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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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.

RESPONDENTS' BRIEF

By MEREDITH A. LONG
Attorney for Respondents

WSBA #48961
MEREDITH A. LONG
Law Office of Meredith A Long PLLC
1315 14th Avenue
Longview, WA 98632
Email: attorney.m.long@gmail.com
Phone: (360) 998-3030

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INTRODUCTION

Plaintiffs-Respondents Lynne A. DeLoriea and Stephen E. DeLoriea (the “DeLorieas”) respectfully submit this brief in response to the opening brief submitted by Defendant-Appellant ZURIXX, LLC (“Zurixx”).

Zurixx is appealing the trial court’s denial of a motion to compel arbitration. At the motion hearing, Zurixx offered no evidence (other than an affidavit from its attorney authenticating three documents) and argued that the arbitration clauses should be enforced simply because the DeLorieas signed the contracts containing them. Zurixx did not file a responsive pleading denying any of the allegations made in the verified Complaint or any document refuting the declaration testimony offered by Lynne DeLoriea at the hearing. The trial court ruled there was not enough information to make a decision as to the enforceability of the clauses and left discovery open for the parties to explore the issue. CP 86-87.

The record on appeal only supports one finding: that the arbitration clauses are unenforceable because they are unconscionable and violate public policy. The DeLorieas therefore ask the Court of Appeals to remand this case back to the trial court with directions that the arbitration clauses be deemed unenforceable.

II. RESTATEMENT OF THE CASE

Note: All of these facts are uncontested, as Zurixx never filed a responsive pleading, denied these allegations or gave any contradicting testimony or evidence.

In early 2018, Lynne DeLoria ("Lynne") saw an advertisement for a free real estate investment seminar called the "Rules of Renovation" to be held at the Red Lion Inn in Kelso, Washington. CP 2. Lynne signed up for the free workshop because she was eager to learn how she and her husband might make money in the real estate market during their retirement years. Id.

During the free workshop, the presenter told Lynne and the other attendees that they could learn how to make money flipping homes and get access to hundreds of useful real estate forms at a three-day live seminar in Portland, Oregon, for a fee of \$1,997.00. CP 2-3. Lynne testified via declaration that she was pressured to purchase the three-day training on terms that she had absolutely no power to negotiate:

At that seminar, the presenter was pushing me and all the other attendees to sign up for a more in-depth three-day seminar that cost \$1,997.

The presenter spoke at length about the three-day seminar and made it seem like I would be missing out on an amazing opportunity to make money if I did not sign up for it. I was

hesitant about signing up and asked if we could have time to think about it. They said no, that they were only in town for one day and that if we didn't sign up, there would be no seats left and we would lose our opportunity. Looking back, I realize this was just a high-pressure sales tactic. But at the time, I really felt like I had no choice but to sign up immediately.

The presenter told everyone who wanted to sign up to go to the back of the room where several representatives were waiting to help with the paperwork.

I went to one of the representatives and he filled out the contract for me and gave it to me to sign. I do not recall looking at the back of the contract form. No one told me that the back had terms and conditions printed on it, and no one mentioned anything about them to me. I did not realize that I was signing something agreeing to arbitrate my dispute with Zurixx.

Even if I had realized that the back of the form I signed had a bunch of terms and conditions on it, I felt I had no opportunity to negotiate those terms. It's not like I was dealing with the head of the company – I was just filling out paperwork with one of several representatives that were on site that day. It seemed like they were trying to fill out the paperwork really quickly and just collect money from people.

CP 61-62.

Lynne attended the Portland training, which was hosted by a presenter named Alan Swails. CP 3. The three-day seminar did not deliver the education or forms Lynne was promised. Id. Most of the material that Mr. Swails presented was not educational – he simply shared personal anecdotes about getting rich. Id. He also offered advice about questionable tactics he used to artificially lower his income taxes, such as “renting” his personal home to a

company he owned and then using the rental income to pay for his personal vacations. Id. In addition, many of the “tips” offered by Mr. Swails were things that no legitimate real estate professional would do because they are unethical and carry the risk of huge civil liability with them. CP 4. For example, Mr. Swails told the DeLorieas they should create a number of different limited liability companies within the state to hold their investment properties so that they could move their assets around to protect them from creditors and other legitimate obligations. Id.

Mr. Swails used promises of financial independence and wealth to get attendees to sign up for more expensive trainings where they would supposedly receive the training that the DeLorieas believed they had already paid for and were supposed to be receiving at the three-day Portland seminar. Id.

Mr. Swails told the DeLorieas and other attendees that they would be guaranteed financial success flipping homes if they signed up for expensive real estate investment “training packages” offered by Rules of Renovation. Id. He also said that anyone who signed up for the expensive “training packages” would receive guaranteed funding for any renovation venture that they decided to pursue. Id. Mr. Swails told the DeLorieas that if they found property they wanted to buy, Rules of Renovation would fund the purchase with a loan and the DeLorieas would have no obligation to repay the loan until they “flipped”

and sold the property and made a profit. Id. This funding guarantee was the primary reason the DeLorieas signed a second contract with Zurixx to purchase the \$41,297 “Diamond” training package. Id. As with the first contract she signed, Lynne testified via declaration that she was pressured to sign a contract for the Diamond package on terms that she had no power to negotiate:

When we went to the three-day seminar in Portland, the presenter was pushing us to sign up for more seminars. My husband and I signed another contract to purchase additional training. The circumstances surrounding the execution of that contract were the same as those that I described for the first contract. They pressured us to sign up and repeatedly said people who did not sign up were “stupid.” The only opportunity I had to review the contract is when the representative handed it to me for my signature. Again, I do not recall looking at the back of the contract form and I didn’t know there were terms and conditions on it. No one mentioned any of the terms or the arbitration clause.

CP 62.

In order to pay for the Diamond training package, the DeLorieas had to liquidate some of their retirement investments. CP 5. The Diamond training package was supposed to include several additional educational workshops and training seminars, two full days of one-on-one mentorship tailored to the DeLorieas’ local real estate market, and online training modules, among other things. Id. The DeLorieas did not receive the services that they paid for as part of the Diamond training package. Id. For example, they did not receive two full

days of one-on-one mentorship – all they received was five short phone calls from a person who said he was assigned to be their “coach.” Id. Also, some of the workshops and seminars they went to had little or no educational components and were merely platforms used by Rules of Renovation to sell the DeLorieas and other attendees estate planning services, tax preparation and accounting services, legal services, and “discounted” real property. Id. The online training modules offered tips and advice that were the exact opposite of what was taught at the three-day Portland seminar. Id.

After the DeLorieas purchased the Diamond training package, they located a piece of property to “flip” and were preparing to apply to Rules of Renovation for their “guaranteed” loan when they learned from several other program participants that the funding was not actually guaranteed. Id. Three other program participants told the DeLorieas that they had each paid \$2,000 to Rules of Renovation to apply for a loan and all of their applications were denied. Id. Based on this, the DeLorieas concluded that the Rules of Renovation presenters had lied when they told them that they would receive “guaranteed” funding. Id.

The same day that the DeLorieas purchased the Diamond training package, they entered into a Business Consulting Services Agreement with a company called Foundation Funding Group (“FFG”) in which they agreed to pay

\$3,495.00 to have FFG apply for lines of credit in their name with various credit cards and funding sources. CP 6. FFG agreed to secure lines of credit for the DeLorieas with an average interest rate of 0% for the first 12-18 months. CP 6. FFG breached its promise regarding the interest rates. CP 6.

The DeLorieas only entered into the agreement with FFG because Mr. Swails told them that opening up many new lines of credit in their names was an “essential” part of investing in real estate because it would help them “build up their credit.” CP 6. Instead of helping the DeLorieas use their new lines of credit to invest in real estate (which is what the DeLorieas were initially promised), the Rules of Renovation representatives convinced the DeLorieas to authorize \$46,000 in charges to their new credit cards for a “Rules of Renovation Coaching Program.” CP 7. In order to induce the DeLorieas to authorize the additional \$46,000, Rules of Renovation told the DeLorieas that the entire debt would most certainly be paid off by the time interest started accruing on the 0% APR cards they were supposed to be opening under Lynne’s name because Lynne would make at least that much money in her first year of real estate investing. Id. The DeLorieas did not learn that FFG had opened up a credit card under Lynne’s name with a 20.49% APR until after Rules of Renovation had already charged that card \$17,500 (as part of the \$46,000 total charge). Id.

The “Rules of Renovation Coaching Program” that the DeLorieas paid \$46,000 for was supposed to include personalized one-on-one coaching, a “Property Finder” software program, and trainings in other states with travel and room covered by Rules of Renovation. Id. A few months after purchasing the \$46,000 coaching program, the DeLorieas realized they had made a mistake. Id. The “Property Finder” software was so poorly programmed it was virtually unusable. Id. Their personalized one-on-one coaching instructor, “Tony,” gave them very poor advice. Id.

As a result of their dealings with Zurixx, the DeLorieas have suffered losses exceeding \$100,000 and their credit has been irreparably damaged. CP 8.

III. ARGUMENT

A. THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE AND THEREFORE NOT ENFORCEABLE.

“In Washington, we have recognized two categories of unconscionability, substantive and procedural. Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh... Procedural unconscionability is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including [t]he

manner in which the contract was entered, whether the 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.” Adler v. Fred Lind Manor, 153 Wn.2d 331, 344-45 (2004) (internal citations and quotation marks omitted). Washington Supreme Court has held that “generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements.” Id. at 342. An arbitration clause can be invalidated if it is substantively or procedurally unconscionable – it does not have to be both. Id. at 346-47.

i. THE ARBITRATION PROVISIONS ARE PROCEDURALLY UNCONSCIONABLE

“Procedural unconscionability is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including [t]he manner in which the contract was entered, whether the 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 344-45. The arbitration clauses at issue are procedurally unconscionable because Respondents lacked meaningful choice about whether to agree to arbitrate. As Lynne DeLoriea states in her declaration, she and her husband had no idea that the contracts that they signed contained arbitration clauses, and even if they

had known, they had no opportunity to negotiate the clauses. CP 62. Zurixx does not dispute any of these facts.

The two contracts at issue are very short – just one double-sided page. Unfortunately for Plaintiffs, all the information regarding the services that Plaintiffs were purchasing was on the front of the document and they were only required to review and sign the front of the document. CP 64-67. At the bottom of the front page in tiny print, there is a reference to “terms and conditions” on the reverse side of the page. CP 64, 66. The DeLorieas did not see this reference and did not flip over the document they were signing to discover the additional terms and conditions printed on the other side. CP 62. Lynne Deloriea also states in her declaration that although the seminar presenters spoke at great length about the terms contained on the front page of the contracts, they never mentioned any of the terms on the back page (or even mentioned that there was a back page). CP 61-62. Zurixx does not dispute any of these facts, either. If Zurixx wanted its customers to have a meaningful understanding of the terms and conditions of their training programs, it should have either called attention to them at the seminar or put them where customers would see them: in the body of the contract preceding the signature lines – not hidden on the back where not many customers would think to look.

The DeLorieas felt immense pressure to sign the contracts before they left the seminars where they were presented. Zurixx's representatives created a false sense of urgency that discouraged Respondents from taking time to consider the contracts before signing them by suggesting that Respondents would miss out on extremely valuable business opportunities if they did not sign right away. CP 61-62. This tactic further compounded the issue created by the formatting of the contracts by making Respondents feel like they had to rush to sign them.

All of these facts strongly suggest that the arbitration clauses at issue in this case are part of contracts of adhesion. "[T]he fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable," but it suggests unconscionability. Adler, 153 Wn.2d at 348. Washington Supreme Court has established the following factors to determine whether an adhesion contract exists: "(1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a 'take it or leave it' basis, and (3) whether there was no true equality of bargaining power between the parties." Id. at 347 (internal quotation marks omitted).

In Adler, our state Supreme Court found that a standard form printed arbitration agreement that employees had to sign "as is" was an adhesion

contract. Id. at 348. The Supreme Court made a similar finding in Zuver v. Airtouch Comm'ns, 153 Wn.2d 293 (2004). There, the Court held that an arbitration agreement that an employee (Zuver) signed was an adhesion contract because it was a standard form printed contract and Zuver could not negotiate its terms. Id. at 305. In Zuver, the Court also found that the agreement was not procedurally unconscionable because Zuver had a “meaningful choice” regarding its terms. Id. at 306. In so finding, the Court noted that the employer “did not demand that Zuver return the agreement immediately” – it gave her 15 days to consider the agreement, which gave her “ample opportunity to contact counsel or even [the employer] with any concerns or questions...” Id. The Court stated that Zuver might have prevailed if she could show that her employer “placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms.” Id. at 306-07.

In this case, all of the elements of the test for an adhesion contract are satisfied. The DeLorieas were presented with standard, pre-printed contracts that were prepared by Zurixx on a “take it or leave it” basis. The DeLorieas had no ability to negotiate any of the terms. Zurixx placed undue pressure on the DeLorieas to sign the contracts immediately by repeatedly telling the DeLorieas that they were being offered a “one-day-only” opportunity. The DeLorieas did

not have a reasonable opportunity to consider the contracts presented to them – they didn't even know the contracts had arbitration clauses in them.

Zurixx's argument that the DeLorieas had plenty of time to cancel the contracts because the contracts have a clause that says they have three days after signing to cancel is audacious. Three days is not enough time to contact an attorney and/or reconsider, and then figure out how to cancel the contract. The contract tells signees to see "attached notice of cancellation," but there is nothing attached. CP 64-67. So even if the DeLorieas had wanted to cancel, Zurixx did not tell them how. (For reference, Washington's Business Opportunity Fraud Act, which aims to protect consumers from fraudulent business schemes, requires a seven-day cancellation period and all contracts must include a provision explaining exactly how the contract can be cancelled within that period.) RCW 19.110.110 (4)(d).

All of these undisputed facts prove the arbitration agreements between Zurixx and the DeLorieas are contracts of adhesion, and the DeLorieas entered into them with a lack of meaningful choice.

ii. THE ARBITRATION PROVISIONS ARE SUBSTANTIVELY UNCONSCIONABLE

“A term is substantively unconscionable where it is ‘one-sided or overly harsh,’ ‘[s]hocking to the conscience,’ ‘monstrously harsh,’ or ‘exceedingly calloused.’” Gandee v. LDL Freedom Enter., 176 Wn.2d 598, 603 (2013). An arbitration clause may be deemed substantially unconscionable if it creates a financial burden so significant that it effectively denies a party the ability to vindicate his or her rights. Id. at 604 (“Both this court and the United States Supreme Court have recognized this type of prohibitive-cost challenge to mandatory arbitration clauses.”) The party seeking to avoid arbitration must present evidence showing that arbitration would impose prohibitive costs, and a declaration describing the party’s personal finances as well as fee information obtained from the American Arbitration Association can be sufficient to meet this burden. Id. Our Court of Appeals has suggested that an arbitration clause that requires a plaintiff to pursue their case in two separate forums may be substantively unconscionable if the cost of litigating in two forums deprives the plaintiff of their right to seek recovery. Townsend v. Quandrant Corp., 153 Wn. App. 870, 883 (2009).

If enforced, the arbitration clause in this case will make it virtually impossible for the DeLorieas to proceed with their case because it will require

them to initiate and fund two completely separate suits in order to collect the damages they seek in their Complaint. Per the arbitration clause, the suit against Zurixx must be venued in a “reasonably convenient location” – which could be in another state since Zurixx is a Utah-based company. CP 1. The other suit (against FFG, a non-Zurixx entity), will have to be brought in court. This is because Zurixx’s arbitration clause states that “the arbitrator’s authority ... is limited to claims between you and the Company alone,” which means that the DeLorieas cannot bring FFG into the arbitration. CP 65, 67. The DeLorieas will have to pay for two completely separate legal proceedings involving the same nucleus of operative facts. Not only is this a complete waste of time and resources, it is simply beyond the scope of what the DeLorieas can afford.

The DeLorieas are retired and are on a fixed income. CP 62. Thanks to the credit cards that Zurixx convinced them to open, they have \$500 per month in minimum payments. After paying this and making extra payments towards their \$46,000 debt that is accruing 20% interest, the DeLorieas have very little extra money. CP 63. It will cost at least \$30,000 to take this case to trial in Cowlitz County Superior Court (not counting the costs of this and any other appeal). CP 69. If the DeLorieas are forced to arbitrate, they will likely spend twice that amount. Id. The DeLorieas cannot afford to pay for two totally separate cases in two different jurisdictions, especially if they are forced to

arbitrate out of state. CP 63. If forced to arbitrate, they will have to abandon their claim against FFG. Id.

iii. THE ARBITRATION PROVISIONS VIOLATE PUBLIC POLICY

The enforcement of the arbitration clauses contravenes Washington public policy by denying Washingtonians who have been harmed by a deceptive and fraudulent business opportunity the ability to make a claim under the Business Opportunity Fraud Act, or BOFA. For the reasons discussed below, the DeLorieas intend to add a claim for BOFA violations against Zurixx once this case is allowed to proceed.

The Washington legislature enacted BOFA, RCW 19.110 et seq., because “the widespread and unregulated sale of business opportunities has become a common area of investment problems and deceptive practices in the state of Washington.” BOFA was enacted to protect Washingtonians and the state economy from fraudulent business opportunities. BOFA defines “Business Opportunity” as “the sale or lease of any ... service which is sold or leased to enable the purchaser to start a business; and ... [t]he seller represents that if the purchaser pays a fee exceeding three hundred dollars directly or indirectly for the purpose of the seller providing a sales or marketing program, the seller will provide such a program which will enable the purchaser to derive income from

the business opportunity which exceeds the price paid for the business opportunity.” RCW 19.110.020(1)(d). At least one of the packages that Zurixx sold the DeLorieas meets this definition because they were told they would make all their money back (\$46,000) in one year. CP 7. Under BOFA, it is unlawful to “make any untrue or misleading statement of a material fact or to omit to state a material fact in connection with the offer, sale, or lease of any business opportunity in the state....” RCW 19.110.120(1)(a). Zurixx’s representatives made many untrue statements of material facts to the DeLorieas, including a promise that they would make all their money back in one year and that they would qualify for “guaranteed” loan funding. Thus, the DeLorieas have a valid BOFA claim.

“Contract terms are unenforceable on grounds of public policy when the interest in its enforcement is clearly outweighed by a public policy against the enforcement of such terms.” State v. Noah, 103 Wn.App. 29, 50, 9 P.3d 858 (2000) (citing Restatement (Second) of Contracts § 178 (1981)). The arbitration clause in this case forces the DeLorieas to arbitrate in a “reasonably convenient location.” CP 65, 67. That “reasonably convenient location” may or may not be in Washington State, and the arbitrator may or may not apply Washington law. The enforcement of Zurixx’s arbitration provision contravenes Washington public policy by potentially denying Washingtonians, who have been harmed by

a deceptive and fraudulent business opportunity, the ability to make a claim under BOFA. Zurixx's arbitration provision is therefore unenforceable.

IV. CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court affirm the trial court's denial of Zurixx's motion to compel arbitration on the grounds that the arbitration clause in the parties' contract is unenforceable and remand this case back to the trial court with directions to proceed accordingly.

October 14, 2019.

Respectfully submitted,

/s/ Meredith A. Long

MEREDITH A. LONG
Attorney for Respondents
WSB #48961

LAW OFFICE OF MEREDITH A LONG PLLC

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