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No. 42523-8-II

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STATE OF WASHINGTON
BY _____
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WASHINGTON STATE COURT OF APPEALS
DIVISION II

PATTY J. GANDEE, individually and on behalf of a Class of similarly situated Washington residents,

Respondents,

v.

LDL FREEDOM ENTERPRISES, INC. a/k/a LDL FREEDOM, INC. d/b/a FINANCIAL CROSSROADS, a California corporation; DALE LYONS, individually; BETTE J. BAKER a/k/a LIZ BAKER, individually; NATIONWIDE SUPPORT SERVICES, INC., a California corporation; and JOHN AND JANE DOES 1-5,

Appellants.

BRIEF OF APPELLANTS LDL FREEDOM ENTERPRISES, INC. and NATIONWIDE SUPPORT SERVICES, INC.

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR 2

1. Assignment of Error 2

2. Statement of Issues Pertaining to Assignment of Error 2

III. STATEMENT OF THE CASE 4

A. Statement of Facts 4

B. Procedures Below 6

IV. ARGUMENT 7

A. Summary of Argument 7

B. Scope of Review. 12

C. Questions Concerning Conditions Precedent to Arbitration, Such as the Question Whether the Arbitration Provision was Properly Invoked, are for the Arbitrator. 12

D. Both Federal and State Cases Reject the Position Taken By Respondents that Mere Allegations of Substantive Unconscionability Suffice to Allow an

Page

Otherwise-Valid Arbitration Clause to be Rejected. 14

1. Federal Preemption Generally 14

2. State Policies Favoring Arbitration of Disputes. 17

3. The Trial Court's Determination that the Arbitration Agreement is Unconscionable is Inconsistent with Both State and Federal Law. 19

4. The Appropriate Remedy for an Unconscionable Venue Provision is Severance, not Refusal to Enforce the Arbitration Agreement Altogether. 25

E. *Concepcion* Holds Authoritatively That A State's Categorical Rejection of Arbitration Clauses for Consumer Disputes, or Decisional Law Placing Consumer Disputes on a Special Footing in Requiring Judicial Resolution of Claims, Violates the FAA and is Preempted. 27

F. Federal Law Makes Plain That the Word "Unconscionability" Does Not Deprive LDL Freedom of Its Contractual Right to Arbitration; To the Extent Washington Law is Inconsistent, it is Preempted. 29

G. Gandee's Reliance Below on the Substance of the Washington Statutes at Issue is

Page

Misplaced; Courts Decide Only Threshold Issues of Enforceability.....31

H. The "Prevailing Party" Clause Does Not Affect Arbitrability of This Dispute. 32

V. CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Adler v. Fred Lind Manor,
153 Wn.2d 331, 103 P.3d 773 (2004) 9, 28

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 15

AT&T Mobility LLC v. Concepcion,
___ U.S. ___, 131 S.Ct. 1740 (2011) .....passim

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 14, 15, 33

Chelan County v. Chelan County Deputy Sheriff's Ass'n,
162 Wn.App. 176, 252 P.3d 421 (June 2, 2011,
Division III) 19

Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1996) 15

Erwin v. Cotter Health Ctrs., Inc.,
161 Wn.2d 676, 167 P.3d 1112 (2007) 9

Faber v. Menard, Inc.,
367 F.3d 1048 (8th Cir. 2004).....22

Green Tree Fin. Corp.-Ala. v. Randolph,
531 U.S. 79 (2000) .....passim

Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.,
148 Wn.App. 400, 200 P.3d 254 (2009) 17

Hill v. Gateway, Inc.,
105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808 (1997) 24

Howsam v. Dean Witter Reynolds,
537 U.S. 79 (2002) 13

James v. McDonald's Corp.,
417 F.3d 672 (7th Cir. 2005) 24

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 13

Kaneff v. Delaware Title Loans, Inc.,
587 F.3d 616 (3d Cir. 2009) 22

M.A. Mortenson Co., Inc. v. Timberline Software Corp.,
93 Wn.App. 819, 970 P.2d 803 (1999), *aff'd,* 140 Wn.2d 568, 998 P.2d 305 (2000) 20, 21, 25

McKee v. AT & T Corp.,
164 Wn.2d 372, 191 P.3d 845 (2008) 9, 11, 30, 31

Mendez v. Palm Harbor Homes, Inc.,
111 Wn.App. 446, 45 P.3d 594 (2002) 21, 24, 31

Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.,
460 U.S. 1 (1983) 13

Nagrampa v. MailCoups, Inc.,
469 F.3d 1257 (9th Cir. 2006) 33

Nishikawa v. U.S. Eagle High, LLC,
138 Wn.App. 841, 158 P.3d 1265 (2007) 20

Otis Housing Ass'n, Inc. v. Ha,
165 Wn.2d 582, 201 P.3d 309 (2009) 12

Pan Am Flight 73 Liaison Group v. Dave,
711 F. Supp. 2d 13 (D.D.C. 2010), aff'd, 2011 WL 1544670 (D.C. Cir. 2011) 22

Peninsula Sch. Dist. No. 401 v. Pub. Sch. Empls. of Peninsula,
130 Wn.2d 401, 924 P.2d 13 (1996) 18

Perry v. Thomas,
482 U.S. 483 (1987) 15

Preston v. Ferrer,
128 S. Ct. 978 (2008) 16

Preston v. Ferrer,
552 U.S. 356 (2008) 14, 15, 16

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) ..... passim

Satomi Owners Ass'n v. Satomi, LLC,
167 Wn.2d 781, 225 P. 3d 213 (2009) ..... passim

Schnall v. AT & T Wireless Services, Inc.,
171 Wn.2d 260 (2011) 9

Scott v. Cingular Wireless,
160 Wn.2d 843, 161 P.3d 1000 (2007) 12

Southland Corp. v. Keating,
465 U.S. 1 (1984) 15, 29

Taylor Bldg. Corp. of Am. v. Benfield,
117 Ohio St. 3d 352, 884 N.E.2d 12 (2008) 22

Torgerson v. One Lincoln Tower, LLC,
166 Wn.2d 510, 210 P.3d 318 (2009) 20, 21, 23, 24

Townsend v. Quadrant Corp.,
153 Wn.App. 870, 224 P.3d 818 (2009), affirmed,
__Wn2d __, 2012 WL 19736 (Jan. 5, 2012) 11, 30

Verbeek Properties, LLC v. Greenco Environmental, Inc.,
159 Wn.App. 82, 246 P.3d 205 (2010) 14, 17

Walters v. A.A.A. Waterproofing, Inc.,
151 Wn.App. 316, 211 P.3d 454 (2009) 27, 30

Wegeleben v. Dave Barcelon's Truck Town, Ltd.,
2009 WL 1212029 (Wn.App. Div. 2, 2009) 33

Woodall v. Avalon Care Center-Federal Way, LLC,
155 Wn.App. 919, 231 P.3d 1252 (2010) 23

Yakima County Law Enforcement Officers Guild v. Yakima County,
133 Wn.App. 281, 135 P.3d 558 (2006) 18

Zuver v. Airtouch Communications, Inc.,
153 Wn.2d 293, 103 P.3d 753 (2004) 12

Zuver v. Airtouch Communications, Inc.,
supra, 153 Wn.2d 1023 (2005) 27

STATUTES

9 U.S.C. § 2 ..... 14, 15, 29

Consumer Protection Act, ch. 19.86 RCW 10

Consumer Protection Act, RCW 19.86 10

Debt Adjustment Act, ch. 18.28 RCW 6, 10

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... 11, 14

RCW 7.04A.060 ..... 13, 29

I. INTRODUCTION

This is an appeal from an order denying a motion to compel arbitration. The trial court below misconstrued applicable federal and state law in a variety of ways. The trial court made no effort to sever the provisions it found to be unconscionable, although the Agreement contains a severability clause and Appellants offer to waive some of the provisions of the arbitration agreement. The trial court did not allow the arbitrator to decide whether conditions precedent to arbitration had been fulfilled, as applicable law requires. The trial court also found unconscionability despite the lack of any evidence of procedural unconscionability, despite insufficient evidence of substantive unconscionability, and without consideration of recent United States Supreme Court decisions bearing on the subject. Given the strong public policies, state and federal, supporting arbitration of disputes, the trial court's summary determination was erroneous and should be reversed.

II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Assignment of Error.

The trial court erred by issuing an Order, dated August 19, 2011, denying Appellants LDL Freedom Enterprises, Inc. a/k/a LDL Freedom Inc. d/b/a Financial Crossroads, and Nationwide Support Services, Inc.'s motion to compel arbitration, as the parties had agreed.

2. Statement of Issues Pertaining to Assignment of Error.

Appellants raise the following issues pertaining to the assignment of error:

1. Is a venue provision in an arbitration agreement, which calls for arbitration at the location of Appellants' principal place of business, shocking to the judicial conscience?

2. Is Washington free to enforce its public policy favoring judicial resolution of consumer-related cases, in light of recent federal decisions under the Federal Arbitration Act?

3. Assuming an affirmative answer to the first two questions, is severance of the venue provision the appropriate remedy, where the contracting party offers to waive the venue provision, or should a court simply deny the parties their bargained-for right to arbitration?

4. Are Washington cases giving heightened concern for judicial remedy for consumer disputes, which cases find arbitration clauses unconscionable without any determination of procedural unconscionability, preempted by the Federal Arbitration Act under *ATT Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011)?

5. Does a trial court commit error by deciding that Appellants did not properly and timely invoke the arbitration provision of the parties' contract, a determination properly to be made by the arbitrator?

6. Is the validity of a contractual provision calling for costs and attorney's fees to the "prevailing party" a matter of substantive rights, to be decided by the arbitration under *Prima*

Paint, or is such validity a threshold matter of the enforceability of the arbitration clause, a matter for the court in the first instance?

III. STATEMENT OF THE CASE

A. Statement of Facts

On May 6, 2008, Gary and Patty Gandee signed a Debt Settlement Agreement (the "Contract") with Financial Crossroads ("Financial"), a dba of defendant LDL Freedom Enterprises, Inc. ("Freedom"). CP 7-10. The Contract was part of a packet sent to the Gandees at their home. They read the packet, signed the Contract, and returned it. CP 68. There was no evidence that the Gandees were pressured into signing the Contract.

The Contract recites that Financial is located in Santa Ana, California, which is located in Orange County. CP 73. The Complaint recites that Freedom is located in Irvine, California. CP 2. The Gandees' Complaint acknowledges that

Irvine, in Orange County, California, is Freedom's principal place of business. *Id.*

Directly above the Gandees' signatures are the two clauses at issue on this appeal. The first is Paragraph 11, the arbitration clause. It states the following:

> **11. Arbitration.** All disputes or claims between the parties related to this Agreement shall be submitted to binding arbitration in accordance with the rules of American Arbitration Association within 30 days from the dispute date or claim. Any arbitration proceedings brought by Client shall take place in Orange County, California. Judgment upon the decision of the arbitrator may be entered into any court having jurisdiction thereof. The prevailing party in any action or proceeding related to this Agreement shall be entitled to recover reasonable legal fees and costs, including attorney's fees which may be incurred.

CP 75. The second clause is the severability clause, which states:

> **15. Severability.** If any of the above provisions are held to be invalid or unenforceable, the remaining provisions will not be affected.

Id. The Gandees became disenchanted with their Contract with Freedom, and brought the instant lawsuit, claiming that

Freedom violated the Consumer Protection Act and ch. 18.28 RCW.

B. Procedures Below.

After the Complaint was filed, Freedom moved the trial court for an order compelling arbitration and to stay proceedings pending the outcome thereof. CP 13-17. The Gandees submitted a brief, CP 25, and a declaration, CP 67. The Declaration of Patty J. Gandee attaches a printout purporting to show hotel and airplane costs associated with arbitration in Orange County, California. The brief and declaration do not attempt to show the cost savings associated with arbitration. *See* CP 25, CP 67.

The Gandees argued that the arbitration agreement was invalid and unenforceable for several reasons. First, they argued, Appellants did not act with sufficient alacrity to invoke the arbitration agreement. CP 28. Second, they argued that the venue provision was too expensive; a plane ticket and a hotel room were alleged to be too expensive, notwithstanding the

Gandees' claim of treble damages, "total damages [of] ... less than $75,000." CP 8; CP 31. Third, they argued that the prevailing party term of the agreement is inconsistent with Washington consumer law. CP 34. Finally, they argued that the unconscionable provisions were "pervasive" and thus could not be severed, notwithstanding multiple Washington decisions severing terms from arbitration agreements. CP 34-35.

The trial court agreed with the Gandees, and denied Freedom's motion. This appeal followed.

IV. ARGUMENT

A. Summary of Argument.

The trial court overlooked both state and federal policies favoring arbitration, and disregarded clear Washington and federal precedent on several points. Precedent favoring Freedom's position refuted every aspect of the Gandees' argument below. The trial court's decision was inconsistent with *Concepcion* and must be reversed on that ground as well. These points are discussed in turn.

First, both state and federal cases make clear that it is simply insufficient to claim that an arbitration provision is substantively unconscionable *without providing sufficient evidence of the relative burdens* imposed by the provision. The trial court decision was supported only by evidence of the relatively modest cost of travel to Orange County to arbitrate; Orange County has a substantial relationship with the lawsuit.

Second, an arbitration agreement is not and cannot be by itself unconscionable. An unconscionable term is one that shocks the judicial conscience. By itself, there is nothing untoward or unconscionable about the arbitration agreement in the Contract, and no evidence was submitted below to alter that conclusion. Particularly where there is no evidence of procedural unconscionability, it is inconsistent with the Federal Arbitration Act to refuse to enforce consumer arbitration agreements, because of a state's general public policy favoring judicial resolution of consumer disputes.

Third, Washington cases enforce contractual choice of law/choice of forum provisions when the chosen forum bears a rational relationship to the parties and the contract. *Schnall v. AT & T Wireless Services, Inc.*, 171 Wn.2d 260 (2011), *citing McKee v. AT & T Corp.,* 164 Wn.2d 372, 384, 191 P.3d 845 (2008) (citing *Erwin v. Cotter Health Ctrs., Inc.,* 161 Wn.2d 676, 694–96, 167 P.3d 1112 (2007)). As the Gandees allege in their Complaint, Orange County, California is the principal place of business for Appellant Freedom, a relationship that is surely rational under *Schnall.*

But even if this Court is somehow offended by the venue provision, the remedy is to excise it, as other Washington courts have done, and not to refuse to enforce the arbitration agreement altogether. *See, e.g., Adler v. Fred Lind Manor*, 153 Wn.2d 331, 359-360, 103 P.3d 773, 788–789 (2004).

Fourth, the Gandees are simply wrong when they assert that the trial court can determine that Appellants did not timely

invoke the arbitration agreement. Prior decisions make clear that this is a question for the arbitrator, not the courts.

Fifth, the "prevailing party" provision in the Contract has nothing logically to do with the question whether this dispute should be arbitrated. The courts only resolve threshold questions regarding enforceability of agreements to arbitrate. It is inconsistent with the Federal Arbitration Act to go farther, as the trial court did, and refuse to enforce an arbitration agreement simply because of a "prevailing party" provision the court did not like. *See Prima Paint, infra.* If the prevailing party provision is inconsistent with the Consumer Protection Act, RCW 19.86, there is no reason why an arbitrator cannot make that determination, if necessary.

Finally, to the extent that the Gandees insisted that "public policy" requires a judicial forum for disputes arising under the Consumer Protection Act, ch. 19.86 RCW, and the Debt Adjustment Act, ch. 18.28 RCW, they are incorrect and the agreement is preempted by federal law, as well as

inaccurate. Of course, neither statute expressly requires a judicial forum. Washington courts have rejected arguments that any Consumer Protection Act claim must be decided in a judicial forum,[1] under *Concepcion*, the Federal Arbitration Act, 9 U.S.C. §§ 1-16, prohibits a state from adopting anti-arbitration rules by decisional law in order to provide consumers a judicial forum.

Plaintiffs bear the burden of proof to oppose enforcement of the parties' agreement to arbitrate disputes. *Townsend v. Quadrant Corp.*, 153 Wn.App. 870, 224 P.3d 818 (2009), affirmed, __Wn2d __, 2012 WL 19736 (Jan. 5, 2012). All presumptions are made in favor of arbitration. The Gandees have not met their burden of proving that this arbitration agreement is unenforceable, and this Court should, accordingly, reverse.

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[1] *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P. 3d 213 (2009); *see also McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008).

B. Scope of Review.

On review of a trial court's denial of a motion to compel arbitration, the party opposing arbitration has the burden of showing that the arbitration clause is unenforceable or inapplicable. *Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). Appellate review is conducted *de novo*. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007), citing *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). This Court may reach any decision the trial court could have reached on this record.

C. Questions Concerning Conditions Precedent to Arbitration, Such as the Question Whether the Arbitration Provision was Properly Invoked, are for the Arbitrator.

The Gandees asserted below that the fact that defendants did not request arbitration within 30 days after the lawsuit was filed precludes arbitration under the Clause. But this is a question about the procedures in arbitration, an issue committed

by law to the arbitrator. In *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), the court made a sharp distinction between "questions of arbitrability" for the courts (whether the parties agreed to arbitrate) and questions of a more procedural character, like the question whether the parties had met a condition precedent to arbitration, which are for the arbitrator.

In *Howsam*, a claim was filed more than six years after it arose, and a provision in the contract required arbitration within six years. The Court held that this was an issue for the arbitrator, and not for the courts. *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)(procedural questions are for the arbitrator); *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) (presumptively for the arbitrator are questions like waiver, laches, and the effect of delay).

RCW 7.04A.060 is to the same effect. That statute states that an "arbitrator shall decide whether a condition precedent to arbitration has been fulfilled." The arbitrator here can decide

whether the 30-day period has been met or waived. This decision must be made by the arbitrator, not by the trial court. *Verbeek Properties, LLC v. Greenco Environmental, Inc.*, 159 Wn.App. 82, 89, 246 P.3d 205 (2010).

The trial court committed error by deciding this question.

D. Both Federal and State Cases Reject the Position Taken By Respondents that Mere Allegations of Substantive Unconscionability Suffice to Allow an Otherwise-Valid Arbitration Clause to be Rejected.

1. Federal Preemption Generally

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, applies to all arbitration agreements impacting interstate commerce, and preempts state laws inconsistent with its provisions and policies. *See, e.g., Preston v. Ferrer*, 552 U.S. 356, 353-354 (2008), citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-403 (1967), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). Section 2 of the FAA states:

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

> transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This statute "declares a national policy favoring arbitration" of claims that parties contract to resolve in that manner. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). As the Supreme Court noted in *Ferrer*:

> That national policy, we held in *Southland*, "appli[es] in state as well as federal courts" and "*foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements*." *Id.*, at 16. The FAA's displacement of conflicting state law is "now well-established," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), and has been repeatedly reaffirmed, *see, e.g.*, *Buckeye*, 546 U.S., at 445-446; *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-685 (1996); *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

552 U.S., at ___, 128 S.Ct. at 353 (emphasis supplied).[2]

In *Ferrer*, an individual claimed that a state law providing him with specific protections (the California Talent

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[2] *Prima Paint* also teaches that the courts must focus solely on the arbitration clause when determining arbitrability, and may not deny a motion to compel arbitration if the contract as a whole, but not the arbitration clause specifically, is invalid.

Agencies Act) somehow trumped the FAA. The Supreme Court disagreed, pointing out that the FAA favors arbitration in both federal and state courts, and preempts categorical state efforts to vest exclusive jurisdiction over disputes arising out of agreements containing arbitration clauses in some other forum.[3]

While *Ferrer* preempts state *statutes* putting arbitration agreements at a disadvantage, *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740 (2011), the Court made clear that the FAA preempts *state decisional law rules* that "stand as an obstacle to the accomplishment of the FAA's objectives." In *Concepcion*, California case law related to unconscionability and consumer contracts was held preempted by federal law. 131 S.Ct. at 1748. *See* 131 S.Ct. at 1746 (generally applicable contract defenses may be applied consistently with the FAA, but a state may not deny a motion to compel arbitration on grounds "that apply only to arbitration <u>or</u>

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[3] *Preston v. Ferrer*, 128 S. Ct. 978 (2008), citing Cal. Lab. Code §§ 1700.44(a), 1700.45.

derive their meaning from the fact that an agreement to arbitrate is at issue"). Washington cases have treated consumer arbitration clauses as a special class, and invalidated them (or provisions therein) under "public policies" favoring consumers. *See McKee v. AT & T Corp.,* 164 Wn.2d 372, discussed *infra* at section IV F of this Brief. This is error under *Concepcion.*

Thus state court decisions that excuse a party from his or her agreement to arbitrate on grounds of unconscionability must be viewed skeptically, given federal preemption and federal policies favoring arbitration, and such state court case law must be construed in a manner consistent with federal decisions under the FAA.[4]

2. State Policies Favoring Arbitration of Disputes.

Washington courts also indulge every presumption in favor of arbitration, whether the problem at hand is the

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[4] *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P. 3d 213 (2009) (arbitration clause in agreement was neither substantively nor procedurally unconscionable; FAA preempted Washington Condominium Act).

construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, 159 Wn.App. 82, 87, 246 P.3d 205 (2010); *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn.App. 400, 405, 200 P.3d 254 (2009); *see also Peninsula Sch. Dist. No. 401 v. Pub. Sch. Empls. of Peninsula*, 130 Wn.2d 401, 413–14, 924 P.2d 13 (1996). Just last June, this Division III of the Court of Appeals held:

> The courts have authority to determine whether parties to an action have agreed to arbitrate an underlying controversy. *Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wn.App. 281, 285, 135 P.3d 558 (2006). But they have no authority to determine the merits of that controversy " 'unless it may be said with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413–14, 924 P.2d 13 (1996) (emphasis omitted) (quoting *Council of County & City Emps. v. Spokane County*, 32 Wn.App. 422, 425, 647 P.2d 1058 (1982)). *We presume, strongly presume, that a controversy between parties is covered by their arbitration agreement. Id.* at 414, 924 P.2d 13. That presumption is rebutted only by evidence that shows expressly or by clear implication that the controversy is not covered. *Id.* "Thus, apart from matters that the

> parties specifically exclude, the questions on which they disagree must come within the scope of the grievance and arbitration provisions of the collective bargaining agreement." *Id.*

Chelan County v. Chelan County Deputy Sheriff's Ass'n, 162 Wn.App. 176, 181-182, 252 P.3d 421 (June 2, 2011), (emphasis supplied).

Thus under both state and federal law, arbitration of this dispute is "presume[d], strongly presume[d]," and the Gandees have a heavy burden to prove otherwise. They have not met that burden.

3. The Trial Court's Determination that the Arbitration Agreement is Unconscionable is Inconsistent with Both State and Federal Law.

The Gandees argued to the trial court, successfully, that the cost of arbitrating their claims in Orange County, California, was excessive in comparison with the value of the

claim. CP 29-32. They ignored Appellants' offer of waiver of the venue provision.[5]

Cost was the principal *substantive* unconscionability argument advanced by the Gandees; the Gandees made no procedural unconscionability claims. They did not claim that they did not know what they were signing.[6]

A party to an arbitration agreement cannot avoid its operation on grounds of unconscionability *without providing any evidence of the relative burdens* imposed by the provision. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 519, 210 P.3d 318, 323 (2009); *see also M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn.App. 819, 833-34, 970 P.2d 803 (1999) (noting lack of evidence that plaintiff was

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[5] The Gandees also claimed that arbitration would be too expensive, given American Arbitration Association costs, CP 32, but it was pointed out that the Agreement does not require AAA arbitration; it only requires the parties to follow AAA arbitration *rules*.

[6] Of course, parties are presumed to have read the contracts they sign. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.App. 841, 158 P.3d 1265 (2007).

unwilling to enter challenged agreement), *aff'd,* 140 Wn.2d 568, 998 P.2d 305 (2000). Yet that is precisely what happened below. The cost *savings* of arbitration was not considered; only the inconvenience of travel to Orange County was discussed.

In *Torgerson v. One Lincoln Tower, LLC*, *supra,* 166 Wn.2d 510, 519, 210 P.3d 318, 323 (2009), the court stated:

> Here, the only evidence suggesting the Homeowners face financial difficulty are their identical declarations that requiring them to proceed in two forums would be financially ruinous. This presumes their tort claims are not subject to arbitration, a notion we reject infra. *Further, the Homeowners did not present evidence of the cost of arbitration as compared to the value of their claim*, necessary to satisfy the burden recognized in *Mendez. See id.* at 465, 45 P.3d 594 (comparing burden of the $2,000 expense up front to resolve a $1,500 dispute). There is insufficient evidence on which to base an argument of substantive unconscionability under *Mendez.* (Emphasis added.)

See also Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) (rejecting a hypothetical contention that large arbitration costs rendered arbitration agreements unenforceable, and holding that the party alleging unconscionability bears the burden of proving prohibitive costs); *M.A. Mortenson Co.,*

Inc. v. Timberline Software Corp., 93 Wn.App. 819, 833-34, 970 P.2d 803 (1999) (noting lack of evidence that plaintiff was unwilling to enter challenged agreement), *aff'd,* 140 Wn.2d 568, 998 P.2d 305 (2000).

The Gandees argued that it would be a hardship to force them to travel to Orange County, California, to arbitrate the case. The cases decided under *Green Tree* make abundantly clear that *proof* of unconscionability is required—the Gandees' allegations do not suffice.[7]

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[7] *See also Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 2008-Ohio-938, 884 N.E.2d 12 (2008) (applying the *Green Tree* rationale to state-law claims and declining to find unconscionability where the plaintiff failed to present evidence of prohibitive costs); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004) (requiring party claiming that arbitration is cost-prohibitive to "*present specific evidence of likely arbitrator's fees and its financial inability to pay those fees*," including the claimant's "particular financial situation"); *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) ($125 filing fee was not unconscionable); *Pan Am Flight 73 Liaison Group v. Dave*, 711 F. Supp. 2d 13 (D.D.C. 2010), aff'd, 2011 WL 1544670 (D.C. Cir. 2011) ("The Davé's allegation that the costs of arbitration are prohibitive fares no better. A party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs. The Davés contend that the arbitration agreement's terms regarding costs are unreasonably favorable to ... the LG. **But they offer no specific facts, as they must, to support this conclusion — for example, the expected cost difference between arbitration and litigation in court, and whether that cost**

Washington cases are to the same effect. *See, e.g.,* *Woodall v. Avalon Care Center-Federal Way, LLC,* 155 Wn.App. 919, 231 P.3d 1252 (2010), in which the court rejected plaintiff's claim, based upon a conclusory allegation that he could not afford the cost of arbitration, that the clause was unconscionable. But even in *Woodall*, there was more evidence than the trial court had below; the Gandees did not compare litigation and arbitration costs, or consider the cost *savings* provided by arbitration.

Similarly, in *Torgerson v. One Lincoln Tower, LLC, supra*, the court rejected a claim that an arbitration provision was unconscionable because there was insufficient evidence before it that the cost of arbitration was disproportionate to the value of the claim.[8] The court stated:

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differential is so substantial as to deter the bringing of claims. *Indeed, arbitration may be a less costly alternative to formal litigation*"), citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("arbitration agreements allow parties to avoid the costs of litigation").

[8] This Court should note that American Arbitration Association "rules" are to be followed under this arbitration agreement, but there is no requirement that American Arbitration Association *fees* must be paid.

> Here, the only evidence suggesting the Homeowners face financial difficulty are their identical declarations that requiring them to proceed in two forums would be financially ruinous. This presumes their tort claims are not subject to arbitration, a notion we reject infra. Further, the Homeowners did not present evidence of the cost of arbitration as compared to the value of their claim, necessary to satisfy the burden recognized in *Mendez*. *See id.* at 465, 45 P.3d 594 (comparing burden of the $2,000 expense up front to resolve a $1,500 dispute). There is insufficient evidence on which to base an argument of substantive unconscionability under *Mendez*.

Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d at 519.

The Gandees argued below that a plane ticket and a hotel stay during the trial, assuming that LDL Freedom does not waive the right to arbitrate in California, rendered the venue provision unconscionable. This is simply insufficient, under *federal* law, to show unconscionability. *See James v. McDonald's Corp.*, 417 F.3d 672 (7th Cir. 2005); *Hill v. Gateway, Inc.*, 105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808 (1997).

This arbitration agreement is, therefore, relatively unburdensome on its face. There is no other evidence of costs before this Court.

Again, in this post-*Concepcion* era, state courts are simply not free to overturn arbitration clauses they do not like.

This Court is respectfully requested to hold that the trial court erred by holding the arbitration agreement here unconscionable and unenforceable.

4. The Appropriate Remedy for an Unconscionable Venue Provision is Severance, not Refusal to Enforce the Arbitration Agreement Altogether.

In *Satomi Owners Ass'n v. Satomi*, LLC, 167 Wn.2d 781, 225 P. 3d 213 (2009), the court held that an arbitration clause like this one was neither substantively nor procedurally unconscionable; the court also held that the FAA preempted the Washington Condominium Act, a statute adopted to protect consumers. This result is similar to the result reached in *Woodall*, *supra*, and in other cases. *See*, *e.g.*, *Townsend v. Quadrant Corp.*, 153 Wn.2d 870, 224 P.3d 818 (2009).

But if this Court is persuaded that the venue provision is unconscionable (though Freedom believes that would be inappropriate, because there is no evidence to sustain an

unconscionability determination), the appropriate remedy is severance, not refusal to enforce. *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn.App. 316, 211 P.3d 454 (Div. 1 2009), *review denied*, 167 Wn.2d 1019, 224 P.3d 773 (2010) (unconscionable provisions were severed from agreement); *see also Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004) (same, excising several parts of clause); *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.3d 773 (2004) (same; arbitration of WLAD claims).

The Agreement contains a severability clause, CP 75, however, and there is no reason why the arbitration clause cannot be enforced with or without its venue provision. *See Walters, supra.*[9]

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[9] The *Walters* case has an interesting history. Originally the court entirely rejected plaintiff's argument that the arbitration clause was unconscionable. Its first decision, found at 120 Wn.App. 354 (2004), was vacated in light of *Zuver v. Airtouch Communications, Inc.*, *supra*, 153 Wn.2d 1023 (2005), and remanded. On remand, the trial court followed the first *Walters* appellate decision, and enforced the arbitration clause without modification. On appeal a second time, the *Walters* court concluded that plaintiff had submitted just enough evidence on the cost of holding the arbitration in Denver, CO, to pass muster, and held that the

E. *Concepcion* Holds Authoritatively That A State's Categorical Rejection of Arbitration Clauses for Consumer Disputes, or Decisional Law Placing Consumer Disputes on a Special Footing in Requiring Judicial Resolution of Claims, Violates the FAA and is Preempted.

In *Concepcion*, *supra*, 131 S.Ct. 1740 (2011), the Supreme Court reversed the California courts for applying, in essence, a judicial presumption that consumer claims were not suitable for arbitration, as they involved countervailing public policies and may be more burdensome for consumers than a judicial forum. According to *Concepcion*, this approach is preempted by the FAA.

The trial court below did *not* specifically hold that it was refusing to enforce the arbitration agreement because it believed that consumer cases are somehow inappropriate for arbitration. But the trial court did rely on *McKee, supra,* which did just that, and the trial court did find the arbitration agreement

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venue clause was unconscionable. But the *Walters* court enforced the arbitration clause as modified by deletion of its venue provision.

unconscionable, even without any evidence of procedural unconscionability. There are Washington appellate decisions supporting this conclusion, like *McKee,* but these decisions are inconsistent with *Concepcion.*

Freedom points out that the Washington Supreme Court has approved of arbitration in a variety of settings, including the Consumer Protection Act and the Washington Law Against Discrimination.[10] There is no state "public policy" of which Freedom is aware that somehow transcends the FAA and requires a judicial forum for a class of consumer disputes. Such a policy would very likely fail to withstand scrutiny under *Concepcion*, however, if it did exist.

This Court is respectfully requested to reject the Gandees' invitation to hold that "public policy" would be violated by compelling arbitration here. Such a holding would

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[10] *Satomi Owners Ass'n, supra (CPA)*; *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004) (WLAD).

be inconsistent with ch. 7.04A RCW, the FAA, and the recent *Concepcion* decision.

F. Federal Law Makes Plain That the Word "Unconscionability" Does Not Deprive LDL Freedom of Its Contractual Right to Arbitration; To the Extent Washington Law is Inconsistent, it is Preempted.

The trial court was invited by Gandee to mix and match procedural unconscionability and substantive unconscionability, and find that an arbitration clause was unconscionable because it would cost several hundred dollars to fly to California for the arbitration. As this Court is aware, the Federal Arbitration Act, 9 U.S.C. § 2, preempts contrary state law. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In *Concepcion*, the Court held that a judicial rule regarding the unconscionability of class action arbitration waivers in consumer contracts was preempted by federal law.

LDL Freedom believes that the Washington appellate cases on which Gandee relied below are now questionable

under *Concepcion*. Washington cases potentially allow for an unconscionability showing that would not pass muster under federal law to avoid an arbitration clause. *Compare McKee v. A T & T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008), and *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn.App. 316, 211 P.3d 454 (2009), with *Satomi Owners Association v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009), and *Townsend v. Quadrant Corp.,* 153 Wn.App. 870, 224 P.3d 818 (2009). LDL Freedom believes that *McKee* is inconsistent with *Concepcion*, and that *McKee* sets a low standard for overturning arbitration clauses in consumer contracts that is inconsistent with *Concepcion*.[11]

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[11] *See* Alternative Resolution Practice Guide at §§ 15:4 and 15:5 (with September 2011 updates), explaining how *Concepcion* overturned a long line of cases and called many others into question. One of the pre-*Concepcion* cases called into question, according to this treatise, is Washington's own *McKee* case, *supra*, on which Gandee relies. Westlaw search: "ARDPG § 15:5."

G. Gandee's Reliance Below on the Substance of the Washington Statutes at Issue is Misplaced; Courts Decide Only Threshold Issues of Enforceability.

Gandee relied below on the criminal provisions of the Debt Adjustment Act. CP 28-31. Gandee argued, in essence, that criminal laws should not be enforced by arbitration. However, Gandee does *not* "stand in the shoes of the Attorney General" in this action. LDL Freedom is not seeking to compel arbitration of a criminal proceeding.

Plaintiffs seek civil relief, and the fact that their claims are statutorily based is also irrelevant under the FAA. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (statutory claims are subject to arbitration). The same result follows under Washington law. *See Mendez v. Palm Harbor Homes, Inc.,* 111 Wn.App. 446, 454, 45 P.3d 594 (2002) ("In Washington it is well settled that CPA and other statutory claims are subject to arbitration under the FAA").

Under the FAA, this is not an issue for the trial court. *See Prima Paint, supra,* 388 U.S. 395 (19__). Courts *only*

resolve threshold issues of enforceability. Statutory claims are subject to arbitration.

H. The "Prevailing Party" Clause Does Not Affect Arbitrability of This Dispute.

Gandee argued below that the "prevailing party" clause, in which the winner at arbitration would win legal fees and costs, somehow makes the arbitration agreement unenforceable. Gandee is incorrect; if "the contract" is problematic, the "problem" is for the arbitrator.

The United States Supreme Court has established three rules regarding such "invalidity" arguments:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. ***Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.*** Third, this arbitration law applies in state as well as federal courts.

Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 444 (2006); *see also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1263-64 (9th Cir. 2006) (when the crux of the complaint

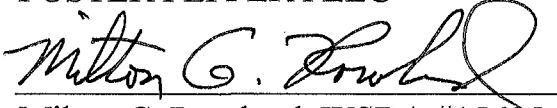
challenges the validity or enforceability of the agreement containing the arbitration provision as a whole, the question is for the arbitrator).[12]

V. CONCLUSION

Based upon the foregoing, Appellants respectfully request this Court to reverse, with directions to the trial court to compel arbitration of the disputes raised herein.

RESPECTFULLY SUBMITTED this 12th day of January, 2012.

FOSTER PEPPER PLLC



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[12] *Accord Wegeleben v. Dave Barcelon's Truck Town, Ltd.*, 2009 WL 1212029, 3 (Wn.App. Div. 2, 2009) (citing *Buckeye*).

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____ DEPUTY

No. 42523-8-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

PATTY J. GANDEE, individually and on behalf of a Class of similarly situated Washington residents,

Respondents,

v.

LDL FREEDOM ENTERPRISES, INC. a/k/a LDL FREEDOM, INC. d/b/a FINANCIAL CROSSROADS, a California corporation; DALE LYONS, individually; BETTE J. BAKER a/k/a LIZ BAKER, individually; NATIONWIDE SUPPORT SERVICES, INC., a California corporation; and JOHN AND JANE DOES 1-5,

Appellants.

CERTIFICATE OF SERVICE

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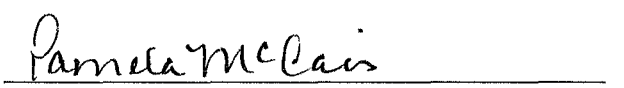
I, Pamela McCain, declare that I am employed by the firm of Foster Pepper PLLC, I am over the age of 18 years, am not a party to the above-entitled litigation, and I am competent to be a witness herein.

On January 12, 2012, I hand delivered a true and correct copy of the Brief of Appellants and this Certificate of Service in the above-captioned case upon the following counsel for the parties of record in this action:

Boyd McFadden Mayo
Darrell W. Scott
The Scott Law Group PS
926 W. Sprague Ave., Ste. 680
Spokane, WA 99201-5071

I declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Executed at Spokane, Washington on January 12, 2012.



Pamela McCain