10.5; RCW 19.86.090. Like the plaintiffs in *Townsend*, the DeLorieas have failed to show that the costs of arbitration “as compared to the value of their claim” render the arbitral forum inaccessible, which is necessary to satisfy their burden. *Townsend*, 153 Wn. App. at 883 (arbitration clause not substantively unconscionable where plaintiffs did not show how arbitration would be cost prohibitive given the value of their claim), *aff’d Townsend*, 173 Wn.2d 451.⁹

4. The Arbitration Agreement is Not Procedurally Unconscionable.

The key inquiry for assessing procedural unconscionability is whether the DeLorieas “lacked meaningful choice.” *Zuver*, 153 Wn.2d at

⁹ The DeLorieas argued below that the Arbitration Agreement between them and Zurixx should not be enforced because requiring them to arbitrate their claims against Zurixx would increase their total expenditure of attorneys’ fees if they elect to pursue a separate action against a third party, Foundation Funding. CP 55-57; CP 63 at ¶ 15; CP 69. No authority supports invalidating a contract because vitiating the agreement saves one party attorney’s fees in asserting claims against a third party. Regardless, even if the total amount of attorney’s fees the DeLorieas may incur is relevant, and even if the DeLorieas’ claims against third-party Foundation Funding were relevant to Zurixx’s ability to enforce its arbitration agreement with the DeLorieas, the amount of attorney’s fees the DeLorieas estimate (\$60,000) is still materially less than their claim value (\$100,000, plus potential exemplary damages, in addition to the recovery of attorney’s fees). CP 68-71.

304. This is determined by evaluating (1) “the manner in which the contract was entered”; (2) “whether [plaintiffs] had a reasonable opportunity to understand the terms of the contract”; and (3) “whether the important terms were hidden in a maze of fine print”. *Id.* (internal quotation omitted).

The DeLorieas assert that the Portland Contract and the Diamond Contract are contracts of adhesion because they were standard form agreements given to the DeLorieas on a take-it-or-leave-it basis and the DeLorieas had no opportunity to negotiate. CP 57-59. But, “the fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable.” *Zuver*, 153 Wn.2d at 304. Instead, where terms are fully disclosed and the other party is given a reasonable opportunity to consider them, a contract of adhesion is not procedurally unconscionable. *Id.* at 305-06.

The terms of the Portland Contract and the Diamond Contract were fully disclosed. They are called out on the first page of the two-page contracts, and the Arbitration Agreement itself is set forth in normal typeface on the second page in one paragraph under the bolded and all-caps heading “**DISPUTE RESOLUTION AGREEMENT.**” CP 64-67. Further, the first page of the contracts contains an acknowledgement that the signatory had read and agrees to the terms and conditions on the

second page. CP 65; CP 67. The Arbitration Agreement is distinctly not hidden in a maze of fine print. *See, e.g., Signavong v. Volt Mgmt. Corp.*, No. C07-515JLR, 2007 WL 1813845, at *2-3 (W.D.Wash. 2007) (granting motion to compel arbitration; arbitration agreement on the last page of three-page contract, containing statement that signatory read and agreed to the terms and conditions, and which was in normal size typeface was not hidden in maze of fine print); *cf. Zuver*, 153 Wn.2d at 306 (arbitration agreement that was sent with five other documents was not hidden in maze of fine print where it was clearly labeled, in normal typeface, and the arbitration agreement terms were one page long);

The DeLorieas had a reasonable opportunity to read and consider the limited contract terms, including the Arbitration Agreement. Below, While the DeLorieas argued that they felt “pressured” to sign the Portland Contract and the Diamond Contract (CP 57-59; CP 61 at ¶ 5), there is bold text on the first page of both contracts, immediately above the signature line, which states:

You, the buyer may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction.

CP 64; CP 66. And right above this notice language, Zurixx provided its customer service number. *Id.*

Thus, the DeLorieas had three business days after signing each contract to read it, contemplate it, call Zurixx’s customer service line, and/or seek the advice of counsel if they wished. CP 64-67. This sort of cancellation right provided them with more than a reasonable opportunity to consider the terms of the Arbitration Agreement. *See Zuver*, 153 Wn.2d at 305-06 (citing *Luna v. Household Finance Corp. III*, 236 F.Supp.2d 1166, 1176 (W.D.Wash. 2002) (three-day rescission period in complex debt adjustment contract provided reasonable opportunity for consumer to consider terms)).¹⁰

¹⁰ The DeLorieas argued below that the Arbitration Agreement is procedurally unconscionable because they did not read the second page of either of the two-page contracts they executed. CP 57-59; CP 62 at ¶¶ 7, 9. It is well-settled that the failure to read a contract does not excuse one’s obligations, and this is not a viable defense to the enforcement of an arbitration agreement. *See, e.g., Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 896, 28 P.3d 823 (2001) (rejecting arguments that employee never read or understood terms of arbitration agreement; affirming order compelling arbitration); *Signavong*, 2007 WL 1813845; *Sprinkle v. Gen. Dynamics Land Sys.*, No. C09-1672Z, 2010 WL 1330328 (W.D.Wash. 2010) (granting motion to compel arbitration; that plaintiffs do not remember signing arbitration agreement and that no one explained the agreement to them did not render arbitration agreement procedurally unconscionable); *Cockerham v. Sound Ford, Inc.*, No. C06-1172JLR, 2006 WL 2841881, *2 (W.D.Wash. 2006) (plaintiff’s “defense that she did not understand what she signed is not a sufficient basis for invalidating an otherwise enforceable agreement;” granting motion to compel arbitration); *Turner v. Vulcan, Inc.*, 190 Wn. App. 1048, 2015 WL 6684259 (Nov. 2, 2015) (rejecting argument that arbitration agreement was procedurally unconscionable because plaintiff did not read it). Pursuant to GR 14.1, Zurixx cites to the unpublished opinion of *Turner v. Vulcan, Inc.* as persuasive, non-binding authority.

5. The DeLorieas' Claims are Subject to the Arbitration Agreement.

The Arbitration Agreement applies to “all disputes, controversies or claims that arise” between Zurixx and the DeLorieas “concerning any aspect of this Purchase Order or the relationship between [them].” CP 65; CP 67.

The DeLorieas have asserted claims against Zurixx based on (a) alleged representations regarding the services and products they would receive in connection with the Portland Contract, the Diamond Contract, and/or the related Coaching Program; (2) the continuation of their relationship with Zurixx through their several purchases; and (3) their dissatisfaction with the products and services under the Portland Contract, the Diamond Contract, and through the Coaching Program. CP 1-27. All of these allegations “concern” an “aspect” of the Portland Contract or the Diamond Contract, or otherwise “concern” the DeLorieas’ “relationship” with Zurixx. *Id.* Accordingly, each of the DeLorieas’ claims fall within the scope of the parties’ Arbitration Agreement. *Id.*; CP 65; CP 67.

The DeLorieas did not dispute this. CP 53-CP 60. The DeLorieas’ asserted claims fall within the scope of the Arbitration Agreement. RCW 7.04A.060(2); *Townsend*, 153 Wn. App. at 881.

V. CONCLUSION

The trial court erred by denying Zurixx's Motion. The Arbitration Agreement is enforceable and requires arbitration of the DeLorieas' claims against Zurixx. Zurixx respectfully asks this Court to reverse the trial court and to order arbitration.

DATED: August 15, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the foregoing document to be served on the following in the manner indicated below:

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

DATED this 15th day of August, 2019, at Seattle, Washington.



Rondi A. Greer

SAVITT BRUCE & WILLEY LLP

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