

No. 84422-4

SUPREME COURT
OF THE STATE OF WASHINGTON

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBOE and JO ANN YESTEBOE, 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 SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community and on behalf of their minor children, COLTON and HANNAH,

Petitioners,

vs.

THE QUADRANT CORPORATION, a Washington Corporation;
WEYERHAEUSER REAL ESTATE COMPANY, a Washington Corporation; and WEYERHAEUSER COMPANY, a Washington Corporation

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF THE CASE	2
IV. ARGUMENT	5
A. Nonsignatory Plaintiffs, Like the Lehtinen and Sigafos Children, Are Rightfully Estopped from Suing on a Contract and, At the Same Time, Avoiding Its Arbitration Provision.	7
B. Under Longstanding Statutory and Decisional Law, the Homeowners' Procedural Unconscionability Challenge To the PSA Is Reserved for Arbitration.....	13
C. WRECO and Weyerhaeuser Preserved Their Rights To Compel Arbitration.	17
V. CONCLUSION	20

TABLE OF AUTHORITIES

	Page
CASES	
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)	14, 15
<i>Freedman v Comcast Corp.</i> , 190 Md. App. 179, 988 A.2d 68 (2010)	18
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001)	6, 12
<i>Hughes Masonry Co. v. Greater Clark County Sch Bldg. Corp.</i> , 659 F.2d 836 (7th Cir. 1981)	8
<i>In re FirstMerit Bank, N.A.</i> , 52 S.W.3d 749 (Tex. 2001)	8
<i>In re Ford Motor Co.</i> , 220 S.W.3d 21 (Tex. Ct. App. 2006)	8
<i>In re Jean F. Gardner Amended Blind Trust</i> , 117 Wn. App. 235, 70 P.3d 168 (2003)	8, 12
<i>In re Weekley Homes, L.P.</i> , 180 S.W.3d 127 (Tex. 2005)	9, 10, 12
<i>Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH</i> , 206 F.3d 411 (4th Cir. 2000)	7
<i>Ives v Ramsden</i> , 142 Wn. App. 369, 174 P.3d 1231 (2008)	17, 20
<i>Keytrade USA, Inc. v. AIN TEMOUCHENT M/V</i> , 404 F.3d 891 (5th Cir. 2005)	18
<i>Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.</i> , 28 Wn. App. 59, 621 P.2d 791 (1980)	17, 19
<i>McBro Planning & Dev Co. v. Triangle Elec. Constr. Co., Inc.</i> , 741 F.2d 342 (11th Cir. 1984)	8
<i>McKee v AT&T Corp.</i> , 164 Wn.2d 372, 191 P.3d 845 (2008)	14

<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002)	6
<i>Munsey v. Walla Walla College</i> , 80 Wn. App. 92, 906 P.2d 988 (1995)	6
<i>Naches Valley Sch. Dist. No. JT3 v. Cruzen</i> , 54 Wn. App. 388, 775 P.2d 960 (1989)	18
<i>Pinkis v. Network Cinema Corp.</i> , 9 Wn. App. 337, 512 P.2d 751 (1973)	14
<i>Powell v. Sphere Drake Ins. P.L.C.</i> , 97 Wn. App. 890, 988 P.2d 12 (1999)	8, 12
<i>Preston v. Ferrer</i> , 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)	12, 14
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)	13, 14, 15, 16
<i>Rent-A-Center, West, Inc v Jackson</i> , --- U.S. ---, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)	14
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn.2d 781, 225 P.3d 213 (2009)	7, 12
<i>Seguros Banvenez, S.A. v. S/S Oliver Drescher</i> , 761 F.2d 855 (2d Cir. 1985)	18
<i>Stolt-Nielsen S.A v AnimalFeeds Int'l Corp.</i> , --- U.S. ---, 130 S. Ct. 1758, --- L. Ed. 2d --- (2010)	2
<i>The Redemptorists v. Coulthard Servs., Inc.</i> , 145 Md. App. 116, 801 A.2d 1104 (2002)	17
<i>Townsend v. Quadrant Corp.</i> , 153 Wn. App. 870, 224 P.3d 818 (2009)	passim
<i>Trimper v. Terminix Int'l Co.</i> , 82 F. Supp. 2d 1 (N.D.N.Y. 2000)	9

Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 103 P.3d
753 (2004)6

STATUTES

RCW 7.04A.0103

RCW 7.04A.06013

RCW 7.04A.060(3)..... 14, 15, 16

I. INTRODUCTION

The Court of Appeals' decision should be affirmed in its entirety. This action involves the routine enforcement of a clear and commonly-used arbitration provision in a residential real estate purchase and sale agreement ("PSA"). Washington law favors arbitration as a means of resolving disputes, and the Court of Appeals, Division One, properly held that all claims in this action are subject to arbitration.

In this appeal, the Petitioners challenge only three aspects of the Court of Appeals' decision, *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009). But in all respects, the Court of Appeals based its decision on well-established arbitration law that aligns with the decisions of this Court and the Court of Appeals, as well as with the arbitration law of other jurisdictions. Its decision should stand.

II. ASSIGNMENTS OF ERROR

The Petition identified three issues for review:

- (1) Did the Court of Appeals properly conclude that all claims asserted by the Petitioner children are arbitrable under Washington law?
- (2) Did the Court of Appeals properly reserve challenges to the enforceability of the PSAs for the arbitrator pursuant to longstanding statutory and decisional law?
- (3) Did the Court of Appeals properly hold that a party

preserves its right to compel arbitration by moving to compel after challenging its status as a proper party to the lawsuit?

III. STATEMENT OF THE CASE

These actions were commenced by four pairs of homeowners (the "Homeowners") who purchased houses designed, built, and sold by Defendant-Respondent The Quadrant Corporation ("Quadrant"). CP 39-48, 50-59, 171-92, 633-51. At all relevant times, Quadrant was a wholly owned subsidiary of Defendant-Respondent Weyerhaeuser Real Estate Company ("WRECO"), which was a wholly-owned subsidiary of Defendant-Respondent Weyerhaeuser Company ("Weyerhaeuser"). CP 61. The Homeowners are Donia Townsend and Bob Perez (the "Perezes"), Paul and Jo Ann Ysteboe, Vivian and Tony Lehtinen, and Jon and Christa Sigafos.

The Homeowners claim that their houses have construction defects. CP 1-27, 742-64, 765-87. Their complaints are virtually identical, and each states claims for (1) outrage, (2) fraud, (3) violation of the Consumer Protection Act (CPA), (4) negligence, (5) negligent misrepresentation, (6) rescission, (7) breach of warranty, and (8) "Declaration of Unenforceability of Arbitration Clause in Purchase and Sale Agreement."¹

¹ As is noted in the Petition for Review, Homeowners Paul and Jo Ann Ysteboe, Donia Townsend, and Bob Perez filed a purported class action. Pet. for Review at 4. No class has been certified. In any event, the U.S. Supreme Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, --- U.S. ---, 130 S. Ct. 1758, --- L. Ed. 2d --- (2010), dealing with class arbitration, does not apply here. The Homeowners did not raise any issues relating to class arbitration in their Petition for Review, and *Stolt-Nielsen* only

Id. Two pairs of Homeowners, the Lehtinens and the Sigafoses, also assert these very same eight claims on behalf of their children. CP 742-64, 765-87. All of the Plaintiffs, parents and children alike, allege that they “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.

On January 11, 2008, Quadrant moved to compel arbitration of all claims asserted by the Perezes and Ysteboes, who had filed their complaint the previous month (the Lehtinens and Sigafoses had not yet filed suit). CP 28-33. The motion was made pursuant to Washington’s Uniform Arbitration Act, RCW 7.04A.010 *et seq.*, and was based on the arbitration provision included just above the signature lines in the PSAs signed by the Perezes and Ysteboes:

Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04.060.

CP 48, 59. The trial court took Quadrant’s motion under advisement.

prohibits, in certain circumstances, one party from compelling another party to engage in class arbitration when the arbitration agreement is silent on the matter. 130 S. Ct. at 1776 *Stolt-Nielsen* does not entitle a party who has agreed to arbitrate to avoid arbitration altogether, as the Homeowners are attempting to do here. *Id.* at 1765 (“The parties agree that . . . [they] must arbitrate their antitrust dispute.”)

Also on January 11, 2008, WRECO and Weyerhaeuser moved for summary judgment on the basis that they had no connection to the Perezes or Ysteboes, or to the houses at issue, and were therefore improper parties to the lawsuit. CP 790-801. That motion was denied without prejudice on February 8, 2008, CP 342, and a subsequent motion for reconsideration was denied on March 17, 2008, CP 1001-02.²

On September 18, 2008, Quadrant moved to compel arbitration of the claims brought by the Lehtinens and Sigafoses. CP 197-209. The PSAs signed by the Lehtinens and Sigafoses contained the same arbitration provision quoted above. CP 178, 640. WRECO and Weyerhaeuser also moved to compel arbitration of the claims asserted against them by all four pairs of Homeowners.³ CP 213-25.

The trial court entered an order on December 2, 2008, denying all three motions to compel. CP 734-36. The trial court stated two reasons for the denials, neither of which was valid, and neither of which was adopted by the Homeowners in their Petition for Review. CP 735; Pet. for Review at 3.

² At a hearing held on November 10, 2008, the trial court stated that it intended to reconsider and grant WRECO's and Weyerhaeuser's motion for summary judgment. *See* CP 1763 (Homeowners' opposition to WRECO and Weyerhaeuser proposed order: "the Court on November 10, 2008 abruptly announced that defendants WRECO and Weyerhaeuser should be 'dismissed'"); CP 1758-59. However, reconsideration of that motion is stayed pending appeal.

³ In the trial court, the Homeowners never contended, as they now do on appeal, that WRECO and Weyerhaeuser had waived their rights to compel arbitration by previously moving for summary judgment. CP 707-21 (Homeowners' opposition brief).

Quadrant, WRECO, and Weyerhaeuser appealed the trial court's order on December 3, 2008. The Court of Appeals issued an opinion on October 19, 2009, reversing the trial court's order in part, but refusing to compel tort claims to arbitration. Pet. for Review, App. A. Both parties filed motions for reconsideration, and, on December 28, 2009, the Court of Appeals granted Quadrant's motion for reconsideration, denied the Homeowners' motion for reconsideration, withdrew its first opinion, and entered a revised opinion reversing the trial court entirely. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009). In its revised Opinion, the Court of Appeals ordered all claims, including tort claims, to arbitration.⁴ *Id* The Homeowners moved for reconsideration again, and the Court of Appeals denied that motion on February 8, 2010.

The Homeowners filed a Petition for Review on March 10, 2010. Quadrant, WRECO, and Weyerhaeuser filed an Answer on April 9, 2010. The Court granted the Homeowners' Petition on September 9, 2010, and later granted the parties leave to file supplemental briefs by November 22, 2010.

IV. ARGUMENT

Washington public policy strongly favors arbitration. *E.g.*, *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 891-92, 16 P.3d 617

⁴ In their Petition for Review, the Homeowners did not renew their argument that tort claims are not arbitrable under Washington law. Pet. for Review at 1-20.

(2001); *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995). To advance that policy, Washington courts enforce contractual agreements to arbitrate whenever possible. *Munsey*, 80 Wn. App. at 95. In fact, courts in Washington “presume arbitrability,” *Zuver v Airtouch Commc’ns, Inc* , 153 Wn.2d 293, 302, 103 P.3d 753 (2004), and place the burden of proving non-arbitrability on the party seeking to avoid arbitration, *Mendez v Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 453, 45 P.3d 594 (2002).

Here, the Homeowners have not met their burden of proving non-arbitrability, and cannot overcome the well-established legal authority, grounded in public policy, requiring arbitration of all claims alleged in this action. First, the Lehtinen and Sigafos children, who did not sign the PSAs, must arbitrate their claims because all of their claims relate directly to the PSAs. Under well-established and sound legal principles, parties who assert legal claims based on a contract must also observe any arbitration provision contained in that contract. Second, pursuant to longstanding statutory and decisional law, the Plaintiffs’ procedural unconscionability challenges to the PSA must be arbitrated. If those claims were decided by a court, the court would determine a significant portion of the underlying dispute and, contrary to public policy, usurp the role intended for the arbitrator. Third, and finally, WRECO and Weyerhaeuser

did not waive their right to compel arbitration when they moved to compel after challenging only their status as proper parties to the lawsuit, and engaging in no other litigation activities.

A. Nonsignatory Plaintiffs, Like the Lehtinen and Sigafos Children, Are Rightfully Estopped from Suing on a Contract and, At the Same Time, Avoiding Its Arbitration Provision.

As the Court recognized in *Satomi Owners Ass'n v Satomi, LLC*, 167 Wn.2d 781, 811 n.22, 225 P.3d 213 (2009), several legal theories, including estoppel, bind parties to arbitration clauses contained in contracts they did not sign. Indeed, courts across jurisdictions, including Washington, have adopted similar expressions of the following estoppel rule, explained by the U.S. Court of Appeals for the Fourth Circuit:

In the arbitration context . . . a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [a nonsignatory plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying [arbitration law].

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (quotations and citations omitted).

Thus, in Washington, where a contract forms "the underlying basis" for a nonsignatory plaintiff's claims, the nonsignatory plaintiff is bound by the contract's arbitration clause. *In re Jean F. Gardner Amended Blind*

Trust, 117 Wn. App. 235, 239, 70 P.3d 168 (2003); *see also Powell v. Sphere Drake Ins P L C*, 97 Wn. App. 890, 896-97, 988 P.2d 12 (1999) (explaining that a nonsignatory plaintiff who bases his right to sue on a contract must also observe any arbitration provision in that contract). Likewise, in other jurisdictions, a nonsignatory plaintiff is required to arbitrate claims that are “intimately founded in and intertwined with the underlying contract obligations.” *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984) (quoting *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981)).

This estoppel-based rule is applied with particular force when nonsignatory plaintiffs join signatory plaintiffs in asserting claims relating directly to the contract containing the arbitration provision. For example, “[w]hen a nonparty to an arbitration agreement fully joins a party to the arbitration agreement’s contract claims, making no distinction between the two, the nonparty ‘subject[s] [itself] to the contract’s terms, including the Arbitration Addendum.’” *In re Ford Motor Co.*, 220 S.W.3d 21, 24 (Tex. Ct. App. 2006) (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001)). Nonsignatory plaintiffs are also bound by a contract’s arbitration clause when their claims “are derivative of and closely related to” the arbitrable claims made by a signatory plaintiff. *Trimper v. Terminix*

Int'l Co., 82 F. Supp. 2d 1, 5 (N.D.N.Y. 2000) (compelling nonsignatory minor children to arbitrate because they asserted the same tort claims as their signatory father).

Arbitration is also required where a nonsignatory plaintiff alleges claims seemingly unrelated to the contract containing the arbitration clause, but still seeks to obtain “direct benefits” from that contract. *In re Weekley Homes, L P*, 180 S.W.3d 127, 134 (Tex. 2005). For example, in *Weekley Homes*, an action against a homebuilder, the plaintiffs included a father and daughter who lived together in an allegedly defective house. *Id.* at 129. The father had signed the purchase and sale agreement containing the arbitration clause, but the daughter had not. *Id.* at 129. In the lawsuit, the nonsignatory daughter alleged only a negligence claim that was no “different from what any bystander would assert,” but because she had also sought “direct benefits from [the] contract by means other than a lawsuit” by, for example, residing in the house, demanding and receiving repairs to what she described as “our home,” and receiving financial reimbursement from the homebuilder while repairs were made, she was prevented from “avoiding the arbitration clause.” *Id.* at 132-35. As the Texas Supreme Court explained, “[a] nonparty cannot both have his contract and defeat it too.” *Id.* at 135.

Each of the estoppel principles stated above applies here and

requires arbitration of the children's claims. The Court of Appeals correctly found that "[t]here is no distinction in the complaints between the children's claims and the parents' claims," and that, even though the Plaintiffs allege a combination of contract, statutory, and tort claims, all of "[t]he claims relate to the PSA." *Townsend*, 153 Wn. App. at 888. The Court of Appeals properly focused "on the substance of the claim[s], [and] not artful pleading," *Weekley Homes*, 180 S.W.3d at 132, and rightly compelled all claims to arbitration, *Townsend*, 153 Wn. App. at 888.

Even a cursory glance at the complaints confirms that the Court of Appeals was correct, and that the Lehtinen and Sigafos children (a) assert contract, statutory, and tort claims relating directly to the PSAs; and (b) assert the very same claims, based on the very same factual allegations, as their signatory parents. For example, the Plaintiffs' claim for fraud (asserted by parents and children alike) alleges that the Defendants made material misrepresentations about "the character and quality of Plaintiffs' home," and that, because of those misrepresentations, "Plaintiffs" (parents and children alike) "were induced to purchase and to continue to reside" in their home. CP 756, 779.

Similarly, the Plaintiffs' statutory CPA claim alleges that the defendants are guilty of "designing, producing, marketing, warranting, and selling Plaintiffs" (parents and children alike) a "Quadrant home when they

knew, or should have known, the home construction violated applicable laws and building codes or” that the house was “defectively constructed.” CP 757, 780.

The Plaintiffs’ claim for negligence alleges that the Defendants violated “a duty to reasonably design, produce and provide their home in compliance with applicable local laws and building codes, and in a workmanlike manner,” and also violated a duty to inform the Plaintiffs (parents and children alike) that their homes allegedly did not meet those construction standards. CP 759-60, 782-83.

The Plaintiffs’ contract claims for breach of warranty and rescission (asserted by parents and children alike) also indisputably relate to the PSAs, CP 761-62, 784-85, as do the Plaintiffs’ other tort claims for outrage and negligent misrepresentation (asserted by parents and children alike), which are based on the same factual allegations underlying their other tort claims, CP 755-56, 760-61, 778-79, 783-84. Thus, the Plaintiffs’ assertion that “[t]he children’s claims are separate and distinct from their parents’ claims and are in no way related to the PSAs” is simply false, and the Lehtinen and Sigafos children must arbitrate their claims pursuant to each of the estoppel principles cited above. Pet. for Review at 12.

The Homeowners incorrectly suggest that these estoppel principles would require “secondary purchasers . . . [other] residents, or guests” to

arbitrate any claims brought against a homebuilder. Pet. for Review at 12-13. Not so. As explained above, such a plaintiff is required to arbitrate only if she seeks to benefit from the contract containing the arbitration clause by, as here, asserting legal claims directly relating to the contract, or, as in *Weekley Homes* (and here), by seeking and deriving substantial direct benefits from the contract outside the lawsuit.⁵ The presence of those factors depends entirely on the plaintiff. In this case, each factor is present, and no plaintiff is a secondary purchaser or guest.

In Washington, as in other jurisdictions, “[a] nonparty cannot both have his contract and defeat it too.” *Weekley Homes*, 180 S.W.3d at 135; *see also Gardner*, 117 Wn. App. at 239; *Powell*, 97 Wn. App. at 896-97. That rule constitutes sound policy grounded in equity and in the well-established legislative preference for arbitration. *See, e.g., Preston v. Ferrer*, 552 U.S. 346, 349, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008) (recognizing national policy favoring arbitration); *Godfrey*, 142 Wn.2d at 891-92 (Washington law favors arbitration). The Court of Appeals correctly applied that rule to compel *all* claims, asserted by parents and children alike, to arbitration, and its decision should be affirmed.

⁵ A non-signatory plaintiff could also be required to arbitrate if other legal doctrines, not discussed here, apply. *See, e.g., Satomi*, 167 Wn 2d at 811 n.22.

B. Under Longstanding Statutory and Decisional Law, the Homeowners' Procedural Unconscionability Challenge To the PSA Is Reserved for Arbitration.

Under Washington's Uniform Arbitration Act, a court decides whether an agreement to arbitrate exists and whether a particular dispute falls within its scope, but "[a]n arbitrator shall decide . . . whether a contract containing a valid agreement to arbitrate is enforceable." RCW 7.04A.060. Therefore, as the Court of Appeals properly held, "a court may entertain only a challenge to the validity of the arbitration clause itself, *not a challenge to the validity of the contract containing the arbitration clause.*" *Townsend*, 153 Wn. App. at 879-80 (emphasis added). This statutory rule derives from longstanding decisional law starting with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

In *Prima Paint*, the party seeking to avoid arbitration claimed that the contract containing the arbitration clause was induced by fraud, and that the entire contract, including the arbitration clause, was unenforceable. 388 U.S. at 398-99. Applying federal arbitration law, the U.S. Supreme Court held that, "if a claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it," but a court cannot "consider claims of fraud in the inducement of the contract

generally.” *Id.* at 403-04. The Court therefore enforced the arbitration clause contained in the challenged agreement, and required arbitration of the plaintiffs’ fraudulent inducement claims. *Id.* at 406-07. The rule announced in *Prima Paint*, which requires parties to arbitrate challenges to the entire contract, has been embraced by this Court, is embodied in RCW 7.04A.060(3), and is consistently reaffirmed by the U.S. Supreme Court, as recently as this past summer. *E.g.*, *Rent-A-Center, West, Inc. v. Jackson*, --- U.S. ---, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403 (2010); *Preston*, 552 U.S. at 349; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 394, 191 P.3d 845 (2008); *Pinkis v. Network Cinema Corp.*, 9 Wn. App. 337, 345-46, 512 P.2d 751 (1973).

The *Prima Paint* rule exists to advance the state and federal public policy favoring arbitration. For example, “[w]ere a court to decide the fraudulent inducement question in *Prima Paint* in order to decide the antecedent question of the validity of the included arbitration agreement, then it would also, necessarily, decide the merits of the underlying dispute” and, contrary to public policy, usurp the role reserved for the arbitrator. *Rent-A-Center*, 130 S. Ct. at 2788 (Stevens, J., dissenting). The *Prima Paint* rule avoids that outcome by requiring arbitration. Without question,

“the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void,” but “it is equally true that [the alternative] approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable.” *Buckeye*, 546 U.S. at 448-49. Given the strong policy preference for arbitration, the *Prima Paint* rule rightly “resolved this conundrum” in favor of requiring arbitration when a plaintiff makes “a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause.” *Id.* at 449.

Here, relying on RCW 7.04A.060(3) and *Prima Paint*’s well-reasoned rule, the Court of Appeals correctly reserved the Homeowners’ procedural unconscionability claims for the arbitrator. *Townsend*, 153 Wn. App. at 885-86. In fact, the Homeowners make the very same arguments here that were made in *Prima Paint*. In their eighth cause of action, the Homeowners claim that “[t]he *purchase and sale agreement* signed by [the Homeowners] and Defendant Quadrant is an adhesion contract obtained through Defendants’ fraud.” CP 26, 763, 786 (emphasis added). As a result, the Homeowners claim, “[t]he arbitration clause is invalid, unconscionable, and unenforceable.” *Id.* That challenge to the PSA must be reserved for the arbitrator, just as it was 43 years ago in *Prima Paint*.

The Homeowners' other legal claims also challenge the making of the PSAs. In their claims for fraud and negligent misrepresentation, for example, the Homeowners allege they were "induced to purchase and to continue to reside" in their homes because of alleged misrepresentations relating to the quality of construction. CP 18, 24, 756, 761, 779, 784. The Homeowners then seek rescission of the PSAs in their sixth cause of action. CP 24-25, 761-62, 784-85.⁶

Those legal claims, and consequently a significant portion of the underlying dispute, would be decided by a court rather than an arbitrator if a court were to consider the Homeowners' allegations of procedural unconscionability. The sound policy reflected in *Prima Paint*, and codified in RCW 7.04A.060(3), exists to prevent that outcome. The Court of Appeals therefore properly reserved the Homeowners' procedural unconscionability challenges for the arbitrator, and that decision should be affirmed.⁷

⁶ In their Answer to Petition for Review, Quadrant, WRECO, and Weyerhaeuser offered additional examples of the Homeowners' direct attacks on the enforceability of the PSAs, focusing particularly on declarations submitted by the Homeowners. Answer to Pet. for Review at 14-18.

⁷ Even if a court could consider the Homeowners' procedural unconscionability allegations, their allegations do not show procedural unconscionability in this case. See, e.g., Appellants' Reply Brief at 17-21.

C. WRECO and Weyerhaeuser Preserved Their Rights To Compel Arbitration.

The Court of Appeals also correctly determined that WRECO and Weyerhaeuser preserved their rights to compel arbitration. In Washington, waiver is defined “as the voluntary and intentional relinquishment of a known right,” and “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, 61-62, 621 P.2d 791 (1980) (emphasis added). Therefore, waiver is determined on a case-by-case basis according to the facts presented and the intentions demonstrated by the parties. *E.g., id.* at 64 (three-month delay in moving to compel arbitration and limited use of discovery insufficient to constitute waiver); *Ives v. Ramsden*, 142 Wn. App. 369, 379, 174 P.3d 1231 (2008) (party waived right to compel arbitration after litigating for three and a half years, engaging fully in discovery, and moving to compel arbitration on the “eve of trial”).

Washington’s case-by-case, fact-based waiver analysis is consistent with the approach taken in other jurisdictions. *E.g., The Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 137, 801 A.2d 1104 (2002) (“there is no ‘bright-line’ test for determining waiver” because the test is “highly factually-dependent”). In fact, there is no truth to the

Homeowners' claim that any motion for summary judgment, made under any circumstances in any point in a case, necessarily constitutes a waiver of the right to compel arbitration. Pet. for Review at 18-19. Indeed, most jurisdictions "find no support for [the] contention that a motion for summary judgment, without more, waives arbitration." *Freedman v Comcast Corp.*, 190 Md. App. 179, 201, 988 A.2d 68 (2010) (conducting national survey of legal standards governing waiver of right to compel arbitration); see also *Keytrade USA, Inc. v AIN TEMOUCHENT M/V*, 404 F.3d 891, 897 (5th Cir. 2005) ("extensive summary judgment motion—in excess of 100 pages" insufficient to constitute waiver of right to arbitrate when filed "from a defensive posture"); *Seguros Banvenez, SA v S/S Oliver Drescher*, 761 F.2d 855, 862 (2d Cir. 1985) (no waiver even though party moved for summary judgment).

The Homeowners point only to *Naches Valley Sch. Dist. No. JT3 v Cruzen*, 54 Wn. App. 388, 775 P.2d 960 (1989), to suggest that, under Washington law, a party necessarily waives its right to compel arbitration by moving for summary judgment. Pet. for Review at 18-19. But for all the reasons described in the Answer to Petition for Review, *Naches Valley* (in which the parties moving for summary judgment *never* requested arbitration or evinced any desire ever to do so) is inapposite. Answer to Pet. for Review at 18-19. Washington courts, like other courts, analyze

waiver by focusing on the facts of each individual case, not by applying a bright-line rule of the type suggested by the Homeowners. Courts are also guided by the public policy favoring arbitration. *Lake Wash. Sch. Dist* , 28 Wn. App. at 64 (holding that no waiver had occurred, and citing public policy in favor of arbitration).

Here, the Court of Appeals properly analyzed the facts of this case and correctly held that WRECO and Weyerhaeuser engaged in conduct “demonstrat[ing] they did not intend to waive their right to arbitrate” *Townsend*, 153 Wn. App. at 890. WRECO and Weyerhaeuser moved *immediately* for summary judgment on all claims asserted by the Perezes and Ysteboes on the basis that “they were not properly parties to the lawsuit, as the Homeowners had not pleaded facts that implicated their liability.” *Id.* at 889. Indeed, although WRECO and Weyerhaeuser submitted evidence outside the pleadings, they submitted only two declarations, one from a WRECO executive and one from a Weyerhaeuser executive, for the *sole* purpose of clarifying the corporate relationships between Quadrant, WRECO, and Weyerhaeuser, and, accordingly, the Homeowners’ lack of privity with WRECO and Weyerhaeuser. CP 802-05 (Sowell & Hanson Decls.). WRECO and Weyerhaeuser’s motion was denied *without prejudice*. CP 342. WRECO and Weyerhaeuser then joined Quadrant in moving to compel arbitration. On those facts, the Court

of Appeals properly held that WRECO and Weyerhaeuser did not waive their right to arbitrate. *Townsend*, 153 Wn. App. at 890.

This is not a case in which the party seeking to compel arbitration did so after engaging in extensive litigation for years. *See Ives*, 142 Wn. App. at 379. Nor is it a case of forum shopping, as the Homeowners suggest, since the motion for summary judgment was denied without prejudice and can be relitigated either in the trial court or in arbitration. WRECO and Weyerhaeuser moved immediately for summary judgment, had their motion denied without prejudice, then joined Quadrant in moving to compel arbitration before engaging in discovery or taking any other significant action. Given those facts, it is not surprising that the Homeowners failed to raise a waiver argument in the trial court, and the Court of Appeals correctly held that no waiver has occurred. The Court of Appeals should be affirmed.

V. CONCLUSION

The Court of Appeals correctly applied the law in compelling all claims in this action to arbitration. The law applied by the Court of Appeals is long-standing, grounded in sound public policy, and adopted across jurisdictions. The Court of Appeals' decision should be affirmed.

Dated this 22^d day of November, 2010.

Respectfully submitted,

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Attached are copies of the Supplemental Brief of Respondents and Certificate of Service in the above-referenced matter.

The person submitting this supplemental brief is Laurie Lootens Chyz, 206-623-1745, WSBA No. 14297, e-mail address: llc@hcmp.com.

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