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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

WASHINGTON STATE COURT OF APPEALS
DIVISION III

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

Plaintiffs-Respondent,

vs.

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 RESPONDENT

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I. INTRODUCTION

This appeal presents the opportunity to reaffirm and strengthen Washington's protections against the predatory business practices of the for-profit "debt settlement" industry that has arisen in response to the recent economic downturn. Unfair, deceptive, and abusive practices are endemic to the debt settlement industry, which often requires already financially distressed consumers to pay significant fees to the debt settlement company while being left worse off than they had been previously. *See Carlsen v. Global Client Solutions*, 171 Wn.2d 486, 502, 256 P.3d 321 (2011) (CHAMBERS, J. concurring).

The present case arises from a debt settlement company's attempt to insulate itself from legal liability through the use of arbitration provisions that many courts have already deemed substantively unconscionable. This case also presents an issue of first impression raised by the fact that the debt settlement program at issue was offered as a legal service provided by a law firm. The Spokane County Superior Court found that the attorney Defendants violated their fiduciary duties to their clients by requiring them to accept, without explanation or consultation, an arbitration provision that strips them of numerous legal protections, making the arbitration provision both procedurally and substantively unconscionable. The trial court also rejected Defendants' argument that

the court lacked personal jurisdiction, finding that Plaintiffs had alleged sufficient minimum contacts with the State of Washington.

After filing a notice of appeal, 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”) made CR 68 offers of judgment to both named plaintiffs, only one of which was accepted. The Ward Defendants now argue, erroneously, that the offers of judgment render this case moot.

The Ward Defendants’ arguments are unsupported by legal precedent and inconsistent with all notions of fairness and substantial justice. This Court should, therefore, affirm the ruling of the trial court.

II. STATEMENT OF THE CASE

A. Nature of Underlying Dispute

Plaintiffs/Respondents Sherrie Kay Gorden and Debbie Kay Miller, along with the members of the proposed class they seek to represent, are financially distressed and vulnerable Washington residents who have been victimized by the Ward Defendants’ illegal debt adjusting scheme. Ms. Gorden found herself with unmanageable debt after a diagnosis of leukemia caused her to lose her job and health insurance. CP 194, ¶¶ 3-4. Ms. Miller is a single mother and small business owner who,

like many people, experienced financial difficulty in recent years. CP 189, ¶¶ 3-4.

After seeing advertisements on the Internet, Ms. Gorden and Ms. Miller enrolled in the Ward Defendants' debt settlement program and electronically signed Client Services Agreements substantially similar to the exemplar provided to the Court by the Ward Defendants. CP 189, 194, ¶¶ 5-7; CP 36-38. The Client Services Agreement is an attorney retainer agreement. CP 36 ("By this Agreement, Client retains Attorney for the limited and express purposes of providing legal and administrative services limited to Savings and Debt Negotiation with respect to Client's existing debt and current creditors, as identified by Client.").

The attorney retainer agreement contains a number of provisions that purport to deprive the client of significant legal rights and access to a legal forum, including a portion that reads, in part: "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." CP 37, ¶ 9. Midway through Paragraph 10, which is quite lengthy, the Agreement goes on to state:

If, after giving LWG thirty (30) days notice of any complaint, you remain unsatisfied with LWG's response to your complaint, you hereby agree to mediate and/or arbitrate any complaint against Firm prior to the initiation of any public or private complaints or claims of any kind against LWG or its attorneys. You agree to submit any dispute over the amount of fees charged to you to the Fee Dispute Committee of the Collin County Bar Association, State Bar of Texas. Client understands that this agreement is performable in Collin County, Texas and hereby consents to venue and jurisdiction in Collin County, Texas under Texas state law for any dispute arising hereunder. 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 the parties. The arbitrator's award will be final and binding and judgment may be entered in any court of competent jurisdiction.

CP 37, ¶ 10.

No attorney or attorney's representative discussed these provisions with Ms. Miller or Ms. Gorden, or advised them of the rights that were at stake. CP 189, ¶ 8; CP 194, ¶ 7. Ms. Gorden and Ms. Miller were never counseled or advised regarding the consequences of relinquishing the legal protections provided by the Washington State law or of the protections provided by Texas law, which in fact provides zero protection to consumers residing outside of Texas. *Id.* See Tex. Finance Code § 394.202(4) ("Consumer" means an individual who resides in this state and seeks a debt management service or enters a debt management service

agreement.”). Ms. Gorden and Ms. Miller were never informed of the advantages or disadvantages of arbitration, including the requirement that they must bring arbitration claims in Texas. CP 189, ¶ 8; CP 194, ¶ 7. Moreover, no one explained the inconsistent and mutually exclusive venue provisions, one of which states that venue and jurisdiction is exclusively in Dallas County, Texas, while another states that venue and jurisdiction shall be in Collin County, Texas. *Id.*; CP 37 ¶¶ 9-10.

Both Ms. Gorden and Ms. Miller made monthly payments as required under the Defendants’ debt settlement program: Ms. Gorden paid several thousand dollars, while Ms. Miller paid \$800. CP 189, ¶ 7; CP 194 ¶¶ 6,8. After getting continued calls from creditors, Ms. Gorden and Ms. Miller each contacted the Defendants and learned that none of the money they paid into the program had been paid to creditors; rather, the Defendants had taken most, or all, of the money as their own fees and would not provide a refund. CP 190, ¶¶ 9-10; CP 194, ¶¶ 8,12. As a result, Ms. Gorden and Ms. Miller were left in worse financial situations than before they entered the program, with increased debt, less money available to pay debts, and damaged credit scores. CP 190, ¶ 11, 194, ¶¶ 11-12. Both have limited incomes and lack the resources to travel to Texas to arbitrate their claims. *Id.*

The Complaint brought by Ms. Gorden and Ms. Miller alleges that Defendants are engaged in the for-profit business of debt adjusting and subject to Washington's Debt Adjusting Act, chapter 18.28 RCW ("DAA"). CP 15-17. The Complaint further contends that Defendants violated the DAA and the Washington Consumer Protection Act ("CPA") by, among other things, charging predatory fees prohibited by RCW 18.28.080, as well as breached fiduciary duties. *Id.* Ms. Gorden and Ms. Miller also seek injunctive relief. CP 17-18. The action is brought on behalf of Plaintiffs as well as a proposed class of all Washington residents who have paid debt adjuster fees to Defendants in violation of Washington law. CP 18-21. Over five hundred Washington residents have contracted with, or paid fees to, Defendants, which fees may exceed one million dollars. CP 87, ¶ 2.

B. Appellants' Roles in the Debt Settlement Program

As alleged in the Complaint, each named Defendant is, or at least has been, involved in the debt settlement program. CP 3-22, 86-97. Appellants acknowledge that Lloyd Ward Group, P.C., is a contracting party to the Client Services Agreement. AOB, p. 8. Another Defendant, Lloyd Ward, P.C., is listed as the contracting party in the Client Service Agreement provided by Appellants. CP 36, ¶ 1. Moreover, the Agreement

is printed on letterhead for “Lloyd Ward, P.C.” and “Lloyd Ward, Attorney at Law.” CP 36.

The law firm of Lloyd Ward and Associates also has a role in the alleged scheme: once enrolled in the program, Plaintiff Gorden was provided a “Debt Relief Package” from Lloyd Ward and Associates that refers to her as a “Valued Lloyd Ward and Associates Client.” CP 96. Moreover, the email address that is used on the enrollment contract letterhead refers to “Lloydward.com,” which is a website for Lloyd Ward & Associates. CP 36, 91-93. The website for Lloyd Ward and Associates advertised debt negotiation services and encouraged consumers to contact the firm. CP 92. As of December 7, 2011, the website proclaimed: “**Our program is guaranteed in writing to work or your fees will be returned!** Take the next step and talk to us. 972-361-0036.” *Id.* (emphasis in original).

Lastly, the individual Defendants have admitted to directing the actions of one or more corporate Defendants. Attorney Lloyd Ward is the sole officer and director of Lloyd Ward P.C., Lloyd Ward Group, P.C., and Lloyd Ward and Associates, P.C. CP 29, ¶ 2. Amanda Ward is the director of marketing for Lloyd Ward & Associates, with responsibilities that include the design and maintenance of its website. CP 24, ¶ 2.

C. Course of Proceedings Below

On November 21, 2012, roughly six months after having been served with the Complaint, Ward Defendants moved to compel arbitration and to dismiss based on a lack of subject matter and personal jurisdiction. CP 42-62, 205-19. The trial court denied this motion in its entirety, finding that (1) the arbitration was unenforceable as a result of procedural and substantive unconscionability and (2) the *prima facie* allegations in the Complaint were sufficient to confer personal jurisdiction over all defendants. CP 222-24, RP 32-40. The trial court certified its ruling as final judgment under CR 54(b), and Appellants lodged a timely notice of appeal. CP 223, 226-7.

After filing the notice of the present appeal, the Ward Defendants made CR 68 Offers of Judgment to both Plaintiffs on their individual claims, without offering any relief to the class. Appellants' Opening Brief (hereinafter "AOB"), App. A & B. Ms. Gorden chose to accept the Ward Defendants' CR 68 offer on her individual claims; Ms. Miller did not. *Id.*, App. C. Plaintiffs and the class have not obtained any recovery or injunctive relief against Defendants Silver Leaf Debt Solutions or Michael Miles, who are not parties to this appeal.

Further proceedings have been stayed pending resolution of this appeal, with the exception of the entry of a Stipulated Judgment in favor of Plaintiff Sherrie Gorden against Appellants. **Appendix A.**

III. ARGUMENT

A. The Court Has Subject Matter Jurisdiction Because the Arbitration Clause Is Unenforceable.

Under the Federal Arbitration Act, arbitration clauses are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In recent decisions, the U.S. Supreme Court has reaffirmed that generally applicable state law contract defenses such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements without contravening the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742, 751 (2011).

“In Washington, either substantive *or* procedural unconscionability is sufficient to void a contract. *Gandee v. LDL Freedom Enterprises*, 176 Wn.2d 598, 603, 293 P.3d 1197, 1199 (2013) (emphasis in original). Substantive unconscionability involves “those cases where a clause or term in the contract is alleged to be one-sided or overly harsh,” whereas procedural unconscionability relates to “impropriety during the process of forming a contract.” *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896

P.2d 1258 (1995) (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). The trial court found the arbitration clause at issue to be both substantively and procedurally unconscionable, and thus unenforceable. This ruling should be affirmed.

1. Standard of Review.

Arbitrability is a question of law that Washington Courts of Appeal review *de novo*. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009); RCW 7.04A.280(1)(a); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45, 17 P.3d 1266 (2001). The burden of proof is on the party seeking to avoid arbitration. *Satomi*, 167 Wn.2d at 797; *Stein*, 105 Wn. App. at 48.

2. Courts, Rather Than an Arbitrator, Are to Determine the Validity of the Arbitration Agreement.

Washington law firmly establishes that challenges to the enforceability of an arbitration clause are to be decided by a Court rather than an arbitrator. Washington's Uniform Arbitration Act expressly provides: "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060(2). The Act further states: "If the refusing party opposes the motion [to arbitrate], the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to

arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.” RCW 7.04A.070(1). *See also River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 233, 272 P.3d 289 (2012) (affirming statutory intent to give courts authority to decide questions of arbitrability).

Federal case law is equally clear that a “question of arbitrability” is “an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.” *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). *See also Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (“[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide.”); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010) (“[W]hen a plaintiff argues that an arbitration clause, standing alone, is unenforceable—for reasons independent of any reasons the remainder of the contract might be invalid—that is a question to be decided by the court.”).

Appellants argue that the Court lacks the ability to decide the question of arbitrability because the enforceability of the arbitration clause

is inseparable from the issue of whether the contract as a whole is enforceable, and because the parties clearly and unmistakably delegated the authority to decide arbitrability to the arbitrator. Appellants are wrong on both counts.

The Complaint alleges that the arbitration clause, standing alone, is unenforceable for an entirely different and independent reason than the contract itself is illegal. Allegations of unconscionability are directed only at the arbitration provision. *See, e.g.*, CP 12-13, ¶¶ 4.31-4.32. Plaintiffs allege, by contrast, that the debt settlement contract should be set aside solely because the illegal fee provisions contained therein violate Washington’s Debt Adjusting Act and Consumer Protection Act. CP 12-15, ¶¶ 4.17-4.25; *see* RCW 18.28.090 (“If a debt adjuster contracts for, receives or makes any charge in excess of the maximums permitted by this chapter, except as the result of an accidental and bona fide error, the debt adjuster’s contract with the debtor shall be void.”). The record, thus, leaves no doubt that Plaintiffs challenge the validity of the arbitration provision for reasons other than those that make the contract itself invalid, meaning that the enforceability of the arbitration clause is for the Court to decide. *Bridge Fund Capital Corp.*, 622 F.3d at 1000.

Appellants are also incorrect in their claim that the parties “clearly and unmistakably” agreed to delegate to the arbitrator the authority to

determine the enforceability of the arbitration agreement. Appellants claim that a single reference in the lengthy arbitration clause to the “prevailing rules and procedures of the American Arbitration Association” serves as the clear and unmistakable delegation. AOB, p. 16. This argument is deficient on its face, as an oblique reference that layperson consumers would not understand without conducting independent legal research is, in fact, the opposite of “clear and unmistakable.”

Appellants then refer to cases from various federal district courts in other states, including a case that points to a federal circuit split on this issue. *Id.*, citing *Sys. Research & Applications Corp. v. Rohde & Schwarz Fed. Sys.*, 840 F. Supp. 2d 935, 941 (E.D. Va. 2012). These non-binding decisions are inconsistent with Washington jurisprudence. In at least three cases, the Washington Supreme Court has considered arbitration clauses containing similar references to the rules of the American Arbitration Association; in all three instances the Court went on to determine the issue of arbitrability. *Gandee*, 176 Wn.2d at 602; *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 338, 103 P.3d 773 (2004); *Zuver v. Airtouch Commc'ns*, 153 Wn.2d 293, 299, 103 P.3d 753 (2004). In light of these decisions and the plain language of Washington’s Uniform Arbitration Act, the issue of arbitrability is not for the arbitrator to decide.

Lastly, all of the factors indicating procedural and substantive unconscionability, discussed below, apply with equal weight to any alleged delegation provision. The fiduciary duties created by the attorney-client relationship would require Appellants to counsel clients on the significance of the legal rights being taken away by a material term in an attorney-client retainer agreement, including a delegation provision; the lack of any such consultation would make the provision procedurally unconscionable. Similarly, the delegation provision would create the same financial burdens and obstacles as the arbitration provision itself, which the trial court found to be substantively unconscionable. Thus, the Court has the authority to resolve the question of arbitrability.

3. The Arbitration Clause is Procedurally Unconscionable.

Procedural unconscionability relates “to impropriety during the process of forming a contract.” *Nelson v. McGoldrick*, 127 Wn.2d at 131. It involves “blatant unfairness in the bargaining process and a lack of meaningful choice.” *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 518, 210 P.3d 318 (2009). “Procedural unconscionability is determined in light of the totality of the circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were hidden in a maze of fine print.” *Id.* at 518-19

(internal quotations and citations omitted); *see also Adler*, 153 Wn.2d at 347. If the contract includes limitations on liability, those limitations “must be negotiated between the parties and set forth with particularity in a conspicuous manner.” *Schroeder*, 86 Wn.2d at 258.

Additional duties are imposed upon attorneys who seek to enforce arbitration provisions. “In much of their daily work, lawyers act as a fiduciary for the client, in that they have a duty to act in and for the client’s best interests at all times and to act in complete honesty and good faith to honor the trust and confidence placed in them.” *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991). “These duties require full communication and candor, as well as performance meeting professional standards.” *Id.* In Washington, attorney fee agreements that violate the Washington Rules of Professional Conduct are against policy and unenforceable. *Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007) (citing *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004)).

Two Washington Rules of Professional Conduct are relevant here. Under Rule 1.5(a)(9), a client must receive “a reasonable and fair disclosure of material elements of the fee agreement.” Under Rule 1.4(b), a “lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the

representation.” The Washington State Bar Association has, accordingly, issued an advisory opinion that when “including an arbitration provision in a fee agreement with a client, . . . it (1) must be consistent with a lawyer’s fiduciary obligations and statutory law . . . ; and (2) it properly **must be done only with full disclosure to the client.**” WSBA Advisory Op. 1670 (1996) (emphasis added). This opinion is consistent with the conclusion of the American Bar Association, which states that a lawyer must inform the client of all “the advantages and disadvantages of arbitration” such that the client has “sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement.” ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 02-425 (2002). A number of courts have reached the same conclusion. *See, e.g., Wong v. Michael Kennedy, P.C.*, 853 F. Supp. 73, 80 (E.D.N.Y. 1994) (lawyer who drafts fee agreements stands in fiduciary relationship to client and has burden of showing agreement is fair, reasonable, and fully known and understood by client); *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 10, 207 Cal. App. 3d 1501 (Cal. App. 2d Dist. 1989) (finding “client must be fully advised of the possible consequences of [an arbitration agreement]” for agreement to be binding) (citing Cal. Compendium of Prof’l Resp., pt. IIA, State Bar Formal Op. No. 1977-47, p. 1); RPC 1.4(b) (“A lawyer shall explain a

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.).

The precise issue before the Court was recently litigated in U.S. District Court for the Western District of Washington. *Smith v. Legal Helpers Debt Resolution*, 2011 U.S. Dist. LEXIS 153938 (W.D. Wash., Oct. 24, 2011) (provided at CP 99-112). In that case, the defendant law firm (also engaged in debt adjusting) attempted to compel arbitration based on a contractual provision similar to the one at issue; the court denied the motion to compel, holding that the arbitration provision was procedurally unconscionable as a result of the defendants' failure to fulfill their fiduciary obligations as lawyers. CP 108-111. As here, the attorneys failed to discuss the arbitration clause with plaintiff in order to provide an adequate disclosure of its material elements and the rights being relinquished. CP 111.

The district court's reasoning and analysis apply equally to the present case. Here, attorney Lloyd Ward and his associated law firms attempt to enforce an arbitration agreement that was imposed upon Washington clients in violation of an attorney's fiduciary duties. Mr. Ward has testified that neither he nor any of his employees would have any direct contact with legal clients unless answering or returning a call placed by the client. CP 30, ¶ 5. Appellants failed to negotiate, or even

discuss, the arbitration clause with Plaintiffs, failed to provide full disclosure of the rights that Plaintiffs were relinquishing (most critically, the legal protections of Washington's CPA), failed to provide sufficient information to permit Plaintiffs to make informed decisions about whether to agree to the arbitration, venue, and choice of law provisions, and hid the arbitration provision in a maze of fine print among several other documents. CP 36-38; 189, ¶ 8; 194, ¶ 8. Thus, the inclusion of the arbitration provision violated the Washington State Bar Association's Rules of Professional Conduct, the American Bar Association's ethical guidelines, Appellants' fiduciary duties as attorneys, and public policy. These violations clearly involve impropriety during the process of forming the attorney-client contract and blatant unfairness in the bargaining process, making the arbitration clause procedurally unconscionable and unenforceable.

In response, Appellants argue that Texas law should apply here because (1) Lloyd Ward is only licensed to practice law in Texas, and (2) Appellants included in the Client Services Contract a statement that the services provided "occur entirely within the State of Texas" and are "governed by the laws of the State of Texas." AOB, p. 22. Appellants then ask the Court to hold that the Federal Arbitration Act prevents the Court from requiring attorneys to advise clients on the consequences of

arbitration provisions contained in representation agreements. *Id.* Appellants' position is without merit.

a. Washington's Laws and Rules Govern.

In Washington, the Supreme Court "has exclusive, inherent power to admit, enroll, discipline, and disbar attorneys." *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163 (1984). The Court's power to regulate the practice of law "is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients." *Seattle v. Ratliff*, 100 Wn.2d 212, 215, 667 P.2d 630, 632 (1983) (citation omitted).

It is well established that attorneys are subject to regulation by all of the states in which they choose to practice. Washington Rule of Professional Conduct 8.5(a) states: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct." Texas advises its lawyers of the same. *See, e.g.*, Tex. R. Prof'l Conduct 8.05 cmt 2 ("In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. . . . If their activity in

another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction.”).

Mr. Ward and his law firms have entered into ongoing, multi-year attorney-client agreements with, and have charged and collected substantial legal fees from, hundreds of Washington residents. CP 87, ¶ 2. In doing so, they have established a “systematic and continuous presence in this jurisdiction for the practice of law.” *See* RPC 5.5(b)(1) (prohibiting such conduct unless the attorney is licensed to practice in Washington). *See also* RPC 5.5, cmt. 4 (“Presence may be systematic and continuous even if the lawyer is not physically present here.”). Mr. Ward and his law firms, therefore, must comply with the Washington Rules of Professional Conduct. *See* RPC 8.5(b)(2).

Nor can Appellants rely on the choice of law provision in the Client Services Agreement. Washington courts void a choice of law provision where “the chosen state has no substantial relationship to the parties or . . . the application of the chosen law would be contrary to a fundamental policy of Washington.” *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 267, 259 P.3d 129 (2011) (citations omitted). Courts apply the “most significant relationship test,” which weighs the relative importance of the (a) place of contracting, (b) the place of negotiation of the contract, (c) the place of performance of the contract, (d) the location

of the subject matter of the contract, and (e) the domicile, residence, or place of information of the parties. *Id.*; *see also McKee v. AT&T Corp.*, 164 Wn.2d 372, 384-85, 191 P.3d 845 (2008).

Here, Washington is the place of contracting, the place where Plaintiffs reside, and is the location of the subject matter (that being the money paid from Plaintiffs' bank accounts). There appears to have been neither negotiation nor performance on the contracts. *See* CP 189-90, 194-95. Thus, Washington has the most significant relationship to the parties, while Texas lacks any substantial relationship.

Moreover, there is no question that the application of Texas law would be contrary to a fundamental policy of Washington, as it would deprive Plaintiffs and proposed class members of the benefits of the Washington CPA, a remedial statute intended to deter and punish deceptive trade practices committed by businesses dealing with the Washington public. *See* RCW 19.86.920 (to achieve its purposes, the CPA is to be "liberally construed that its beneficial purposes may be served"); *see also Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (The statute is intended to afford consumers readily available remedies against consumer fraud through "injunctive relief, damages, attorney fees and costs, and treble damages."). Instead, it would replace the Washington CPA with Texas law, which in fact provides no

protection to consumers residing outside of Texas. Tex. Finance Code § 394.202(4) (“‘Consumer’ means an individual who resides in this state and seeks a debt management service or enters a debt management service agreement.”). Thus, the Court should void the choice of law provision.

b. The FAA Does Not Preempt Rules Enforcing Attorneys’ Fiduciary Duties.

Finally, Appellants argue that the trial court’s ruling on procedural unconscionability “should be rejected because it prohibits arbitration of a particular type of claim—i.e., claims involving attorney-client agreements.” AOB, p. 22. Appellants mischaracterize the trial court’s decision.

The ruling of the trial court in no way prohibits attorneys and clients from entering into pre-dispute arbitration agreements. RP 33-38. The trial court simply found, consistent with the rules of professional conduct, that lawyers’ fiduciary duties require them to enter into an arbitration agreement with full disclosure to the client so that the client may make an informed decision regarding the representation. *Id.*; see WSBA Advisory Op. 1670 (1996); RPC 1.4(b). This ruling is consistent with the other myriad fiduciary duties attorneys have toward clients, such as rules requiring attorneys to disclose to clients potential conflicts of interest and prohibiting attorneys from making an agreement prospectively

limiting the attorney's malpractice liability unless it is permitted by law and the client is independently represented in making the agreement. RPC 1.7(b)(4); 1.8(h). The trial court treated arbitration provisions the same as any other material term in an attorney-client agreement.

The U.S. Supreme Court decisions cited by Appellants are therefore inapposite because they only concern situations in which state law was used to prohibit arbitration altogether or impose procedures that defeat the purpose of arbitration, despite the fact that the arbitration clauses were otherwise conscionable. *See Gandee*, 176 Wn.2d at 610 (noting that *Concepcion* overturned an overbroad rule invalidating an arbitration clause that might otherwise be conscionable, and finding it inapplicable to case in which clause was unconscionable.) The present case is fundamentally different, as there is no attempt to disfavor, prevent, or modify arbitration provisions that are otherwise conscionable. The trial court's ruling simply means that arbitration provisions, like every other part of attorney-client agreements, must comport with attorneys' fiduciary and professional responsibilities.

4. **The Arbitration Clause is Substantively Unconscionable Because It Overthrows Washington's CPA And Imposes Unreasonable Financial Burdens on Consumers.**

Substantive unconscionability "involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh."

Schroeder, 86 Wn.2d at 260. A clause that “unilaterally and severely” limits one side’s remedies is substantively unconscionable. *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) (citing *Scott v. Cingular Wireless*, 160 Wn.2d 843, 857, 161 P.3d 1000 (2007)). Arbitration clauses, in this regard, are enforceable only where they permit a plaintiff to effectively vindicate her rights. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). Where arbitration costs make the arbitration prohibitively expensive, a party is effectively denied a forum to vindicate his or her claim and the arbitration clause, as a consequence, may be deemed substantively unconscionable. *Zuver*, 153 Wn.2d at 307; *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 467-68, 45 P.3d 594 (2002).

Moreover, arbitration provisions are a specialized kind of forum selection clause that should be held invalid and unenforceable if they violate the strong public policy of the state. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 838, n.7, 161 P.3d 1016 (2007) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)). A forum selection clause that “seriously impairs” a plaintiff’s ability to

bring suit to enforce the CPA violates strong public policy of Washington State. *Id.* at 837.

In *Dix*, the Washington Supreme Court found a forum selection clause substantively unconscionable because it transferred jurisdiction to an out of state jurisdiction where the plaintiff's class action would be prohibited. *Id.* at 828, 840-41. The Court's holding was rooted in the critical importance of private citizen actions under the Washington CPA, which it wrote was a "significant aspect" of the dual enforcement scheme. *Id.* at 837. Consumer actions to enforce Wash. Rev. Code § 19.86.020 necessarily serve "the public interest" and operate to vindicate both the rights of individual plaintiffs and the public at large. *Id.* at 837.

The arbitration clause at issue similarly deprives Plaintiffs of the ability to bring suit to enforce the CPA through an express¹ provision that the laws of the State of Texas shall apply. CP 37, ¶¶ 9, 10. Worse, as already discussed, the CPA is not replaced by a similar statute, as Texas law does not protect Washington consumers. The arbitration clause therefore violates the rights of the individual plaintiffs, as well as the public interest, by precluding enforcement of a statute deemed critically important to the protection of Washington citizens. Thus, as many courts

¹ Contrary to Appellants' characterization of this as "speculative," the deprivation of Washington law is spelled out in the plain language of the contract.

have already held, the arbitration clause violates Washington's strong public policy and is unenforceable. *See Bradley v. Morgan Drexen, Inc.*, 2009 U.S. Dist. LEXIS 86880 at *9-11 (E.D. Wash., Aug. 31, 2009), CP 127-131; *Bersante v. Noteworld*, Spokane Superior Court Cause No. 11-2-01145-8, Order (July 28, 2011), CP 133-34; *Carlsen v. Freedom Debt Relief, LLC*, 2010 U.S. Dist. LEXIS 29056 (E.D. Wash. Mar. 26, 2010) CP 138-147.

Further, Appellants included in the arbitration agreement provisions that make it financially impossible for the victims of their scheme to vindicate their rights. The travel and housing costs alone for a one-day hearing in Texas attended by a consumer and her attorney would likely exceed \$2,000. CP 199, ¶ 4. On top of this, the arbitration provision requires both parties to bear the costs and fees of the arbitrator. CP 37, ¶ 10. Neither Plaintiff can afford these expenses. CP 190, ¶ 12, 195, ¶ 13. Indeed, Plaintiffs, like other class members are, by definition, financially distressed individuals, and it would not make economic sense to do so when the expenses of filing a claim would approach or exceed the amount of recovery.

In short, after specifically targeting and extracting exorbitant fees from Washington consumers experiencing acute financial hardship, Appellants included an arbitration provision designed to deprive people of

limited pecuniary means of a legal basis or a forum for vindication of their rights. The provision is therefore illusory, substantively unconscionable, and unenforceable. *Dix*, 160 Wn.2d at 837. *Gandee*, 176 Wn.2d at 605.

5. The Court Should Decline to Rewrite the Unconscionable Arbitration Provision.

Now that litigation has commenced and Appellants are faced with the negative consequences of their unconscionable arbitration provisions, they attempt to escape these consequences by offering to “waive” the provisions that the Court finds unconscionable, which they suggest moots the challenges to these provisions. AOB, p. 26. This is incorrect.

An “after-the-fact” offer to waive the unconscionable provisions cannot cure a contract’s illegality because the fairness of a contract is “generally interpreted as of the time of contracting, making any subsequent offer to waive unconscionable terms irrelevant.” *Gandee*, 176 Wn.2d at 608. While the Washington Supreme Court recognized an exception to this rule in *Zuver*, in the context of an arbitration agreement that contained a severance clause *in the arbitration agreement itself*, 153 Wn.2d at 320, it recently made clear that “*Zuver* did not announce a broad rule requiring courts to simply accept all offers of waiver.” *Gandee*, 176 Wn.2d at 608.

To the contrary, “[s]trong reasons exist for encouraging contracts to be conscionable at the time they are written and allowing after-the-fact waiver to moot unconscionability challenges is the **exception**, not the rule.” *Id.* (emphasis added). “Parties should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver. This would encourage rather than discourage one-sided agreements and would lead to increased litigation. Any other approach is inconsistent with the principle that contracts—especially the adhesion contracts common today—should be conscionable and fairly drafted.” *Id.* at 608-609. *See also Mckee v. AT&T*, 164 Wn.2d at 403 (“Permitting severability as requested by AT&T in the face of a contract permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.”).

Moreover, the Supreme Court recently pointed out that an offer to waive unconscionable terms conditioned upon a court first finding them unconscionable is “essentially meaningless.” *Gandee*, 176 Wn.2d at 608. After a judicial determination of unconscionability has been made, a party has no choice but to “waive” them. *Id.*

The Supreme Court's reasoning applies fully here. The unconscionable aspects of the Client Services Agreement reflect a much larger insidious pattern in which Appellants attempt to tip the scales entirely in their favor, and thus cannot be cured by severance. First and foremost, as the trial court noted, severance cannot cure procedural unconscionability. RP 37 (“[P]rocedurally if it is unconscionable, that goes to the very heart of the arbitration provision.”). The blatant unfairness in the bargaining process and a lack of meaningful choice permanently tainted the entire agreement at the time of its formation, and cannot be cured after the fact.

Second, the substantively unconscionable terms permeate the entire agreement. As part and parcel of their predatory scheme to extract illegal fees from vulnerable consumers, Appellants required consumers to sign a procedurally unconscionable one-sided adhesion contract that contains a burdensome and confusing arbitration and venue provision that makes it financially infeasible to bring a legal action, as well as a choice of law provision that deprives consumers of critical legal protections. These provisions are a transparent attempt to insulate the drafter from all legal liability and have the effect of deterring consumers from even attempting to vindicate their legal rights, out of fear that they would incur substantial additional costs and fees. If severance were permitted,

dominant parties like Appellants would still be able to improperly benefit from the deterrent effect these unconscionable provisions have on consumers, with absolutely no downside to doing so.

Third, Appellants' offer to "waive" the venue and choice of law provisions is illusory and meaningless. The offer, made in briefing more than six months after litigation commenced, is conditioned upon the Court first finding that the provisions are unconscionable and that Plaintiffs are able to prove hardship. CP 32 §§ 10, 11; CP 61. Thus, Appellants offer to waive nothing: once the provisions have been found to be unenforceable, there is nothing left to waive. Moreover, Appellants have not offered to remove the unconscionable terms for all Washington consumers, but only the two named Plaintiffs, and only upon specific proof of hardship. *Id.* Appellants have shown no sincere interest in conforming their conduct to Washington law.

Because the unconscionable provisions are part of an insidious pattern and pervade the entire arbitration agreement, severance is inappropriate. *See Gandee*, 176 Wn.2d at 608-609; *Adler*, 153 Wn.2d at 359 (where a defendant engages in an "insidious pattern" of seeking to tip the scales in its favor by inserting unconscionable provisions in an arbitration agreement, courts may decline to sever the unconscionable

provisions). The Court should instead rule the entire arbitration provision to be unenforceable.

B. The Court Has Personal Jurisdiction Over All Defendants.

1. Appellants Apply an Incorrect Standard of Review.

A trial court's assertion of personal jurisdiction is a question of law reviewed *de novo*, with the plaintiff bearing the burden of proving that jurisdiction exists. *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991). The question of whether this Court has personal jurisdiction over each Defendant, consistent with due process, is resolved through examination of the *prima facie* allegations made in the complaint and whether those allegations, taken as true, are sufficient to establish liability under Washington's CPA. *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 563, 226 P.3d 141 (2010); *Shaffer v. McFadden*, 125 Wn. App. 364, 370, 104 P.3d 742 (2005).

Appellants apply the incorrect standard of review when they repeatedly argue that Plaintiffs have failed to present sufficient *evidence* to support personal jurisdiction and base their arguments on self-serving declarations that have not yet been investigated or contested through discovery. AOB, p. 30 *et seq.* In so doing, Appellants essentially ask the Court to make factual findings rather than take as true the *prima facie*

allegations in the Complaint. This error permeates and undermines virtually all of Appellants' arguments.

2. Requirements For Personal Jurisdiction.

Washington's long-arm jurisdiction statute provides, in relevant part:

(1) Any person, whether or not a citizen or resident of this state, who *in person or through an agent* does any of the acts in this section enumerated, thereby submits said person, and if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state; . . .

RCW 4.28.185 (emphasis added).

Because Plaintiffs allege that Defendants violated Washington's Consumer Protection Act, Chapter 19.86 RCW, that statute's long-arm jurisdiction provision is also relevant. It provides:

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.

RCW 19.86.160.

Washington's long-arm statutes permit the exercise of jurisdiction to the full extent of the due process clause of the United States Constitution. *Shute v. Carnival Cruise Lines, Inc.*, 113 Wn.2d 763, 766-67, 783 P.2d 78 (1989), *rev'd on other grounds by Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991). This analysis varies based on whether courts are exercising general or specific jurisdiction.

The Court can exercise general jurisdiction over "a nonresident defendant 'doing business' in this state, that is, transacting substantial and continuous business of such character as to give rise to a legal obligation." *MBM Fisheries*, 60 Wn. App. at 418. Five factors are considered in determining whether the exercise of general jurisdiction is consistent with due process: (1) the interest of Washington State in providing a forum for its residents; (2) the ease with which Plaintiffs could gain access to another forum; (3) the amount, kind and continuity of activities carried on by the nonresident defendant in the state; (4) the significance of economic benefits accruing to the nonresident defendant as a result of activities purposefully conducted in the state; and (5) the foreseeability of injury resulting from the use of the non-resident defendants' product. *Id.*, citing *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 57, 558 P.2d 764 (1977).

When examining whether specific personal jurisdiction exists, the due process analysis comprises a three-prong test:

(1) The . . . [defendant] must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963), *quoted in MBM Fisheries*, 60 Wn. App. at 423.

“Purposeful availment may be established by a nonresident defendant’s act of doing business in Washington,” and the “contact may be the initiation of a transaction outside the state in contemplation that some phase of it will take place in the forum state.” *CTVC of Hawaii, Co. v. Shinawatra*, 82 Wn. App. 699, 711, 919 P.2d 1243 (1996) (quotations omitted). Most relevant to this case, a “nonresident defendant may also purposefully act in Washington even though the defendant did not initiate contact with Washington ‘if a business relationship subsequently arises.’” *Id.*, quoting *Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 299, 647 P.2d 514 (1982).

Further, violations of Washington's CPA are the type of wrongful conduct that potentially imposes liability on corporate officers. *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 554, 599 P.2d 1271 (1979). An officer or director assumes individual liability for fraudulent conduct of his company where he exercises close control, direction, and management of the company such that the law as a matter of elemental justice ought to charge him or her with knowledge of the fraud. *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 754, 489 P.2d 923 (1971). When an officer participates in wrongful conduct or with knowledge approves of the conduct, both the corporation and the officer are liable under Washington's Consumer Protection Act. *Grayson*, 92 Wn.2d at 554.

Finally, a defendant cannot assert the "fiduciary shield doctrine" that shields employees from liability if jurisdiction is supported by the long-arm statute of the forum state. *Brink v. First Credit Resources*, 57 F. Supp. 2d 848, 858-59 (D. Ariz. 1999) (citing *Calder v. Jones*, 465 U.S. 783, 789, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984)). The personal jurisdiction contemplated under RCW 19.86.160, therefore, extends not only to the business entity that engages in unfair or deceptive practice, but also to managers and employees of the business responsible for the unfair or deceptive practice.

3. The *Prima Facie* Allegations Establish Jurisdiction.

The allegations in the Class Action Complaint satisfy the statutory and due process requirements set forth above. The Complaint details the numerous ways in which Defendants, acting in concert, are alleged to have violated numerous provisions of Washington's Debt Adjusting Act, chapter 18.28 RCW, which in turn constitutes a *per se* violation of the CPA. CP 8-17, ¶¶ 4.11-4.29, 5.1-5.9. These violations include contracting for, charging, and receiving excessive fees, engaging in unfair business schemes, failing to disclose material facts, and aiding and abetting others' unlawful conduct. *Id.* As such, Plaintiffs have provided sufficient factual support for their allegation that "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." *Id.*, ¶ 3.2.

Similarly, Plaintiffs have set forth the ways in which Defendants have regularly conducted business in Washington by soliciting business from Plaintiffs and the Class, entering into contracts with Washington consumers, and extracting money from Washington consumers. *Id.*, ¶¶ 3.2, 4.11-4.29, 5.1-5.9. Plaintiffs also allege that Defendants committed a tortious breach of fiduciary duties. *Id.*, 5.10-5.13. Plaintiffs have thus satisfied the requirements of RCW 4.28.185(1)(a) and (b).

The exercise of personal jurisdiction under the long-arm statutes fully comports with due process. The Court is able to exercise general jurisdiction, as all five of the relevant factors support this outcome. Washington State has a clear and compelling interest in providing a forum for its residents to enforce the CPA where, as here, Plaintiffs are economically unable to gain access to a forum in Texas and Texas law does not provide any protections to out-of-state residents. CP 190, 195; Tex. Finance Code § 394.202(4). The scope of the alleged illegal debt adjusting scheme satisfies the final three factors: it is alleged that Defendants purposefully contracted with and extracted exorbitant predatory fees from hundreds of Washington consumers over the course of several years, collecting approximately one million dollars in illegal fees from Washington consumers, with entirely foreseeable injury to Washington consumers. CP 3-22; CP 87, ¶ 2. After engaging in ongoing, continual, and substantial business relationships with hundreds of Washington consumers, thereby benefiting from the Washington marketplace and Washington laws, Defendants should have expected to be haled into Washington courts. *See, e.g., Raymond v. Robinson*, 104 Wn. App. 627, 15 P.3d 697 (2001).

The Court is also empowered to exercise specific personal jurisdiction under the three-part due process analysis. *MBM Fisheries*, 60

Wn. App. at 420. Appellants argue that jurisdiction is lacking because all of the key acts and transactions, except for the signing of the contracts, occurred in Texas. AOB, pp. 36-37. For factual support, Appellants rely on the self-serving and incorrect statement in their Client Services Agreement that all services occur entirely within the State of Texas.² *Id.* In fact, Plaintiffs, and presumably scores of other clients, received and sent contracts, information, correspondence, and money from Washington. CP 189, 194. Both Plaintiffs contacted Appellants from Washington in order to discover that none of their debt had been settled, meaning that no services were provided in Texas or elsewhere. *Id.* Thus, the only part of the business transaction that did occur—contracting and payment of illegal fees—took place in Washington.

Moreover, “a nonresident defendant may also purposefully act in Washington even though the defendant did not initiate contact with Washington if a business relationship subsequently arises.” *CTVC*, 82 Wn. App. at 711 (citation and internal quotation omitted). There is no question that a subsequent business relationship arose between the Ward Defendants and Plaintiffs. Indeed, Appellants purposefully acted and consummated transactions in Washington by soliciting hundreds of

² Appellants’ attempt to insulate themselves from liability in other states through the inclusion of this self-serving provision reveals their awareness of the fact that they were doing business in other states.

Washington residents to join their debt settlement program, entering into attorney-client relationships with hundreds of Washington residents, in Washington, and extracting approximately one million dollars in illegal fees from these residents. CP 3-22; CP 87, ¶ 2. The present cause of action under the CPA arises from these actions. The Court's assumption of jurisdiction is perfectly consistent with the traditional notions of fair play and substantial justice, given the quality, nature, and extent of the alleged illegal activities in Washington State, the inability of Plaintiffs and class members to pursue claims in Texas, and the critical protections of the CPA. Basic equity dictates that Appellants be held to account under Washington law.

The cases cited by Appellants are easily distinguishable from the facts of this case. For instance, the plaintiff in *MBM Fisheries* had physically travelled to Louisiana to deliver a boat to defendant for repair. 60 Wn. App. at 417. The defendant had done business with only four other Washington residents, and these past instances all involved boat repairs or sales that occurred in Louisiana. *Id.* The dispute in *CTVC v. Shinawatra* arose from an agreement between Washington corporations and foreign corporations to provide cable television service to Bangkok, Thailand, with the majority of negotiations and activities physically taking place in Thailand. 82 Wn. App. at 712-713. The facts of both cases are a

far cry from Appellants' deliberate decision to enter Washington's consumer marketplace, extract illegal fees from hundreds of consumers, and flout Washington law.

In short, the allegations in the Complaint meet the requirements of both long-arm statutes cited above, and satisfy due process requirements for both general and specific jurisdiction.

4. All Defendants Can Be Held Personally Liable.

Lastly, the Court should reject Appellants' argument that it lacks personal jurisdiction over Lloyd Ward and Associates, Lloyd Ward P.C., and Lloyd and Amanda Ward because these parties did not directly contract with Plaintiffs. Appellants claim that Lloyd Ward Group, P.C. (LWG) is "the only named defendant that arguably could have engaged in [debt settlement] practices" and "is the only Ward defendant with whom plaintiffs allege they entered into contracts for debt settlement," and that, at a consequence long-arm jurisdiction is lacking over all other Ward defendants. AOB, p. 31.

First, Appellants' claim is inaccurate and misleading. Lloyd Ward Group, P.C. is not the only defendant with whom plaintiffs allege they entered into contracts for debt settlement. Indeed, the plain language of the Client Service Agreement lists the contracting party as "Lloyd Ward

Group, LLC, an operating division of **Lloyd Ward, P.C.**” CP 36 (emphasis added). Moreover, the Agreement is printed on letterhead for “Lloyd Ward, P.C.” and “Lloyd Ward, Attorney at Law.” *Id.* The law firm of Lloyd Ward and Associates also clearly has a role in the scheme: once enrolled in the program, Plaintiff Gorden was provided a “Debt Relief Package” from Lloyd Ward and Associates that referred to her as a “Valued Lloyd Ward and Associates Client.” CP 96. The email address used on the enrollment contract letterhead refers to “Lloydward.com,” which is a website for Lloyd Ward & Associates. CP 36.

Second, the fact that not all parties directly contracted with Plaintiffs is irrelevant. The long-arm statutes clearly provide jurisdiction over defendants who engage in business or commit a tortious act in Washington, either in person or through an agent, or who engage in any conduct that CPA reprehends. RCW 4.28.185; 19.86.160. The CPA reprehends not only direct violations, but also aiding and abetting violations committed by others. RCW 18.28.190; *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 500, 256 P.3d 321 (2011). Plaintiffs have alleged that all Defendants aided and abetted the wrongful conduct of the other Defendants, which is sufficient to establish personal jurisdiction over all Defendants. CP 11, ¶ 4.15.

Lastly, Lloyd and Amanda Ward can each be held personally liable for their actions taken as officers and/or employees of the corporate Defendants. *Grayson*, 92 Wn.2d at 554; *Calder*, 465 U.S. at 789. Lloyd Ward is the founder, owner, and officer of all Lloyd Ward Corporate entities; Amanda Ward is an officer and/or employee (Director of Marketing) for at least one corporate Defendant, Lloyd Ward & Associates, P.C. CP 6, ¶¶ 2.4, 2.5; CP 24, 29. Each is alleged to have established, directed, approved, ratified and carried out the unfair business practices directed at Washington consumers detailed in the Complaint through the instrumentality of the corporate entities, and aided and abetted others engaged in unlawful activities. CP 6-22, ¶¶ 2.4, 2.5, 4.12, 4.13, 4.15, 4.29, 5.7. These uncontroverted allegations alone supply *prima facie* jurisdictional facts establishing personal jurisdiction over Lloyd and Amanda Ward pursuant to RCW 4.28.180 and RCW 19.86.160. *See, e.g., Casselberry v. Bay View Law Group, PC*, 2012 U.S. Dist. LEXIS 154260 (E.D. Wash. Oct. 26, 2012), CP 114-124; *Bradley v. Morgan Drexen, Inc.* 2009 U.S. Dist LEXIS 86880 (E.D. Wash., Aug. 31, 2009), CP 127-131; *Bronzich v. Persels*, 2012 U.S. Dist. LEXIS 127765 (E.D. Wash. Sept. 7, 2012), CP 159-187 (all finding personal jurisdiction over owners and officers of out-of-state law firms sued by Washington consumers under the CPA).

C. This Case is Not Moot.

After filing notice of appeal, Appellants have attempted to “pick off” the proposed class representatives through strategic CR 68 Offers of Judgment, and now argue that an unaccepted offer of judgment moots the case and deprives the Court of jurisdiction. Appellants’ strategy is based entirely on an incorrect interpretation of *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013), and must be rejected.

1. General Mootness Standards

“Mootness [is] the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (internal quotation marks omitted). “Generally, when a party settles all of his personal claims before appeal, an appeals court must dismiss the appeal as moot unless that party retains a personal stake in the case that satisfies the requirements of Article III.” *Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009). “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Chafin v. Chafin*, 568 U. S. ___, ___, 133 S. Ct. 1017, 185 L. Ed. 2d 1, 11 (2012) (internal quotation marks omitted).

2. **Genesis is Inapposite Because the Individual Claims Are Not Moot.**

While the Ward Defendants discuss *Genesis* at great length, they focus on the wrong question. The obvious antecedent issue in *Genesis*, and in the case at bar, is whether an unaccepted Rule 68 Offer of Judgment actually moots a plaintiff's individual claims. Only if this threshold question is answered in the affirmative is there any reason to broach the issue of whether the mooting of the individual claims also moots the class claims. Here, the individual claims are not moot.

First, the Ward Defendants have not offered all of the individual relief sought by Plaintiffs. The Complaint alleges that the arbitration clause that is the subject of this appeal, by itself, constitutes an unfair or deceptive practice under the Consumer Protection Act, is a violation of Defendants' fiduciary obligations as lawyers, and violates public policy. CP 14-15, ¶¶ 4.30-32. The relief sought by Plaintiffs, in their individual capacity, includes a request for an injunction prohibiting Defendants from engaging in further business violative of the Consumer Protection Act, which business would include the use of the subject arbitration clause. CP 21, ¶ 5. The Ward Defendants' offers of settlement plainly did not include the requested injunctive relief prohibiting use of the arbitration clause because, even with Ms. Gorden having accepted the offer, the Ward

Defendants continue in bringing this appeal. *See* Appendix A. As such, it is still possible for the Court to grant effectual relief to Plaintiffs because they retain a concrete interest in the outcome of the litigation.

Second, the offer of judgment cannot moot this case because Plaintiff Miller did not accept the offer. Appellants cannot rely on *Genesis* to argue to the contrary because the majority explicitly sidestepped this issue and chose to “assume, without deciding, that petitioners’ *Rule 68* offer mooted respondent’s individual claim,” despite the fact that the offer was unaccepted, based on the position taken by the plaintiff earlier in the litigation. 133 S.Ct. at 1529. Indeed, Appellants can cite no binding authority holding that an unaccepted offer of judgment moots a claim. AOB, p. 41 (citing cases from third and sixth circuits).

The minority opinion in *Genesis*, by contrast, squarely addressed Appellants’ position, and called it “wrong, wrong, and wrong again.” 133 S.Ct. at 1533. The four-justice dissent authored by Justice Kagan noted that the Court just recently held that “a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Id.*, citing *Chafin*, 133 S. Ct. at 1023. The dissent thus concludes:

By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit

remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer “leaves the matter as if no offer had ever been made.” *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 151, 7 S. Ct. 168, 30 L. Ed. 376 (1886). Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that “[a]n unaccepted offer is considered withdrawn.” Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.

Id. at 1533-34. Because the majority decision is based on an incorrect assumption that the respondent's case was moot, the dissent instructs: “Feel free to relegate the majority's decision to the furthest reaches of your mind,” and provides “a note to all other courts of appeals: Don't try this at home.” *Id.* at 1532, 1534.

The present case is not moot on an individual or class basis because it remains possible for the Court to grant effectual relief to the prevailing party. While Plaintiff Gorden has accepted judgment in her favor on her individual claims against Appellants, Plaintiff Miller did not accept. AOB, App. C. “An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.” CR 68. Thus, the matter is left “as if no offer had ever been made.” *Minneapolis & St. Louis R. Co.*, 119 U. S. at 151. Because no relief has actually been provided to Plaintiff Miller, and the relief offered

is incomplete, the case is not moot. *Chafin* 133 S. Ct. at 1023. (“As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.”) (citation omitted).

3. Genesis Is Inapplicable to Class Actions Under Rule 23.

Although it is not necessary to reach this issue for the reasons just discussed, Appellants’ argument that individual offers of judgment can moot class actions is also incorrect.

The rule in the Ninth Circuit³ squarely and unmistakably rejects Appellants’ position: “[A]n unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff’s individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action.” *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-1092 (9th Cir. 2011). A rule “allowing a class action to become moot simply because the defendant has sought to ‘buy off’ the individual private claims of the named plaintiffs before the named plaintiffs have a chance to file a motion for class certification would thus contravene Rule 23’s core concern: the aggregation of similar, small, but otherwise doomed claims.”

³ Like Appellants, Respondents have not found any Washington State cases addressing the impact of the *Genesis* decision, and therefore agree that it would be appropriate to look to federal interpretations of Fed. R. Civ. P. 68 when interpreting CR 68. AOB, p. 41, citing *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 580, 271 P. 3d 899 (2012).

Id. at 1091 (internal quotations omitted), citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). In so holding, the Ninth Circuit joined the three other circuits that had addressed the effect of a Rule 68 offer of judgment on a class action at the pre-certification stage. *Id.* at 1092 n.3.

Moreover, every Ninth Circuit decision to address the issue has held that the *Genesis* decision does not abrogate the holding in *Pitts*. See *Canada v. Meracord, LLC*, 2013 U.S. Dist. LEXIS 80479 (W.D. Wash. June 6, 2013) (“[T]here is nothing to indicate that the specific holding [in *Genesis*] extends beyond FLSA collective actions.”); accord *Craftwood II, Inc. v. Tomy Int'l, Inc.*, 2013 U.S. Dist. LEXIS 99350 (C.D. Cal. July 15, 2013); *Ramirez v. Trans Union, LLC*, 2013 U.S. Dist. LEXIS 100095 (N.D. Cal. July 17, 2013). Indeed, the majority in *Genesis* expressly limited the scope of the decision, stating that “Rule 23 actions are fundamentally different from collective actions under the FLSA” and finding cases dealing with mootness in the context of class actions to be inapposite to the case before it. 133 S. Ct. at 1529. Moreover, the *Genesis* decision actually reaffirms the continued viability of cases where, as here, there is a claim for injunctive relief challenging ongoing conduct. *Id.* at 1531 (emphasizing that dismissal was appropriate because claim only sought statutory damages).

In conclusion, *Genesis* is based on entirely different facts and law and is inapplicable to the present case. Appellants' offers of judgment do not moot this case.

IV. CONCLUSION

Respondents, therefore, respectfully request that this Court affirm the trial court's denial of Appellants' Motion to Dismiss.

Respectfully submitted this 9th day of August, 2013.



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Counsel for Plaintiffs

CERTIFICATE OF FILING AND SERVICE

I, Sheila M. Sprayberry, hereby certify that on the 9th day of August, 2013, I caused to be filed one original and one copy of the Respondents' Answering Brief via hand delivery to:

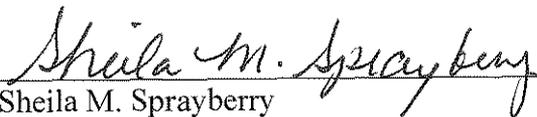
Clerk of the Court
Court of Appeals, Division III
500 N. Cedar St.
Spokane, WA 99201

I also caused to be served true and correct copies of the same to the following person via email and First Class Mail:

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

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

EXECUTED this 9th day of August, 2013, at Spokane, Washington.


Sheila M. Sprayberry

APPENDIX "A"
BRIEF OF RESPONDENT

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THE SCOTT LAW GROUP

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APR 10 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

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

8 SHERRIE KAY GORDEN and DEBBIE
9 KAY MILLER, individually and on behalf of
10 a Class of similarly situated Washington
11 residents,
12
13 Plaintiffs,

v.

12 LLOYD WARD & ASSOCIATES, P.C., a
13 Texas Domestic Professional Corporation;
14 LLOYD WARD, P.C., a Texas Domestic
15 Professional Corporation; THE LLOYD
16 WARD GROUP, P.C., a Texas Domestic
17 Professional Corporation, LLOYD EUGENE
18 WARD and AMANDA GLEN WARD,
19 individually and on behalf of the marital
20 community; SILVER LEAF DEBT
21 SOLUTIONS, LLC, a Texas Limited
22 Liability Company; MICHAEL MILES,
23 individually and on behalf of the marital
24 community of MICHAEL MILES and JANE
25 DOE MILES; and JOHN and JANE DOES 1-
26 5,

Defendants.

NO. 12-2-01551-6

STIPULATION AND ~~[PROPOSED]~~
ORDER TO STAY LITIGATION
PENDING APPEAL

23 IT IS HEREBY STIPULATED by and between the parties hereto that the litigation in
24 this matter be stayed pending the outcome of the Ward defendants' appeal filed January 18,
25 2013, of this Court's December 21, 2012 "Order Denying Defendants' Motion to Dismiss and
26 to Compel Individual Arbitration."

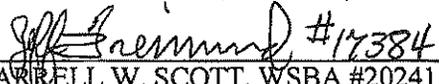
1 The parties stipulate that the Case Scheduling Order in this matter also be stayed
2 pending the resolution of the appeal.

3 RESPECTFULLY SUBMITTED this 8th day of April, 2013.

4 FREIMUND JACKSON TARDIF
5 & BENEDICT GARRATT, PLLC

6 
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14 Attorney for Ward Defendants

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16 *per email authorization 4/6/13*
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JUN 28 2013

THOMAS R. FALLOQUIST
SPOKANE COUNTY CLERK

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SUPERIOR COURT, STATE OF WASHINGTON, 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, PC, 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

STIPULATED JUDGMENT IN FAVOR OF PLAINTIFF SHERRIE KAY GORDEN AGAINST WARD DEFENDANTS

TO THE JUDGMENT CLERK:

- | | |
|------------------------------------|--|
| 1. Judgment Creditor(s): | Sherrie Kay Gorden |
| 2. Attorney for Judgment Creditor: | Andrew S. Biviano, The Scott Law Group |
| 3. Judgment Debtors: | Lloyd Ward; Amanda Ward; Lloyd Ward, P.C.; Lloyd Ward & Associates, P.C.; The Lloyd Ward Group, P.C. |
| 4. Principal Judgment Amount: | \$11,147.73 |
| 5. Interest to Date of Judgment: | \$891.81 |
| 6. Costs: | \$845.45 |
| 7. Attorney's Fees: | \$22,115.01 |
| 8. Judgment Total | \$35,000 |
| 9. Interest Rate on Judgment: | 12% per annum |

STIPULATED JUDGMENT IN FAVOR OF PLAINTIFF SHERRIE KAY GORDEN AGAINST WARD DEFENDANTS: 1

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JUDGMENT

THIS MATTER having come before the undersigned and the parties, acting by and through their counsel, agreeing by stipulation and accepted Rule 68 Offer of Judgment that Stipulated Judgment may be entered herein, with no admission of liability or jurisdiction,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff Sherrie Kay Gorden shall have Judgment against Defendants Lloyd Ward, Amanda Ward, Lloyd Ward, P.C., Lloyd Ward & Associates, P.C., and The Lloyd Ward Group, P.C. (collectively, "Ward Defendants") as follows: Principal sum of \$11,147.73, plus pre-judgment interest to the date of Judgment in the amount of \$891.81, plus costs in the amount of \$845.45, and attorney fees in the amount of \$22,115.01, for a total of \$35,000. The Judgment is payable within 45 days of the date of this Order, after which date post-judgment interest will accrue at the rate of 12% per annum until paid in full.

INJUNCTIVE AND DECLARATORY RELIEF

Ward Defendants further agree to have judgment taken against them in the form of a permanent injunction prohibiting Ward Defendants from engaging in future business violative of chapter 18.28 RCW and/or chapter 19.86 RCW, and from accepting any future debt adjustment clients from the State of Washington, and in the form of a declaratory judgment that Ward Defendants' debt adjusting agreement with Plaintiff Sherrie Kay Gorden is void *ab initio*. The Court finds the accepted offer of judgment to be sufficient reason, pursuant to CR 65(d), for the issuance of an injunction and declaratory relief, as follows:

(1) Ward Defendants are permanently enjoined, from the date of entry of this Judgment forward, from contracting with or charging Washington residents fees for debt adjusting services that are inconsistent with the provisions of Chapter 18.28 RCW. This prospective injunction specifically includes, but is not limited to, the following:

STIPULATED JUDGMENT IN FAVOR OF PLAINTIFF
SHERRIE KAY GORDEN AGAINST WARD
DEFENDANTS: 2

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1 (a) Ward Defendants may not contract with or charge Washington residents debt
2 adjusting fees that exceed fifteen percent of the total debt listed by the debtor on the contract.

3 (b) The fee retained by Ward Defendants from any one payment made by or on
4 behalf of Washington resident debtors may not exceed fifteen percent of the payment.

5 (c) Ward Defendants may charge Washington residents an initial fee of no more
6 than twenty-five dollars, which shall be considered part of the total fee. If an initial charge is
7 made, no additional fee may be retained which will bring the total fee retained to date to more
8 than fifteen percent of the total payments made to date.

9 (2) Ward Defendants are permanently enjoined from accepting any future debt
10 adjustment clients from the State of Washington.

11 (3) Ward Defendants' debt adjusting agreement with Plaintiff Sherrie Kay Gorden is
12 void *ab initio*.

13 This stipulated judgment does not preclude Ward Defendants from asserting affirmative
14 defenses as to claims brought by plaintiff Debbie Kay Miller and/or the putative class of
15 plaintiffs.

16 DATED this ____ day of _____, 2013. KATHLEEN M. O'CONNOR
17 SUPERIOR COURT JUDGE

18 THE HONORABLE KATHLEEN O'CONNOR

19 Presented by:

20 THE SCOTT LAW GROUP, P.S.

21 By: *Andrew Biviano*
22 ANDREW S. BIVIANO, WSBA# 38086

23 *Attorney for Plaintiff*

24
25 FREIMUND JACKSON TARDIF & BENEDICT GARRATT, PLLC

STIPULATED JUDGMENT IN FAVOR OF PLAINTIFF
SHERRIE KAY GORDEN AGAINST WARD
DEFENDANTS: 3

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JEFFREY A.O. FREIMUND, WSBA#173854
Attorney for Ward Defendants

STIPULATED JUDGMENT IN FAVOR OF PLAINTIFF
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DEFENDANTS: 4

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