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Donia Townsend and Bob Perez, individually, on behalf of their marital community, and as class representatives; Paul Ysteboe and Jo Ann Ysteboe, individually, on behalf of their marital community, and as class representatives, Vivian Lehtinen and Tony Lehtinen, individually, on behalf of their marital community and on behalf of their minor children, Niklas and Lauren; Jon Sigafos and Christa Sigafos, individually, on behalf of their marital community and on behalf of their minor children, Colton and Hannah,

Plaintiffs-Respondent,

vs.

**The Quadrant Corporation, a Washington Corporation;
Weyerhaeuser Real Estate Company, a Washington Corporation; and
Weyerhaeuser Company, a Washington Corporation,**

Defendants-Appellant.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The arbitration provisions at issue in this appeal are broad. They require arbitration of “[a]ny controversy or claim arising out of or relating to” the Purchase and Sale Agreements (“PSAs”) signed by Plaintiffs-Respondents (the “Homeowners”), “any claimed breach of [the PSAs], or any claimed defect[s] relating to the propert[ies]” CP 48, 59, 178, 640. They also explicitly require the Homeowners to arbitrate “any claim brought under the Washington State Consumer Protection Act” (“CPA”). *Id.* In their Brief of Respondents (“Brief”), the Homeowners do not dispute that at least two of their eight claims, for breach of warranty and violation of the CPA, fall within the scope of the broad arbitration provisions. Nonetheless, they contend that their other claims are not arbitrable. They also contend that the PSAs, and the arbitration clauses within them, are invalid. The Homeowners’ assertions of non-arbitrability are baseless.

II. ARGUMENT

A. All of the Homeowners’ Claims Are Arbitrable.

The Homeowners bear the burden of showing that their claims are unsuitable for arbitration. *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wn. App. 438, 445, 72 P.3d 220 (2003). “Absent an express provision excluding a particular type of dispute, ‘only the *most forceful evidence* of a purpose to exclude a claim from arbitration can prevail.’”

The court must be able to say ‘with *positive assurance*’ that the arbitration clause is *not susceptible of an interpretation that covers* the asserted dispute.” *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602 (1993) (citations omitted and emphasis added). The Homeowners have not met their burden.

1. The Homeowners’ tort claims are arbitrable.

The Homeowners do not deny that their claims for breach of warranty and violation of the CPA fall within the scope of the arbitration provisions. *See* Resp. Br. at 26-48. They argue, however, that the arbitration provisions “cannot subject plaintiffs’ tort claims which arise out of appellants’ *post-agreement tortious conduct* to arbitration.” *Id.* at 26 (emphasis in original). The Homeowners cite no legal authority for that position. *See id.* at 26-28.

Indeed, adoption of the Homeowners’ position would require the Court either to rewrite or ignore the arbitration provisions. The Homeowners contend that their tort claims are excluded from arbitration because “[t]he arbitration clause is expressly limited to claims relating to the enforcement of the Purchase and Sale Agreements . . . and claims of property defects.” *Id.* at 26. But the provisions are not “expressly limited” in that way. Instead, they broadly require arbitration of “[a]ny controversy or claim *arising out of or relating to* [the PSA], any claimed

breach of [the PSA], or any claimed defect relating to the property,” including CPA claims. CP 48, 59, 178, 640 (emphasis added). That language easily encompasses tort claims, and “it is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract.” *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984).

The arbitration clauses also include claims based on “post-agreement” conduct. For example, the clauses explicitly cover “any claimed breach of [the PSA],” which would necessarily occur *after* the PSA was executed. Similarly, claims relating to defects would almost certainly arise “post-agreement,” after the Homeowners actually moved into their house and discovered alleged defects. Nothing in the language of the arbitration clauses indicates any temporal limit on their applicability.¹

The Homeowners’ tort claims (fraud, negligent misrepresentation, negligence, and outrage) also plainly “arise out of or relate to” the PSAs or “defect[s] relating to the propert[ies].” To determine whether the tort claims are arbitrable, the Court must focus on the *factual allegations* in the

¹ In fact, the arbitration provisions exclude only “any request by Seller to quiet title to the Property.” CP 48, 59, 178, 640. Any other controversy or claim, whether

complaints, not the legal labels assigned to the claims. *E.g., Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999). As explained in the Brief of Appellants, the factual allegations underlying each of the Homeowners' tort claims relate either to alleged defects in the Homeowners' houses, the PSAs themselves, or both. Br. of Appellants at 7-9, 20-21. Therefore, all of the Homeowners' tort claims (involving post-agreement conduct or otherwise) are arbitrable.²

2. All claims asserted by, and against, nonsignatories to the PSAs are arbitrable.

The Homeowners are attempting to avoid their arbitration agreements with Quadrant by asserting otherwise-arbitrable claims against, and purportedly on behalf of, nonsignatories. In their eighth cause of action, which is designed specifically to avoid arbitration, and in their Brief, the Homeowners contend that their claims against WRECO and Weyerhaeuser are not arbitrable because WRECO and Weyerhaeuser did not sign the PSAs. CP 26, 763, 786; Resp. Br. at 32. Similarly, they argue that the claims purportedly asserted by their children, who also did not sign the PSAs, are not arbitrable either. CP 26, 763, 786; Resp. Br.

grounded in contract, tort, statute, or any other source of law, is arbitrable if related to the PSAs or alleged defects.

² The Homeowners also suggest that their tort claims are not arbitrable because certain tort claims could be available even to plaintiffs who "*did not enter into a purchase and sale agreement with Quadrant.*" Resp. Br. at 27 (emphasis in original). That argument is irrelevant, even if true. *These* Homeowners *did* enter into PSAs with Quadrant, and the arbitration clauses contained in the PSAs plainly cover tort claims.

at 39. The Homeowners do not acknowledge, however, that the claims asserted against WRECO and Weyerhaeuser are *exactly the same claims, based on exactly the same facts*, as the claims asserted against Quadrant.³ See CP 3-27, 744-764, 767-787 (complaints). Nor do they acknowledge that the children purportedly assert *the very same claims, based on the very same facts*, as their parents. See *id.*

Because the legal claims and factual allegations involving the children, WRECO, and Weyerhaeuser are the same as the legal claims and factual allegations involving the Homeowners and Quadrant, any trial involving the children, WRECO, or Weyerhaeuser would resolve all of the issues of law and fact disputed by the Homeowners and Quadrant. Such a trial could thus destroy any benefits of arbitration between the Homeowners and Quadrant, and thwart the pro-arbitration policies acknowledged time and again by Washington courts. *E.g., Heaphy*, 117 Wn. App. at 445 (noting Washington’s strong public policy in favor of arbitration).

³ The substantive factual allegations against WRECO and Weyerhaeuser (grouped with Quadrant and described collectively as “Defendants” in the complaints) are at most derivative of the factual allegations made against Quadrant. For example, the Homeowners allege that the “*Defendants* lied to and defrauded Quadrant home buyers” because of things the home buyers were “falsely told by *Quadrant*,” or because of things “*Quadrant* . . . specifically represented” to them. CP 11-12, 751-52, 774-75 (emphasis added). Such derivative allegations are made throughout the complaints. The Homeowners therefore cannot, on the one hand, hold WRECO and Weyerhaeuser responsible for Quadrant’s alleged actions and, on the other hand, claim that WRECO

Courts have developed doctrines designed to prevent such an outcome, and to prevent gamesmanship by plaintiffs attempting to avoid arbitration agreements. For example, the Fourth Circuit long ago held that “[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.” *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988). The Fourth Circuit, quoting the Fifth Circuit, explained: “If the parent corporation was forced to try the case, the arbitration proceedings [involving the subsidiary] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.” *Id.* at 321 (quoting *Sam Reisfeld & Son Imp. Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976)). That reasoning applies with equal force under Washington’s Uniform Arbitration Act (UAA), and on the facts presented here.

Applying similar reasoning, many other courts, including this Court, have issued decisions that prevent plaintiffs from avoiding arbitration simply by attempting to assert otherwise-arbitrable claims against nonsignatory defendants. *E.g.*, *McClure v. Davis Wright*

and Weyerhaeuser cannot benefit from an arbitration agreement entered into by Quadrant.

Tremaine, 77 Wn. App. 312, 316, 890 P.2d 466 (1995) (claims against nonsignatory defendant arbitrable because the central issues involved the signatory defendant); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008) (courts should compel arbitration of claims filed against a nonsignatory defendant when “the subject matter of the suit is intertwined with the subject matter within the scope of the arbitration clause” and the underlying agreement); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000) (arbitration of claims against nonsignatory defendant appropriate “when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract”).

Courts employ similar legal theories to prevent nonsignatory plaintiffs from avoiding arbitration against signatory defendants. Here, the children’s claims are arbitrable because their claims are identical to the arbitrable claims brought by their signatory parents, *Trimper v. Terminix Int'l Co.*, 82 F. Supp. 2d 1, 5 (N.D.N.Y. 2000), and because the PSAs form the “underlying basis” for all of the children’s claims, *In re Jean F. Gardner Amended Blind Trust*, 117 Wn. App. 235, 239, 70 P.3d 168 (2003); see also *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001) (nonsignatory’s claims arbitrable because “based on” contract).

The Homeowners contend that none of those doctrines applies here.⁴ They argue that some of the doctrines would apply only if the Homeowners' legal claims involved the PSAs directly, and that their legal claims in this case do no such thing. *E.g.*, Resp. Br. at 37, 40-41, 45. They assert, for example, that the children's claims are only "for personal injuries sustained as the result of the alleged intentional or negligent conduct of the defendants," not for any damages having to do with the PSAs. *Id.* at 40. That assertion is false. The complaints make no distinction between the parents' claims and the children's claims, so the children bring the same claims for rescission and breach of warranty that their parents do. CP 24-26, 761-62, 784-85. Moreover, even a cursory glance at the complaints reveals that the gravamen of the complaints is that the "Plaintiffs did not receive the homes they bargained, expected, or paid for as their Quadrant homes were neither properly built nor safe and healthy to live in." CP 12, 752, 775. The PSAs are thus central to this action.

⁴ The Homeowners cite *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 892, 988 P.2d 12 (1999), for the proposition that "[a] person who is not a party to an agreement to arbitrate may be bound to such agreement only by ordinary principles of contract and agency." Resp. Br. at 39. *Powell* recognizes, however, that other theories have developed to bind nonsignatories to arbitration agreements. *Powell*, 97 Wn. App. at 895-96. The parties in *Powell* did not contend that those theories applied in that case. *Id.* at 896.

The Homeowners also cite two cases in which courts have refused to compel arbitration of claims brought by, or against, nonsignatories, but those cases involve facts nothing like those presented here. In *Coots v. Wachovia Securities, Inc.*, 304 F. Supp. 2d 694, 699-701 (D. Md. 2003), *vacated on other grounds*, 114 Fed. Appx. 586 (4th Cir. 2004), a mother misappropriated funds belonging to her children. When the children sued the financial institutions involved in the misappropriation, the court refused to bind those children to the arbitration agreement existing between their mother and the institutions. The *Coots* court distinguished *Trimper*, for example, by stating the obvious: the signatory mother in *Coots* had no legal claim at all, and the children's interests were not aligned with the interests of their thieving mother. *Coots*, 304 F. Supp. 2d at 700 n.5. Here, the claims brought by the signatory parents and the nonsignatory children are identical, as are their interests. The children are therefore justifiably bound by the same arbitration agreement that applies to their parents. *Trimper*, 82 F. Supp. 2d at 5.

The Homeowners also cite *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185 (Tex. 2007), but *Merrill Lynch* is also different from the present case. In *Merrill Lynch*, two nonsignatory defendants tried to enforce an arbitration clause contained in an agreement between the plaintiff and a third signatory defendant. However, the two nonsignatory

defendants had their own, independent contracts with the plaintiff, neither of which contained arbitration clauses. *Merrill Lynch*, 235 S.W.3d at 191. The court unsurprisingly refused to allow the nonsignatory defendants to compel arbitration “[a]s allowing [them] to compel arbitration would effectively rewrite their contracts” with the plaintiff.⁵ *Id.* Here, of course, WRECO and Weyerhaeuser do not have independent contracts with the Homeowners that might be undermined by enforcing the arbitration clauses in the PSAs.

3. *The children are not properly named plaintiffs.*

The Homeowners bristle at the suggestion that the children are not properly named plaintiffs, but do not deny that RCW 4.08.050 requires that the children appear by guardian if they are, in fact, separate plaintiffs.⁶ *See* Resp. Br. at 37 n.9. Because the children are not properly named, the claims purportedly brought on their behalf are alleged pursuant to RCW 4.24.010, which authorizes parents to seek damages for injuries suffered by their children. Causes of action pursuant to RCW 4.24.010 belong to the parents, who, in this case, signed the PSAs.

⁵ The *Merrill Lynch* court did, however, require that trial of the nonarbitrable claims be stayed pending resolution of the arbitrable claims, since “the same issues must be decided both in arbitration . . . and in court.” *Merrill Lynch*, 235 S.W.3d at 195-96.

⁶ The Homeowners contend that any judgment involving the children is “voidable” at the option of the children if they are not properly represented by a guardian, but they are wrong. The case cited by the Homeowners explains that judgments entered *against* minors unrepresented by a guardian may be voidable in certain circumstances. *See*

4. ***WRECO and Weyerhaeuser did not waive their rights to compel arbitration.***

For the first time on appeal, the Homeowners claim that WRECO and Weyerhaeuser waived their right to compel arbitration by moving immediately for summary judgment against the Perezes and the Ysteboees on the ground that there was no privity between those Homeowners and the companies. *Id.* at 28-31. The Homeowners accuse WRECO and Weyerhaeuser of “forum shop[ping]” after their motion for summary judgment was denied by the trial court. *Id.* at 31. WRECO and Weyerhaeuser are doing no such thing, nor did they waive their rights to compel arbitration.

Under Washington law, “a waiver cannot be found absent conduct inconsistent with *any other intention* but to forego a known right.” *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980) (emphasis added). Delay in moving to compel arbitration is insufficient to constitute a waiver, *id.* at 64, as is limited use of discovery, *id.* In fact, courts may even compel arbitration where it would require relitigation of substantive issues. *B & D Leasing Co. v. Ager*, 50 Wn. App. 299, 304-05, 748 P.2d 652 (1988).

Newell v. Ayers, 23 Wn. App. 767, 772, 598 P.2d 3 (1979) (judgment against minors *not* voidable on facts presented). That case does not apply here.

The Homeowners have not argued that they would be prejudiced by an order compelling arbitration, and did not raise the issue of waiver in the trial court. *See* CP 707-721. Accordingly, the Court should not consider the Homeowners' waiver argument for the first time on appeal. *Powell*, 97 Wn. App. at 898-99 (court generally does "not consider arguments raised for the first time on appeal," even new arguments raised by respondents).

Moreover, WRECO and Weyerhaeuser are not seeking a "second bite at the apple." They moved immediately for summary judgment in this case, but the motion was denied without prejudice. CP 342. In fact, the trial court has indicated that it intends to reconsider and grant WRECO's and Weyerhaeuser's motions for summary judgment, but reconsideration of those motions is stayed pending appeal. *See* Pls. Objection to Defs.' Proposed Order Dismissing Defs. WRECO and Weyerhaeuser Noted for Presentation on Dec. 1, 2008 at 2 ("[T]he Court on November 10, 2008 abruptly announced that defendants WRECO and Weyerhaeuser should be 'dismissed.'"); *see also* Notice of Presentation of Order, Dkt. #109.⁷ In any event, arbitration may be compelled even if it requires relitigation of substantive issues. *B & D Leasing*, 50 Wn. App. at 304-05.

⁷ The Clerk's Papers numbers are unavailable because these documents were designated at the time this brief was filed.

This is not, like *Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 395-96, 775 P.2d 960 (1989), a case in which parties subject to arbitration were previously *granted* summary judgment on the merits. Nor is it a case, like *Ives v. Ramsden*, 142 Wn. App. 369, 379, 174 P.3d 1231 (2008), in which the party seeking arbitration litigated for three and a half years, engaged fully in discovery, and then moved to compel arbitration on the “eve of trial.” WRECO and Weyerhaeuser, which have no relationship to the Homeowners whatsoever, moved immediately for summary judgment and had their motion denied without prejudice. They have conducted no discovery and taken no other significant action in this case other than to join Quadrant in moving to compel arbitration. On these facts, no waiver has occurred.⁸

B. The Arbitration Provisions Are Valid.

1. Questions relating to the validity of the PSAs are reserved by statute for the arbitrator.

Although courts determine the scope of an arbitration clause, Washington’s UAA requires the arbitrator to decide “whether a contract containing a valid agreement to arbitrate is enforceable.” RCW 7.04A.060(3).⁹ In an effort to escape arbitration, the Homeowners

⁸ The Court certainly cannot find a waiver with respect to the Lehtinen and Sigafos actions, because WRECO and Weyerhaeuser did not move for summary judgment in those actions.

⁹ The Homeowners cite *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 163 P.3d 807 (2007), to argue that attacks made on the validity of the PSAs may be

contend that their procedural unconscionability arguments are not directed at the PSAs, but only at the arbitration provisions within them. Resp. Br. at 11-12. That contention is belied by nearly every allegation and argument made by the Homeowners.

First, the Homeowners' complaints make clear that their procedural unconscionability arguments are directed at the PSAs. Their eighth cause of action, for "Declaration of Unenforcability [sic] of Arbitration Clause in Purchase and Sale Agreement," alleges that "[t]he purchase and sale agreement signed by the Plaintiffs and Defendant Quadrant is an adhesion contract obtained through Defendants' fraud." CP 26, 763, 786 (emphasis added). As a result, the Homeowners contend, "[t]he arbitration clause is invalid, unconscionable and unenforceable." *Id.* That cause of action, which is designed specifically to avoid arbitration, thus constitutes an *explicit* attack on the validity of the PSAs.

decided by the trial court, but *Nelson* is inapplicable here. Resp. Br. at 46-48. First, it arose under Washington's previous arbitration statute, and therefore never addresses the current statute, RCW 7.04A.060(3), which explicitly reserves for arbitrators disputes relating to the validity of contracts containing arbitration clauses.

Second, the arbitration clause disputed in *Nelson* covered only claims "arising from" the contract at issue. *Nelson*, 140 Wn. App. at 106. Here, the arbitration clauses cover all claims "arising out of or relating to" the PSAs. Courts long ago determined that such language "is easily broad enough to encompass" claims challenging the validity of any contract containing that arbitration language. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). *Nelson* simply does not apply here, and does not interpret, displace, or limit RCW 7.04A.060(3).

Second, the procedural unconscionability arguments advanced in the Homeowners' Brief relate to the PSAs generally, not specifically to the arbitration clauses within them. As they did in the trial court, the Homeowners contend that the PSAs were non-negotiable adhesion contracts presented "on a 'take-it-or-leave-it basis,'" and that the Homeowners were not given sufficient opportunity to "review and question the arbitration clause (and the rest of the PSAs) before signing." Resp. Br. at 16-17.

They contend that Quadrant "deliberately created a sense of extreme urgency" when the PSAs were signed, and, in the case of the Perezes and Yesteboes, provided only electronic copies of the PSAs for review. *Id.* at 18. The Homeowners claim that Quadrant did not "discuss the terms of the agreements" and "failed to identify the arbitration provision." *Id.* at 19. At most, the Homeowners contend, Quadrant described the arbitration provisions, like all provisions, as "just part of the process" and "standard stuff." *Id.*

Finally, the Homeowners contend that Quadrant "failed to tell them the true nature of" previous lawsuits against Quadrant, and that Quadrant "knew that their 54 day construction process resulted in dangerous air quality conditions in Quadrant homes." *Id.* at 19-20. The Homeowners claim that, had Quadrant not withheld material safety

information, the Homeowners “would not have agreed to arbitrate any potential disputes with Quadrant (let alone purchase a home from the company).” *Id.* at 20.

Each of those arguments attacks the making of the PSAs generally, not the individual arbitration clauses.¹⁰ That being the case, Washington law requires that the Homeowners’ procedural unconscionability arguments be decided by an arbitrator. RCW 7.04A.060(3). The Homeowners cannot escape that result simply by asserting what is not true: that their arguments relate to the arbitration clauses alone.¹¹ *Rojas v. TK Commc’ns, Inc.*, 87 F.3d 745, 749 n.3 (5th Cir. 1996) (plaintiff’s

¹⁰ The Homeowners direct only one procedural unconscionability argument toward the arbitration clauses themselves, but that argument, made for the first time on appeal, is plainly baseless. The Homeowners contend that the arbitration provisions were “effectively hidden in a maze of fine print” because they were “in the same size and type of font” as the other provisions and were presented on the last pages of the agreements. Resp. Br. at 19. The Homeowners cite no legal authority requiring arbitration clauses to receive special prominence. *See id.* Even if they could (they cannot), the arbitration provisions in this case had prominent placement *directly above the signature lines*. CP 48, 59, 178, 640.

¹¹ Because Quadrant, WRECO, and Weyerhaeuser drafted the order from which they now appeal, the Homeowners contend that Quadrant, WRECO, and Weyerhaeuser “invited” the court to rule as it did with respect to procedural unconscionability, and therefore have no standing to challenge it. Resp. Br. at 11. That argument is nonsense. After the trial court orally denied the motions to compel arbitration, it asked the parties to propose a joint draft order. The parties could not agree on an order, and each side presented its own draft. *See, e.g.*, Pls.’ Proposed Order Denying The Quadrant Corporation’s, Weyerhaeuser Real Estate Company’s, and Weyerhaeuser Company’s Motions to Stay Proceedings and Compel Arbitration, Dkt. #106 (Clerk’s Papers number is unavailable because this document was designated at the time this brief was filed). The trial court signed the order prepared by Quadrant, WRECO, and Weyerhaeuser because it accurately reflected the reasoning expressed in the trial court’s oral ruling. The trial court undoubtedly understood and agreed with what it signed. Quadrant, WRECO, and Weyerhaeuser did not “invite” the trial court’s reasoning, nor did they invite the trial court to deny their motions to compel arbitration.

procedural unconscionability arguments were directed at the entire agreement and were therefore reserved for the arbitrator even though the plaintiff characterized all arguments as being directed at the only arbitration clause).

2. *Neither the PSAs nor the arbitration clauses are invalid for reasons of procedural unconscionability.*

Even though the issue of procedural unconscionability is not properly before the Court, and even though no Washington court has ever invalidated a contract for reasons of procedural unconscionability alone, the Homeowners spend six pages of their Brief trying to explain why they had no meaningful choice in deciding whether to purchase a house from Quadrant.¹² See Resp. Br. at 15-21; see also *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 348-49, 103 P.3d 773 (2004) (“the key inquiry for finding procedural unconscionability is whether [the party challenging the contract] lacked meaningful choice”). The Homeowners’ contentions are not supported by the record.

¹² No reported decision reveals an instance in which a Washington court has invalidated a contract based on procedural unconscionability alone. In fact, the Washington Supreme Court has expressly declined to decide whether procedural unconscionability alone may invalidate a contract. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004). Although the Homeowners claim that some courts have analyzed the issue of procedural unconscionability as if it might be sufficient to invalidate a contract, they cannot cite any reported decision, in state or federal court, in which a court actually invalidated a contract under Washington law for reasons of procedural unconscionability. See Resp. Br. at 13-14.

In fact, the Homeowners' declarations make clear that they had options, and made many voluntary decisions, before deciding to buy houses from Quadrant. For example, in his declaration, Bob Perez explained that he and his wife "signed-up to wait for a Quadrant home." CP at 133. When their name was "next on the list," they were offered an opportunity to buy a Quadrant house in the Brookside development. *Id.* "[I]f [they] wanted to buy a Quadrant home at Brookside," they had to schedule an appointment for the next day. *Id.* If they decided not to sign a purchase and sale agreement at that time, they would have had to wait for a period of time before another Quadrant house became available to them. *Id.* All of those decisions were the Perezes' to make.

The Ysteboes also had options. Paul Ysteboe explained that he and his wife "wanted to purchase a home in Snoqualmie, Washington." CP 138-39. Because "[t]here were a number of builders who were constructing homes in Snoqualmie," the Ysteboes "had a number of options available to [them] as well as the option of buying an existing home." CP at 139. They "toured the Quadrant model homes" and decided to buy from Quadrant, as was their prerogative. *Id.*

The Sigafoses had choices, as well. When they first visited the Brookside development, they met with a Quadrant sales representative "to discuss potentially purchasing a Quadrant home." CP at 679. After

viewing lots and selecting one they wanted, the Sigafoses returned to the sales office to discover that the lot had just sold. CP at 680. Rather than walk away, they selected a different lot and put money down to hold it. *Id.* Evidently, they feared losing out on the remaining good lots after seeing “people running down the street in front of the model homes to claim desirable lots before others could.” *Id.*

The Lehtinens had a similar experience. When they decided to purchase a Quadrant house, they claim they were told that if they did not sign a purchase and sale agreement that day, they were at risk of losing their favorite lot, and they feared having to settle for “an undesirable lot.” CP 674. The Lehtinens decided to sign the PSA rather than risk settling for “an undesirable lot.”

The Homeowners’ Brief grossly mischaracterizes that declaration testimony in an attempt to paint a distorted picture of their experiences with Quadrant. For example, the Homeowners claim that, at their initial sales appointments, Quadrant “informed them that *they must immediately agree to Quadrant’s terms,*” as if Quadrant were holding their loved ones for ransom. Resp. Br. at 17 (emphasis added). They also claim that Bob Perez and his wife “were *forced at their initial sales appointment . . . to decide to purchase a Quadrant home.*” *Id.* at 18 (emphasis added). Indeed, they contend that “Quadrant used high-pressure tactics to *force*

[all of the Homeowners] to sign the agreements immediately.” *Id.* at 7 (emphasis added). The declarations do not support those outlandish claims. CP 131-35, 138-40, 672-75, 678-82.

The Homeowners also falsely claim that Quadrant forced them to sign PSAs without reviewing them. Resp. Br. at 17-19. In their declarations, none of the Homeowners claimed that they were denied an opportunity to read the PSAs before they signed them. *See* CP 131-35, 138-140, 672-75, 678-82; *see also Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (citing the general rule “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”).¹³

Finally, the Homeowners attempt to establish procedural unconscionability by complaining that Quadrant did not tell them “the true nature” about “prior homeowner lawsuits against Quadrant” or that Quadrant “knew that [its] 54 day construction process resulted in dangerous air quality conditions in Quadrant homes.” Resp. Br. at 19-20. Those complaints improperly assume wrongdoing by Quadrant. Because the merits of the underlying controversy are not before the Court when

¹³ Nor were the Lehtinens handed only “the signature page” of the PSA and “pressured to sign it.” Resp. Br. at 7. In her declaration, Vivian Lehtinen acknowledged that she and her husband were “presented . . . with [the] purchase and sale agreement.” CP 674. She claims that she and her husband were given a copy of only the signature

arbitrability is at issue, the Homeowners' unproven allegations cannot defeat the arbitration clauses. *Meat Cutters Local #494 v. Rosauer's Super Markets, Inc.*, 29 Wn. App. 150, 154, 627 P.2d 1330 (1981); see also RCW 7.04A.070(3).

3. The arbitration clauses are not substantively unconscionable.

Citing *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (2002), the Homeowners also contend that the arbitration provisions are substantively unconscionable because of the potential cost of proceeding in "multiple forums." Resp. Br. at 21-23. On that basis, they ask the Court to affirm the trial court's denial of arbitration even if the "arbitration clause was valid, and any of the [Homeowners'] claims were subject to it." *Id.* at 22. The Homeowners' request is contrary to the plain provisions of the UAA. The UAA requires the Court to order arbitration where it finds an enforceable agreement to arbitrate.

RCW 7.04A.070(1). The Court has "no discretionary power in this respect." 1 Martin Domke, *Domke on Commercial Arbitration* § 22:2 (3d ed. 2003). Indeed, the Court must order arbitration even if "the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217,

page after they signed the PSA, but does not say that she or her husband asked for anything more than that. CP 674-75.

105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

In any event, *Mendez* does not provide the Court with a basis on which to find substantive unconscionability here. In *Mendez*, the court refused to compel arbitration where a destitute plaintiff, Mendez, would have had to pay, at a minimum, \$2,000 in arbitration filing fees to recover, at most, \$1,500 in alleged damages. *Mendez*, 111 Wn. App. at 465. Mendez filed an affidavit describing his dire financial circumstances, and offered evidence about the cost of arbitration with AAA, the contractually-specified arbitrator. *Id.* Both parties agreed that the AAA filing fees would be “prohibitive” for Mendez, *id.* at 470, and the court denied arbitration because the arbitration costs would have had “the practical effect of preventing [Mendez] from pursuing his . . . claims,” *id.* at 471.

The facts are very different here. The Homeowners’ claims for damages (including rescission of the PSAs) are large, and the Homeowners do not contend that arbitration is prohibitively expensive for them. They contend only that litigating this matter in “multiple forums” (*i.e.*, in arbitration *and* in the courts) would be “financially burdensome” and burdensome to their schedules. CP 134, 140, 675, 681. Those concerns are insufficient to invalidate the arbitration clauses.¹⁴

¹⁴ The Homeowners can also avoid litigating in “multiple forums” simply by fulfilling their obligations to arbitrate.

Moreover, unlike Mendez, the Homeowners present no evidence of their own financial circumstances, or of the potential costs of arbitration. *See id.* The Court therefore has no basis on which to make a finding of financial hardship, or of substantive unconscionability. *Heaphy*, 117 Wn. App. at 446 (requiring, at a minimum, some evidence of the costs that may be associated with arbitration).

Finally, any concern about litigation in multiple forums can be addressed by staying litigation of any non-arbitrable claims. Such a stay is presumed under Washington's UAA, and would preserve judicial resources, avoid duplicative discovery, and foreclose the risk of inconsistent results in separate forums. RCW 7.04A.070(6) ("If the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration.").

4. *The arbitration clauses are not defeated by the Homeowners' attempts to pursue a class action.*

The Homeowners also contend that the cost and inconvenience of litigating in "multiple forums" would impermissibly prevent a class action.¹⁵ Resp. Br. at 25. The Homeowners cite no legal authority in support of that contention. *See id.*

They do cite two class action cases in which arbitration clauses

were held to be unenforceable, but the reasoning of those cases does not apply here. *Id.* at 23-25. Like *Mendez*, both *Scott v. Cingular Wireless* and *Dix v. ICT Group* involved individually small consumer claims. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 855-58, 161 P.3d 1000 (2007); *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007). The claims were so small that they could not economically be brought outside the class action context. *Id.* Therefore, to ensure the plaintiffs a feasible avenue for relief, the *Scott* court refused to enforce an arbitration clause that explicitly prohibited class actions,¹⁶ 160 Wn.2d at 847, and the *Dix* court refused to enforce a forum selection clause that effectively produced the same result,¹⁷ 160 Wn.2d at 828 (the chosen forum, Virginia, did not allow class actions for suits like the one at issue). In cases *not* involving individually small consumer claims, as in this

¹⁵ The issues relating to the appropriateness of class certification have not been raised in the trial court and, in any event, should be addressed in arbitration rather than in court.

¹⁶ The arbitration provisions in this case do not prohibit class actions. CP 48, 59, 178, 640. Class-wide arbitration is therefore available here (if otherwise appropriate), and is favored, like all arbitration. *Scott*, 160 Wn.2d at 858 (“[W]e see no reason why the purposes of favoring individual arbitration would not equally favor class-wide arbitration.”).

¹⁷ The Homeowners argue that the *Dix* decision, which did not involve an arbitration clause, was based on “the costs and related barriers that prevent consumers from being able to pursue claims on an individual basis . . . not the relative value of the claimants’ damages.” Resp. Br. at 24. The Homeowners misread *Dix*. *Dix*, like *Mendez* and *Scott*, protected a plaintiff’s “ability to go forward on a claim of small value.” *Dix*, 160 Wn.2d at 837. The *Dix* court never considered the financial circumstances of the plaintiffs, and refused to enforce the forum selection clause simply because, without the class action mechanism, “[i]ndividual claims may be so small that it otherwise would be impracticable to bring them . . .” *Id.*

matter, courts enforce arbitration clauses even if potential class actions may be affected. *See Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 17 P.3d 1266 (2001); *Heaphy*, 117 Wn. App. 438. And they do so even if only some of the claims are arbitrable (rightfully rejecting the argument that plaintiffs cannot be forced to litigate in multiple forums). *Heaphy*, 117 Wn. App. at 447.

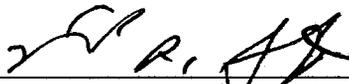
III. CONCLUSION

The arbitration clauses at issue here are both valid and broad. Each of the Homeowners' claims falls within their scope. The trial court therefore erred in denying Quadrant's, WRECO's, and Weyerhaeuser's motions to compel arbitration, and should be reversed.

RESPECTFULLY SUBMITTED this 13th day of April, 2009.

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