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NO. 87643-6

WASHINGTON STATE SUPREME COURT

MHN GOVERNMENT SERVICES, INC.; HEALTH NET, INC.; and
MHN SERVICES dba MHN SERVICES CORPORATION, a Washington
corporation,

Appellants,

v.

BARBARA BROWN and CINDY HIETT,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

The trial court's denial of and Plaintiffs' opposition to the Motion to Compel Arbitration rest upon a fundamental misinterpretation of AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). Plaintiffs argue that Concepcion stands for the proposition that, because unconscionability is a "generally applicable contract defense[]," unconscionability laws apply to arbitration agreements without limitation. Resp. Br. ("RB") at 7-8, 36-45. That is wrong. As the Concepcion Court made clear, such laws do *not* apply if they "derive their meaning from the fact that an agreement to arbitrate is at issue" or they "interfere with fundamental attributes of arbitration." 131 S. Ct. at 1746-48. Plaintiffs' faulty contrary reading of Concepcion infects every aspect of their brief and the trial court's holding—the procedural-unconscionability analysis, the substantive-unconscionability analysis, and even the severability analysis. Thus, **the correct law *never* has been applied to this case:** Neither the trial court below, nor Plaintiffs here, *ever* grapple with the unconscionability principles that actually govern the PSTOA. And that is no surprise: When the PSTOA is measured against the appropriate unconscionability principles that *do* govern, Plaintiffs' position and the trial court's decision are wholly unsupportable.

A. **The FAA Preempts Any Contract Defense That Singles Out Arbitration or “Interferes with Fundamental Aspects of Arbitration”**

Plaintiffs’ Concepcion analysis (such as it is, buried two-thirds of the way into their brief) makes a major concession. Not even they defend the trial court’s narrow and clearly erroneous view that “[Concepcion] dealt specifically with the Discover Bank rule and dealing with class arbitration.” RP 38. Instead, Plaintiffs say that, “[a]t its most expansive,” Concepcion merely reiterates that state unconscionability laws do not apply to arbitration agreements when they single out arbitration. RB at 38-39. They insist that Concepcion does *not* preempt unconscionability defenses, even if they interfere with the fundamental attributes of arbitration. Id. Plaintiffs are demonstrably wrong. The Concepcion Court was unequivocal:

Although § 2’s saving clause preserves generally applicable contract defenses, *nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.* As we have said, a federal statute’s saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.

Concepcion, 131 S. Ct. at 1748 (emphasis added, citations and internal quotation marks omitted).

Thus the Court struck down the Discover Bank rule even though it did not single out arbitration agreements. Id. And it could not have been clearer as to why: “The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. [The Discover Bank rule] interfere[d] with fundamental attributes of arbitration *and thus* create[d] a scheme inconsistent with the FAA.” Id. at 1748 (emphasis added). The principle that emerges follows like night follows day: state unconscionability laws *do not apply* to arbitration agreements to the extent they *either* single out arbitration *or* “interfere[] with fundamental attributes of arbitration.”¹

Plaintiffs’ contrary theory infects every strand of their (and the trial court’s) analysis. First, Plaintiffs ground their entire procedural-

¹ Concepcion sheds doubt on many prior state arbitration decisions that conflict with this principle. Despite Plaintiffs’ claim that “not one court has adopted MHNGS’s novel interpretation of Concepcion,” (RB at 43), courts have repeatedly suggested that cases upon which Plaintiffs rely are no longer valid after Concepcion. This includes cases like Armendariz v. Foundation Health Psychcare Servs., 24 Cal. 4th 83, 119, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000), which served as the basis for the now-overruled Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005). See, e.g., Oguejiofor v. Nissan, No. C-11-0544, 2011 WL 3879482, at *3 (N.D. Cal. Sept. 2, 2011) (compelling arbitration, noting that Armendariz was abrogated in part by Concepcion); Ruhe v. Masimo Corp., No. SACV 11-00734, 2011 WL 4442790, at *2 (C.D. Cal. Sept. 16, 2011) (compelling arbitration, observing that “[t]he parties dispute whether Armendariz merely creates a test for the general contract doctrine of unconscionability, or provides a separate set of ‘requirements’ If Armendariz does the latter, such a requirement would appear to be preempted by the FAA under the Supreme Court’s reasoning in Concepcion.” (citation omitted)); Burnett v. Macy’s W. Stores, Inc., No. 1:11-cv-01277, 2011 WL 4770614, at *4 n.3 (E.D. Cal. Oct. 7, 2011) (compelling arbitration, noting that “[a] few courts have questioned the vitality of [the Armendariz] requirements in light of [Concepcion].”).

unconscionability analysis on a faulty presumption that so-called “contracts of adhesion” are procedurally unconscionable. RB at 9-10 (“Ordinary contracts of adhesion . . . contain a degree of procedural unconscionability even without any notable surprises”) (quoting Gentry v. Superior Court, 42 Cal. 4th 443, 469, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (Cal. Sup. Ct. 2007))). To the extent such a presumption exists under California law, that presumption applies only to arbitration contracts and would potentially relieve Plaintiffs of their otherwise heavy burden to prove procedural unconscionability. Indeed, “[w]hen the adhesive contract clause at issue is anything other than an agreement to arbitrate, California courts apply a demanding test to determine procedural unconscionability.” Stephen A. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L.J. 39, 61 (2006) (cited in Concepcion). Under this more rigorous test (for one trying to prove procedural unconscionability), even a “take-it-or-leave-it” agreement that the employer opened to the signature page before presenting to the employee—without advice to seek counsel or otherwise review the contract—has been enforced according to its terms. Id. (discussing Robison v. City of Manteca, 78 Cal. App. 4th 452, 454, 92 Cal. Rptr. 2d 748 (2000)). As such, that presumption—which singles out

arbitration agreements—is invalid. And because everything the trial court did below and Plaintiffs do here is premised on that presumption, so is their analysis.

Plaintiffs’ substantive-unconscionability arguments run head-on into Concepcion, too. This is because Plaintiffs contend that various PSTOA provisions are unconscionable *precisely because* they diverge from the dispute-resolution rules that would govern in the non-arbitration context. As one example, they challenge the six-month limitation period not because six months is too quick, but because it does not give every second of time that the otherwise-applicable statute of limitation would give. RB at 24-26. And they challenge the San Francisco venue provision based on a heightened standard that they admit applies only to “restrictions in arbitration agreements.” *Id.* at 35. That, however, is exactly what Concepcion forbids.

Plaintiffs’ severability analysis fares no better. As they freely acknowledge, whether severability is appropriate depends directly upon the extent to which “the central purpose of the contract is ‘permeated’ or ‘tainted’ with unconscionability.” RB at 45 (internal quotation marks omitted). Because, as explained above, Plaintiffs’ procedural and substantive unconscionability analyses stack the deck against arbitration, their severability analysis, too, is defective.

MHNGS is not, as Plaintiffs suggest, urging the Court to conclude that Concepcion is “an absolute bar to unconscionability defenses.” RB at 43-45. MHNGS has never argued that *no* unconscionability defense is viable after Concepcion.² Unconscionability defenses still apply so long as they are not specific to arbitration and do not impede the primary purposes of arbitration. When the Agreement is measured against generally applicable unconscionability principles, the trial court’s decision is wholly unsupportable.

B. The Agreement Is Not Unconscionable

The Agreement must be enforced unless Plaintiffs can prove that it is *both* procedurally *and* substantively unconscionable under the unconscionability rules that survive Concepcion, i.e., that do not single out arbitration or otherwise “interfere” with arbitration’s “fundamental attributes.” Concepcion, 131 S. Ct. at 1746-48.³ Neither the trial court nor Plaintiffs have attempted to apply those rules in the first place. But, applying them shows that Plaintiffs have not and cannot meet their burden.

² Nor is that a logical consequence of MHNGS’s position. Indeed, that essentially was one of the claims of the dissenters in Concepcion. See 131 S. Ct. at 1761 (accusing majority of “immuniz[ing] an arbitration agreement from judicial challenge on grounds applicable to all other contracts” and contending that doing so “would be to elevate it over other forms of contract” (internal quotation marks omitted)). But Plaintiffs are wrong for the same reason that their argument did not garner a majority in Concepcion.

³ Plaintiffs imply that *either* procedural or substantive unconscionability is sufficient to support finding unconscionability. RB at 9 n.4 (citing Adler v. Fred Lind Manor, 153 Wn.2d 331, 346-47, 103 P.3d 773 (2004)). But the Agreement is governed by California law, not Washington law, (see CP 97, 106), and Adler does not apply.

1. The Agreement Is Not Procedurally Unconscionable

a. The Process Was Fair to Both Parties

Plaintiffs lose sight of the ultimate issue: the fairness and reasonableness of the Agreement. Instead, they improperly convert cases with hugely divergent facts into rigid rules to be applied to all arbitration agreements. For example, Plaintiffs rely heavily on Samaniego v. Empire Today LLC, 205 Cal. App. 4th 1138, 140 Cal. Rptr. 3d 492 (2012), claiming that the case “addressed questions of unconscionability substantially similar to those before this Court.” RB at 4. This is not true. Samaniego concerned a contract of adhesion given to non-English-speaking manual laborers only after they were hired. Samaniego, 205 Cal. App. 4th at 1145. The employer refused to provide a translated agreement when the employees asked for one; gave them only 24 hours to sign and return it; and told them that they would be fired if they did not comply. Id. at 1145-46. The court found unconscionability only after citing these facts demonstrating that the entire process was grossly unfair. Id. No such facts exist here.

The Samaniego court evaluated Concepcion and confirmed that the FAA does not permit “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” Samaniego, 205 Cal. App. 4th at 1150. The court ultimately concluded

that the agreement there “remain[ed] subject, post-Concepcion, to the unconscionability analysis employed by the trial court *in this case*” (id. (emphasis added)), thus highlighting the fact-specific nature of its inquiry. The facts in Samaniego made the contract unconscionable even under general contract principles. Thus, Samaniego did not hold, as Plaintiffs suggest, that Concepcion has no bearing on the unconscionability defense.

This case is a horse of a different color. Plaintiffs try to paint themselves as “weaker” or “adhering” parties (RB at 11), but this is grossly misleading. Before contracting with MHNGS, Plaintiffs described themselves as sophisticated licensed professionals (one owns a business) capable of counseling service members actively engaged in war.⁴ CP 35-42, 99, 55-62, 109. Because of the demands imposed on MFLCs, engagements are inherently difficult to fill, and MHNGS pays MFLCs handsomely.⁵ MHNGS competed to recruit Plaintiffs, and Plaintiffs could sign up for as many or as few rotational engagements as they chose and could participate in the network in addition to their regular counseling

⁴ The installations on which MFLCs provide their counseling can be highly demanding. Some are located in active war zones, like Djibouti, Africa. Plaintiffs provided services at Ft. Lewis in Pierce County, Washington (CP 3), the home installation of Staff Sergeant Robert Bales, who is accused of killing 16 Afghan villagers in March 2012.

⁵ By way of example, MHNGS paid Plaintiff Hiatt more than \$12,800 for her 45-day engagement in Ft. Wainwright, Alaska from November 6, 2008 to December 20, 2008. CP 55, 116. MHNGS paid Plaintiff Brown more than \$17,100 for her 60-day engagement in Ft. Riley, Kansas from November 28, 2008 to January 26, 2009. CP 35, 111.

practices. See id. While Plaintiffs also try to diminish their position by purporting to be employees, the PSTOA is not an employment contract (CP 96, 105), and no court has ruled otherwise. Nor can Plaintiffs “bootstrap their action merely by assuming as true what they are obligated to prove.” Sotelo v. MediaNews Grp., Inc., 207 Cal. App. 4th 639, 650, 143 Cal. Rptr. 3d 293 (2012). Plaintiffs’ self-serving declarations that they did not discuss or negotiate the contract terms (RB at 12), also do not prove that they were “weak” or “adhering,” much less that the Agreement was procedurally unconscionable.

Moreover, MHNGS presented the Agreement to Plaintiffs in a direct, fair manner. The Agreement was clearly marked, bolded, and underlined, and in the same type as the rest of the PSTOA. CP 97, 106; see Monex Deposit Co. v. Gilliam, 671 F. Supp. 2d 1137, 1143-44 (C.D. Cal. 2009) (finding no procedural unconscionability where arbitration provisions were in same typeface and font as rest of agreement and had accurate headings). Nothing was hidden. Plaintiffs also had time to consider the Agreement from the comfort of their own homes without pressure before accepting. See CP 33-34, 53-54.

In sum, Plaintiffs did not come to the Agreement from a position of weakness or vulnerability, as did the non-English-speaking employees

in Samaniego who would be fired if they did not sign an agreement drafted entirely in a language they could not understand.

b. “Special Scrutiny” Is Unwarranted

Plaintiffs claim that “MHNGS acknowledges in its opening brief that the facts demonstrate a contract of adhesion.” RB at 11. MHNGS does not. Yet even if the Agreement were adhesive, it should not be subjected to “additional scrutiny” under Gentry, as Plaintiffs claim. RB at 9-10 (citing Gentry, 42 Cal. 4th at 469). Gentry—which applied heightened scrutiny to arbitration clauses (but no other provisions) in adhesive contracts—does not survive Concepcion. See, e.g., Morse v. ServiceMaster Global Holdings Inc., No. C 10-0628, 2011 WL 3203919, at *3, n.1 (N.D. Cal. July 27, 2011) (“Concepcion rejected the reasoning and precedent behind Gentry[.]”). And, under generally applicable contract principles, adhesion contracts are not *per se* unconscionable. See Crippen v. Cent. Valley RV Outlet, Inc., 124 Cal. App. 4th 1159, 1165, 22 Cal. App. 4th 1159 (2004) (“[T]here is no general rule that a form contract used by a party for many transactions is procedurally unconscionable.”); Broome, supra, at 61-64 (observing that adhesion agreements in non-arbitration contracts are not *per se* unconscionable under California law, citing cases).

Plaintiffs imply that MHNGS must offer a unique contract to each MFLC, but this is impractical and ignores modern business world realities. See Concepcion, 131 S. Ct. at 1750 (“[T]he times in which consumer contracts were anything other than adhesive are long past.”) This is particularly true here given the size of the MFLC network and the urgency with which the military demands their services. Without form contracts, the parties likely could not contract. This insurmountable bar contradicts preemptive federal law favoring arbitration. Id.

Plaintiffs *must* present some fact other than the adhesive nature of the contract showing oppression, such as lack of reasonable market alternatives. See Morris v. Redwood Empire Bancorp, 128 Cal. App. 4th 1305, 1320-21, 27 Cal. Rptr. 3d 797 (2005) (holding plaintiff failed to meet burden to show lack of reasonable market alternatives). Plaintiffs cannot avoid this requirement by claiming that the Agreement is an “employment contract[]” (RB at 17) because no court has yet ruled that Plaintiffs are employees. See Sotelo, 207 Cal. App. 4th at 650 (plaintiffs cannot “bootstrap their action merely by assuming as true what they are obligated to prove”). Moreover, it is not the case, as Plaintiffs argue, that “the absence of market alternatives pertains to a potential *defense* to be raised by the party seeking to enforce a contract.” RB at 18. Either a plaintiff or a defendant may argue the “reasonable market alternatives”

issue, but the ultimate burden is on the plaintiff to prove unconscionability. See Morris, 1287 Cal. App. 4th at 1320-21 (noting that either plaintiff or defendant may argue “reasonable market alternatives” issue, but plaintiffs have ultimate burden to prove unconscionability). It is undisputed that Plaintiffs had plenty of market alternatives available, including choosing to maintain a private practice, as Plaintiff Brown had. Moreover, Plaintiffs had the option to sign up for as many or as few short-term, rotational MFLC assignments as they wanted.

c. **The Agreement Need Not Attach the AAA Rules**

Plaintiffs impose yet another unreasonable and outmoded burden on arbitration by claiming that the Agreement should have attached a copy of the AAA Rules. Plaintiffs rely on Samaniego, noting that “[t]he California Court of Appeals found [it] ‘significant’ in affirming a finding of unconscionability” that the AAA rules “‘were not attached to [the agreement] or otherwise provided to the plaintiffs.’” RB at 16 (quoting Samaniego, 205 Cal. App. 4th at 1146). However, Plaintiffs ignore several other significant facts that colored the court’s decision—facts that do not exist here. See I.B.1.a, supra. Furthermore, any cases cited in Samaniego that suggest a *per se* rule predate Concepcion. See Samaniego, 205 Cal. App. 4th at 1146 (citing Trivedi v. Curexo Tech. Corp., 189 Cal. App. 4th 387, 393-94, 116 Cal. Rptr. 3d 804 (2010)) (citing cases).

Contrary to Concepcion's mandate, these cases singled out arbitration contracts for such vigorous scrutiny; California has no general contract rule requiring that all documents referenced in a contract must be included with the contract to enforce it. Rather, a contract may incorporate another document by reference if, as here, the reference is clear and unequivocal, the reference is brought to the attention of and consented to by the other party, and the terms are readily available. Shaw v. Regents of Univ. of Cal., 58 Cal. App. 4th 44, 54, 67 Cal. Rptr. 2d 850 (1997) (“A contract may validly include the provisions of a document not physically a part of the basic contract It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document.” (quoting Williams Constr. Co. v. Standard-Pacific Corp., 254 Cal. App. 2d 442, 454, 61 Cal. Rptr. 912 (1967))). Requiring a special rule for arbitration agreements that differs from the general contract rule is exactly what the Court prohibited in Concepcion.

Furthermore, the cases relied on by Plaintiffs precede the widespread availability of high-speed internet. RB at 16 (quoting Harper v. Ultimo, 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418 (2003)) (obtaining Better Business Bureau's arbitration rules would require “effort” of “go[ing] to another source to find out the full import of what he or she is about to sign”). Now, nearly a decade after Harper, anyone

(including Plaintiffs) can easily view the rules online, and they are as accessible as the Washington Rules of Civil Procedure, if not more so. See Ruhe, 2011 WL 4442790, at *3 (observing that “JAMS rules are easy to locate in an online search,” thus copy of rules need not be included with agreement). AAA also continually updates its rules to comply with ever-changing laws. Online access ensures that parties can view the most recent versions.⁶

Plaintiffs also claim that the Agreement “meets the ‘oppression’ element of procedural unconscionability” because it does not specify which AAA rules should apply. RB at 16-17. Plaintiffs suggest that MHNGS did this intentionally so that it could “pick which arbitration rules best served its interest (to a plaintiff’s corresponding detriment) based on MHNGS’s views at the time.” Id. This is a red herring. The differences between the sets of rules are negligible and none of them conceivably offers any greater benefit to MHNGS than another. In each set of rules, the procedures for determining the arbitrator’s jurisdiction, scope of discovery, presentation of evidence, time and place of hearings,

⁶ Given these modern considerations, is unsurprising that the California Supreme Court recently granted review of two California Court of Appeals decisions finding arbitration agreements procedurally unconscionable in part because they did not include a copy of the AAA Rules. See Wisdom v. AccentCare, Inc., 202 Cal. App. 4th 591, 136 Cal. Rptr. 3d 188, 194 (2012), *review granted and opinion superseded by* 139 Cal. Rptr. 3d 315, 273 P.3d 513 (2012); Mayers v. Volt Mgmt. Corp., 203 Cal. App. 4th 1194, 137 Cal. Rptr. 3d 657, 666-67 (2012), *review granted and opinion superseded by* 142 Cal. Rptr. 3d 807, 278 P.3d 1167 (2012).

arbitrator selection, and ex parte communications with the arbitrator, among other procedures, are the same.⁷ See AAA Commercial Arbitration Rules, <http://www.adr.org> (follow “Rules & Procedures” hyperlink; then follow “Search Rules” hyperlink; then follow “Commercial Arbitration Rules and Mediation” hyperlink) (last visited Nov. 20, 2012); AAA Employment Arbitration Rules, <http://www.adr.org> (follow “Rules & Procedures” hyperlink; then follow “Search Rules” hyperlink; then follow “Employment Arbitration Rules and Mediation Procedures” hyperlink) (last visited Nov. 20, 2012); see also Perez v. Maid Brigade, Inc., No. C 07-3743, 2007 WL 2990368, at *6 n.6 (N.D. Cal. Oct. 11, 2007) (rejecting claim that agreement must specify which AAA rules apply, as “the [AAA] rules themselves” provide means to determine which rules apply).⁸

⁷ For example, both the Commercial and Employment Rules grant the arbitrator the power “to rule on his or her own jurisdiction” and provide that objections to the arbitrability of a particular claim must be made “no later than the filing of the answering statement to the claim . . . that gives rise to the objection.” AAA Commercial Rule 7; AAA Employment Rule 6. Both sets of rules also allow the arbitrator discretion to order discovery “consistent with the expedited nature of arbitration.” AAA Commercial Rule 21(a); AAA Employment Rule 9.

⁸ Plaintiffs overstate the issue by, for example, suggesting that “Government Programs” rules could apply (RB at 14), but there are no such rules. As even Plaintiffs’ citation suggests, this is merely one of AAA’s “Areas of Expertise.” Plaintiffs also make a fuss about AAA’s newly adopted Healthcare Payor Provider Arbitration Rules (RB at 14), but there is no conceivable way that these rules could apply, as both parties must expressly agree to use them, and one party must be a healthcare insurer, which is not the case here. See AAA Healthcare Payor Provider Arbitration Rule 1, <http://www.adr.org> (follow “Areas of Expertise” hyperlink; then follow “Healthcare and Life Sciences” hyperlink; then follow “Healthcare” hyperlink, then follow “AAA Healthcare Payor Provider Arbitration Rules” hyperlink) (last visited Nov. 20, 2012).

Moreover, Plaintiffs do not assert that any version of the AAA Rules are unfair to them or that if they had received a copy of the Rules they would not have assented to them. See Sullivan v. Lumber Liquidators, Inc., No. C-10-1447, 2010 WL 2231781, at *5-6 (N.D. Cal. June 2, 2010) (rejecting plaintiffs' unconscionability claim for failure to attach AAA rules because plaintiffs never showed AAA rules were unfair); Sullenberger v. Titan Health Corp., No. CIV. S-08-2285, 2009 WL 1444210, at *8 (E.D. Cal. May 20, 2009) (same). This further distinguishes this case from Harper, where plaintiffs were "surprised" that the Better Business Bureau rules limited substantive remedies available to the plaintiffs. See Harper, 113 Cal. App. 4th at 1405-06 ("customer must inevitably receive a nasty shock when he or she discovers that no relief is available even if out and out fraud has been perpetrated"); Sullivan, 2010 WL 2231781, at *5 (distinguishing Harper; plaintiff "made no showing that AAA Rules referenced . . . limit[ed] his available remedies or otherwise restrict[ed] the scope of claims"). Here, there is no surprise because AAA Rules did not unexpectedly limit Plaintiffs' remedies or otherwise introduce any procedural or substantive unfairness.

The ultimate issue is whether the process was fair to all parties. The trial court's procedural-unconscionability analysis was infected by a misreading of Concepcion. Rather than applying general notions of

unconscionability in the context that existed at the time Plaintiffs agreed to the Agreement, the trial court applied outdated legal concepts now overruled by Concepcion. And Plaintiffs have failed to prove how any aspect of the process that existed for them to decide whether to agree to arbitrate claims was unfair, oppressive, or a surprise to them.

2. **The Agreement Is Not Substantively Unconscionable**

Given the Agreement's overall fairness, it is not procedurally unconscionable and a substantive-unconscionability analysis is unnecessary. The trial court's decision should be reversed on that basis alone. See Monex, 671 F. Supp. 2d at 1142 (procedural unconscionability is *required* to find an agreement unenforceable). But should the Court nonetheless elect to go further and analyze substantive unconscionability according to the applicable principles that survive Concepcion—something that neither the trial court nor Plaintiffs ever did—it should conclude that the Agreement is not substantively unconscionable.

The San Francisco forum-selection clause is reasonable because a pre-selected venue simplifies arbitration. This is especially true when, as here, the Agreement is governed by California law, and MHNGS (with its witnesses) is headquartered there. Plaintiffs did not meet their “heavy burden” to show that, under generally applicable contract principles, the contractually selected forum is “so gravely difficult and inconvenient” that

they cannot pursue their claims there.⁹ M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). Plaintiff Hiett lived in northern California when the complaint was filed. See CP 3. Plaintiffs have not explained why it is any more “oppressive” for Plaintiff Brown, a Washington resident, to arbitrate a claim in California, than it is for Hiett, a California resident, to litigate a claim in Washington. Notably, Plaintiffs also filed a virtually identical collective action in the Western District of Washington, in which they seek to represent MFLCs from all over the country. Hiett v. MHN Gov’t Servs., Inc., No. 3:12-cv-05428 (W.D. Wash.). Thus, they, too, are requiring other MFLCs to litigate in a forum outside of their home state. They can hardly say that the San Francisco forum-selection clause is oppressive or unconscionable.

Contractual limitations on the time to bring a claim are not *per se* unconscionable under general contracts law. See, e.g., Moreno v. Sanchez, 106 Cal. App. 4th 1415, 1430, 131 Cal. Rptr. 2d 684 (2003). Despite Plaintiffs’ claim (RB at 25-26), courts have found that even six-month limitations periods in arbitration agreements are not unconscionable when applied to statutory employment claims. See Perez v. Safety-Kleen Sys., Inc., Nos. C 05-5338, C 07-0886, 2007 WL 1848037, at *4 (N.D.

⁹ Insofar as Plaintiffs try to apply a heightened “unduly oppressive” standard, they concede that the standard is specific to “determining the unconscionability of ‘restrictions in *arbitration agreements*’” (RB at 35 (internal quotation marks omitted)), which runs directly counter to Concepcion. 131 S. Ct. at 1747.

Cal. June 27, 2007) (upholding arbitration agreement's six-month limitation provision in wage-hour case). Further, the PSTOA is not an employment contract (as it was in Samaniego), and an "obligation" to pay minimum wage was not contemplated, as Plaintiffs assert. RB at 23. Various claims could have arisen under the Agreement, including claims by MHNGS against MFLCs for violating the confidentiality clause or for indemnification for torts committed on military sites. Insofar as any law (or interpretation) targets statute of limitations clauses in arbitration agreements, the FAA preempts because the law does not apply to contracts generally. Shortening time to bring claims to six months is not unreasonable and improves efficiency by avoiding delay and uncertainty.¹⁰

The arbitrator selection clause is fair. Although Plaintiffs complain that "MHNGS may select the three most pro-employer arbitrators in the country," (RB at 20), this directly contradicts the *express* terms of the Agreement, which provides for "*neutral*" arbitrators. CP 97, 106. Thus, if MHNGS selected "pro-employer" arbitrators, Plaintiffs could object because it violates the Agreement. The Agreement further protects Plaintiffs by adopting AAA's arbitrator selection procedure. See

¹⁰ Plaintiffs' claim that "MHNGS's position has shifted on appeal" (RB at 24) is wrong. MHNGS continues to assert that "nothing would prevent Plaintiffs from trying to recover damages beyond six months." CP 140. The Agreement merely limits the amount of time within which Plaintiffs can bring a claim, and insofar as it does that, for the reasons stated, the limitation is not unconscionable.

CP 97-98, 106-07. Under these rules, MHNGS requests a list of three neutral arbitrators from AAA, and a Plaintiff selects one arbitrator from that list. Id.; see also AAA Commercial Arbitration Rules; AAA Employment Arbitration Rules. The procedure is efficient, simple, and gives Plaintiffs the ultimate say. This is more than fair. In any event, if there is any ambiguity, the Court should choose the interpretation that upholds enforceability. See Adams v. AT&T Mobility, LLC, 816 F. Supp. 2d 1077, 1085 (W.D. Wash. 2011) (when considering two reasonable interpretations of arbitration clause, court must choose enforceable one).

The punitive damages limitation is fair because it does not restrict Plaintiffs' alleged right to the Washington Minimum Wage Act ("MWA") double damages penalty.¹¹ The MWA is a remedial, not a punitive statute. See, e.g., Morrison v. Basin Asphalt Co., 131 Wn. App. 158, 163, 127 P.3d 1 (2005) ("The act is remedial and should be construed liberally to effectuate the purpose of the statute."). Insofar as there is ambiguity, the Court should enforce the Agreement as in PacifiCare Health Systems, Inc.

¹¹ The punitive damages provision also applies equally to MHNGS—a point this Court should not ignore. MFLCs could equally be sued by MHNGS. For instance, as licensed counselors, MFLCs have a legal "duty to warn" if a client presents a threat to himself or others. Imagine that a client tells an MFLC that he will soon set off a bomb at a military installation, the MFLC ignores her duty to warn, and the client sets off the bomb as threatened. In addition, the MFLC had fraudulently represented her credentials and was never licensed. The victims' families later sue MHNGS. MHNGS could sue the MFLC, including for a potential fraud claim that might allow for punitive damages. In this scenario, the punitive damages provision in the Agreement would benefit the MFLC, as would the Agreement's other provisions that streamline litigation.

v. Book, 538 U.S. 401, 405-07, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003). PacifiCare makes clear that a clause stating that “punitive damages shall not be awarded” is insufficient, on its own, to make the Agreement unenforceable.¹² See id. at 405.

Finally, the fee-shifting clause is enforceable. While Plaintiffs claim that “[f]ee shifting provisions that only benefit the employer are unlawful,” (RB at 29), either party may claim the benefit of the fee-shifting clause here. Cf. Samaniego, 140 Cal. Rptr. 3d at 499-500 (holding that fee-shifting clause that did not impose reciprocal requirement on employer was unconscionable). Also, Plaintiffs have not yet proven that MHNGS is an employer. See Sotelo, 207 Cal. App. 4th at 650 (plaintiffs cannot “bootstrap their action merely by assuming as true what they are obligated to prove”). Ultimately, forbidding fee-shifting clauses in arbitration agreements, as Plaintiffs seek to do, interferes with the FAA and runs counter to Concepcion, 131 S. Ct. at 1748. The Concepcion Court pronounced as a general principle that policies disfavoring enforcement of arbitration agreements cannot be supported, even if they are “desirable for unrelated reasons,” such as to prevent Plaintiffs from being deterred from bringing their claims. Id. at 1753.

¹² On this point, Plaintiffs claim that “[o]nce again, MHNGS’s position shifts on appeal.” RB at 26-28. But, once again, this is not true. CP 143.

C. Any Allegedly Offending Provisions Are Severable

California contracts law favors severability of unenforceable clauses. See, e.g., Adair v. Stockton Unified Sch. Dist., 162 Cal. App. 4th 1436, 1450, 77 Cal. Rptr. 3d 62 (2008); see also Beynon v. Garden Grove Med. Grp., 100 Cal. App. 3d 698, 713, 161 Cal. Rptr. 146 (1980) (noting “loose view of severability” in California contract law (quoting 1 Witkin, Summary of Cal. Law, Contracts § 343 at 290 (8th ed. 1973))). Although Plaintiffs claim that “[t]he trial court’s decision to not sever the unconscionable provisions in the arbitration clause is reviewed for abuse of discretion,” (RB at 46), this standard is not applicable to the issues in this case. Pre-*Concepcion* California authority gives the trial court discretion to not sever if, and only if, the Agreement is permeated with unconscionability. See Armendariz, 24 Cal. 4th at 122. But as discussed below, MHNGS argues that the “permeated with unconscionability” standard is inconsistent with *Concepcion*. This is a question of *law*, not fact, and is therefore reviewed de novo. See Crocker Nat’l Bank v. City & Cnty. of S.F., 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278 (1989) (applying de novo review: “[i]f . . . the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently”).

Courts encourage severability to preserve the contractual relationship, so long as doing so does not “condon[e] an illegal scheme.” MKB Mgmt., Inc. v. Melikian, 184 Cal. App. 4th 796, 804, 108 Cal. Rptr. 3d 899 (2010) (internal quotation marks omitted). This policy is in line with U.S. Supreme Court precedent. See, e.g., Concepcion, 131 S. Ct. at 1749 (noting that one goal of FAA is “enforcement of privately made agreements” (internal quotation marks omitted)); Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1774, 176 L. Ed. 2d 605 (2010) (“Arbitration is simply a matter of contract between the parties[.]”)” (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995))).

Here, there is no illegal purpose. Rather, the central purpose of the Agreement is to offer a streamlined, predictable way to resolve disputes that may arise between MHNGS and any one of the highly mobile MLFCs who provide temporary services on an urgent basis at military installations throughout the world. This purpose is consistent with federal policy that encourages arbitration as an alternative to costly litigation.

Plaintiffs point to California case law holding that “[a]n *arbitration* agreement can be considered . . . unconscionab[le] if it contains more than one unlawful provision.” RB at 46 (emphasis added, internal quotation marks omitted). Such cases impose a stricter rule on

arbitration agreements than on other contracts and are premised upon Armendariz, 24 Cal. 4th at 124, which courts have questioned because it is incompatible with Concepcion. See note 1, supra. This Court should reject any invitation to impose a *per se* rule against severing multiple arbitration clauses. To do otherwise would single out arbitration agreements and run afoul of Concepcion. See Concepcion, 131 S. Ct. at 1747. Instead, the Court should follow general California contracts law that favors severing unenforceable clauses and enforcing contracts. See, e.g., Laughlin v. VMware, Inc., No. 5:11-CV-00530, 2012 WL 298230, at *7 (N.D. Cal. Feb. 1, 2012) (severing multiple unenforceable clauses from arbitration agreement and enforcing remaining agreement); Grabowski v. C.H. Robinson Co., 817 F. Supp. 2d 1159, 1179 (S.D. Cal. 2011) (same). As MHNGS points out in its opening brief, severing the challenged provisions will not, as Plaintiffs suggest, leave “virtually nothing of substance left to the contract” or require “filling in the blanks.” RB at 45-46 (internal quotation marks omitted). The challenged provisions are not so central to the Agreement that it cannot exist without them.

* * *

The correct law has never been applied to this case. The trial court below, improperly ignoring the full import of the U.S. Supreme Court’s recent decision in Concepcion, evaluated procedural unconscionability,

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To the Washington State Supreme Court Clerk:

The attached brief is filed in MHN Government Services, Inc. v. Brown, No. 87643-6 on behalf of:

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