

No. 42523-8-II

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STATE OF WASHINGTON  
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WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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

Respondent,

vs.

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.

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BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

The present Appeal presents an opportunity for the Washington Court of Appeals, Division II, to affirm both: (1) the judiciary's role in resolving questions of arbitrability in Washington State; and (2) Washington State's unconscionability doctrine as a valid, generally applicable defense to the enforceability of illegal agreements to arbitrate.

Pursuant to Section 2 of the Federal Arbitration Act ("FAA"), the Pierce County Superior Court denied Appellants' Motion to Compel Arbitration—on two separate and independent bases—including application of generally applicable Washington contract defenses, namely Washington's unconscionability doctrine. Appellants, unfortunately, distort the trial court's holding as the result of application of a state policy specifically disfavoring arbitration agreements. It was not. This Honorable Court should decline Appellants' invitation to upset either the trial court's holding or valid Washington law, and should affirm.

## **II. STATEMENT OF THE CASE**

Patty J. Gandee ("Gandee") is a Washington consumer residing in Tacoma. Like many other Americans, around the time of the most recent recession, Mrs. Gandee experienced financial distress due to unsecured credit card debt and unforeseen hardship. **CP 2; 67-68.** Appellant LDL Freedom Enterprises, doing business as "Financial Crossroads"

(“Crossroads”), subsequently solicited Gandee for participation in a debt adjusting program—to reduce the principal balance owed on her respective debts. Although promoted by Crossroads, the subject debt adjusting program was, in fact, implemented, managed, and maintained by a behind-the-scenes California company—Appellant Nationwide Support Services, Inc. (“Nationwide”). Crossroads, itself a California company, is owned and operated by named co-Defendants Dale Lyons (“Lyons”) and Bette J. Baker (“Baker”). Neither Crossroads nor Nationwide, importantly, were registered to do business in the state of Washington.

**CP 1-12.**

On May 9, 2011, Gandee filed a Class Action Complaint on behalf of herself and all similarly situated Washington residents. The Complaint alleges that Appellants are engaged in the for-profit business of debt adjusting and subject to Washington’s Debt Adjusting Act, chapter 18.28 RCW (“DAA”). **CP 1-12.** The Complaint further contends that Appellants violated the DAA and the Washington Consumer Protection Act (“CPA”) by, among other things, charging predatory fees prohibited by RCW 18.28.080. **CP 7-8.**

Appellants solicited Mrs. Gandee’s participation in their debt adjusting program through standardized promotional materials, which included a standardized Debt Adjusting Agreement (“the Agreement”).

The Complaint alleges that the standardized fee set forth in the Agreement violates RCW 18.28.080, giving rise to a per se CPA violation. The proposed Class, in this regard, consists of residents of Washington who entered into the subject Debt Settlement Agreement. The Complaint therefore seeks actual damages, exemplary damages, attorneys' fees and costs, and permanent injunctive relief. CP 1-12. Nationwide was successfully served with the Complaint on May 18, 2011, and Crossroads was served on May 19, 2011. CP 27; RP 28.

The standardized Agreement contains an arbitration provision that provides:

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. (Emphasis added).

On August 10, 2011, roughly three months after having been served, Appellants sought to compel arbitration. CP 14-15. Gandee responded, arguing that: (1) the action was not arbitrable due to thirty-day substantive limitation; and (2) the arbitration provision as a whole was so

riddled with substantively unconscionable terms that severance was inappropriate and arbitration could not lawfully be compelled. CP 33-35. The Pierce County trial court denied Appellants' Motion to Compel Arbitration on both independent bases. CP 62-63.

### III. STANDARD OF REVIEW

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

### IV. ARGUMENT

#### A. Washington Courts Resolve Questions of Arbitrability and Can Only Compel Arbitration When They Find that a Valid and Enforceable Arbitration Agreement Exists.

Parties to a contract containing an arbitration clause may “invoke the jurisdiction of Washington courts to facilitate and enforce the arbitration.” *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 896, 16 P.3d 617 (2001). RCW 7.04A.070(1), however, provides:

On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not

oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

Moreover, a “question of arbitrability” is “an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.” *AT&T Techs., Inc. v. Commc’ns. Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). “[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide.” *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

“[W]hen a plaintiff argues that an arbitration clause, standing alone, is unenforceable—for reasons independent of any reasons the remainder of the contract might be invalid—that is a question to be decided by the court.” *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010). “[O]ur case law makes clear that courts properly exercise jurisdiction over claims raising (1) defenses existing at law or in equity for the revocation of (2) the arbitration clause itself.” *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1120 (9th Cir. 2008). See *Winter v. Window Fashions Prof’ls, Inc.*, 166 Cal. App. 4th 943, 83 Cal. Rptr. 3d 89, 93 (Ct. App. 2008) (distinguishing *Buckeye*

*Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), and *Nagrampa v. MailCoups Inc.*, 469 F.3d 1257 (9th Cir. 2006), and explaining that courts decide the issue of arbitrability where the plaintiff's specific "challenge to the arbitration clause was [raised] in response to [a] petition to compel arbitration" as opposed to the Complaint).

In the case *sub judice*, Crossroads and Nationwide jointly sought to compel arbitration by filing a Motion to Compel Arbitration with the trial court. **CP 13-16**. Gandee opposed the motion to compel arbitration, raising generally applicable contract defenses. **CP 25-51**. Washington law required the trial court to determine whether the parties had an enforceable agreement. RCW 7.04A.070(1). The trial court, as elaborated below, appropriately determined this matter to be inarbitrable, finding no enforceable arbitration agreement existed. **RP 27-29**. *See* RCW 7.04A.070(1). The law thus demanded denial of Appellants' Motion to Compel Arbitration.

**B. A Time Limitation on the Parties' Reciprocal Right to Compel Arbitration Substantively Limits the Arbitrator's Jurisdiction.**

"[P]arties may contractually agree on the time limits in which to commence arbitration. Such time limits act as substantive limitations on the arbitrator's jurisdiction, that is, courts will find that parties intended to

preclude arbitration of claims not filed within the time period.” *Bapu Corp. v. Choice Hotels Int’l, Inc.*, 2008 U.S. Dist. LEXIS 49575 at \*10-11 (D.N.J. June 24, 2008) (internal citations omitted). [Attached hereto as Appendix “A”]. *See also Nat’l Iranian Oil Co. v. Mapco Int’l, Inc.*, 983 F.2d 485, 492 (3d Cir. 1992). Where a party seeks to compel arbitration outside of the specified agreed-upon period, it presents a question of arbitrability.<sup>1</sup> *Id.* at 491 n.4. *See, e.g., United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”); *Rent-A-Ctr., W., Inc. v. Jackson*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2772, 2775, 177 L. Ed. 2d 403 (2010) (arbitrability is a question for the arbitrator “where the agreement explicitly assigns that decision to the arbitrator[.]”).

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<sup>1</sup> RCW 7.04A.060, in Washington State, similarly delineates authority for arbitrators and courts:

- (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.
- (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
- (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

Here, Appellants, masters of their own contract, limited arbitrability to “disputes or claims” that are filed “within 30 days from the dispute date or claim.” CP 75.

The thirty-day term is subject to multiple interpretations. Courts, however, construe contracts against the drafter. *See Dirk v. Amerco Mktg. Co.*, 88 Wn.2d 607, 614, 565 P.2d 90 (1977). BLACK’S LAW DICTIONARY, in this regard, defines claim as: “A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.” BLACK’S LAW DICTIONARY 264 (8th ed. 2004).

The Court, therefore, properly construed the thirty-day term as substantively limiting a prospective arbitrator’s jurisdiction to claims filed within thirty days. Since the arbitration agreement did not give a prospective arbitrator the power to resolve questions of arbitrability, moreover, this determination was for the court to decide.<sup>2</sup> *See AT&T Techs.*, 475 U.S. at 649.

The thirty-day provision is not, as Appellants suggest, a “condition precedent,” Brief of Appellants at 13, to be assessed by an arbitrator. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §

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<sup>2</sup> The second interpretation of the thirty-day provision is discussed *infra* at Section D 3 below [p. 25].

11.5, at 398 (4th ed. 1998) (defining condition precedent as “an act or event, other than the lapse of time, which must exist or occur before a duty to perform a promise arises.”); *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556-57, 730 P.2d 1340 (1987) (“A condition precedent is an event occurring subsequent to the making of a valid contract which must exist or occur before there is a right to immediate performance.”).

Appellants nevertheless offer *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), as authority that an arbitrator should interpret parties’ express contractual limitations in agreements to arbitrate. Brief of Appellants at p. 13. Whereas *Howsam* affirms the principle that arbitrability questions are for courts and procedural questions are for arbitrators, it nevertheless is inapplicable here.

In *Howsam*, there was no express time-limitation in the arbitration agreement at-issue. Rather, *Howsam* involved interpretation of specific procedural rules imposed by the code procedure of the National Association of Securities Dealers (“NASD”)—the arbitration organization selected post-dispute to administer the arbitration. NASD procedures, in this regard, required all claims to be filed within six years. The Court found that *particular* procedural rule to be for the arbitrator and that the NASD itself was better suited to determine compliance with its own specific procedural rules. *Id.* at 86. As *Howsam* involved application and

interpretation of the selected body's arbitration procedures—as opposed to substantive contract terms governing a claim's arbitrability—that case has no persuasive value here. *See Cox*, 533 F.3d at 1121 (“Because the parties would likely have committed interpretation of a NASD rule to a NASD arbitrator, that particular issue of procedure was left for the arbitrator to decide.”) (citing *Howsam*, 537 U.S. at 86).

The trial court, therefore, appropriately found the thirty-day term to constitute a substantive limitation here and thus presented a question of arbitrability. Since the parties only agreed to arbitrate claims within that period, the trial court properly deemed the entire action inarbitrable. The trial court's decision should be affirmed on this basis alone.

**C. Neither the Federal Arbitration Act Nor *AT&T Mobility v. Concepcion* Preempts Generally Applicable State Law Contract Defenses, Such as Those Applied by the Trial Court.**

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.*, makes arbitration agreements “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. By enacting the FAA, Congress sought to “place such agreements ‘upon the same footing as other contracts[.]’” *Volt Info. Scis. v. Bd. of Trs. Of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)) (emphasis

added). In this regard, “the FAA does not require parties to arbitrate when they have not agreed to do so, . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” *Volt*, 489 U.S. at 478 (internal citations omitted).

Moreover, the “FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.” *Volt*, 489 U.S. at 478. State law may only “be pre-empted to the extent it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). *Cf. Perry v. Thomas*, 482 U.S. 483, 491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (preempting a minimum wage law that required *ipso facto* a judicial forum for vindication of wage claims).

Because agreements to arbitrate are on the “same footing,” not superior footing, to other contracts, “[s]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Perry*, 482 U.S. at 492. Courts simply cannot “invalidate arbitration

agreements under state laws applicable only to arbitration provisions,” thereby placing them on an inferior footing. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996).

*AT&T Mobility LCC v. Concepcion*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (April 27, 2011), in this regard, strengthens the propriety of applying generally applicable state law to invalidate contracts, including arbitration agreements, as the trial court did in the present case.

The *Concepcion* Court, faced with the validity of a class action waiver within an arbitration agreement, merely (1) reversed California’s *Discover Bank* rule,<sup>3</sup> (2) reaffirmed the general purpose of the FAA, and (3) upheld class action waivers in consumer contracts bearing consumer-

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<sup>3</sup> In *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, 1110 (2005), the California Supreme Court faced an arbitration agreement with a class action waiver in an arbitration agreement and held:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.” Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

(internal citations and quotation marks omitted).

friendly arbitration agreements (rendering *Concepcion* immediately factually distinguishable from the present case).

*Concepcion* and 9 U.S.C. § 2 thus buttress judicial invalidation of arbitration agreements by “generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at 1746 (emphasis added). See *Kanbar v. O’Melveny & Myers*, 2011 U.S. Dist. LEXIS 79447, at \*6-9 (N.D. Cal. July 21, 2011) (*Concepcion* does not render arbitration agreements immune from state law unconscionability challenges);<sup>4</sup> *Williams v. Securitas Sec. Servs. USA, Inc.*, 2011 U.S. Dist. LEXIS 75502, at \*9 (E.D. Pa. July 13, 2011) (interpreting *Concepcion* to stand for the

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<sup>4</sup> In *Kanbar*, the Court explained:

In *Concepcion*, the Supreme Court specifically noted that the FAA “permits agreement to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ [although] not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 131 S. Ct. at 1746. In short, arbitration agreements are still subject to unconscionability analysis. [ . . . ] The doctrine of unconscionability can override the terms of an arbitration agreement and the parties’ expectations in connection therewith.

*Kanbar*, 2011 U.S. Dist. LEXIS 79447, at \*15-16.

proposition that states may not adopt rules of contract interpretation whose sole intention is to undermine the goals of the FAA); *See Hamby v. Power Toyota Irvine*, 798 F. Supp. 2d 1163, 1164-65 (S.D. Cal. July 18, 2011) (narrowly interpreting *Concepcion* to stand for the proposition that plaintiffs can no longer rely on California's Discover Bank rule, but plaintiffs could still challenge class action waivers under generally applicable contract unconscionability defenses); *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1286 (D. Colo. June 6, 2011) (Colorado's test for unconscionability did not explicitly disfavor arbitration and is not preempted by the Federal Arbitration Act pursuant to *Concepcion*).

Since, as elaborated more fully below, Washington's unconscionability doctrine applies to all contracts equally, without disfavor to arbitration agreements, the trial court's decision should be affirmed.<sup>5</sup>

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<sup>5</sup> Appellants invite this Court to upset *McKee v. AT&T Corp.*, 164 Wn.2d 372 (2008), because, in the Appellants' view, *McKee* requires consumer cases to always be submitted to the judicial forum and therefore offends the FAA and *Concepcion*. *See* Brief of Appellants at pp. 27-28. However, the enforceability of a class action waiver (present in both *McKee* and *Concepcion*) is not at issue here. Similarly, the issue of whether public policy of Washington State demands that all consumer claims be resolved in a judicial forum was not at issue at the trial court, and therefore, it is not before the Court today. The trial court here merely deemed the matter inarbitrable due to the thirty-day limitation and the arbitration agreement unconscionable, based upon generally applicable contract defenses. Appellants' invitation otherwise should be declined.

**D. An Arbitration Agreement is Illegal and Unenforceable Where Substantively Unconscionable Terms Pervade the Agreement.**

“[W]hen deciding whether an arbitration provision is unconscionable, courts apply ordinary state-law principles governing the formation of contracts.” *Pro Tech Indus. v. URS Corp.*, 377 F.3d 868, 872 (8th Cir. 2004). See 9 U.S.C. § 2. Two types of unconscionability exist: procedural and substantive. A finding of either procedural or substantive unconscionability is sufficient to deem the entire agreement unenforceable. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396, 191 F.3d 845 (2008) (citing *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346-47, 103 P.3d 773 (2004)); *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1174 (W.D. Wash. 2002). While the issue of unconscionability is a question of law for the court, the decision is one based on the factual circumstances surrounding the transaction in question. *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 898, 28 P.3d 823 (2001); *McKee*, 164 Wn.2d at 396. Unconscionability is, therefore, determined at the time of contracting. *Adler*, 153 Wn.2d at 358.

Substantive unconscionability “involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh . . . .” *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975). A clause “unilaterally and severely” limiting one side’s remedies is

substantively unconscionable because it denies “any meaningful remedy.” *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) (citing *Scott v. Cingular Wireless*, 160 Wn.2d 843, 857, 161 P.3d 1000 (2007)). The Washington Supreme Court has explained:

In some instances, individual contractual provisions may be so one-sided and harsh as to render them substantively unconscionable despite the fact that the circumstances surrounding the parties’ agreement to the contract do not support a finding of procedural unconscionability. [ . . . ] Accordingly, we now hold that substantive unconscionability alone can support a finding of unconscionability.

*Adler*, 153 Wn.2d at 346 (internal quotation and citation omitted).<sup>6</sup>

In the present case, the trial court correctly found that Appellants’ arbitration agreement contained three substantively unconscionable terms: (1) the unconscionable fore-shortening of a consumers’ right to pursue a claim from four-years to thirty days; (2) the venue provision requiring Washington consumers to resolve their claim in Orange County, California, which imposed unconscionable barriers to a consumer commencing a claim in the first instance; and (3) the mandatory “loser pays all” provision. These unconscionable terms permeated the arbitration

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<sup>6</sup> *Adler v. Fred Lind Manor* clearly and unequivocally rejects Appellants’ contention that “[p]articularly 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.” Brief of Appellants at p. 8.

agreement such that severance was inappropriate. The trial court's decision should be affirmed.

1. An Arbitration Provision is Substantively Unconscionable Where Prohibitive Costs are Likely to Render the Arbitral Forum Illusory or Inaccessible.

Courts refuse to compel arbitration if a plaintiff cannot effectively vindicate her statutory rights in the arbitral forum. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). A party is effectively denied his right to vindicate his or her claim where arbitration is prohibitively expensive. *Zuver v. Airtouch Commc'n, Inc.*, 153 Wn.2d 293, 307, 103 P.3d 753 (2004); *Green Tree*, 531 U.S. at 91-92; *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 467-68, 45 P.3d 594 (2002). An arbitration agreement is substantively unconscionable, in this regard, if it triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindication of claims. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 883, 224 P.3d 818 (2009). *See Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007).

In the case *sub judice*, Respondent Gandee presented the trial court with evidentiary proof that the significant costs associated with being forced to arbitrate her consumer protection claim in Orange County,

California, effectively deprived her of a forum for the vindication of her claims. *See Mendez, Inc.*, 111 Wn. App. at 465. The then-current average cost to purchase a flight from Seattle-Tacoma airport to Orange County airport, alone, was approximately \$334.41. Hotel costs were \$123.00 per room while meals and incidental costs equaling approximately \$71.00 per day. As evidenced by Gandee's Declaration, these costs would quite possibly exceed the monetary value of her monetary losses, rendering arbitration in Orange County, California, illusory. **CP 67-100.** Consequently, the arbitration agreement is substantively unconscionable. *See, e.g., Townsend*, 153 Wn. App. at 883; *Dix*, 160 Wn.2d at 837.

Two other courts, significantly, have similarly denied motions to compel arbitration of the exact same arbitration provision and under analogous factual circumstances.

Denying the defendant debt adjuster's motion to compel arbitration on July 28, 2011, the Spokane Superior Court in *Bersante v. NoteWorld, LLC*, No. 11-2-01145-8, explained:

Freedom Debt Center is a debt adjuster within the meaning of RCW 18.28 et al and under the exceptions to 9 U.S.C. § 2, specifically 'grounds that exist at law' the Plaintiffs have provided justification to apply the Washington State statute. The arbitration clause does not mandate arbitration of violations of Washington statutes and to do so would be overly burdensome to the Plaintiffs by forcing them to go to California, in front of a California arbitrator, and decide violations of Washington statutory law on this matter.

CP 46. See also Order Re Motion to Compel Arbitration, *Wheeler v. v. NoteWorld*, No. CV-10-0202-LRS (E.D. Wash. Oct. 27, 2011)<sup>7</sup> (“The subject agreement provides that the Wheelers must arbitrate their Washington legal claim of approximately \$4,700.00 in Orange County, California. This travel would render the arbitral forum inaccessible. Moreover, while Freedom is willing to waive that provision, it is not required to do so by the terms of the agreement and Wheeler is not required to accept this modification.”). [Attached hereto as Appendix “B”].

The unconscionability of the arbitration provision arises from a generally applicable contract defense, not hostility to arbitration itself.<sup>8</sup> Hence, courts invalidate substantively identical provision with equal force,

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<sup>7</sup> Respondent’s Counsel admits this Order is not a published opinion. Nevertheless, the Order is persuasive because it is a very recent case involving a Washington State Court invalidating a verbatim arbitration agreement and one of the parties in *Wheeler*, Nationwide Support Services, is also a party-Appellant here.

<sup>8</sup> Indeed, as Appellants aptly declare:

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.

Brief of Appellants at p. 28.

and on the same basis, where the provision contemplates litigation, rather than arbitration.

In *Bradley v. Morgan Drexen, Inc.*, 2009 U.S. Dist. LEXIS 86880 at \*10 (E.D. Wash., Aug. 31, 2009), [CP 39-43] as point of illustration, the trial court found that requiring a consumer to litigate a claim (not arbitrate) in Orange County, California, would severely limit the remedies available to a claimant:

The state of Washington also has a strong interest in protecting its citizens from predatory debt adjuster practices. Defendant's business directly targets those individuals who are in financially-dire circumstances, and thus, would be financially unable to litigate their relatively small claims outside their local jurisdiction. Under these circumstances, the contract closely resembles an adhesion contract that was entered into by a sophisticated and predatory company with a vulnerable consumer with very limited financial resources. In effect, Defendant can violate state consumer laws with impunity knowing that it is very unlikely that its customers would be able to pursue any legal action against them if the lawsuit would have to be pursued in the state of California. Given the amount of available damages and the already impoverished state of Defendant's customers, the result would be that a cause of action to enforce the Washington statute would never be initiated if it had to be brought in the state of California.

**CP 42** [*Bradley*, 2009 U.S. Dist. LEXIS 86880 at \*10-11] (internal citations omitted).

In addition to the logistical costs associated with attempting to comply with the venue provision, the arbitration agreement in the present

case is further unconscionable because it renders the proposition of seeking injunctive relief fiscally impossible for an indebted consumer. **CP 32.** The arbitration agreement calls for arbitration under the “auspices” of the American Arbitration Association (“AAA”). The AAA fee schedule, which was attached to Plaintiff’s Memorandum in Opposition below, provides that where a consumer seeks injunctive relief, as in the present case, the consumer is obligated to fees amounting to at least \$4,600.00. **CP 51.** Adding the \$125.00 general filing fee to this amount, the total foreseeable fee to pursue both monetary and injunctive relief equals at least \$4,775.00, which exceeds the monetary value of Gandee’s actual damages (approximately \$3,500.00) by \$1,275.00, **CP 67-70**, and is more than twenty times the filing fee required by filing in Pierce County Superior Court.

Appellant’s arbitration agreement, thus, effectively forecloses any Washington consumer from pursuing their CPA right to seek injunctive relief to protect the Washington public. The egregious character of Appellant’s arbitration agreement is exacerbated here, where the defrauded Washington consumer enlisted the Defendants’ service precisely because they were financially distressed.<sup>9</sup> **CP 67-70.**

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<sup>9</sup> As Washington Supreme Court Justice Tom Chambers recently wrote in a concurring opinion to *Carlson v. Global Client Solutions*, 171 Wn.2d

Respondent Gandee, as spelled out in her Declaration and exhibits submitted herein, **CP 67-100**, as well as her Memorandum in Opposition to Defendants' Motion to Compel Arbitration and attachments thereto, **CP 25-51**, is incapable of shouldering the fees necessitated by pursuit of her claim in the arbitral forum. *See, e.g., Mendez*, 111 Wn. App. 446, 45 P.3d 594 (deeming costs prohibitive and an arbitration term unconscionable where evidence submitted by Plaintiff below included a declaration spelling out the claimant's difficult financial circumstances as well as documents indicating the high fees required by the American Arbitration Association).

Far from the "conclusory allegations" that Appellants attempt to color Gandee's evidentiary proof as, the evidence submitted by Gandee clearly establishes that the high costs of pursuing her claim through

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486, 256 P.3d 321 (2011) (en banc), in which the Supreme Court *first interpreted* the Washington Debt Adjusting Act:

This case illustrates the creativity of businesses attempting to circumvent regulation. As cats are drawn to cream, many for-profit debt adjusters will be attracted to the most unsophisticated of consumers. Despite the recent federal rule, I fear that until the Legislature prohibits debt adjusting for profit, consumers in Washington will continue to suffer. In my view, the chronic and systemic abuses in the Washington debt adjusting industry deserve the attention of the Washington State Legislature.

*Id.* at 502.

arbitration to be prohibitive and disproportionate, rendering the forum for vindication of her rights illusory, which is patently offensive to the FAA. The trial court's decision deeming this term unconscionable should therefore be affirmed.

2. The “Loser Pays All” Feature of the Arbitration Provision is Substantively Unconscionable Because it Both Chills Consumers’ Exercise of their Consumer Protection Rights and Obliterates a Central Feature of Those Statutory Rights.

“A clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable under Washington law for denying any meaningful remedy.” *Zuver*, 160 Wn.2d at 857. The Washington CPA grants the significant remedy to consumers who are successful in bringing a suit under the Act the ability to recover “the costs of the suit, including reasonable attorney’s fees.” This remedy represents a purposeful and policy-driven decision by the Legislature to both permit and encourage consumers to effectively vindicate their rights. *See Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976) (the private right of action is intended to “enlist the aid of private individuals . . . to assist in the enforcement” of the CPA); *see also* RCW 19.86.920. (“[The purpose of the Act is] to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair

and honest competition.”); *Id.* (The CPA is to be liberally construed to serve its purposes).

This statutory incentive for consumers to pursue consumer protection claims is effectively nullified by a counterbalancing arbitration provision that imposes the substantial financial risks on the consumer if the claim does not prove successful. *See, e.g., Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 203 (3d Cir. 2010) (“Such provisions . . . undermine the legislative intent behind fee-shifting statutes . . . .”); *Hackwell v. United States*, 491 F.3d 1229, 1240 (10th Cir. 2007) (“Title VII’s fee-shifting provision . . . was intended to encourage private citizens to enforce the statute’s guarantees and [] if successful plaintiffs were forced to bear their own attorneys’ fees, few aggrieved parties would be in the position to advance the public interest.”).

The arbitration agreement here does exactly that—it mandates that the victor of any claim be awarded their legal fees and expenses without discretion. *See CP 75* (“The prevailing party in any proceeding related to this Agreement **shall be entitled** to recover reasonable legal fees and costs, including attorney’s fees which may be incurred.”) (emphasis added); *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 324-25, 211 P.3d 454 (2009) (holding an agreement to arbitrate substantively unconscionable where it provided that the prevailing party “shall be

entitled to all costs and expenses of such arbitration (including its reasonable legal fees).”).

The unconscionability of this term and its chilling effect on Washington consumers’ private enforcement of the CPA are especially heightened in this case, where Appellants’ targeted clientele are already financially distressed and heavily indebted Washington consumers. CP 67-70. The “loser pays” provision is therefore substantively unconscionable because it conflicts with and undermines the purposes and goals Washington CPA. *See* RCW 19.86.920. The trial court, therefore, was correct in finding the term substantively unconscionable and this court, respectfully, should affirm. *Walters*, 151 Wn. App. at 324.

3. A Contractual Provision Fore-Shortening the Statute of Limitations of a Consumer Protection Act Claim from Four Years to Thirty Days is Substantively Unconscionable.

The systemic unconscionability of Appellants’ arbitration agreement is further manifested in its attempt to dramatically limit the time period within which the consumer could assert his or her claim. This result is derived from a second possible interpretation of Appellants’ ambiguous contractual thirty-day limitation.

The purpose of the Washington CPA is “to protect the public and foster fair and honest competition.” RCW 19.86.920. *See also Lightfoot*, 86 Wn.2d at 335-36 (the private right of action is intended to “enlist the

aid of private individuals . . . to assist in the enforcement” of the CPA). In this regard, the Washington Legislature has granted consumers a four-year window in which to bring a claim. RCW 19.86.120. Moreover, each violation of the Debt Adjusting Act, which is an independent and new *per se* violation of the Washington Consumer Protection Act, gives rise to a new cause of action against the wrongdoer.

The inclusion of the thirty-day limitation is a transparent effort to obtain unfair advantage against individual Washington consumers by severely limiting the remedies available to a Washington consumer by dramatically shortening the statute of limitations. The term is substantively unconscionable because it generates a one-sided effect to the exclusive benefit of its drafter. *See, e.g., Adler v. Fred Lind Manor; Alexander*, 341 F.3d at 267 (holding a 30-day limitations provision is substantively unconscionable); *Plaskett v. Bechtel Int'l, Inc.*, 243 F. Supp. 2d 334, 341 (D.V.I. 2003) (holding a 30-day limitations provision is substantively unconscionable).

The Ninth Circuit, in this regard, has held that a one-year limitations provision is substantively unconscionable because it deprives the plaintiffs of the benefit of the continuing violation and tolling doctrines. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003), *overruled on other grounds by AT&T v. Concepcion*, 131

S. Ct. 1740, 179 L. Ed. 2d 742 (2011); *see also Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894-95 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112, 153 L. Ed. 2d 160, 122 S. Ct. 2329 (2002); *Gadson v. Supershuttle Int'l*, 2011 U.S. Dist LEXIS 33824 (D. Md. March 30, 2011).

The rule declaring that the shortening of a statute of limitations is substantively unconscionable, moreover, does not “rely on the uniqueness of an agreement to arbitrate” and does not directly conflict with the overriding goals of the FAA, nor does this the rule derive its meaning from the fact that an agreement to arbitrate is at issue. *Concepcion*, 131 S. Ct. at 1747. Consequently, the trial court’s decision should be affirmed.

**E. A Court Will Not Sever Individually Offending Terms From an Arbitration Agreement, Where That Agreement Itself Lacks a Severability Clause.**

“A critical consideration in assessing severability is giving effect to the intent of the contracting parties.” *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84 (D.C. Ct. App. 2005). “[W]hen parties have agreed to a **severability clause in an arbitration agreement**, courts often strike the offending unconscionable provisions to preserve the contract’s essential term of arbitration.” *Zuver*, 153 Wn.2d at 320 (emphasis added).

The arbitration agreement here, however, lacks a severability clause. The severability provision to which Appellants point, not found in the arbitration provision itself, reads: “If any of the above **provisions** are

held to be invalid or unenforceable, the remaining **provisions** will not be affected.” CP 75. (Emphasis added).

In interpreting contracts, courts enforce the contract as written, to the extent it is legal and valid, so as to enforce the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The Appellants here elected not to include a severability clause within their arbitration agreement, and therefore there is no contractual basis to conclude that Appellants intended to make the individual terms of the arbitration agreement severable from the arbitration agreement itself. *See Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (“[W]e attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement.”).

Consequently, this court may not excise the individual offending provisions of the arbitration agreement, and the entire clause must be stricken—an effect that comports with federal substantive arbitration law.

**F. Where Unconscionable Terms Permeate a Contractual Provision, a Court will not Sever the Offending Terms and the Agreement Should be Denied *In Toto*.**

An arbitration agreement is entirely unenforceable where unconscionable provisions are pervasive. *See Adler*, 153 Wn.2d at 358 (where a defendant engages in an “insidious pattern” of seeking to tip the scales in its favor by inserting numerous unconscionable provisions in an

arbitration agreement, courts may decline to sever the unconscionable provisions).<sup>10</sup>

Courts, moreover, refuse to sever unconscionable terms when those terms are essential to the agreement. *Spinetti v. Service Corp. Intern.*, 324 F.3d 212, 214 (3d Cir. 2003); *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 206. See RESTATEMENT (SECOND) OF CONTRACTS § 184(1) (1981). In determining whether terms are essential court examine the number and nature of the individually unconscionable terms. *Nino v. Jewelry Exchange, Inc.*, 609 F.3d at 206. See RESTATEMENT (SECOND) OF CONTRACTS § 184(1) (1981).

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<sup>10</sup> Importantly, while the Court in *Adler v. Fred Lind Manor* severed the unconscionable provisions, the court there specifically noted that the “arbitration agreement contains just two substantively unconscionable provisions,” *Id.* at 359, out of a total six provisions, which stands in contrast to the three unconscionable provisions out of a total four provisions in the Appellants’ arbitration agreement here. Thus, in *Adler*, the substantively unconscionable provisions did not permeate the agreement as they do here. Moreover, in *Adler* the arbitration agreement called for Washington law to apply as well as set the venue in Washington State, *Id.* at 338, rendering severance further appropriate in this case.

The present arbitration agreement is even more distinguishable from the arbitration agreement in *Zuver*, which involved a multi-paragraphed arbitration agreement, with a severability provision therein, and therefore after severance of merely two substantively unconscionable terms, out of at least twelve individual other terms, an agreement to arbitrate would still exist without the court’s interference. See *Id.* at 298. It is therefore appropriate to decline Appellants’ invitation to sever the substantively unconscionable provisions in this case.

Courts, therefore, will not enforce an arbitration agreement “afflicted by fundamental and pervasive unfairness,” *Hall*, 371 Fed. Appx. at 314 (citing *Alexander v. Anthony Intern., L.P.*, 341 F.3d 256, 271 (3d Cir. 2003), or where “the central purpose . . . is tainted with illegality . . . .” *Plaskett*, 243 F. Supp. 2d at 345. *See also Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 788 (9th Cir. 2002).

In making this determination, courts look to the agreement as drafted, as “the underlying concern is whether individuals, upon reading an arbitration agreement, will be deterred from bringing a claim . . . .” *Tillman v. Commer. Credit Loans, Inc.*, 362 N.C. 93, 106, 655 S.E.2d 362 (2008) (citing *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676-77 (6th Cir. 2003)). “The overarching inquiry is whether ‘the interests of justice . . . would be furthered’ by severance.” *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4<sup>th</sup> 83, 6 P.3d 669, 696, 99 Cal. Rptr. 2d 745 (2000) (quoting *Beynon v. Garden Grove Med. Grp.*, 100 Cal. App. 3d 698, 161 Cal. Rptr. 146, 155 (Ct. App. 1980)).

In the present case, the unconscionable terms of Appellants’ agreement, as drafted, reveal an insidious pattern, such that the entire agreement is infused with illegality and the interests of justice will only be served by striking the entire agreement.

The terms include: (1) the dramatic shortening of time period within which a consumer may assert a claim (from four years to thirty days); (2) requirement that defrauded Washington consumers must pursue their claim in a distant venue (Orange County, California); and (3) an imposition of a “loser pays all” provision that further insured that the consumer would never risk bringing a claim. These unconscionable terms are systemic to the arbitration agreement, define its essential purpose, and permeate that agreement.

Severance is inappropriate because the individual provisions strongly evidence a cynical attempt by the Appellants, not to provide for a *bona fide* dispute resolution mechanism, but to prevent claims from ever seeing the light of day. Consequently, the arbitration agreement itself is unenforceable and must be stricken. *See Graham Oil*, 43 F.3d at 1248 (“The more difficult question is whether the *entire* arbitration clause should be severed, or simply the provisions pertaining to exemplary damages, attorney’s fees, and the statute of limitations. Relying on principles that are analogous to those we use in determining whether a particular clause is severable from an entire contract, we conclude that in this case the *entire* clause must be eliminated.”).

An effort to resurrect Appellant’s unconscionable arbitration agreement through severance would promote a further injustice,

permitting Appellants to enjoy the benefits of their unconscionable arbitration terms where the arbitration serves its intended purpose of avoiding claims altogether, and bearing no risk or consequences for their unconscionable conduct, in the rare circumstance where a claim is actually commenced and the arbitration provision challenged.

**G. Where a Court Cannot Cure Unconscionability Through Severance, A Court Will Not Rewrite the Parties' Agreement to Make the Arbitration Agreement Enforceable.**

It is not the function of the court to rewrite contracts for the parties, *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955), and “it is inappropriate to rewrite an illegal or unconscionable contract.” *Tillman v. Commer. Credit Loans, Inc.*, 362 N.C. at 106 (citing *Morrison*, 317 F.3d at 676-77). Where individual components of an arbitration agreement cannot be “excised without gutting the agreement,” a court will invalidate the agreement because the court would otherwise be required to rewrite it. *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1079 (9th Cir. 2007);<sup>11</sup>

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<sup>11</sup> See, e.g., *Davis*, 485 F.3d at 1084 (“[T]he DRP is procedurally unconscionable and contains *four* substantively unconscionable or void terms: (1) the “notice” provision, (2) the overly-broad confidentiality provision, (3) an overly-broad “business justification” provision, and (4) the limitation on initiation of administrative actions. These provisions cannot be stricken or excised without gutting the agreement. Despite a ‘liberal federal policy favoring arbitration agreements,’ *Moses H. Cone Memorial Hospital*, 460 U.S. at 24, **a court cannot rewrite the arbitration agreement for the parties.**”) (emphasis added); see also *Armendariz*, 6 P.3d at 697 (“multiple defects indicate a systematic effort

*Perez v. Globe Airport Sec. Servs. Inc.*, 253 F.3d 1280, 1285-86 (11th Cir. 2001). This is so in spite of the “liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury Cosntr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). See, e.g., *Murray v. UFCW Int’l, Local 400*, 289 F.3d 297, 304 (4th Cir. 2002) (“The arbitration agreement is unenforceable as written and Local 400 may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order to claim that it is an acceptable one.”).

In the present case, the number and scope of the unconscionable provisions render severance and enforcement legally impossible. Were the three substantively unconscionable terms severed, the parties would be left with a “disintegrated fragment” of an arbitration agreement, *Booker*, 413 F.3d at 84-85, forcing the Court into the position of having to rewrite the parties agreement to make it enforceable, which courts refuse to do. See *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955); *Mercurio*

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to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer’s advantage. . . . Because a court is unable to cure this unconscionability through severance or restriction, and is not permitted to cure it through reformation and augmentation, it must void the entire agreement.”).

v. *Superior Court*, 96 Cal. App. 4th 167, 185, 116 Cal. Rptr. 2d 671 (2002).<sup>12</sup>

Consequently, the trial court's decision not to sever the unconscionable terms was correct, and this court should affirm. *See Ingle*, 328 F.3d at 1180 ("Any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require this court to assume the role of contract author rather than interpreter."); *Circuit City Stores*, 279 F.3d at 896 ("In addition to the damages limitation and the fee-sharing scheme, the unilateral aspect of the [agreement] runs throughout the

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<sup>12</sup> In an analogous situation, the Court in *Gadson v. Supershuttle Int'l*, 2011 U.S. Dist. LEXIS 33824 (D. Md. March 30, 2011) explained:

The question of severability turns on whether the offending clause or clauses are merely "collateral" to the main purpose of the arbitration agreement, or whether the [agreement] is "permeated" by unconscionability. *See Davis*, 485 F.3d at 1084. The Court has found three substantively unenforceable terms (1) the fee-splitting provision, (2) the prohibition of a class action suit, and (3) the one-year statutory limitation provision. It appears that the Parties' franchise agreement has been so permeated by substantively unconscionable provisions, that it cannot be remedied by severance. Although the UFA contains a severability clause, the Court deems such a measure unsuitable in the current case. The illegality of the fee splitting and the class action provision is such that attempting to sever these provisions would result in a near rewrite of the contract. Despite a "liberal federal policy favoring arbitration agreements," a court cannot rewrite the arbitration agreement for the parties.

agreement and defines the scope of the matters that are covered. Removing these provisions would go beyond mere excision to rewriting the contract, which is not the proper role of this court.”).

**H. A Party Cannot Cure an Arbitration Agreement’s Illegality by Offering to Waive the Unconscionable Terms Therein.**

An “after-the-fact” offer to waive the unconscionable provisions cannot cure the arbitration agreement’s illegality because “the fairness of a contract must be viewed as of the time the contract was formed.” *LeLouis v. W. Directory Co.*, 230 F. Supp. 2d 1214, 1224-25 (D. Or. 2001). *See Armendariz*, 24 Cal. 4th at 125, 6 P.3d at 697 (“No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it.”); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (“If a contract or a term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract.”); *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 13-14, 857 N.E.2d 250, 259, 306 Ill. Dec. 157 (2006) (“[A] defendant’s after-the-fact offer to pay the costs of arbitration should not be allowed to preclude consideration of whether the original arbitration clause is unconscionable.”).

In the *case sub judice*, Appellants’ arbitration agreement is plagued with unconscionable provisions. The Court’s paramount concern must

necessarily rest with how those provisions will deter potential litigants from bringing their claims in the arbitral forum. A heavily indebted Washington consumer who reads the arbitration agreement is highly likely to be deterred from assuming the costs and risks associated with pursuing their legal rights. This deterrent effect, as well as the unconscionability of the individual terms from which the deterrent effect arises, must necessarily be determined at the moment of contracting. It is therefore irrelevant whether the offending party offers to “waive” the offending provisions. It is the offending party who drafted the contract and therefore it is the offending party who must be saddled with the consequences of the provision as drafted. *See, e.g., Spinetti*, 324 F.3d at 217-18 n.2; *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 285 (3d. Cir. 2004); *Nino*, 609 F.3d at 205.

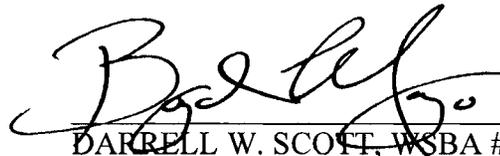
Finally, to permit an out-of-state, non-registered company to do business in Washington and include substantively unconscionable terms in an arbitration agreement and, when they get caught, permit them to “waive” their unconscionable terms so as to make the entire arbitration agreement conscionable contravenes the purpose of the CPA. *See RCW*

19.86.920 (purpose of the act is to “protect the public and foster fair and honest competition.”).<sup>13</sup>

## V. CONCLUSION

Plaintiffs, therefore, respectfully request that this Court affirm the trial court’s denial of Appellants’ Motion to Compel Arbitration.

Respectfully submitted this 13 day of February, 2012.



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<sup>13</sup> Appellants, finally, argue that Gandee’s reliance on the criminal provisions of the Washington DAA is improper. Brief of Appellants at pp. 31-32. This argument should be disregarded. The Washington Supreme Court, in *Carlsen v. Global Client Solutions*, specifically determined that by virtue of the Washington Legislature’s criminalization of “aiding and abetting” a violation of the DAA, aiding and abetting a violation of the DAA itself constitutes a *per se* violation of the Washington CPA, *id.* at 500, which is alleged in Plaintiff’s Complaint. **CP 1-12.**

CLERK OF COURT  
COURT OF APPEALS

**CERTIFICATE OF FILING AND SERVICE**

12 FEB 15 PM 10:54

STATE OF WASHINGTON

I, Kristy L. Bergland, hereby certify that on the 13<sup>th</sup> day of Feb  
February, 2012, I caused to be sent for filing one original and one copy of  
the Respondents' Answering Brief via U.S. mail to:

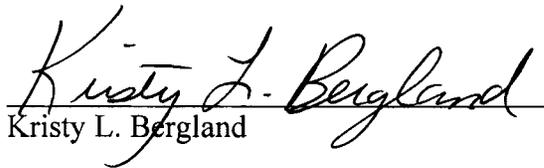
Clerk of the Court  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

I also caused to be served true and correct copies of the same to the  
following persons via hand delivery:

Milton G. Rowland/ John R. Nelson  
Foster Pepper PLLC  
422 W. Riverside Ave., Suite 1310  
Spokane, WA 99201-0302

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

EXECUTED this 13th day of February, 2012, at Spokane,  
Washington.

  
Kristy L. Bergland

APPENDIX "A"

BRIEF OF RESPONDENT



**BAPU CORP., HARSHAD S. PATEL, Plaintiffs, v. CHOICE HOTELS  
INTERNATIONAL, INC., Defendant.**

**MASTER FILE: 07-CV-5938 (WJM)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

*2008 U.S. Dist. LEXIS 49575*

**June 24, 2008, Filed**

**SUBSEQUENT HISTORY:** Motion granted by, Motion denied by *Bapu Corp. v. Choice Hotels Int'l, Inc., 2008 U.S. Dist. LEXIS 71252 (D.N.J., Sept. 8, 2008)*

**COUNSEL:** [\*1] For Plaintiffs: Michael R. Curran, E-4 Greenbriar Court, Clifton, NJ.

For Defendant: John P. Mueller, Ballard, Spahr, Andrews & Ingersoll, LLP, Voorhees, NJ.

**JUDGES:** HON. WILLIAM J. MARTINI, U.S.D.J.

**OPINION BY:** WILLIAM J. MARTINI

**OPINION**

**WILLIAM J. MARTINI, U.S.D.J.:**

This suit stems from an arbitration award. Defendant moves to dismiss Plaintiffs' complaint on the grounds that Plaintiffs' claims were resolved in the arbitration. Defendant also moves to confirm the arbitration award. Plaintiffs move to vacate the award on several grounds--including that the statute of limitations for commencing arbitration expired before Defendant filed its arbitration demand. The Court agrees with Plaintiffs' statute of limitations argument. Accordingly, Plaintiffs' motion to vacate the arbitration award is **GRANTED**, and Defendant's motion to dismiss and motion to confirm the arbitration award are **DENIED**.

**I. FACTS AND PROCEDURE**

This suit concerns whether a contract claims was subject to arbitration. Plaintiffs in this case breached a contract with Defendant. Defendant initiated arbitration pursuant to the contract and secured an award. The parties now dispute the arbitration's validity.

**A. The Contract**

In 2000, the two Plaintiffs, Bapu [\*2] Corporation and Bapu President Harshad Patel, entered into a franchise contract with Defendant, Choice Hotels International, Inc. (First Am. Compl. PP 1, 6, 7; Aff. of Harshad Patel P 1; Decl. of John Mueller Ex. B.) The contract provided Plaintiffs the right to operate a building that Plaintiffs were then leasing as a Quality Inn hotel. (Patel Aff. P 4; Mueller Decl. Ex. B.)

Under the contract, Plaintiffs had to renovate the building before they could operate it as a Quality Inn. (Mueller Decl. Ex. B Addendum No. 1.) The contract required Plaintiffs to complete this renovation by November 30, 2000. <sup>1</sup> However, the contract also provided that in the event Plaintiffs could not meet this renovation deadline, they could request and Defendants could grant one or more three-month extensions if Plaintiffs paid an "extension fee" of \$ 5,000 for each extension. <sup>2</sup>

<sup>1</sup> The contract stated that "[y]ou agree to make

the following changes and additions to upgrade the Hotel to meet our standards or to cure existing deficiencies *before* entering the QUALITY INN System, ***but in no event later than November 30, 2000.***" (Mueller Decl. Ex. B Addendum No. 1.)

2 The contract stated as follows:

If you do not cause [\*3] the Construction Start to occur within 8 months of the date of this Agreement, you may request, before the end of the 8 months, an additional 3 months for Construction Start. We are not obligated to extend the time for Construction Start. If we agree to extend the time for Construction Start, you will pay us an extension fee of \$ 5,000 for each 3-month extension." (Mueller Decl. Ex. B P 23(c)(3).)

The contract also contained two relevant provisions regulating disputes between the parties. First, the contract contained an arbitration clause requiring arbitration of "any controversy or claim arising out of or relating to this Agreement." (Mueller Decl. Ex. B P 22.) Second, the contract stated that "[n]either party may file a claim . . . arising out of or relating to this Agreement after 3 years from the date that the claim arose, unless applicable law states a shorter statute of limitations." (Mueller Decl. Ex. B P 20(k).)

### **B. The Breach**

As of the deadline for renovations on November 30, 2000, Plaintiffs had not completed the required renovations. (Mueller Decl. Ex. C.) Defendant then sought to unilaterally extend the deadline. On May 8, 2001, Defendant sent Plaintiffs a letter purporting [\*4] to extend the time for Plaintiffs to begin the renovations until September 28, 2001. (Mueller Decl. Ex. C.) Plaintiffs deny having ever received this letter and sent no response.<sup>3</sup> (Patel Aff. P 20(d)(iii).) Having not received a response, Defendant on October 16, 2001, sent Plaintiffs another letter offering to extend the renovation deadline for another three months, until January 16, 2002, if Plaintiffs agreed to pay a \$ 5,000 extension fee. (Mueller Decl. Ex. C.) Plaintiffs declined this offer. (Pls.'

Mem. of Law in Opp'n to Def.'s Mot. to Dismiss 4.)

3 Plaintiffs suggest that Defendant fabricated this and other letters: "The May 8, 2001 letter (# 2) was probably created by Defendant for the arbitration in order to try to extend the time allotted to CHOICE to sue by an extra year." (Patel Aff. P 20(d)(iii).) The Court reminds Plaintiffs that this is quite a serious accusation and strongly cautions Plaintiffs--and Plaintiffs' attorney--against mounting such attacks without evidentiary support.

Defendant accordingly began the process of terminating the contract. On January 10, 2002, Defendant sent Plaintiffs a letter titled "Notice of Default." (Mueller Decl. Ex. D.) In the letter, Defendant [\*5] demanded that Plaintiffs complete their promised renovations within thirty days of the letter's date and threatened to terminate the contract if Plaintiffs failed to do so. (Mueller Decl. Ex. D.) Plaintiffs deny having received this letter. (Patel Aff. P 20(d)(iv).)

Although Defendant received no response to this letter, Defendant apparently failed to take any further action until 2004. On January 15, 2004, and again on September 10, 2004, Defendant sent Plaintiffs letters titled "Notice of Default." (Mueller Decl. Exs. E, F.) These letters were similar to Defendant's previous letter and threatened termination of the contract if Plaintiffs failed to renovate within thirty days. (Mueller Decl. Exs. E, F.) Again, Plaintiffs deny having received these letters. (Patel Aff. P 20(d)(iv).)

Finally on September 15, 2004, Defendant sent Plaintiffs a letter titled "Notice of Termination." (Mueller Decl. Ex. G.) In the letter, Defendants purported to terminate the contract and claimed to be entitled to damages. (Mueller Decl. Ex. G.) Once again, Plaintiffs deny having received this letter. (Patel Aff. P 20(d)(iv).)

### **C. The Arbitration**

On October 19, 2006--six years after Plaintiffs failed to meet [\*6] the renovation deadline and two years after Defendant sent Plaintiffs the "Notice of Termination"--Defendant served Plaintiffs with a demand for arbitration. (Mueller Decl. Ex. H.) The demand for arbitration sought "recovery of damages . . . sustained due to a breach by Respondents of a franchise agreement that required Respondents to complete changes and

additions to upgrade the hotel." (Mueller Decl. Ex. H.)

Plaintiffs objected to the arbitration on several grounds, including on the grounds that the arbitration was barred by the applicable statute of limitations. On April 23, 2007, Plaintiffs filed a letter with the arbitrator stating that they would suffer prejudice by participating in the arbitration. (Mueller Decl. Ex. Q.) Plaintiffs argued, *inter alia*, "Choice could succeed in committing a deception upon the AAA, having used these proceedings to avoid dismissal as to personal jurisdiction and the limitations period." (Mueller Decl. Ex. Q.) On June 10, 2007, Plaintiffs filed another letter with the arbitrator stating that "the alleged contract automatically terminated within six months of signing so that there is a statute of limitations bar to this matter." (Mueller Decl. Ex. [\*7] S.)

In a prehearing opinion, the arbitrator acknowledged Plaintiffs' statute of limitations argument but refused to address it before the hearing. The arbitrator stated as follows:

This dispute is heavily fact based on one that cannot be disposed of by way of a preliminary motion at this time. The issues of statute of limitations and laches are pertinent issues, but they will have to wait for another day. I cannot "judge" or "decide" this case on the papers presented. (Ex. W at 29.)

Ultimately, the arbitrator ruled for Defendant. The arbitrator found Plaintiffs in breach of the contract and awarded Defendant \$ 142,560 as damages pursuant to a liquidated damages clause in the contract. (Cross-Pet. to Confirm Arbitration Award Ex. A 11.) The arbitrator did not address Plaintiffs' statute of limitations argument.

#### D. This Suit

Plaintiffs believing that the arbitrator lacked jurisdiction over this dispute, they filed this suit. In the complaint, Plaintiffs generally requested relief from both the arbitration award and contract. (Compl. PP 24-32.) Plaintiffs also appear to allege that Defendant breached the contract, and Plaintiffs seek resulting damages.<sup>4</sup>

<sup>4</sup> In the complaint's prayer for relief, [\*8] Plaintiffs request "a judgment for \$ 2,000,000.00

in lost franchise revenue due to the wrongful conduct of Defendant in violation of the New Jersey covenant of good faith and fair dealing." (Compl.)

The parties then filed the instant motions, which essentially hinge upon whether the arbitrator had jurisdiction over this dispute. Plaintiffs file a motion to vacate the arbitration award. Plaintiffs argue, *inter alia*, that the arbitrator lacked jurisdiction over this dispute because the three-year period provided by the contract in which to file claims expired before Defendant filed its demand for arbitration.<sup>5</sup> (Pls.' Mem. of Law in Opp'n to Def.'s Mot to Dismiss 24-25.) In response, Defendant has filed a motion to dismiss Plaintiffs' claims as being completely resolved by the arbitration and a motion to confirm the arbitration award.

<sup>5</sup> Plaintiffs offer an array of arguments in favor of vacating the arbitration award. However, because the statute of limitations argument completely disposes of all pending motions, the Court will address only that issue.

## II. DISCUSSION

Arbitration is at essence a matter of contract. *United Steelworkers of Am., AFL-CIO-CLC v. Rohm & Haas Co.*, 522 F.3d 324, 331 (3d Cir. 2008). [\*9] Parties are bound to arbitrate--rather than litigate--their disputes only to the extent that they have contractually agreed to do so. *See Gay, v. CreditInform*, 511 F.3d 369, 386 (3d Cir. 2007). The question of whether the parties have contractually submitted a dispute to arbitration--the question of arbitrability--is generally an issue for judicial determination by a district court. *Id.* at 387.

As discussed above, the motions hinge upon the arbitrator's jurisdiction over this dispute. If the arbitrator possessed jurisdiction over this dispute, Plaintiffs face a formidable challenge if they wish to upset the arbitration award, and Defendant is likely entitled to dismissal of Plaintiffs' complaint. *See United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995) (holding that courts have very little authority to disturb arbitration awards). Also, in this instance the Court would likely grant Defendant's motion to confirm the arbitration award. *See 9 U.S.C. § 9* (allowing a court to confirm and enter judgment on an arbitration award). If, however, the arbitrator lacked jurisdiction to resolve this dispute, the Court would likely grant Plaintiffs'

motion to vacate [\*10] the award. *See 9 U.S.C. § 10(a)(4)* (stating that a district court has the authority to vacate an arbitration award "where the arbitrators exceeded their powers"). In the latter case, Plaintiffs' complaint might proceed as it would not have been resolved by any valid arbitration.

Plaintiffs argument is that the arbitrator lacked jurisdiction over this dispute because Defendants failed to initiate arbitration within the time allowed for arbitration provided in the contract. (Pls.' Mem. 24-25.) Plaintiffs note that the contract allowed Defendant to arbitrate a claim for breach only within three years of that breach. (Pls.' Mem. 14, 24.) Plaintiffs reason that Defendant failed to meet this requirement because Plaintiffs initially breached the contract by failing to meet the November 30, 2000, deadline for renovation while Defendant did not file a demand for arbitration until October 19, 2006. (Pls.' Mem. 24.) The Court agrees.

A corollary of the contractual nature of arbitration is that parties may contractually agree on the time limits in which to commence arbitration. *See Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 78 F.3d 474 (10th Cir. 1996). Such time limits act as substantive [\*11] limitations on the arbitrator's jurisdiction, that is, courts will find that parties intended to preclude arbitration of claims not filed within the time period. *See Nat'l Iranian Oil Co. v. Mapco Int'l, Inc.*, 983 F.2d 485, 492 (3d Cir. 1992) ("[I]f an agreement provides that no dispute is eligible for arbitration after a specific time period, and if the plaintiff demands arbitration after expiration of that period, the district court must dismiss the petition to compel arbitration as time-barred because the time period is a substantive limitation on the arbitration agreement."). Like any other substantive limitation on the arbitrator's jurisdiction, whether a party has arbitrated a claim within the contract's substantive time limits is a question for the district court, not the arbitrator. *Id.* at 491 n.4 ("If . . . the arbitration clause provides a substantive timeliness limitation on claims to be submitted to arbitration . . . the timeliness of the demand for arbitration or of the underlying claim is a question for the district court because it concerns what claims the parties have contractually agreed to submit to arbitration.").

Here, the parties have clearly agreed to such a time [\*12] limit. The contract provides as follows: "Neither party may file a claim . . . arising out of or relating to this Agreement after 3 years from the date that the claim

arose, unless applicable law states a shorter statute of limitations." (Mueller Decl. Ex. B P 20(k).) Thus the questions are when Defendant's breach of contract claim arose and whether Defendant submitted this claim to arbitration within three years of that date.

The court need not determine precisely when Defendant's breach of contract claim arose because it was clearly more than three years before Defendant filed its demand for arbitration. A cause of action for breach of contract arises when the contract is breached and when the breach was or should have been discovered. *Jones v. Hyatt Ins. Agency, Inc.*, 356 Md. 639, 741 A.2d 1099, 1104 (Md. 1999). While a party's mere failure to perform within a contract's time deadline is not necessarily a material breach, the breach becomes material if that party fails to perform within a reasonable time. 23 Richard A. Lord, *Williston on Contracts* § 63:18 (4th ed. 1990); *see Clarke v. Lacy*, 213 Md. 482, 132 A.2d 478, 483 (Md. 1957) ("[G]enerally, where time is found not to be of the essence, the party in [\*13] default has it within his power to fulfil, within a definite period, the obligation he should have fulfilled earlier . . ."). Here, Defendant did not file a demand for arbitration until October 19, 2006. Given the contract's time limitation provision, claims filed on such a date must have arisen within the prior three years, or after October 19, 2003. Yet Defendant's claim initially arose on November 30, 2000, when Plaintiff failed to meet the contract's deadline for renovation. Even giving Plaintiff a reasonable amount of time to perform before the failure could be considered a material breach, *see Clarke*, 132 A.2d at 483, Defendant's claim for material breach arose significantly more than three years before Defendant filed for arbitration. Accordingly, the arbitrator lacked jurisdiction over Defendant's claim for breach.

Defendant puts forth three arguments to rebut the foregoing analysis and conclusion.<sup>6</sup> The Court finds these three arguments unpersuasive.

<sup>6</sup> Defendant does not appear to argue that it properly extended Plaintiffs' time to renovate under the contract's provision allowing for three month extensions of this deadline. (Mueller Decl. Ex. B P 23(c)(3).) Furthermore, such [\*14] an argument would be futile. This provision allowed Defendant to extend the renovation deadline for three-month periods upon Plaintiffs' request if Plaintiffs paid a \$ 5,000 fee for each three-month

extension. (Mueller Decl. Ex. B P 23(c)(3).) While Defendant did offer one extension in the renovation deadline to Plaintiffs (Mueller Decl. Ex. C), it appears from the record that Plaintiffs neither requested this extension nor paid a \$ 5,000 fee for it. Accordingly, Defendant's extension was not pursuant to the contract's extension provision.

First, Defendant argues that Plaintiffs failed to raise the issue of the three-year time limitation in the arbitration and thus may not do so now. (Opp'n 22.) But as discussed above, Plaintiffs indeed did raise this issue before the arbitrator. For example, on June 10, 2007, Plaintiffs filed a prehearing letter with the arbitrator stating that "the alleged contract automatically terminated within six months of signing so that there is a statute of limitations bar to this matter." (Mueller Decl. Ex. S.) Indeed, the arbitrator acknowledged Plaintiffs' statute of limitations argument:

This dispute is heavily fact based on one that cannot be disposed of [\*15] by way of a preliminary motion at this time. The issues of statute of limitations and laches are pertinent issues, but they will have to wait for another day. I cannot "judge" or "decide" this case on the papers presented. (Ex. W at 29.)

Thus the Court cannot find Plaintiffs to have waived this argument.

Second, Defendant argues that Plaintiffs were not in breach of the contract until Defendant mailed Plaintiffs a notice of termination. (Opp'n 23.) But as explained above, Plaintiffs were in breach of the contract as of their failure to meet the November 30, 2000, renovation deadline, and Plaintiffs were in material breach of the contract within a reasonable time after that. The date on which Plaintiffs breached the contract is different from and precedes the date on which Defendant terminated the contract in response to that breach.

Third, Defendant argues that Plaintiffs should be

equitably estopped from relying on the statute of limitations. (Opp'n 23.) Where a wrongful party intentionally induces the injured party to delay filing a claim, the wrongful party may be equitably estopped from then asserting certain statute of limitations defenses against that claim. *See Knill v. Knill*, 306 Md. 527, 510 A.2d 546, 550 (Md. 1986). [\*16] Defendant argues that they granted Plaintiffs extended time to renovate and delayed filing for arbitration "with the good faith belief that Petitioners would comply with the Franchise Agreement." (Opp'n 24.) But any such good faith belief appears unfounded and not justified by any facts in the record. Certainly by the time Defendant sent its first notice of default, on January 10, 2002, Defendant can not claim to have reasonably believed that Plaintiffs would fulfil their obligations. Yet even this date is significantly more than three years prior to Defendant's demand for arbitration, on October 19, 2006. Plaintiffs are thus not equitably estopped from relying on the three-year deadline for filing claims.

In summary, Defendant appears to have simply sat on its rights too long. The record indicates that Plaintiffs were in material breach shortly after the November 30, 2000, deadline for renovation. Yet Defendant waited until October 19, 2006, to file a demand for arbitration, well beyond the three-year time period in which to arbitrate breach of contract claims. The record fails to provide any justification for this delay. Accordingly, the arbitrator lacked jurisdiction over this dispute, [\*17] and the Court must vacate its award.

### III. CONCLUSION

The arbitrator lacked jurisdiction to issue an award in this case. Its award is thus **VACATED**. Accordingly, Plaintiffs' motion to vacate is **GRANTED**, and Defendant's motions to dismiss and to confirm are **DENIED**. An Order accompanies this Opinion.

/s/ William J. Martini

William J. Martini, U.S.D.J.

APPENDIX "B"

BRIEF OF RESPONDENT

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DOYLE WHEELER and CARRI WHEELER,	)	
husband and wife, individually	)	NO. CV-10-0202-LRS
and on behalf of similarly	)	
situated Washington residents,	)	ORDER RE MOTION TO COMPEL
	)	ARBITRATION
Plaintiffs,	)	
	)	
- vs -	)	
	)	
NOTEWORLD, LLC, d/b/a NOTEWORLD	)	
SERVICING CENTER, a Delaware	)	
limited liability company;	)	
NATIONWIDE SUPPORT SERVICES,	)	
INC., a California corporation;	)	
FREEDOM DEBT CENTER, a	)	
California corporation; and JOHN	)	
and JANE DOES A-K,	)	
	)	
Defendants.	)	

BEFORE THE COURT, without oral argument, is Defendant Freedom Debt Center's Motion to Compel Arbitration, ECF No. 47, filed September 13, 2011, and noted without oral argument.

**I. BRIEF FACTUAL BACKGROUND**

This is a consumer debt case. It arises from Plaintiffs Doyle and Carrie Wheeler's (the Wheelers) engagement of Defendant Freedom Debt Center (Freedom) to provide them with debt settlement services.

1 Freedom's service, generally, consists of negotiating with creditors on  
2 behalf of clients for the reduction of unsecured debt and the settlement  
3 of enrolled accounts. In their complaint, the Wheelers assert claims on  
4 behalf of themselves, individually, and as representatives of a purported  
5 class. To date, no other purported class members have been identified by  
6 name.

7 On January 12, 2009, the Wheelers entered into a written contract  
8 with Freedom for the provision of debt settlement services. The contract,  
9 signed by both Doyle and Carrie Wheeler, contains an arbitration  
10 provision, which states:  
11

12 11. Arbitration. All disputes or claims between  
13 the parties related to this agreement shall be  
14 submitted to binding arbitration in accordance with  
15 the rules of American Arbitration Association within  
16 30 days from the dispute date or claim. Any  
17 arbitration proceedings brought by client shall take  
18 place in Orange County California. Judgment upon the  
19 decision of the arbitrator may be entered into any  
20 court having jurisdiction thereof. The prevailing  
21 party in any action or proceeding related to this  
22 agreement shall be entitled to recover reasonable  
23 legal fees and costs, including attorney's fees  
24 which may be incurred.

19 ECF No. 49, Exh. E, Page 6, paragraph 11 of "Debt Settlement Agreement."

20 Plaintiffs brought this action on June 24, 2010 as a class action,  
21 claiming that Defendant Freedom was a "debt adjuster" within the meaning  
22 of RCW 18.28 et seq., that the fees charges by Freedom violated that  
23 statute, and that, by violating RCW 18.28 et seq., Freedom also violated  
24 Washington's Consumer Protection Act, RCW 19.86 et seq.

## 25 **II. DISCUSSION**

26 Defendant Freedom moves to compel arbitration pursuant to the

1 arbitration provision in the Debt Settlement Agreement. Defendant  
2 Freedom asserts that the arbitration provision in the "Debt Settlement  
3 Agreement" is valid and enforceable. Defendant Freedom further states  
4 that although it expects Plaintiffs to argue that the arbitration  
5 provision is substantively unconscionable because it requires  
6 arbitration proceedings to take place in Orange County California,  
7 Freedom is willing to arbitrate Plaintiffs' claims in Washington.  
8 Defendants assert the severability clauses in the agreement permit the  
9 court to sever the venue and choice of law provisions. Defendants'  
10 willingness to forego enforcement of these provisions is understandable  
11 given that this court finds it would be substantively unconscionable to  
12 require financially-strapped Washington citizens to travel to Orange  
13 County California to arbitrate a dispute without the benefit of  
14 Washington's Consumer Protection Act.  
15

16 Further, Defendant Freedom concedes that the first sentence of the  
17 arbitration provision is not a model of clarity, and suggests that the  
18 30 day period in the arbitration provision should not apply under the  
19 circumstances of this case.<sup>1</sup> Finally, Freedom concedes that the "loser  
20 pays all" costs and attorney fee provision is unconscionable under  
21

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22 <sup>1</sup>Defendants explain that the Wheelers did not provide Freedom with  
23 any pre-litigation notice of a claim or dispute. The full nature and  
24 extent of Plaintiffs' claims are, at this point, unknown because the  
25 Court has yet to certify Plaintiffs as a class. And, after the case was  
26 filed, no action of substance took place because of parties' and the  
Court's agreement that the matter should be stayed pending a  
determination by the Washington Supreme Court on the issues certified by  
this Court in *Carlsen v. Global Client Solutions*. It has only been  
since August 2011 that this case has been back on procedural track.

1 Washington case law and the court can and should sever this provision but  
2 otherwise enforce the arbitration provision.

3 Plaintiffs oppose the motion arguing that "[t]he arbitration  
4 agreement underlying Defendants' Motion is so plagued with substantively  
5 unconscionable provisions that arbitration cannot lawfully be compelled."

6 ECF No. 51, at 2. Plaintiffs interpret the arbitration agreement,  
7 drafted by the Defendants, to require any party requesting arbitration  
8 to make the request within thirty days of the dispute. Plaintiffs assert  
9 that Defendants, by waiting more than a year to request arbitration, have  
10 waived their right to enforce the arbitration provision. Additionally,  
11 as Defendants anticipated, Plaintiffs take issue with the arbitration  
12 provision requiring the Wheelers to arbitrate their claim of  
13 approximately \$4,700 in Orange County, California and a mandate that they  
14 pay all of Defendants' attorney's fees and costs if they lose. ECF No.  
15 3. In other words, Plaintiffs contend it is prohibitively expensive and

16 such provisions should be voided as unconscionable. In response to  
17 Defendants' concessions of severing the purported unconscionable  
18 provisions, Plaintiffs respond that such "provisions are so pervasive  
19 that severing them from the agreement is unwarranted and impractical"  
20 rendering the entire [arbitration] agreement unenforceable. *Id.* at 3.

21  
22 Defendants, relying on a line of cases favoring arbitration,  
23 conclude that under the circumstances of the instant case and complicated  
24 procedural history, the strong public policy in favor of arbitration  
25 should prevail over Plaintiffs' waiver claim. Defendants also argue that  
26

1 certain parts of the arbitration clause discussed above should be  
2 severed.

3 **II. ANALYSIS**

4 **FEDERAL ARBITRATION ACT AND WASHINGTON ARBITRATION ACT**

5 The Federal Arbitration Act ("FAA"), and the Washington Uniform  
6 Arbitration Act ("WAA") provide that where the parties have entered into  
7 a contract that contains an agreement to arbitrate disputes, the  
8 agreement will be upheld.  
9

10 In particular, the FAA provides that written agreements to arbitrate  
11 contained in any contract "evidencing a transaction involving commerce  
12 . . . shall be valid, irrevocable, and enforceable, save upon such  
13 grounds as exist at law or in equity for the revocation of any contract."  
14 9 U.S.C. § 2. The FAA further explicitly states that this Court has  
15 authority to enforce such written agreements:

16 A party aggrieved by the alleged failure, neglect,  
17 or refusal of another to arbitrate under a written  
18 agreement for arbitration may petition any United  
19 States district court which, save for such  
20 agreement, would have jurisdiction under Title 28,  
21 in a civil action or in admiralty of the subject  
22 matter of a suit arising out of the controversy  
23 between the parties, for an order directing that  
24 such arbitration proceed in the manner provided for  
in such agreement. . . . The court shall hear the  
parties, and upon being satisfied that the making of  
the agreement for arbitration or the failure to  
comply therewith is not in issue, the court shall  
make an order directing the parties to proceed to  
arbitration in accordance with the terms of the  
agreement.

25 9 U.S.C. § 4.  
26

1 Whether an arbitration agreement is enforceable under the FAA is  
2 generally determined by reference to common-law principles of general  
3 applicability. *Southland Corp. v. Keating*, 465 U.S. 1, 19-20, 104 S. Ct.  
4 852 (1984).

5 While the issue of unconscionability of a contract or clause of a  
6 contract is a question of law for the court, the decision is one based  
7 on the factual circumstances surrounding the transaction in question.  
8 *Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 898, 28 P.3d 823 (2001).  
9 The burden of proving that a contract or contract clause is  
10 unconscionable rests upon the party attacking it. *Id.* Washington  
11 recognizes two types of unconscionability. Substantive unconscionability  
12 "involves those cases where a clause or term in the contract is alleged  
13 to be one-sided or overly harsh . . . ." *Id.* quoting *Schroeder v. Fageol*  
14 *Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975). Procedural  
15 unconscionability is the lack of a meaningful choice, considering all of  
16 the circumstances surrounding the transaction including the manner in  
17 which the contract was entered, whether each party had a reasonable  
18 opportunity to understand the terms of the contract, and whether the  
19 important terms were hidden in a maze of fine print. *Id.*

20  
21 The WAA and RCW 7.04A.070(1) states, in relevant part:  
22

23 On motion of a person showing an agreement to  
24 arbitrate and alleging another person's refusal to  
25 arbitrate pursuant to the agreement, the court shall  
26 order the parties to arbitrate if the refusing party  
does not appear or does not oppose the motion. If  
the refusing party opposes the motion, the court  
shall proceed summarily to decide the issue. Unless  
the court finds that there is no enforceable

1 agreement to arbitrate, it shall order the parties  
2 to arbitrate. If the court finds that there is no  
3 enforceable agreement, it may not order the parties  
4 to arbitrate.

5 Pursuant to the FAA and WAA, this Court must enforce the provisions  
6 of the parties' arbitration agreement if such agreement is found to be  
7 valid and enforceable. Viewing the arbitration agreement as a whole, the  
8 Court concludes it is not enforceable because of provisions therein which  
9 are unconscionable. For example, the agreement states that the  
10 "prevailing party in any action or proceeding related to this agreement  
11 shall be entitled to recover reasonable legal fees and costs, including  
12 attorney's fees which may be incurred." While such clauses are not, by  
13 themselves, invalid in many settings, the Washington Unfair Business  
14 Practices - Consumer Protection law sets forth a strong policy permitting  
15 attorney fees and costs to successful plaintiffs but says nothing about  
16 permitting such fees and costs to successful defendants. See RCW  
17 19.86.090. Under the arbitration agreement here, the prevailing party  
18 is entitled to collect attorneys' fees and costs. While the Wheelers are  
19 assured that they will recover their expenses and legal fees if they win  
20 decisively, they must assume the risk that if they lose, they will have  
21 to pay Freedoms's expenses and legal fees. This risk is a significant  
22 deterrent to already financially-strapped consumers contemplating a suit  
23 to vindicate their rights under consumer protection laws involving  
24 relatively small claims. See *Walters v. A.A.A. Waterproofing, Inc.*, 151  
25 Wash.App. 316 (2009) for application of this principle, albeit in an  
26 employment context.

1 An arbitration agreement is also unconscionable "when the party  
2 opposing arbitration reasonably shows in law or equity that prohibitive  
3 costs are likely to render the arbitral forum inaccessible." *Mendez v.*  
4 *Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 465 (2002). The subject  
5 agreement provides that the Wheelers must arbitrate their Washington  
6 legal claim of approximately \$4,700.00 in Orange County, California.  
7 This travel would render the arbitral forum inaccessible. Moreover,  
8 while Freedom is willing to waive that provision, it is not required to  
9 do so by the terms of the agreement and Wheeler is not required to accept  
10 this modification.  
11

12 The Court finds that the unconscionable terms within the  
13 "Arbitration" section of the agreement (requiring loser to pay all,  
14 requiring arbitration in Orange County, California, and the 30-day  
15 limitations period) can not be severed because they permeate the entire  
16 arbitration agreement. When unconscionable provisions so permeate an  
17 agreement, courts can strike the entire section or contract. See *McKee*  
18 *v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008). Therefore, the Court  
19 denies Defendants' motion to compel arbitration.  
20

### 21 **III. CONCLUSION**

22 The Court has reviewed the record, the pending motion, and is fully  
23 informed. For the foregoing reasons, the parties are not compelled to  
24 arbitrate pursuant to the agreement.

#### 25 **IT IS ORDERED:**

- 26 1. Defendants' Motion to Compel Arbitration, **ECF No. 47**, filed

1 September 13, 2011, is **DENIED**.

2 The District Court Executive is directed to file this Order and  
3 provide copies to counsel.

4 **DATED** this 27th day of October, 2011.

5 *s/Lonny R. Suko*

6 \_\_\_\_\_  
7 LONNY R. SUKO  
8 UNITED STATES DISTRICT JUDGE  
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