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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31399-9-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

SHERRIE KAY GORDEN and DEBBIE KAY MILLER, individually and
on behalf of a Class of similarly situated Washington residents,

Plaintiffs-Respondents,

v.

LLOYD WARD & ASSOCIATES, P.C., a Texas Domestic Professional
Corporation; LLOYD WARD, P.C., a Texas Domestic Professional
Corporation; THE LLOYD WARD GROUP, P.C., a Texas Domestic
Professional Corporation, LLOYD EUGENE WARD and AMANDA GLEN
WARD, individually and on behalf of the marital community; SILVER LEAF
DEBT SOLUTIONS, LLC, a Texas Limited Liability Company; MICHAEL
MILES, individually and on behalf of the marital community of MICHAEL
MILES and JANE DOE MILES; and JOHN and JANE DOES 1-5,

Defendants-Appellants.

BRIEF OF APPELLANTS WARD

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
IV.	STATEMENT OF THE CASE.....	4
A.	Plaintiffs' Allegations.....	4
B.	The Arbitration Agreement.....	5
C.	The Plaintiffs' Allegations of Personal Jurisdiction.....	6
D.	Facts Regarding the Ward Defendants.....	7
1.	Defendant Lloyd Ward.....	7
2.	Defendant Lloyd Ward Group, P.C.....	8
3.	Defendant Lloyd Ward & Associates.....	9
4.	Defendant Lloyd Ward, P.C.....	9
5.	Defendant Amanda Ward.....	10
E.	Procedural History.....	10
F.	CR 68 Offers of Judgment to Plaintiffs.....	11
V.	ARGUMENT.....	11
A.	An Arbitrator, Not the Court, Has Subject Matter Jurisdiction over Plaintiffs' Claims Based on the Arbitration Agreement in the Parties' Contract.....	11

1.	The Issue of Whether the Arbitration Clause is Enforceable Is Inseparable from the Issue of Whether the Contract as a Whole Is Enforceable.....	14
2.	The Parties Clearly and Unmistakably Delegated Authority to Decide Conscionability to the Arbitrator.....	16
3.	Plaintiffs Do Not Claim, Nor Could They, that the Clause Delegating Authority to the Arbitrator to Decide Whether the Arbitration Agreement Is Enforceable Is Itself Unconscionable.....	17
B.	Even If Arbitrability Issues Are Not Deemed to Have Been Delegated to the Arbitrator, The Arbitration Agreement Is Not Procedurally Unconscionable.....	19
C.	Even If Arbitrability Issues Are Not Deemed To Have Been Delegated To The Arbitrator, The Arbitration Agreement Is Not Substantively Unconscionable.....	24
D.	Even If Arbitrability Issues Are Not Deemed To Have Been Delegated To The Arbitrator, Any Unconscionable Terms Are Severable.....	26
E.	Even If Arbitrability Issues, Including Jurisdictional and Enforceability Issues, Were Not Delegated To The Arbitrator, Plaintiffs' Claims Should Be Dismissed For Lack Of Personal Jurisdiction Because They Cannot Meet Their Burden Of Showing Each Of The Ward Defendants Had The Requisite Minimum Contacts With Washington State Review.....	29
1.	No Personal Jurisdiction By Statute.....	31
2.	Due Process Precludes Personal Jurisdiction.....	34
F.	Even If Arbitrability Issues, Including Jurisdictional And Enforceability Issues, Were Not Delegated To The Arbitrator, This Case Should Be Dismissed As Moot Because The Ward Defendants Offered To	

Have Judgment Taken Against Them Pursuant To CR 68, Providing Complete Relief As To All Of Plaintiffs' Individual Claims Review.....	40
1. General Mootness Standards.....	40
2. Mootness in the Class Action Context.....	42
3. <i>Genesis</i> Holds the "Inherently Transitory" Mootness Exception Does Not Apply to Damages Class Actions Where the Named Plaintiff is Offered Full Individual Relief Before a Ruling on Class Certification.....	43
4. The Impact of <i>Genesis</i> on Decisions of the Court of Appeals Extending the "Inherently Transitory" Mootness Exception to Damages Class Actions.....	46
5. Application of <i>Genesis</i> to This Case.....	48
VI. CONCLUSION.....	49

TABLE OF AUTHORITIES

Cases

<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004)	29
<i>AT&T Mobility LLC v. Concepcion</i> , ___ U.S. ___, 131 S.Ct. 1740 (2011)	23
<i>AT&T Techs., Inc. v. Commc'ns. Workers of Am.</i> , 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)	16
<i>Board of Sch. Comm'rs of City of Indianapolis v. Jacobs</i> , 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)	42
<i>Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.</i> , 622 F.3d 996 (9 th Cir. 2010)	17
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)	34
<i>Calder v. Jones</i> , 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)	30
<i>Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440, 126 S.Ct. 1204 163 L.Ed.2d 1038 (2006)	14
<i>Compucredit Corp. v. Greenwood</i> , ___ U.S. ___, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012)	12
<i>Coneff v. AT&T Corp.</i> , 673 F.3d 1155 (9 th Cir. 2012)	13
<i>County of Riverside v. McLaughlin</i> , 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)	43-44, 47-48
<i>CTVC of Hawaii, Co. v. Shinawatra</i> , 82 Wn. App. 699, 919 P.2d 1243 (1996), <i>review denied</i> , 131 Wn.2d 1020 (1997)	35

<i>Cybersell, Inc. v. Cybersell, Inc.</i> , 130 F.3d 414 (9 th Cir. 1997)	34
<i>Deposit Guaranty National Bank, Jackson, Miss. v. Roper</i> , 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)	45
<i>Freestone Capital Partners, L.P. v. MKA Real Estate Opportunity Fund I, LLC</i> , 155 Wn. App. 643, 230 P.3d 625 (2010)	8
<i>Gandee v. LDL Freedom Enterprises, Inc.</i> , 176 Wn.2d 598, 293 P.3d 1197 (2013)	11-13
<i>Garmo v. Dean, Witter, Reynolds, Inc.</i> , 101 Wn.2d 585, 681 P.2d 253 (1984)	25
<i>Genesis Healthcare Corp. v. Symczyk</i> , ___ U.S. ___, 133 S.Ct. 1523 (2013)	2, 11, 40-49
<i>Gerstein v. Pugh</i> , 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)	43-44, 47-48
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20, 111 S.Ct. 1647 (1991)	24
<i>Guidotti v. Legal Helpers Debt Resolution, LLC</i> , 866 F.Supp.2d 315 (D. N.J. 2011)	23
<i>Hanson v. Denckla</i> , 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)	35
<i>Harbison v. Garden Valley Outfitters, Inc.</i> , 69 Wn. App. 590, 849 P.2d 669 (1993)	31-34
<i>Harbor Islands LP v. City of Blaine</i> , 146 Wn.App. 589, 191 P.3d 1282 (2008)	40
<i>Huebner v. Sales Promotion, Inc.</i> , 38 Wn. App. 66, 684 P.2d 752 (1984), <i>review denied</i> , 103 Wn.2d 1018, <i>cert. denied</i> , 474 U.S. 818 (1985)	30

<i>In re Pham</i> , 314 S.W.3d 520 (Tex. Ct. App. 2010)	23
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.95 (1945)	30
<i>Ireland v. Lear Capital, Inc.</i> , 2012 WL 6021551 (D. Minn., December 4, 2012)	17
<i>John Does 1-9 v. Compcare, Inc.</i> 52 Wn. App. 688, 763 P.2d 1237 (1988)	30
<i>Kimble v. Rhodes College, Inc.</i> , 2011 WL 2175249 (N.D. Cal., June 2, 2011)	17
<i>Labidi v. Sydow</i> , 287 S.W.3d 922 (Tex. Ct. App. 2009)	23
<i>Lewis v. Continental Bank Corp.</i> , 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)	45
<i>Lietz v. Hansen Law Offices, P.S.C.</i> , 166 Wn.App. 571, 271 P.3d 899 (2012)	41
<i>MBM Fisheries, Inc. v. Bollinger Shipyard, Inc.</i> , 60 Wn. App. 414, 804 P.2d 627 (1991)	33-34
<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 64 P.3d 22 (2003)	20
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)	24
<i>Nitro-Lift Technologies, LLC v. Howard</i> , ___ U.S. ___, 133 S.Ct. 500 (2012)	12, 22
<i>O'Brien v. Ed Donnelly Enters., Inc.</i> , 575 F.3d 567 (6th Cir. 2009)	41
<i>Pacificare Health Sys., Inc. v. Book</i> , 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 155 (2003)	25

<i>Pitts v. Terrible Herbst, Inc.</i> , 653 F.3d 1081 (9th Cir. 2011)	46-47
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)	14
<i>Rent-A-Center, West, Inc. v. Jackson</i> , ___ U.S. ___, 130 S.Ct. 2772, 2777-78, 177 L.Ed.2d 403 (2010)	18-19
<i>Satomi Owners Assoc. v. Satomi, LLC</i> , 167 Wn.2d 781, 225 P.3d 213 (2009)	23
<i>SeaHAVN, Ltd. v. Glitnir Bank</i> , 154 Wn. App. 550, 226 P.3d 141 (2010)	34, 37
<i>Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.</i> , 327 S.W.3d 859 (Tex. Ct. App. 2010)	23
<i>Sosna v. Iowa</i> , 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)	42-43, 47-48
<i>State v. Reader's Digest Assoc., Inc.</i> , 81 Wn.2d 259, 501 P.2d 290 (1972)	35
<i>Symczyk v. Genesis Healthcare Corp.</i> , 656 F.3d 189 (3d Cir. 2011)	47
<i>Sys. Research & Applics. Corp. v. Rohde & Schwarz Fed. Sys., Inc.</i> , 840 F.Supp.2d 935 (E.D. Va. 2012)	17
<i>Townsend v. Quadrant Corp.</i> , 173 Wn.2d 451, 268 P.3d 917 (2012)	14-16
<i>U.S. Parole Commission v. Geraghty</i> , 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)	42
<i>Walters v. A.A.A. Waterproofing, Inc.</i> , 151 Wn. App. 316, 211 P.3d 454 (2009), <i>review denied</i> , 167 Wn.2d 1019 (2010)	11, 26, 28-29

<i>Wash. Fed. Sav. & Loan Ass'n v. Alsager</i> , 165 Wn. App. 10, 266 P.3d 905 (2011)	20
<i>Weiss v. Regal Collections</i> , 385 F.3d 337 (3d Cir. 2004)	41, 47
<i>Zuver v. Airtouch Commun., Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004)	12, 19, 25-29

Statutes

9 U.S.C. § 1	3, 12
9 U.S.C. § 2	12
29 U.S.C. § 216	48
RCW 4.28.080(10)	32, 34
RCW 4.28.185(1)(a)	32, 34
RCW 18.28	4
RCW 19.86	4
RCW 19.86.160	30-31, 35
RCW 49.60	25

Rules

Civil Rule 12(b)(1)	1
Civil Rule 12(b)(2)	1
Civil Rule 54(b)	10
Civil Rule 56	8

Civil Rule 68	1, 2, 4, 11, 40-41
Federal Rule of Civil Procedure 68	41
Rules of Appellate Procedure 2.5(a)	2

Other

Tex. Comm. On Prof'l Ethics, Op. 586, 2008 WL 5680298 (2008)	22
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I. INTRODUCTION

Defendants/Appellants Lloyd Ward & Associates, P.C., Lloyd Ward, P.C., The Lloyd Ward Group, P.C., Lloyd Ward and Amanda Ward (collectively “the Ward defendants”) appeal the denial of their motion to compel individual arbitration and for dismissal based on lack of subject matter and personal jurisdiction. Dismissal was sought on the following grounds:

1. Dismissal pursuant to CR 12(b)(1) because subject matter jurisdiction over plaintiffs’ complaints about the fees they were charged under the contract they each allegedly entered into with one of the Ward defendants (*i.e.*, Lloyd Ward Group, P.C.) lies with an arbitrator, not the Superior Court, as a result of plaintiffs’ contractual agreement “to submit all disputes arising under or related to” the contract “to binding arbitration.”

2. Dismissal pursuant to CR 12(b)(2) because personal jurisdiction over the Ward defendants, who are all Texas residents, is lacking.

After this appeal was filed another issue regarding subject matter jurisdiction has arisen. The Ward defendants made CR 68 offers of judgment to both of the named plaintiffs for complete relief on all of their individual claims. One plaintiff (Sherrie Gorden) accepted the offer and the other (Debbie Miller) declined. As a result, a new issue has arisen concerning whether the case is now moot based on the United States

Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S.Ct. 1523 (2013). Consistent with RAP 2.5(a), this additional jurisdictional defect may be raised for the first time on appeal.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering the order of December 21, 2012, denying the Ward defendants' motion to dismiss and to compel individual arbitration pursuant to the terms of the arbitration agreement in the contract each plaintiff executed with the Ward defendants.

B. The trial court erred in entering the order of December 21, 2012, denying the Ward defendants' motion to dismiss for lack of personal jurisdiction over the Ward defendants.

C. Since this appeal was filed, the case has become moot due to the Ward defendants' CR 68 offers of judgment for complete relief and should now be dismissed for lack of subject matter jurisdiction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the parties delegate threshold challenges to whether their arbitration agreement is valid and enforceable, including claims the arbitration agreement is unconscionable, to an arbitrator to decide rather than a court (Assignment of Error A)?

B. Even if arbitrability issues were not delegated to the arbitrator, does the remaining plaintiff's procedural unconscionability claim fail

because imposing an extra burden on attorneys to clarify the advantages and disadvantages of arbitration with their clients before entering into a contract containing an arbitration agreement conflict with the strong public policy favoring arbitration and is thus preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (Assignment of Error A)?

C. Even if arbitrability issues were not delegated to the arbitrator, does the remaining plaintiff's substantive unconscionability claim fail because she is able to prosecute her state Consumer Protection Act claims in arbitration, and the forum selection and choice of law clauses in the arbitration agreement were waived by the Ward defendants (Assignment of Error A)?.

D. Even if arbitrability issues were not delegated to the arbitrator and some terms in the arbitration agreement were deemed to be unconscionable and not mooted by the Ward defendants' agreement to waive those provisions, should any such unconscionable terms be severed pursuant to the severance clause in the parties' agreement in order to enforce the parties' agreement to arbitrate (Assignment of Error A)?

E. Even if arbitrability issues, including enforceability and jurisdictional issues, were not delegated to the arbitrator, should plaintiffs' claims be dismissed for lack of personal jurisdiction because they cannot meet their burden of showing each, or any of the Ward defendants, all of

whom reside in Texas, had the requisite minimum contacts with Washington State (Assignment of Error B)?

F. Even if arbitrability issues, including jurisdictional and enforceability issues, were not delegated to the arbitrator, should this case be dismissed as moot because the Ward defendants offered to have judgment taken against them pursuant to CR 68, providing complete relief as to all of plaintiffs' individual claims (Assignment of Error C)?

IV. STATEMENT OF THE CASE

A. Plaintiffs' Allegations

Plaintiffs Sherrie Gorden and Debbie Miller allege the Ward defendants generally, along with two other named defendants and unidentified "John and Jane Does 1-5" who are not parties to this appeal, engaged in conduct that violated the Washington Debt Adjusting Act, chapter 18.28 RCW ("DAA") and the Washington Consumer Protection Act, chapter 19.86 ("CPA"). CP 4-8. Specifically, plaintiffs claim they entered into contracts with the Lloyd Ward Group, P.C. ("LWG") to help them settle, through negotiation with plaintiffs' creditors, credit card debts plaintiffs had incurred. CP 12 at ¶ 4.18; CP 30 at ¶ 6; CP 36-38 (exemplar of contract at issue).¹ Plaintiffs allege the fees set forth in the contracts

¹ The contracts plaintiffs allegedly agreed to explicitly state in the first paragraph following the bold and underlined title of "**Parties**" that the parties to the contract are only the plaintiffs and LWG, and none of the other defendants is referenced anywhere in

they entered into with LWG were excessive in violation of the DAA and CPA. CP 13 at ¶¶ 4.20-4.24.

B. The Arbitration Agreement

Plaintiffs admit the contracts they entered into with LWG require that any disputes arising from the contracts shall be submitted to binding arbitration according to the rules and procedures of the American Arbitration Association. CP 14-15 at ¶ 4.30; *see also* CP 37, at ¶¶ 9 and 10. They further admit they agreed that venue and jurisdiction for any dispute arising from their contracts shall be in Dallas County, Texas. *Id.* They also admit they agreed to a choice of law provision making Texas law applicable to any disputes. *Id.*

The arbitration agreement is found in paragraph 10 under the bold and underlined heading of “**Arbitration of Dispute**” and provides in pertinent part as follows:

The parties will submit all disputes arising under or related to this Agreement to binding arbitration according to the then prevailing rules and procedures of the American Arbitration Association. Texas law will govern the rights and obligations of the parties with respect to the matters in controversy. The arbitrator will allocate all costs and fees attributable to the arbitration between to [sic] the parties. The arbitrator’s award will be final and binding and judgment may be entered in any court of competent jurisdiction.

the body of plaintiffs’ respective agreements with LWG. *See* CP 30 at ¶ 6; CP 36-38.

CP 37 at ¶ 10.

Venue, jurisdiction and choice of law provisions are also found in paragraph 9 (under the bold and underlined heading of “**Governing Law; Severability**”). CP 37 at ¶ 9 (“This Agreement is governed by the laws of the State of Texas, without regard to the conflict of law rules of that state. Further, venue and jurisdiction for any dispute or conflict arising from or in any way related to this Agreement shall be exclusively in Dallas, Dallas County, Texas.”). The severability clause in paragraph 9 provides as follows: “If any provision of this Agreement is held to be unenforceable, the remainder of this Agreement shall remain in full force and effect.” CP 37 at ¶ 9. “Agreement” is defined in the contract as the entire Client Services Agreement, not just the arbitration agreement. CP 36 at ¶ 1.

C. Plaintiffs’ Allegations of Personal Jurisdiction

With respect to personal jurisdiction, plaintiffs allege as follows:

This Court has personal jurisdiction over each Defendant. Defendants, collectively and individually, have engaged in conduct in violation of chapter 19.86 RCW, which conduct has had an impact in Washington, giving rise to personal jurisdiction pursuant to RCW 19.86.160. Defendants also regularly conduct business in Washington by, among other things, soliciting Washington consumers, entering into contracts with Washington consumers, providing debt adjusting services to Washington consumers, and receiving fees from Washington consumers. Defendants have obtained the benefits of the laws of Washington as well as Washington’s consumer market.

CP 8 at ¶ 3.2.

Plaintiffs admit defendants Lloyd and Amanda Ward are residents of Texas, not Washington. CP 6 at ¶¶ 2.4-2.5. They also admit defendants LWG, Lloyd Ward & Associates, P.C. and Lloyd Ward, P.C. are businesses located only in Texas, and none are registered to do business in Washington. CP 5 at ¶ 2.3. Further, plaintiffs admit they entered into contracts only with LWG to provide debt settlement services, not with any of the other named defendants. CP 12 at ¶ 4.18; *see also* CP 36-38 (referencing only LWG and the client as parties to the contract).

D. Facts Regarding the Ward Defendants

The Ward defendants, including Lloyd Ward, are not registered to do business in Washington, do not solicit clients in Washington, nor do they advertise in Washington. CP 29 at ¶¶ 2-3; CP 31-32 at ¶¶ 7-8; CP 24 at ¶¶ 2-4. They own no property in Washington, have no bank accounts in Washington, and do not pay Washington taxes. *Id.* They have no employees, agents, or independent contractors in Washington. *Id.* They have no offices in Washington, no mailing address in Washington, and have never had a registered agent in Washington. *Id.*

1. Defendant Lloyd Ward

Lloyd Ward is a Texas resident who has practiced law in Texas

since 1985. CP 29 at ¶ 2.² He is not authorized to practice law in Washington State. *Id.* Mr. Ward is the sole officer and director of defendants Lloyd Ward & Associates, P.C., Lloyd Ward P.C., and LWG. CP 29 at ¶ 3; CP 31-32 at ¶¶ 7-8. None of these entities act under the direction or control of any other entity. CP 32 at ¶ 9. Although the names of “Lloyd Ward” and “Lloyd Ward, P.C.” appear in the top corners of the first page of the contract allegedly entered into between LWG and plaintiffs, neither Lloyd Ward nor Lloyd Ward, P.C. is a party to the agreement. CP 30-31 at ¶ 6; CP 36.

2. Defendant Lloyd Ward Group, P.C.

LWG is the entity through which debt negotiating occurs. CP 29 at ¶ 4. LWG does not actively market its services in Washington; its sole method of advertising was passively done via the internet through which interested people could seek information about LWG through search engines. CP 30 at ¶ 5. LWG did not direct or send any advertising to Washington residents via telephone, mail, radio, television, or other media. *Id.* It does not solicit clients in any state. *Id.*

Employees of LWG do not travel into Washington to conduct

² A trial court may consider matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, but conversion to summary judgment standards results. *Freestone Capital Partners, L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 653-54, 230 P.3d 625 (2010). Accordingly, the Ward defendants’ motion to dismiss, supported by declarations and exhibits, was briefed consistent with the briefing schedule in CR 56 applicable to summary judgment motions. *See* CP 63, 85, 220.

business. *Id.* If a Washington resident wants to conduct business with LWG, they must initiate a call to Texas. *Id.* LWG's Client Services Agreement provides (and plaintiffs contractually agreed) that "all services provided by LWG to Client or on Client's behalf occur entirely within the State of Texas and not the state of Client's residence." CP 37 at ¶ 9.

3. Defendant Lloyd Ward & Associates

Lloyd Ward & Associates, P.C. ("LWA") is a law firm that was formed as a Texas corporation in January 1995 and is located solely in Dallas, Texas. CP 31-32 at ¶ 8. Mr. Ward's primary vocation is as an attorney for LWA. *Id.* LWA does not provide debt adjusting services to Washington clients, solicit Washington clients, enter into contracts with Washington clients, or receive fees from Washington clients. *Id.*

4. Defendant Lloyd Ward, P.C.

Lloyd Ward, P.C. is a Texas professional corporation that was formed in 2004 as a law firm to potentially merge with another Texas law firm. CP 31 at ¶ 7. The merger never occurred. *Id.* Lloyd Ward, P.C. is still a Texas professional corporation, but it has not conducted any business for several years. *Id.* Lloyd Ward, P.C. has no assets, conducted no business in connection with debt settlement clients, has not entered into any contracts with Washington residents, and none of Lloyd Ward, P.C.'s employees had any contact with Washington residents. *Id.*

5. Defendant Amanda Ward

Mrs. Ward is the spouse of Lloyd Ward and a Texas resident. CP 24 at ¶¶ 2-3. Mrs. Ward performs marketing tasks for LWA, the Texas law firm, including maintenance of the law firm's website. *Id.* Among the Ward defendants, she is an employee of only LWA. *Id.* She has no affiliation with defendant LWG (the debt negotiating entity), or the other defendant entities. *Id.* Mrs. Ward has not engaged in any of the challenged debt negotiating activities and has no contact with any debt settlement clients in Washington or elsewhere. *Id.* Mrs. Ward owns no property located in Washington, has no bank accounts in Washington, pays no Washington taxes, has no registered agent in Washington, and has never advertised, solicited, conducted, or transacted business in Washington. *Id.*

E. Procedural History

In lieu of filing an Answer to plaintiffs' Complaint, the Ward defendants moved to compel individual arbitration and for dismissal based on lack of subject matter and personal jurisdiction. CP 42-62, 205-19. The trial court denied the motion to dismiss and to compel individual arbitration. CP 222-24; RP 32-40. Pursuant to CR 54(b), the trial court certified this ruling as a final judgment concerning the forum that has subject matter jurisdiction over the parties' dispute and found no just reason for delaying an appeal of this final judgment. CP 223.

The Ward defendants timely appealed the trial court's ruling. CP 226-27. Further proceedings in the trial court have been stayed pending resolution of this appeal. *See* RP 39-40. A motion for class certification has yet to be brought or decided. *See id.*

F. CR 68 Offers of Judgment to Plaintiffs

After this appeal was filed, the United States Supreme Court issued its decision in *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S. Ct. 1523 (2013), which addressed whether a full offer of judgment moots a case, including putative class actions. Shortly after *Genesis* was published, the Ward defendants made full offers of judgment to the two named plaintiffs pursuant to CR 68. *See* Appendices A and B attached hereto. Plaintiff Sherrie Gorden accepted the offer of judgment. *See* Appendix C attached hereto. Plaintiff Debbie Miller did not accept the offer.

V. ARGUMENT

A. An Arbitrator, Not the Court, Has Subject Matter Jurisdiction over Plaintiffs' Claims Based on the Arbitration Agreement in the Parties' Contract

A trial court's decision denying a motion to compel arbitration is reviewed *de novo*. *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 602-03, 293 P.3d 1197 (2013). The party seeking to avoid arbitration has the burden to show the arbitration agreement is unenforceable. *Id.*; *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321, 211 P.3d 454 (2009), *review denied*, 167 Wn.2d 1019 (2010).

Federal and state law both strongly favor arbitration. *Gandee*, 176 Wn.2d at 603. The Federal Arbitration Act (“FAA”) provides in relevant part as follows:

A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... 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. This provision establishes a “liberal federal policy favoring arbitration agreements ... [and] requires courts to enforce agreements to arbitrate according to their terms” *Compucredit Corp. v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665, 669, 181 L.Ed.2d 586 (2012). State law is in accord, requiring all presumptions to be made in favor of arbitration. *Zuver v. Airtouch Commun., Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004).

“State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state ... courts adhere to a correct interpretation of the legislation.” *Nitro-Lift Technologies, LLC v. Howard*, ___ U.S. ___, 133 S.Ct. 500, 503 (2012) (reversing Oklahoma Supreme Court’s refusal to enforce arbitration agreement in employment contract based on state law, on ground that court’s reliance on state law improperly “disregards this Court’s precedents on the FAA”). State courts must abide

by the FAA, which is the supreme law of the land, and by the U.S. Supreme Court's interpretations of the FAA. *Id.* at 503. The FAA forecloses "judicial hostility towards arbitration." *Id.* "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 504.

The FAA preempts state unconscionability rules to the extent they create obstacles to the accomplishment of the FAA's objectives favoring enforcement of arbitration agreements. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159-61 (9th Cir. 2012); *Gandee*, 176 Wn.2d at 609-10.

In this case, plaintiffs assert the contract as a whole, including the arbitration agreement within the contract, is unconscionable because it is an adhesion contract that was unfairly and deceptively induced. CP 4, 9-10, 12-15 at ¶¶ 1.2, 4.3-4.10, 4.17-4.25, 4.31-4.32. They assert the arbitration clause is unconscionable for essentially the same reason, because unspecified "[d]efendants did not discuss the arbitration clause with Plaintiffs, did not provide full disclosure of the rights that Plaintiffs were relinquishing, did not provide sufficient information to permit Plaintiffs to make informed decisions about whether to agree to the arbitration provision, and hid the arbitration provision in a maze of fine print among several other documents." CP 15 at ¶ 4.32. They also claim the Texas choice of law and venue provisions are unconscionable. *Id.*

There are three alternative reasons why plaintiffs' unconscionability arguments should be decided by the arbitrator rather than a court. First, the issue of whether the arbitration clause is enforceable is inseparable from the issue of whether the contract as a whole is enforceable. Second, the parties "clearly and unmistakably" agreed to submit arbitrability issues to the arbitrator. Third, plaintiffs do not contend, nor could they, that the delegation provision *itself*, authorizing the arbitrator to decide threshold issues of arbitrability, is unconscionable. Any one or more of these reasons justify reversal of the trial court's ruling denying the Ward defendants' motion to compel arbitration.

1. The Issue of Whether the Arbitration Clause Is Enforceable Is Inseparable from the Issue of Whether the Contract as a Whole Is Enforceable

The FAA "does not permit the ... court to consider claims of fraud in the inducement of the contract generally." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). When a plaintiff's unconscionability claim is directed to a contract as a whole rather than discretely focused on the arbitration clause within the contract, an arbitrator rather than a court should decide the issue of whether the contract as a whole is voidable for alleged fraud. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S.Ct. 1204, 1208-09, 163 L.Ed.2d 1038 (2006); *Townsend v. Quadrant Corp.*, 173

Wn.2d 451, 458-60, 268 P.3d 917 (2012) (applying *Buckeye*).

In *Townsend*, the plaintiffs leveled more specific allegations relative to alleged unconscionability than plaintiffs do here, but the court still held the unconscionability issue should be determined by the arbitrator. The *Townsend* plaintiffs claimed the contract was procured by fraud; they were told the contract terms were not negotiable (including the arbitration clause); they were denied the opportunity to review and question the contract terms before signing; and they were subjected to “high-pressure sales tactics,” thereby suggesting the entire process resulted in an adhesion contract. *Townsend*, 173 Wn.2d at 459-60. The *Townsend* court concluded, however, that a decision on whether the arbitration clause was enforceable could only be made by deciding whether the contract as a whole was enforceable, thus the issue of whether the arbitration clause was enforceable was inseparable from the issue of whether the contract as a whole was enforceable. *Id.* Accordingly, the court held the unconscionability issue was a matter reserved for the arbitrator. *Id.*

The same is true here. Like the *Townsend* plaintiffs, the plaintiffs here claim they were denied an adequate opportunity to review and question the contract terms, including the arbitration clause, before signing their contracts. CP 4, 9-10, 12-15 at ¶¶ 1.2, 4.3-4.10, 4.17-4.25, 4.31-4.32. As in *Townsend*, these claims are directed to the contract as a whole, as

well as the arbitration clause in particular. Thus, as held in *Townsend*, the issue of whether the arbitration clause is enforceable is inseparable from the issue of whether the contract as a whole is enforceable, so the enforceability of the contract, including the arbitration clause within the contract, is for the arbitrator to decide, not the court.

2. The Parties Clearly and Unmistakably Delegated Authority to Decide Conscionability to the Arbitrator

The issue of arbitrability (such as whether an arbitration agreement is unconscionable) is for the arbitrator, not the court, where the parties “clearly and unmistakably” delegate the issue to the arbitrator. *AT&T Techs., Inc. v. Commc’ns. Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Here, the parties “clearly and unmistakably” agreed to such delegation.

Specifically, the contract with LWG provides: “The parties agree to submit all disputes arising under or related to the Agreement to binding arbitration according to the then prevailing rules and procedures of the American Arbitration Association.” CP 37 at ¶ 10 (emphasis added). Disputes relating to the conscionability of the arbitration agreement certainly are “related to the Agreement” and are thus “clearly and unmistakably” delegated to the arbitrator to decide.

The reference to the American Arbitration Association (“AAA”)

rules further demonstrates a “clear and unmistakable” expression of intent for an arbitrator to decide arbitrability. “The rule adopted by a majority of federal courts is that the incorporation of AAA Rules into a contract ‘clearly and unmistakably vests the arbitrator, and not the district court, with authority to decide which issues are subject to arbitration.’” *Sys. Research & Applics. Corp. v. Rohde & Schwarz Fed. Sys., Inc.*, 840 F.Supp.2d 935, 941 (E.D. Va. 2012) (citing 11 cases in support, including cases from the Second, Ninth and Eleventh Circuits). *See also Kimble v. Rhodes College, Inc.*, 2011 WL 2175249, *2-3 (N.D. Cal., June 2, 2011) (“numerous courts have held that incorporation by reference of rules promulgated by the AAA specifically constitutes a clear and unmistakable expression of intent to arbitrate arbitrability”); *Ireland v. Lear Capital, Inc.*, 2012 WL 6021551, *2-3 (D. Minn., December 4, 2012) (“Due to this language [in AAA Rule 7], courts have repeatedly recognized that incorporation of the AAA Rules into an arbitration clause manifests a ‘clear and unmistakable’ intent to leave issues of arbitrability to the arbitrator.”).

Notably, the *Ireland* case distinguishes the case relied on by plaintiffs (*Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996 (9th Cir. 2010)) because that case did not address whether incorporation of the AAA Rules manifests a “clear and unmistakable” intent to leave issues of arbitrability to the arbitrator. Application of the rule

interpreting the incorporation of AAA rules into arbitration agreements thus supports the conclusion that the parties here “clearly and unmistakably” agreed to delegate the threshold issue of arbitrability to the arbitrator. The trial court erred by concluding otherwise.

3. Plaintiffs Do Not Claim, Nor Could They, that the Clause Delegating Authority to the Arbitrator to Decide Whether the Arbitration Agreement Is Enforceable Is *Itself* Unconscionable

The United States Supreme Court holds that as a matter of contract law parties may delegate threshold challenges to whether an arbitration agreement is valid and enforceable, including claims the agreement is unconscionable, to an arbitrator to decide rather than a court. *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___, 130 S.Ct. 2772, 2777-78, 177 L.Ed.2d 403 (2010). Where the parties to an arbitration agreement have delegated such arbitrability issues to the arbitrator the only possible issue for a court to decide is whether the delegation provision *itself* is unconscionable. *Id.* at 2778-79.

In *Rent-A-Center*, the plaintiff did not argue the delegation provision itself was unconscionable; he argued procedures in the arbitration agreement as a whole were unconscionable (e.g., provisions limiting discovery and potentially disallowing attorney fees if the plaintiff prevailed). *Id.* at 2779-80. The *Rent-A-Center* Court held those latter issues were for the arbitrator

to decide, not the Court, because there was no claim the delegation provision itself was unconscionable. *Id.* (where the plaintiff had not “challenged the delegation provision specifically,” arbitrability issues were for the arbitrator). Accordingly, the Court compelled arbitration and reversed the Ninth Circuit’s ruling that the plaintiff’s unconscionability challenges to the arbitration agreement as a whole were for the court. *Id.* at 2776, 2781.

The same is true here. Plaintiffs do not argue the delegation provision in the arbitration agreement *itself* is unconscionable. They argue other procedures in the arbitration agreement as a whole are unconscionable. Thus, as held in *Rent-A-Center*, the threshold question of unconscionability is for the arbitrator to decide.

In summary, the trial court erred by not compelling arbitration of plaintiffs’ claims, including alleged unconscionability, for any one or more of these three alternative reasons.

B. Even If Arbitrability Issues Are Not Deemed To Have Been Delegated To The Arbitrator, The Arbitration Agreement Is Not Procedurally Unconscionable

Even if arbitrability issues are not deemed to have been delegated to the arbitrator, plaintiffs’ claims that the arbitration agreement is unconscionable should be rejected. There are two categories of unconscionability: procedural and substantive. *Zuver*, 153 Wn.2d at 303. 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.* Substantive unconscionability involves contract terms that are shockingly one-sided or “monstrously harsh.” *Id.*

Turning first to procedural unconscionability, plaintiffs admit they electronically signed the contract containing the arbitration agreement and the delegation clause, and make no claim they were pressured or deprived of a reasonable opportunity to review the entire contract before signing and sending any money. CP 189 at ¶¶ 7-8; CP 194 at ¶¶ 6-7. Further, they could have cancelled the agreement at any time (CP 38 at ¶ 14), yet they both performed the agreement for months. *Id.*

Plaintiffs were obligated to read all terms of any contract they signed and to reject or cancel the contract if they disputed any contract terms.³ The AAA rules identified in the arbitration clause were reasonably available for their review on the AAA’s website, www.adr.org. Thus, they cannot claim

³ See, e.g., *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003) (“[A] party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding”); *Wash. Fed. Sav. & Loan Ass’n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011) (“A fundamental principle of Washington contract law is ‘that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.’”); *Zuver*, 153 Wn.2d at 302 (“It is black letter law of contracts that the parties to a contract shall be bound by its terms.”).

they did not consent to selection of the AAA rules, which, as stated above, delegate to the arbitrator issues of arbitrability, including issues of alleged unconscionability.

Given these facts and law, plaintiffs' argue the arbitration agreement is procedurally unconscionable because (1) it was hidden "in a maze of fine print" and (2) their arbitration agreements are unique and subject to state advisory opinions not applicable to other arbitration agreements. *See* CP 15 at ¶ 4.32.

The first argument is easily refuted. Although plaintiffs suggest the arbitration clause is hidden "in a maze of fine print" (CP 15 at ¶ 4.32), the clause actually is on the second page of a three-page contract and is set out in bold print and underlined in a paragraph entitled "**Arbitration of Dispute.**" CP 37 at ¶ 10. The clause was emphasized, not hidden.

Plaintiffs' second procedural unconscionability argument also should be rejected. Plaintiffs contend that Lloyd Ward, as a Texas licensed attorney, could not assume plaintiffs would review the terms of the arbitration agreement like parties to any contract are obligated to do. Instead, because he is a lawyer in addition to being a businessman who owns a debt settlement company, he had an ethical duty to explain the advantages and disadvantages of binding arbitration to plaintiffs and his failure to do so prevented plaintiffs from having a reasonable opportunity to understand the

arbitration agreement. *See* CP 15 at ¶ 4.32. Presumably, under plaintiffs' theory, other debt settlement companies have no such obligation to explain contract terms unless they, too, happen to be affiliated with a lawyer.

This argument should be rejected because it prohibits arbitration of a particular type of claim – *i.e.*, claims involving attorney-client agreements. “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Nitro-Lift*, 133 S.Ct. at 504.

Further, the parties agree that “[i]t is well established that attorneys are regulated by the states in which they practice.” CP 71 at n.1. Because Mr. Ward practices law only in Texas (*see* CP 29 at ¶ 2), his conduct as an attorney is regulated only by Texas law. This is consistent with the parties' contract, which states all services provided by LWG “occur entirely within the State of Texas” and are “governed by the laws of the State of Texas.” CP 37 at ¶ 9.

The Texas appellate courts have squarely addressed the enforceability of attorney-client fee agreements containing an arbitration clause in cases where the attorney allegedly failed to explain the advantages and disadvantages of arbitration. As is true in Washington, there is a Texas State Bar Advisory Opinion (*see* Tex. Comm. On Prof'l Ethics, Op. 586, 2008 WL 5680298, *2 (2008)) stating that attorneys should explain the

advantages and disadvantages of arbitration to their clients before entering into arbitration agreements. Texas appellate courts have explained that imposing an extra burden on attorneys to clarify the advantages and disadvantages of arbitration with their clients before entering into a contract containing an arbitration agreement creates an obstacle in conflict with public policy favoring arbitration and is thus preempted by the FAA. *E.g.*, *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 865-66 (Tex. Ct. App. 2010); *In re Pham*, 314 S.W.3d 520, 527-28 (Tex. Ct. App. 2010); *Labidi v. Sydow*, 287 S.W.3d 922, 928-29 (Tex. Ct. App. 2009). Other jurisdictions are in accord. *E.g.*, *Guidotti v. Legal Helpers Debt Resolution, LLC*, 866 F.Supp.2d 315, 329-32 (D. N.J. 2011) (enforcing arbitration agreement as to attorneys involved in debt settlement services where the agreement clearly stated all disputes relating to the agreement would be resolved by an arbitrator, even though the agreement did not explicitly state this meant the plaintiff agreed not to try any dispute in a court of law). *See also Satomi Owners Assoc. v. Satomi, LLC*, 167 Wn.2d 781, 800-06, 225 P.3d 213 (2009) (explaining FAA preemption).

Supreme Court precedent likewise makes this point clear, confirming that arbitration is a favored means of dispute resolution, and not a relinquishment of rights. *See, e.g., AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 1747-49 (2011) (ruling that arbitration limits on

class actions, discovery, application of evidence rules, and trial by jury are not unconscionable). Accordingly, the trial court erred in concluding the arbitration agreement in plaintiffs' contracts with LWG is procedurally unconscionable.

C. Even If Arbitrability Issues Are Not Deemed To Have Been Delegated To The Arbitrator, The Arbitration Agreement Is Not Substantively Unconscionable

Even if the Court were to consider the threshold issue of arbitrability, plaintiffs' claim that the arbitration agreement is substantively unconscionable should be rejected. Specifically, plaintiffs allege the arbitration clause "shocks the conscience" because (1) they would not be able to prosecute their state Consumer Protection Act ("CPA") claims in arbitration, and (2) the venue clause in the arbitration agreement is financially burdensome. CP 73-75. These arguments are meritless.

As an initial matter, "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647 (1991). "[B]y agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). These principles apply equally to statutory claims

under Washington's CPA, which have long been held to be arbitrable pursuant to arbitration agreements. *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 590, 681 P.2d 253 (1984).

Second, any contention that arbitration agreement is shockingly harsh or one-sided because the arbitrator might not allow plaintiffs to assert their CPA claims has been rejected by both the United States Supreme Court and the Washington Supreme Court. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07, 123 S.Ct. 1531, 155 L.Ed.2d 155 (2003) (compelling arbitration despite speculation the arbitrator might limit damages otherwise available in RICO action); *Zuver*, 153 Wn.2d at 310-12 (compelling arbitration despite speculation the arbitrator might limit recovery of attorney fees in a RCW 49.60 discrimination action). As explained in *PacifiCare* and *Zuver*, speculation that an arbitrator will disregard applicable state laws under which plaintiffs' bring their claims is insufficient to invalidate an arbitration agreement. *Id.*

At any rate, the Ward defendants have agreed that, if need be, the arbitration may occur in Washington applying Washington law. CP 32 at ¶10. Given this agreement, plaintiffs' speculation that an arbitrator might not resolve their state CPA claims or might not apply Washington law is baseless. *See Zuver*, 153 Wn.2d at 310 (holding that alleged substantively unconscionable allocation of arbitration costs is moot when the other

contracting party agrees to pay the arbitration fees and costs).⁴

Third, because the Ward defendants have agreed to arbitrate in Washington and to pay the entire costs of arbitration should plaintiffs demonstrate that such costs are unduly burdensome for them (CP 32-33 at ¶¶ 10-11), plaintiffs' claim that the arbitration agreement is substantively unconscionable because it would be financially burdensome for them to arbitrate in Texas is moot. *See Zuver*, 153 Wn.2d at 310. Thus, plaintiffs are unable to prove the arbitration agreement is substantively unconscionable.

D. Even If Arbitrability Issues Are Not Deemed To Have Been Delegated To The Arbitrator, Any Unconscionable Terms Are Severable

Even if the Court proceeds to determine the issue of arbitrability the parties delegated to the arbitrator and finds the Texas venue and choice of law provisions to be unconscionable and not mooted in light of the Ward defendants' agreement to waive those provisions, the Court should sever those provisions rather than invalidate the parties' entire agreement to arbitrate. *See Zuver*, 153 Wn.2d at 319-20; *Walters v. A.A.A.*

⁴ The *Gandee* Court distinguished *Zuver* on the grounds that in *Zuver* the defendant offered before the trial court to waive specific provisions in an arbitration agreement that were alleged to be unconscionable, while in *Gandee* the defendant did not offer to waive any provisions until its appellate reply brief, and then only agreed to waive unspecified provisions determined to be unconscionable by the Supreme Court. *Gandee*, 176 Wn.2d at 608. Here, the Ward defendants offered to waive specific provisions alleged to be unconscionable before the trial court as occurred in *Zuver*. CP 32-33 at ¶¶ 10-11. Thus, as in *Zuver*, the issue of whether the choice of law and venue terms are unconscionable is moot due to the Ward defendants' waiver of those specific terms before the trial court.

Waterproofing, Inc., 151 Wn. App. at 329-30.

There is no dispute the parties' agreement contains a severance clause in paragraph nine after the bold-typed and underlined heading **Governing Law; Severability**, which states: "If any provision of this Agreement is held to be unenforceable, the remainder of this Agreement shall remain in full force and effect." CP 37 at ¶ 9 (emphasis added). Plaintiffs argue this severability clause does not apply to the next provision in the contract, paragraph ten entitled **Arbitration of Dispute**, because the severability clause is not repeated in the arbitration clause. CP 76. Although plaintiffs cite *Zuver* in support of their contention, the *Zuver* court severed the unconscionable provisions in an arbitration agreement even though, like here, the severability clause was not repeated in the arbitration agreement itself. *Zuver*, 153 Wn.2d at 298-99. Further, the severability clause plainly applies to "any provision" in the contract, not just provisions in the severability clause. Plaintiffs' argument that the severability clause cannot be construed as applying to the arbitration clause is meritless.

Similarly meritless is plaintiffs' argument that severability is limited by paragraph fifteen of the contract, which provides that amendments to the contract must be in writing and signed by both parties. CP 76. Judicial severance of a contract term is not akin to parties' mutual agreement to amend contract terms. If that were so, judicial severance could never occur

absent mutual consent among the parties.

Plaintiffs next argue the arbitration agreement is entirely unenforceable because unconscionable provisions are “pervasive.” Yet, plaintiffs cite to only two substantively unconscionable terms: the venue and choice of law provisions. CP 73-75. The *Zuver* and *Walters* courts both found that similar clauses in contracts containing arbitration agreements were not “pervasive,” and thus severed the same to give effect to the parties’ agreement to arbitrate. *Zuver*, 153 Wn.2d at 319-20; *Walters*, 151 Wn. App. at 329-30. Faced with a similar argument of “pervasive” unconscionability, the *Zuver* court held that “when 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 319-20. The court noted that when parties expressly assent to a severability clause in a contract, they manifest intent that a court should sever any unconscionable provisions. *Id.* at 320 n. 20; *see also Walters*, 151 Wn. App. at 329-30 (“Severability [to allow arbitration] is particularly likely when the agreement includes a severability clause.”).

Application of this law yields the same result here. The choice of law and venue provisions are easily severed by simply removing the sentences referring to Texas law and Texas venue, leaving the basic agreement to arbitrate under the AAA rules. Such severance would further

the strong public policy favoring arbitration. Under plaintiffs' theory that severance violates public policy because it encourages one-sided agreements, severance would never be permitted as occurred in *Zuver, Walters, and Adler v. Fred Lind Manor*, 153 Wn.2d 331, 358-61, 103 P.3d 773 (2004) (also severing two unconscionable terms and enforcing agreement to arbitrate). The trial court erred by not severing any provisions deemed unconscionable.

E. Even If Arbitrability Issues, Including Jurisdictional and Enforceability Issues, Were Not Delegated To The Arbitrator, Plaintiffs' Claims Should Be Dismissed For Lack Of Personal Jurisdiction Because They Cannot Meet Their Burden Of Showing Each Of The Ward Defendants Had The Requisite Minimum Contacts With Washington State

As argued above, threshold issues such as personal jurisdiction over each of the Ward defendants should be delegated to the arbitrator to decide consistent with the parties' agreement to have the arbitrator resolve all disputes relating to the parties' agreement. Should the Court disagree, however, plaintiffs' claims against the Ward defendants still should be dismissed for lack of personal jurisdiction because plaintiffs cannot meet their burden of showing each individual Texas defendant had the requisite minimum contacts with Washington. The trial court erred by concluding otherwise.

When a defendant challenges jurisdiction, the plaintiff has the

burden of making a *prima facie* showing that jurisdiction exists. *John Does 1-9 v. Compcare, Inc.* 52 Wn. App. 688, 693, 763 P.2d 1237 (1988). Plaintiffs must show there is personal jurisdiction over each individual defendant. *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984) (“Each defendant’s contacts with the forum State must be assessed individually.”); *Huebner v. Sales Promotion, Inc.*, 38 Wn. App. 66, 70-71, 684 P.2d 752 (1984), *review denied*, 103 Wn.2d 1018, *cert. denied*, 474 U.S. 818 (1985) (“The forum court may not aggregate the contacts of multiple defendants, *i.e.*, the requirements of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.95 (1945)] must be met as to each defendant over whom a state court asserts jurisdiction.”). Jurisdiction over a nonresident corporation does not create jurisdiction over individual officers or employees of the corporation. *Huebner*, 38 Wn. App. at 72-73.

As indicated above, plaintiffs allege personal jurisdiction over all defendants pursuant to the long-arm jurisdiction statute in RCW 19.86.160, or because all defendants “regularly conduct business in Washington ... [by] entering into contracts with Washington consumers” CP 8 at ¶ 3.2. Personal jurisdiction analysis involves two linked questions: (1) whether a statute applies to extend jurisdiction; and (2) whether imposing jurisdiction on non-resident defendants would violate constitutional due process

principles. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 597, 849 P.2d 669 (1993).

1. No Personal Jurisdiction By Statute

Under RCW 19.86.160, personal jurisdiction may only be exercised over nonresident defendants who have engaged in unfair and deceptive practices that had an impact in Washington:

Personal service of any process in an action under this chapter may be made upon any person outside the state if such person has engaged in conduct in violation of this chapter which has had the impact in this state which this chapter reprehends. Such persons shall be deemed to have thereby submitted themselves to the jurisdiction of the courts of this state within the meaning of RCW 4.28.180 and 4.28.185.

The Ward defendants deny they have engaged in any unfair and deceptive practices sufficient to confer jurisdiction under RCW 19.86.160. At best, the only named defendant that arguably could have engaged in such practices is LWG, which is the only Ward defendant with whom plaintiffs allege they entered into contracts for debt settlement services, and the only Ward defendant engaged in debt settlement activities. *See* CP 12 at ¶ 4.18; CP 29-31 at ¶¶ 3-4, 6; CP 36 at ¶ 1. Consequently, at a minimum, long-arm jurisdiction is lacking under RCW 19.86.160 for defendants LWA, Lloyd Ward, P.C., and Lloyd and Amanda Ward individually. As argued below, even though long-arm jurisdiction under RCW 19.86.160

arguably extends to LWG, such long-arm jurisdiction would violate due process.⁵

Before addressing due process, however, the Ward defendants are first compelled to address the suggestion in plaintiffs' Complaint that they may also be basing their jurisdiction allegations on other statutes. Plaintiffs allegation in paragraph 3.2 of their Complaint (CP 8) that defendants "regularly conducted business in Washington" may be a vague reference to the general jurisdiction provision in RCW 4.28.080(10), which has been interpreted as conferring general jurisdiction over nonresident corporations "who transact[] business in Washington that is substantial and continuous, and of such character as to give rise to a legal obligation." *Harbison*, 69 Wn. App. at 595. Alternatively, this reference may be to the specific jurisdiction provision in RCW 4.28.185(1)(a), which is Washington's long-arm statute conferring jurisdiction over nonresident corporations that "purposefully do some act or consummate some transaction" in Washington. *Id.* at 596-97. In either case, plaintiffs are unable to show defendants LWA, Lloyd Ward, P.C., and Lloyd and Amanda Ward

⁵ The Ward defendants deny that LWG (much less any of the other defendants) charged excessive fees in violation of the DAA or CPA as plaintiffs allege, but even if they did, due process considerations preclude personal jurisdiction for resolution of this dispute in Washington courts as argued later in this brief. Additionally or alternatively, as argued above, whether LWG or any of the other Ward defendants engaged in unfair and deceptive practices is a matter for an arbitrator to decide pursuant to enforcement of the parties' contractual agreement to submit such disputes to binding arbitration. The dispute over whether LWG (or any of the other Ward defendants) engaged in unfair and deceptive practices is not at issue in this appeal.

individually did substantially and continuously transact business in Washington, or purposefully did some act or transaction in Washington. Again, at best, the only named defendant that arguably could have engaged in such substantial, continuous, or purposeful transactions is LWG, which is the only Ward defendant plaintiffs allege they entered into contracts with, and the only Ward defendant engaged in debt settlement activities. *See* CP 12 at ¶ 4.18; CP 29-31 at ¶¶ 3-4, 6; CP 36 at ¶ 1.

Plaintiffs are unable to show that LWG engaged in substantial, continuous or purposeful transactions in Washington. In *MBM Fisheries, Inc. v. Bollinger Shipyard, Inc.*, 60 Wn. App. 414, 804 P.2d 627 (1991), the court held that a nonresident corporation was not subject to either general or specific personal jurisdiction in Washington where (a) its receipt of fees from Washington residents, participation in a Seattle trade show, advertisements in magazines distributed in Washington, and performance of contracts in Louisiana entered into with Washington residents did not suggest continuous or substantial business activity sufficient to confer jurisdiction and (b) it was the plaintiffs (rather than the nonresident defendant) who initiated the parties' contact, and work performed by the nonresident defendant for the plaintiffs was performed in the nonresident's home state. *MBM Fisheries*, 60 Wn. App. at 418-28. *See also Harbison*, 69 Wn. App. at 596 (explaining the *MBM Fisheries* court's analysis);

SeaHAVN, Ltd. v. Glitnir Bank, 154 Wn. App. 550, 569, 226 P.3d 141 (2010) (emphasizing the significance of the plaintiffs initiating contact with the defendants as grounds for defeating personal jurisdiction over the defendants). Moreover, “[t]he mere execution of a contract with a resident of the forum state does not fulfill the purposeful act requirement” *Harbison*, 69 Wn. App. at 600 (explaining *MBM Fisheries*, and citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S.Ct. 2174, 2185-86, 85 L.Ed.2d 528 (1985)).

Here, plaintiffs initiated the contact with LWG, not the other way around, and LWG performed the contracted services in Texas (as the parties acknowledged in their agreement, CP 37 at ¶ 9). LWG’s passive advertising on the internet is less substantial than the active payment for local magazine advertising and attendance at Washington trade shows that was still deemed insufficient in *MBM Fisheries*. See also *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417-20 (9th Cir. 1997) (passive internet advertising insufficient to establish personal jurisdiction). Thus, personal jurisdiction based on statute over LWG (as well as the other Ward defendants) is lacking under RCW 4.28.080(10) and RCW 4.28.185(1)(a).

2. Due Process Precludes Personal Jurisdiction

As indicated above, the only potential statutory basis for personal jurisdiction here is limited to defendant LWG pursuant to the long-arm

provisions of RCW 19.86.160 due to plaintiffs' allegation that LWG engaged in unfair and deceptive practices that had an impact in Washington. Imposing jurisdiction on LWG would, however, violate due process.

The federal due process clause must be satisfied for a Washington court to have personal jurisdiction under RCW 19.86.160 where, as here, the out-of-state individuals and entities have no agents, employees, offices or property in Washington. *State v. Reader's Digest Assoc., Inc.*, 81 Wn.2d 259, 276-77, 501 P.2d 290 (1972). Three criteria must be met under the federal and state constitutions for a Washington court to have personal jurisdiction over non-residents: (1) the nonresident defendant must purposefully do some act or consummate some transaction in Washington; (2) the cause of action must arise from such act or transaction; and (3) assumption of jurisdiction must not offend "traditional notions of fair play and substantial justice." *Compcare*, 52 Wn. App. at 696.

As noted above, "mere execution of a contract with a resident of this jurisdiction alone does not establish the purposeful act requirement." *See CTVC of Hawaii, Co. v. Shinawatra*, 82 Wn. App. 699, 711, 919 P.2d 1243 (1996), *review denied*, 131 Wn.2d 1020 (1997). In part, that is because personal jurisdiction is determined by considering the acts of the defendant, not the plaintiffs. *Id.* at 710 (citing *Hanson v. Denckla*, 357 U.S.

235, 254, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958)). The focus is on whether the nonresident defendant purposely established minimum contacts by entering into a contract with a Washington resident. *Id.* at 711. This determination is made by examining the circumstances of the entire transaction, including “prior negotiations, contemplated future consequences, the terms of the contract, and the parties’ actual course of dealings.” *Id.* (citing cases).

Here, none of the Ward defendants came to Washington to negotiate the Client Services Agreement with plaintiffs, the contract was not drafted in Washington, and the Ward defendants did not ever meet with plaintiffs in Washington. *Cf. id.* at 711-14 (concluding requisite minimum contacts were lacking even where such contacts occurred in that case).⁶ Moreover, the Ward defendants did not purchase any products or services in Washington or open any bank accounts in Washington for purposes of negotiating the contract. *Cf. id.* at 714-18 (concluding such contacts might be sufficient to establish purposeful acts).

The contemplated future consequences and terms of the contract also show the Ward defendants did not purposefully avail themselves of the

⁶ The *CVTC of Hawaii* court also noted the plaintiffs failed to show the wife of one of the defendants signed the agreements at issue or purposefully conducted any activities in Washington, which easily justified dismissal of the claims against her. *CVTC of Hawaii*, 82 Wn. App. at 711-12. The same is true here for all Ward defendants, other than perhaps LWG.

protections of Washington's laws. The contract expressly provides it is "governed by the laws of the State of Texas," and "all services provided by LWG to Client or on Client's behalf occur entirely within the State of Texas and not the state of Client's residence." CP 37 at ¶ 9. If future disputes arose, the parties contemplated those disputes would be resolved in Texas pursuant to binding arbitration, in which "Texas law will govern the rights and obligations of the parties with respect to the matters in controversy." *Id.* at ¶ 10.

The parties' actual course of dealing all occurred outside of Washington, too. There is no evidence the Ward defendants had any dealings with plaintiffs in Washington, other than the mere, insufficient fact that plaintiffs electronically signed the contracts in Washington. Thus, plaintiffs are unable to prove LWG, or any of the other Ward defendants had the requisite purposeful, minimum contacts with Washington sufficient to impose personal jurisdiction over them in Washington.

The second part of the due process test requires plaintiffs to show a nexus between their cause of action and each defendant's activities in the forum state. *SeaHAVN*, 154 Wn. App. at 570-71. Jurisdiction is proper only if the events giving rise to the claim would not have occurred "but for" the defendant's contacts in the forum state. *Id.* Here, LWG's contract with plaintiffs containing the allegedly excessive fees was negotiated and

drafted by LWG in Texas after plaintiffs initiated contact with LWG in Texas, and the contract was performed by LWG in Texas. Because the Ward defendants' purposeful acts that plaintiffs challenge all occurred in Texas, plaintiffs are unable to prove a nexus between each defendant's alleged purposeful acts in Washington, or lack thereof, and plaintiffs' claims.

Even if purposeful contacts could be shown and there was a nexus between those contacts and plaintiffs' cause of action, assumption of jurisdiction would offend "traditional notions of fair play and substantial justice." Analysis of this third factor requires consideration of "the quality, nature and extent of the defendant's activities in Washington, the relative convenience of the plaintiff and the defendant in maintaining the action here, the benefits and protection of the Washington's laws afforded the parties, and the basic equities of the situation." *CVTC of Hawaii*, 82 Wn. App. at 720.

As discussed above, the quality, nature and extent of each Ward defendant's contacts in Washington were slim to nonexistent. Thus, this consideration weighs against exercising jurisdiction over the Ward defendants in Washington.

The relative convenience of the respective parties does not weigh in favor of exercising jurisdiction in Washington. The subject matter of the

dispute involves events that took place in Texas after plaintiffs initiated contact with the Ward defendants in Texas. The discoverable documents and witnesses are primarily located in Texas, other than plaintiffs and the few documents they may have. The five Ward defendants all reside, or are headquartered exclusively in Texas. Thus, this consideration either tilts slightly against Washington jurisdiction, or does not favor either party.

Plaintiffs cannot meet their burden of showing Washington's laws afford the parties any special benefits or protections that do not exist in Texas. Texas courts have as much or more interest as Washington courts in ensuring that Texans and Texas corporations comply with federal and state consumer protection laws.

Finally, the basic equities of the situation dictate that Washington should not exercise jurisdiction in conflict with the parties' contractual agreement that jurisdiction over the parties' agreement lies in Texas. The dispute arising from the parties' agreement involves conduct that occurred in Texas, not Washington. Based on traditional notions of fair play and substantial justice, and in light of the parties' agreement, the Ward defendants had no reason to believe they each would be haled into Washington courts just because plaintiffs initiated contact with LWG in Texas. Therefore, plaintiffs' claims against the Ward defendants should be dismissed for lack of personal jurisdiction.

F. Even If Arbitrability Issues, Including Jurisdictional And Enforceability Issues, Were Not Delegated To The Arbitrator, This Case Should Be Dismissed As Moot Because The Ward Defendants Offered To Have Judgment Taken Against Them Pursuant To CR 68, Providing Complete Relief As To All Of Plaintiffs' Individual Claims

Since this appeal was filed, an additional basis for dismissal has arisen. The case has become moot due to the Ward defendants' CR 68 offers of judgment providing complete relief to plaintiffs as to all of their individual claims. Mootness issues are jurisdictional and thus may be raised for the first time on appeal pursuant to RAP 2.5(a). *Harbor Islands LP v. City of Blaine*, 146 Wn.App. 589, 592, 191 P.3d 1282 (2008).

1. General Mootness Standards

A case becomes moot when a court can no longer provide effective relief. *Harbor Islands LP*, 146 Wn.App. at 592. To avoid a mootness argument, "a plaintiff must demonstrate that he possesses a legally cognizable interest, or 'personal stake,' in the outcome of the action." *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S.Ct. 1523, 1528 (2013). If at any point in the litigation a plaintiff receives complete relief and no longer has a "personal stake in the outcome of the lawsuit,' . . . the action can no longer proceed and must be dismissed as moot." *Id.*

In *Genesis*, the United States Supreme Court held that where a named plaintiff's individual claims become moot due to a Rule 68 offer of

judgment prior to a ruling on class certification, the entire class action also is rendered moot, unless certain narrow exceptions apply. 133 S.Ct. at 1529-32. In so holding, the Court "assume[d] without deciding" that a Rule 68 offer of judgment in full satisfaction of a named plaintiff's individual claims moots the plaintiff's claims, whether or not the offer is accepted. *Id.* at 1529. Although the issue was not before the Court because the respondent had conceded her individual claim was mooted by the petitioner's offer, the Supreme Court noted that "Courts of Appeals on both sides of the issue have recognized that a plaintiff's claim may be satisfied even without the plaintiff's consent." *Id.* at 1529 n.4 (citing *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004) (holding that unaccepted offer of judgment moots individual plaintiff's claim), and *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009) (holding court should enter judgment in favor of plaintiff where unaccepted Rule 68 offer of judgment satisfies plaintiffs' entire demand)).

The Ward defendants have not found any reported Washington cases addressing the issue determined in *Genesis*. However, because Federal Rule of Civil Procedure ("FRCP") 68 is "virtually identical" to CR 68, Washington courts may look to federal interpretations of FRCP 68 when interpreting CR 68. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn.App. 571, 580, 271 P.3d 899 (2012).

2. Mootness in the Class Action Context

In a class action, there must be an actual controversy between the named plaintiff and the defendant. Therefore, mooting the claims of the named plaintiff generally renders the class action moot. *Board of Sch. Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 129, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975). Although the *Genesis* Court noted there are limited exceptions to this rule, the Court found none of those exceptions applicable in the context of that case.

First, in *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the Court held that satisfaction of the named plaintiff's individual claims *after* a motion for class certification has been granted does not render the class action moot. Once a class has been certified, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by" the named plaintiff. *Genesis*, 133 S.Ct. at 1530 (quoting *Sosna*, 419 U.S. at 399-402). Here, class certification has not been granted.

Second, in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), the Court "narrowly extended this principle to *denials* of class certification motions." *Genesis*, 133 S. Ct. at 1530 (emphasis in original). This ruling, however, merely addressed the situation where, "but for the district court's erroneous denial

of class certification," the *Sosna* exception to mootness would have applied. *Id.* (citing *Geraghty*, 445 U.S. at 404 & n.11). Here, there has been no ruling denying class certification.

Third, there is a narrow exception for "inherently transitory" class actions where the mootness event occurs before the class certification issue has been adjudicated. *Genesis*, 133 S. Ct. at 1530-31 (discussing *Sosna*, *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)). In *Gerstein*, for example, the named plaintiffs' pretrial detention ended prior to a ruling on class certification. See *Genesis*, 133 S.Ct. at 1531. The *Gerstein* court found that, because pretrial detention is "by nature temporary," the case fit within the "narrow class of cases" in which satisfaction of a named plaintiff's claims prior to a class certification decision does not render the entire class action moot. 420 U.S. at 110 n.11.

As discussed below, the *Genesis* decision makes it clear that the "inherently transitory" exception does not apply where, as here, plaintiffs seek to recover monetary damages and non-transitory injunctive relief now satisfied by the offers of judgment.

3. *Genesis* Holds the "Inherently Transitory" Mootness Exception Does Not Apply to Damages Class Actions Where the Named Plaintiff is Offered

Full Individual Relief Before a Ruling on Class Certification

In *Genesis*, the Supreme Court explained that the "inherently transitory" exception to mootness applies only where it is "'certain that other persons similarly situated' will continue to be subject to the challenged conduct and the claims raised are 'so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" 133 S.Ct. at 1530-31 (quoting *County of Riverside*, 500 U.S. at 52). The *Genesis* court then held that the narrow "inherently transitory" exception to mootness should not apply to damages class actions where, as here, the defendant offers to fully satisfy the named plaintiffs' claims prior to any ruling on class certification. 133 S.Ct. at 1531.

The Court explained that the "inherently transitory" exception "focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." *Id.* Unlike the claims for injunctive relief at issue in *Gerstein* and *County of Riverside* that otherwise might evade review, "a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations." *Id.*

The *Genesis* court explained that a defendant's tendering of full

individual damages to a named plaintiff does not "insulate such a claim from review, for a full settlement offer addresses plaintiff's alleged harm by making the plaintiff whole." *Id.* Additionally, "[w]hile settlement may have the collateral effect of foreclosing unjoined claimants from having their rights vindicated in *respondent's* suit, such putative plaintiffs remain free to vindicate their rights in their own suit." *Id.* (emphasis in original).

The Supreme Court went on to question a policy rationale against allowing the tactical use of offers of judgment to "pick off" individual plaintiffs prior to class certification. *Id.* at 1531-32. Relying on *Deposit Guaranty National Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), several Courts of Appeals had held that satisfaction of a named plaintiff's individual claims prior to a ruling on class certification does not render the class action moot, under the theory that the defendant should not be allowed to "pick off" named plaintiffs in order to avoid class certification. *Id.* at 1531. The *Genesis* court explained that, in *Roper*, the named plaintiff maintained an "ongoing, personal economic stake" in appealing the denial of class certification, "namely, to shift a portion of attorney's fees and expenses to successful class litigants." *Id.* at 1532 (citing *Roper*, 445 U.S. at 332-34 & n.6).⁷ It

⁷ Because the Court distinguished *Roper* "on the facts," it did not address *Roper's* continuing vitality in light of the later decision in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990), which held that an "interest in

was only "in dicta" that the *Roper* court "underscore[d] the importance of a district court's class certification decision" and noted a potential concern with frustrating the objectives of class actions. *Id.*

The *Genesis* court ruled that *Roper* "turned on a specific factual finding that the plaintiffs possessed a continuing personal economic stake in the litigation, even after the defendants' offer of judgment." *Id.* In contrast, the offer of judgment in *Genesis* provided the named plaintiff with "complete relief on her individual claims," and the named plaintiff failed to assert "any continuing economic interest in shifting attorney's fees and costs to others." *Id.*

4. The Impact of *Genesis* on Decisions of the Court of Appeals Extending the "Inherently Transitory" Mootness Exception to Damages Class Actions

Prior to *Genesis*, several of the Courts of Appeals, including the Ninth Circuit and the Third Circuit (in the decision reversed in *Genesis*), had expanded the "inherently transitory" mootness exception to include damages class actions. *See, e.g., Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) (holding that the "inherently transitory" exception should not be limited to "cases involving inherently transitory claims," but should instead be extended to damages claims that are

attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *See* 133 S. Ct. at 1532 n.5.

""acutely susceptible to mootness' in light of [the defendant's] tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action"" (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)); *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189 (3d Cir. 2011) (following *Weiss* in holding that defendants could not "pick off" named plaintiffs by tendering the full amount of their individual damages claim, whether the collective action was brought under the Fair Labor Standards Act or Rule 23), *rev'd*, 133 S. Ct. 1523 (2013). These decisions all relied on the same Supreme Court decisions analyzed in *Genesis* (*i.e.*, *Sosna*, *Gerstein*, *Geraghty*, *Roper*, and *County of Riverside*). See *Pitts*, 653 F.3d at 1087-92; *Symczyk*, 656 F.3d at 195-97; *Weiss*, 385 F.3d at 342-48.

The Supreme Court's decision in *Genesis*, however, confirms each of these decisions should be limited to their factual context: (1) *Sosna* should be limited to cases where class certification has been granted; (2) *Geraghty* should be limited to cases where class certification has been wrongly denied; (3) *County of Riverside* and *Gerstein* should be limited to injunctive relief cases where the challenged conduct was "inherently transitory;" and (4) *Roper* should be limited to cases where class certification has been denied and the named plaintiff retains an interest in appealing the denial in order to shift attorneys' fees and costs to others.

Although *Genesis* arose in the context of a collective action under 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA"), the authorities on which the Third Circuit had relied in finding that the class action claims were not moot – and which the Supreme Court found did not support a broad application of the "inherently transitory" relation-back doctrine – all arose in the Rule 23 context. See *Sosna*, 419 U.S. 553; *Geraghty*, 455 U.S. 388; *Roper*, 445 U.S. 326; *County of Riverside*, 500 U.S. 44; *Gerstein*, 420 U.S. 103. In holding these decisions did not support the Third Circuit's ruling, the Supreme Court discussed *both* the differences between § 216(b) and Rule 23 *and* the Third Circuit's reliance on Rule 23 cases that were, "by their own terms," distinguishable from the facts in *Genesis*. 133 S.Ct. at 1529. Under the Supreme Court's interpretation of its own precedent in *Genesis*, the only valid exceptions to the general rule that mootng the named plaintiff's claim moots the class action involve either (a) mootng events occurring *after* a class certification ruling; or (b) injunctive relief claims where the challenged conduct is "inherently transitory."

5. Application of *Genesis* to This Case

In this case, no class certification decision has been made. Further, the named plaintiffs seek monetary damages and non-transitory injunctive relief. The Ward defendants served Rule 68 offers of judgment upon both

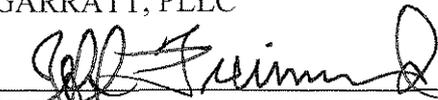
named plaintiffs in full satisfaction of their individual claims, including reasonable attorneys' fees, costs, and all requested injunctive relief. Appendices A-B. Under *Genesis*, no exception applies to the general rule that satisfaction of named plaintiffs' individual claims moots the class action. *See* 133 S. Ct. 1529-32. Accordingly, this case should be dismissed for lack of subject matter jurisdiction.

VI. CONCLUSION

Based on the foregoing reasons, the trial court's order denying the Ward defendants' motion to compel arbitration should be reversed and this matter should be dismissed without prejudice to allow plaintiffs' claims to proceed to arbitration. Alternatively, the trial court's order denying the Ward defendants' motion to dismiss for lack of personal jurisdiction should be reversed and the case should be dismissed due to lack of personal jurisdiction over each of the Ward defendants. Additionally, or alternatively, the case should be dismissed due to mootness.

RESPECTFULLY SUBMITTED this 21st day of June, 2013.

FREIMUND JACKSON TARDIF & BENEDICT
GARRATT, PLLC



JEFFREY A.O. FREIMUND, WSBA No. 17384
Attorneys for Appellants Ward

CERTIFICATE OF SERVICE

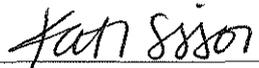
I certify that the foregoing was served by the method indicated below to the following this 21st day of June, 2013.

Darrell W. Scott	<input checked="" type="checkbox"/>	U. S. Mail
Andrew S. Biviano	<input checked="" type="checkbox"/>	E-mail
Boyd M. Mayo		scottgroup@me.com
Matthew J. Zuchetto		bmmayo@me.com
The Scott Law Group, P.S.		matthewzuchetto@me.com
926 W. Sprague Avenue, Ste 680		andrewbiviano@me.com
Spokane, WA 99201		kristyberglund@me.com

Attorneys for
plaintiffs/appellants

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

DATED this 21st day of June, 2013, at Olympia, WA.



KATHRINE SISSON

APPENDIX A

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

SHERRIE KAY GORDEN and DEBBIE
KAY MILLER, individually and on behalf of
a Class of similarly situated Washington
residents,

Plaintiffs,

v.

LLOYD WARD & ASSOCIATES, P.C., a
Texas Domestic Professional Corporation;
LLOYD WARD, P.C., a Texas Domestic
Professional Corporation; THE LLOYD
WARD GROUP, P.C., a Texas Domestic
Professional Corporation, LLOYD EUGENE
WARD and AMANDA GLEN WARD,
individually and on behalf of the marital
community; SILVER LEAF DEBT
SOLUTIONS, LLC, a Texas Limited
Liability Company; MICHAEL MILES,
individually and on behalf of the marital
community of MICHAEL MILES and JANE
DOE MILES; and JOHN and JANE DOES 1-
5,

Defendants.

NO. 12-2-01551-6

WARD DEFENDANTS' RULE 68
OFFER OF JUDGMENT TO
PLAINTIFF SHERRIE KAY GORDEN

TO: SHERRIE KAY GORDEN, plaintiff

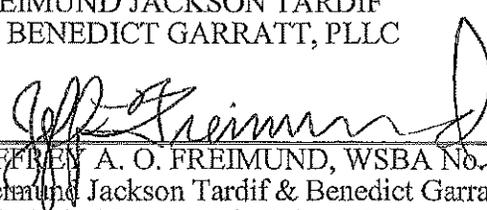
AND TO: ANDREW S. BIVIANO
The Scott Law Group, P.S.
926 W. Sprague Avenue, Suite 680
Spokane, WA 99201
Attorneys for Plaintiff Sherrie Kay Gorden

Pursuant to CR 68, defendants Lloyd Ward, Amanda Ward, Lloyd Ward, P.C., Lloyd

1 Ward & Associates, P.C., and The Lloyd Ward Group, P.C. (collectively "the Ward
2 defendants"), by and through their undersigned attorneys, hereby offer to allow judgment to
3 be taken against them and in favor of Plaintiff Sherrie Kay Gorden for the sum of \$11,147.73
4 (\$3,715.91 trebled for compensatory and exemplary damages), plus pre-judgment interest as
5 authorized by law accrued to the date of service of this offer, post-judgment interest accrued
6 from the date of entry of judgment to the date of payment of this offer, and reasonable
7 attorneys' fees, costs and expenses accrued to the date of service of this offer. The Ward
8 defendants further offer to allow judgment to be taken against them in the form of a
9 permanent injunction prohibiting the Ward defendants from engaging in future business
10 violative of chapter 18.28 RCW and/or chapter 19.86 RCW and from accepting any future
11 debt adjustment clients from the State of Washington, and in the form of a declaratory
12 judgment that the Ward defendants' debt adjusting agreement with Plaintiff Sherrie Kay
13 Gorden is void *ab initio*. This offer is intended to be in full satisfaction of all damages, as
14 well as legal and equitable relief sought by Sherrie Kay Gorden on her individual claims in
15 this action, and is not to be construed as an admission of any liability by the Ward defendants.
16
17

18 DATED this 9th day of May, 2013.

19
20 FREIMUND JACKSON TARDIF
& BENEDICT GARRATT, PLLC

21
22 
23 JEFFREY A. O. FREIMUND, WSBA No. 17384
24 Freimund Jackson Tardif & Benedict Garratt, PLLC
25 711 Capitol Way South, Suite 602
26 Olympia, WA 98501
Telephone: (360) 534-9960
Fax: (360) 534-9959
jefff@fjtlaw.com
Attorney for Ward Defendants

CERTIFICATE OF SERVICE

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I hereby certify that I caused the foregoing document to be served on all parties of record as follows:

Darrell W. Scott
Boyd M. Mayo
Matthew J. Zuchetto
Andrew S. Biviano
The Scott Law Group, P.S.
926 W. Sprague Avenue, Suite 680
Spokane, WA 99201

U. S. Mail
Hand Delivery
Facsimile
E-Mail
Legal Messenger

Attorneys for Plaintiffs

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

DATED this 9th day of May, 2013, at Olympia, WA.

Kath. Sisson

KATHRINE SISSON

APPENDIX B

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

SHERRIE KAY GORDEN and DEBBIE
KAY MILLER, individually and on behalf of
a Class of similarly situated Washington
residents,

Plaintiffs,

v.

LLOYD WARD & ASSOCIATES, P.C., a
Texas Domestic Professional Corporation;
LLOYD WARD, P.C., a Texas Domestic
Professional Corporation; THE LLOYD
WARD GROUP, P.C., a Texas Domestic
Professional Corporation, LLOYD EUGENE
WARD and AMANDA GLEN WARD,
individually and on behalf of the marital
community; SILVER LEAF DEBT
SOLUTIONS, LLC, a Texas Limited
Liability Company, MICHAEL MILES,
individually and on behalf of the marital
community of MICHAEL MILES and JANE
DOE MILES; and JOHN and JANE DOES 1-
5,

Defendants.

NO. 12-2-01551-6

WARD DEFENDANTS' RULE 68
OFFER OF JUDGMENT TO
PLAINTIFF DEBBIE KAY MILLER

TO: DEBBIE KAY MILLER, plaintiff

AND TO: ANDREW S. BIVIANO
The Scott Law Group, P.S.
926 W. Sprague Avenue, Suite 680
Spokane, WA 99201
Attorneys for Plaintiff Sherrie Kay Gorden

Pursuant to CR 68, defendants Lloyd Ward, Amanda Ward, Lloyd Ward, P.C., Lloyd

1 Ward & Associates, P.C., and The Lloyd Ward Group, P.C. (collectively "the Ward
2 defendants"), by and through their undersigned attorneys, hereby offer to allow judgment to
3 be taken against them and in favor of Plaintiff Debbie Kay Miller for the sum of \$3,651.03
4 (\$1,217.01 trebled for compensatory and exemplary damages), plus pre-judgment interest as
5 authorized by law accrued to the date of service of this offer, post-judgment interest accrued
6 from the date of entry of judgment to the date of payment of this offer, and reasonable
7 attorneys' fees, costs and expenses accrued to the date of service of this offer. The Ward
8 defendants further offer to allow judgment to be taken against them in the form of a
9 permanent injunction prohibiting the Ward defendants from engaging in future business
10 violative of chapter 18.28 RCW and/or chapter 19.86 RCW and from accepting any future
11 debt adjustment clients from the State of Washington, and in the form of a declaratory
12 judgment that the Ward defendants' debt adjusting agreement with Plaintiff Debbie Kay
13 Miller is void *ab initio*. This offer is intended to be in full satisfaction of all damages, as well
14 as legal and equitable relief sought by Debbie Kay Miller on her individual claims in this
15 action, and is not to be construed as an admission of any liability by the Ward defendants.
16
17

18 DATED this 9th day of May, 2013.

19
20 FREIMUND JACKSON TARDIF
& BENEDICT GARRATT, PLLC

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22 
23 JEFFREY A. O. FREIMUND, WSBA No. 17384
24 Freimund Jackson Tardif & Benedict Garratt, PLLC
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jeffF@fjtlaw.com
Attorney for Ward Defendants

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be served on all parties of record as follows:

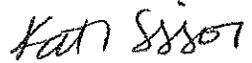
Darrell W. Scott
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The Scott Law Group, P.S.
926 W. Sprague Avenue, Suite 680
Spokane, WA 99201

- U. S. Mail
- Hand Delivery
- Facsimile
- E-Mail
- Legal Messenger

Attorneys for Plaintiffs

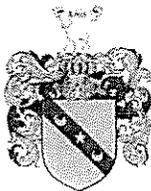
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of May, 2013, at Olympia, WA.



KATHRINE SISSON

APPENDIX C



The Scott Law Group P.S.

926 W. Sprague Avenue, Suite 680, Spokane, Washington, 99201

Phone: 509.455.3966; Fax: 509.455.3906; Toll-Free: 888.955.3966

Email: scottgroup@me.com

Website: www.thescottlawgroup.com

May 15, 2013

Jeffrey A. O. Freimund
Freimund Jackson Tardif
& Benedict Garratt, PLLC
711 Capital Way South, Suite 602
Olympia, WA 98501

Re: Gorden/Miller v. Lloyd Ward & Associates, PC, et al

Dear Mr. Freimund:

Enclosed please find Plaintiff Sherrie Kay Gorden's Notice of Acceptance of Ward Defendants' Rule 68 Offer of Judgment.

Sincerely,

ANDREW S. BIVIANO

ASB/sms
Enclosure

Darrell W. Scott, Ph.D.
Admitted in Washington, Oregon and Idaho

Matthew J. Zuchetto
Admitted in Washington

Boyd M. Mayo
Admitted in Washington

Andrew S. Biviano
Admitted in Washington

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8 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

9 SHERRIE KAY GORDEN and DEBBIE KAY
10 MILLER, individually and
on behalf of a Class of similarly situated
Washington residents,

Plaintiffs,

11 v.

12 LLOYD WARD & ASSOCIATES, P.C.,
a Texas Domestic Professional Corporation;
13 LLOYD WARD, P.C., a Texas Domestic
Professional Corporation; THE LLOYD
14 WARD GROUP, PC, a Texas Domestic
Professional Corporation; LLOYD EUGENE
15 WARD and AMANDA GLEN WARD,
individually and on behalf of the marital
16 community; SILVER LEAF DEBT
SOLUTIONS, LLC; a Texas Limited Liability
17 Company; MICHAEL MILES, individually
and on behalf of the marital community of
18 MICHAEL MILES and JANE DOE MILES;
and JOHN and JANE DOES 1-5,

19 Defendants.

NO. 12-2-01551-6

PLAINTIFF SHERRIE KAY
GORDEN'S NOTICE OF
ACCEPTANCE OF WARD
DEFENDANTS' RULE 68 OFFER OF
JUDGMENT

20 TO: Defendants LLOYD WARD, AMANDA WARD, LLOYD WARD, P.C., LLOYD
21 WARD & ASSOCIATES, P.C. and THE LLOYD WARD GROUP, P.C. (collectively
"the Ward Defendants")

22 AND TO: JEFFREY A. O. FREIMUND
23 Freimund Jackson Tardiff & Benedict Garratt, PLLC
711 Capital Way South, Suite 602
24 Olympia, WA 98501
25 Attorney for Ward Defendants

PLAINTIFF SHERRIE KAY GORDEN'S NOTICE OF
ACCEPTANCE OF WARD DEFENDANTS' RULE 68
OFFER OF JUDGMENT: 1

LAW OFFICES
THE SCOTT LAW GROUP
A PROFESSIONAL SERVICE CORPORATION
926 W SPRAGUE AVENUE, SUITE 680
SPOKANE, WA 99201-0466
(509) 455-1966

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2 Pursuant to Washington Court Rule 68, Plaintiff Sherrie Kay Gorden, by and through
3 her counsel, hereby gives written notice of her acceptance of Ward Defendants' Rule 68 Offer
4 of Judgment, attached hereto as Exhibit "A".

5 DATED this 15th day of May, 2013.

6
7 THE SCOTT LAW GROUP, P.S.

8 
9 ANDREW S. BIVIANO, WSBA #38086
10 *Attorney for Plaintiffs*

1
2 CERTIFICATE OF SERVICE

3 I hereby certify that on the 15th day of May, 2013, I caused to be served a true and
4 correct copy of the foregoing document as indicated, addressed to the following:

5 Jeffrey A. O. Freimund
6 Freimund Jackson Tardif & Benedict Garratt, PLLC
7 711 Capital Way South, Suite 602
8 Olympia, WA 98501

VIA FIRST CLASS MAIL
VIA EMAIL
VIA HAND DELIVERY
VIA FACSIMILE

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11 SHEILA M. SPRAYBERRY

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PLAINTIFF SHERRIE KAY GORDEN'S NOTICE OF
ACCEPTANCE OF WARD DEFENDANTS' RULE 68
OFFER OF JUDGMENT: 3

LAW OFFICES
THE SCOTT LAW GROUP
A PROFESSIONAL SERVICE CORPORATION
926 W SPRAGUE AVENUE, SUITE 680
SPOKANE, WA 99201-0466
(509) 455-3966

EXHIBIT "A"

PLAINTIFF SHERRIE KAY GORDEN'S ACCEPTANCE OF WARD
DEFENDANTS' RULE 68 OFFER OF JUDGMENT

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

SHERRIE KAY GORDEN and DEBBIE
KAY MILLER, individually and on behalf of
a Class of similarly situated Washington
residents,

Plaintiffs,

v.

LLOYD WARD & ASSOCIATES, P.C., a
Texas Domestic Professional Corporation;
LLOYD WARD, P.C., a Texas Domestic
Professional Corporation; THE LLOYD
WARD GROUP, P.C., a Texas Domestic
Professional Corporation, LLOYD EUGENE
WARD and AMANDA GLEN WARD,
individually and on behalf of the marital
community; SILVER LEAF DEBT
SOLUTIONS, LLC, a Texas Limited
Liability Company; MICHAEL MILES,
individually and on behalf of the marital
community of MICHAEL MILES and JANE
DOE MILES; and JOHN and JANE DOES 1-
5,

Defendants.

NO. 12-2-01551-6

WARD DEFENDANTS' RULE 68
OFFER OF JUDGMENT TO
PLAINTIFF SHERRIE KAY GORDEN

TO: SHERRIE KAY GORDEN, plaintiff

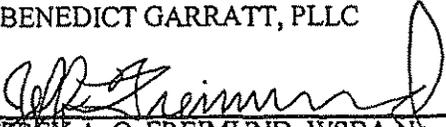
AND TO: ANDREW S. BIVIANO
The Scott Law Group, P.S.
926 W. Sprague Avenue, Suite 680
Spokane, WA 99201
Attorneys for Plaintiff Sherrie Kay Gorden

Pursuant to CR 68, defendants Lloyd Ward, Amanda Ward, Lloyd Ward, P.C., Lloyd

1 Ward & Associates, P.C., and The Lloyd Ward Group, P.C. (collectively "the Ward
2 defendants"), by and through their undersigned attorneys, hereby offer to allow judgment to
3 be taken against them and in favor of Plaintiff Sherrie Kay Gorden for the sum of \$11,147.73
4 (\$3,715.91 trebled for compensatory and exemplary damages), plus pre-judgment interest as
5 authorized by law accrued to the date of service of this offer, post-judgment interest accrued
6 from the date of entry of judgment to the date of payment of this offer, and reasonable
7 attorneys' fees, costs and expenses accrued to the date of service of this offer. The Ward
8 defendants further offer to allow judgment to be taken against them in the form of a
9 permanent injunction prohibiting the Ward defendants from engaging in future business
10 violative of chapter 18.28 RCW and/or chapter 19.86 RCW and from accepting any future
11 debt adjustment clients from the State of Washington, and in the form of a declaratory
12 judgment that the Ward defendants' debt adjusting agreement with Plaintiff Sherrie Kay
13 Gorden is void *ab initio*. This offer is intended to be in full satisfaction of all damages, as
14 well as legal and equitable relief sought by Sherrie Kay Gorden on her individual claims in
15 this action, and is not to be construed as an admission of any liability by the Ward defendants.
16
17

18 DATED this 9th day of May, 2013.

19
20 FREIMUND JACKSON TARDIF
& BENEDICT GARRATT, PLLC

21 
22 JEFFREY A. O. FREIMUND, WSBA No. 17384
23 Freimund Jackson Tardif & Benedict Garratt, PLLC
24 711 Capitol Way South, Suite 602
Olympia, WA 98501
25 Telephone: (360) 534-9960
26 Fax: (360) 534-9959
jeff@fitlaw.com
Attorney for Ward Defendants

CERTIFICATE OF SERVICE

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I hereby certify that I caused the foregoing document to be served on all parties of record as follows:

Darrell W. Scott
Boyd M. Mayo
Matthew J. Zuchetto
Andrew S. Biviano
The Scott Law Group, P.S.
926 W. Sprague Avenue, Suite 680
Spokane, WA 99201

- U. S. Mail
- Hand Delivery
- Facsimile
- E-Mail
- Legal Messenger

Attorneys for Plaintiffs

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

DATED this 9th day of May, 2013, at Olympia, WA.

Kath. Sisson
KATHRINE SISSON