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No. 70648-9-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

JAMES A. FRIEL and DEBORAH L. FRIEL, a marital community,
Individually and on behalf of all others similarly situated,

Plaintiffs/Respondents,

v.

LEGAL HELPERS DEBT RESOLUTION, LLC, a Nevada limited liability company; THE MORTGAGE LAW GROUP, LLP, a Washington limited liability partnership; MACEY, ALEMAN, HYSLIP & SEARNS, also known as MACEY, ALEMAN & SEARNS, an Illinois law firm; THOMAS G. MACEY, individually and on behalf of the marital community of THOMAS G. MACEY and JANE DOE MACEY; JEFFREY J. ALEMAN, individually and on behalf of the marital community of JEFFREY J. ALEMAN and JANE DOE ALEMAN; JEFFREY HYSLIP, individually and on behalf of the marital community of JEFFREY HYSLIP and JANE DOE HYSLIP; JASON SEARNS, individually and on behalf of the marital community of JASON SEARNS and JANE DOE SEARNS,

Defendants/Appellants,

and

AMERICAN PLATINUM FINANCIAL SERVICES, INC., an Arizona corporation; JOSEPH COMPRONE, individually and on behalf of the marital community of JOSEPH COMPRONE and JANE DOE COMPRONE; CHRISTOPHER SAUER, individually and on behalf of the marital community of CHRISTOPHER SAUER and JANE DOE SAUER,

Defendants.

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I. INTRODUCTION

Appellant Legal Helpers Debt Resolution LLC (“LHDR”), a self-described “national” law firm, is one of the corporate faces of Illinois law firm Macey, Aleman, Hyslip & Searns (“MAHS”), also an Appellant to this appeal (LHDR and MAHS are referred to collectively herein as “LHDR”). LHDR appeals the denial of its motion to enforce against Plaintiffs-Appellees James and Deborah Friel an arbitration clause contained in an Attorney Retainer Agreement (“ARA”). The ARA at issue was emailed to the Friels as part of a standardized loan modification enrollment packet that American Platinum Financial Services, Inc. (“APFS”)¹ sent to consumers who were seeking assistance to negotiate mortgage modifications. LHDR failed to explain to the Friels any of the material terms of its ARA, including the arbitration clause, and failed to fully disclose the rights the Friels were purportedly relinquishing, which is a requirement of attorneys who enter into retainer agreements with Washington residents. Finding LHDR’s attorneys breached their fiduciary obligations to the Friels, the Superior Court properly concluded that the arbitration clause in LHDR’s ARA is procedurally unconscionable under Washington law. RP 31:17-23, 32:11 – 34:18.

¹ APFS is a defendant in this action. APFS is not a signatory to the ARA and did not join in the Appellants’ motion to compel arbitration.

Appellants The Mortgage Law Group, LLP (“TMLG”), Thomas G. Macey and Jane Doe Macy (“Macey”), Jeffrey J. Aleman and Jane Doe Aleman (“Aleman”), Jeffrey Hyslip and Jane Doe Hyslip (“Hyslip”), and Jason Searns and Jane Doe Searns (“Searns”) (collectively, the “Non-Signatory Appellants”) also appeal the denial of the motion to compel arbitration. The Non-Signatory Appellants are not parties to the ARA between the Friels and LHDR. Thus, the Superior Court properly concluded that the Non-Signatory Appellants are not entitled to enforce the unconscionable arbitration provision contained in the ARA. RP 32:3-5, 34:19 – 35:14.

For the reasons detailed below, this Court should affirm the Superior Court’s decision denying Appellants’ motion to compel arbitration.

II. STATEMENT OF THE ISSUES

1. Whether this Court should affirm the Superior Court’s order denying Appellants’ motion to compel arbitration based on a clause found in an attorney retainer agreement that is procedurally unconscionable because the attorneys to the agreement failed to comply with their fiduciary obligations as lawyers to explain all material terms of the agreement.

2. Whether this Court should affirm the Superior Court’s order holding the Non-Signatory Appellants are precluded from enforcing

the agreement's unconscionable arbitration clause as non-signatories where the Friel's claims are not intertwined with and do not arise out of the attorney retainer agreement.

III. STATEMENT OF THE CASE

A. Nature of Case

The Friel's class action complaint alleges Defendants provided mortgage loan modification services while unlicensed and charged excessive and illegal fees in violation of Washington law, including Washington's Mortgage Broker Practices Act ("MBPA") and Washington's Consumer Loan Act ("CLA"). CP 44:1 – 45:16, 48:8 – 52:17; Wash. Rev. Code Ann. § 19.146 *et seq.* (West 2013); Wash. Rev. Code Ann. § 31.04 *et seq.* (West 2013). The Friels further allege Defendants, pursuant to their standardized business practice, instructed Plaintiffs to stop communicating with their lender and to stop paying their mortgage. CP 44:19-24. Defendants' common course of conduct defrauded and misled the Friels and Class members in violation of the Mortgage Lending and Homeownership Act ("MLHA"). CP 52:18 – 53:16; Wash. Rev. Code Ann. § 19.144 *et seq.* (West 2013).

Defendants' violations of the MBPA and CLA constitute *per se* violations of the Washington Consumer Protection Act ("CPA"). CP 48:8 – 52:17; Wash. Rev. Code Ann. § 19.86 *et seq.* (West 2013). Moreover, the Friels allege Defendants are enriching themselves at the expense of indebted Washington consumers through violations of the MBPA, CLA,

MLHA and CPA, and by aiding and abetting one another in such violations. CP 48:8 – 58:7.

B. Course of Proceedings

The Friels filed their complaint on February 22, 2013. CP 1 – 35. The Friels amended their complaint on April 9, 2013, before any Defendants answered, adding Attorney Processing Solutions, LLC (“APS”) as a Defendant.² CP 36 – 59. Defendants did not answer the Friel’s complaint. CP 60 – 71. Instead, Appellants filed a motion to compel arbitration on May 6, 2013. *Id.* The Friels timely filed their opposition to the motion to compel arbitration. CP 87 – 179.

C. Disposition Below

On June 21, 2013, the Superior Court heard oral argument from the parties on Appellants’ motion to compel arbitration and denied the motion in an order (the “Order”) issued the same day. CP 191 – 192; RP 1 – 38. In deciding the validity of the arbitration clause, the Superior Court noted the Friels “contend[] there is procedural unconscionability because LHDR failed to explain the material terms of its retainer agreement....” RP 31:20-23. The Superior Court ruled that LHDR had “an affirmative duty... to disclose and explain material terms” and that LHDR failed to do so. RP 32:19 – 34:10. “As a consequence” of this failure, the court concluded “that the arbitration provision and the defendants’ conduct with

² APS is not a signatory to the ARA and did not join in the Appellants’ motion to compel arbitration.

regard to ethical and professional disclosures regarding that material term were not met” and that the arbitration clause was therefore invalid. RP 32:19 – 34:18. The court further determined that the Non-Signatory Appellants were not entitled to enforce the arbitration clause because the allegations against the non-signatories are not directly related, nor are they intimately connected with the ARA. RP 34:19 – 35:14. This appeal followed. CP 193 – 197.

D. Factual Background

1. Background

The ARA at issue in this case arises out of a scheme whereby mortgage loan modification companies like APFS associate themselves with law firms and lawyers that are prepared to lend their names to the mortgage loan modification services of others. CP 38 – 39. A façade is constructed that makes it appear as though mortgage loan modification services are being offered by, performed by, or supervised by an attorney when, in actuality, the services are being performed by nonlawyer mortgage loan modification companies. CP 38 – 39, 43 – 45. Through this stratagem the mortgage loan modification companies seek to avail themselves of a perceived “attorney exemption” from state mortgage loan modification laws in order to charge excessive fees. CP 38 – 39, 43 – 47.

LHDR, an Illinois law firm in the business of debt settlement, is at the forefront of companies trying to execute on this stratagem. CP 38 – 39. LHDR lends its name to APFS, which secures the clients and purportedly

performs the mortgage loan modification services for consumers. *Id.* These business relationships are established in an effort to exempt the companies from state statutes designed to protect consumers from predatory practices based on the pretense that such services are being performed by attorneys with whom consumers have entered into retainer agreements for mortgage loan modification services, as the Friels did in this case. CP 38 – 39, 43 – 47.

2. LHDR Failed to Discuss the Material Terms of Its Attorney Retainer Agreement Including the Arbitration Clause with the Friels

The Friels’ first contact with any of the defendants in this case was with Michael Gill, from APFS. CP 43:16-17. Mr. Gill’s email address came from an APFS address, although he claimed to be a case coordinator with LHDR. CP 43:16-17, 150 – 153. Mr. Gill’s email indicated he would be mailing the Friels “a welcome packet containing a list of several documents... [for Plaintiffs] to gather as well as documents... [for Plaintiffs] to complete and sign.” CP 150 – 153. The accompanying “Modification Document Checklist” identified 14 different documents comprising part of a standardized welcome packet. *Id.* APFS’s standardized welcome packet contained a “Retainer Agreement” (the ARA) with “Legal Helpers Debt Resolution LLC, also known as the law firm of Macey, Aleman, Hyslip & Searns.” CP 115 – 124, 150 – 153. In accordance with APFS’s standardized business practice, Mr. Gill

instructed the Friels to execute and “return all documents using the self addressed envelope included in the welcome packet...” CP 150 – 153.

The Friels had no contact with LHDR before signing the ARA. CP 159 – 160. Rather, following communications with Mr. Gill and pursuant to the direction of Mr. Gill, the Friels executed and returned all of the documents to Defendant APFS, including the Attorney Retainer Agreement with LHDR. CP 150 – 153, 159 – 160.

The ARA, its arbitration clause, and the APFS welcome packet fail to make any disclosures to the Friels regarding the forfeiture of important rights like the right to a jury trial, the right to an appeal, and the right to pursue their claims through class litigation. CP 115 – 124, 150 – 153, 159 – 160.

3. TMLG, Macey, Aleman, Hyslip and Searns Are Not Signatories to or Direct Beneficiaries of the Attorney Retainer Agreement

The ARA defines the “Parties” to the agreement in the very first sentence: “Legal Helpers Debt Resolution, LLC, also known as the law firm of Macey, Aleman, Hyslip & Searns (hereinafter referred to as LHDR) and James Friel (hereinafter referred to as Client).” CP 115. The arbitration clause explicitly provides that arbitration is required of “any claim or dispute between [Mr. Friel] and LHDR...” CP 121 (emphasis added). Thus, the arbitration clause does not provide for arbitration with

TMLG or the individual Defendants-Appellants Macey, Aleman, Hyslip, and Searns.

The contract similarly sets forth the promises the Friels undertake to LHDR, including, for example: that “Client agrees... to pay LHDR,” that “Client authorizes LHDR to deduct some or all legal fees via a one-time credit card payment authorization,” and that “Client authorizes LHDR to deduct all legal fees via electronic payment authorizations....” CP 117 – 118 (emphasis added). Further, while the ARA indicates Defendant APFS will provide “implementation, management, maintenance, and supervision of a mortgage workout... under the direct supervision of LHDR,” the ARA pointedly fails to mention APFS in the arbitration provision, or any of the other Non-Signatory Appellants in any respect. CP 115 – 124. Indeed, the ARA clearly provides that LHDR will make all withdrawals for the services provided under the agreement and that all of Plaintiffs’ obligations are to LHDR. CP 116 – 118. The Friels undertook zero promises to the Non-Signatory Appellants TMLG, Macey, Aleman, Hyslip or Searns (or to APFS) under the ARA. The Non-Signatory Appellants are simply never mentioned in the agreement.

IV. ARGUMENT

A. The Superior Court Properly Concluded Appellants Could Not Enforce the Arbitration Clause in LHDR’s Attorney Retainer Agreement Because LHDR Failed to Comply with Its Fiduciary Obligations When Entering into the Agreement

1. Washington Law Invalidates Procedurally Unconscionable Contract Provisions

Both the Federal Arbitration Act (“FAA”) and the Washington Uniform Arbitration Act (“UAA”) reflect the fundamental principle that arbitration is a matter of contract. *See* 9 U.S.C. §§ 1–16; RCW 7.04A *et seq.* FAA Section 2, the “primary substantive provision,” provides:

A written provision in ... a contract evidencing a transaction involving commerce to settle arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

See also RCW 7.04A.060(1) (An agreement to arbitrate “is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.”). The FAA and UAA thereby place arbitration agreements on equal footing with other contracts and, like other contracts, arbitration clauses may be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 467, 45 P.3d 594, 606–7 (2002). This remains true even after the Supreme Court’s decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citing

Doctor's Assocs., Inc., 517 U.S. at 687). See *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 609-10, 293 P.3d 1197, 1202-3 (2013) (finding arbitration clause unconscionable under Washington law and noting “*Concepcion* provides no basis for preempting our relevant case law”); see also *Kanbar v. O’Melveny & Meyers*, 849 F. Supp. 2d 902, 909-10 (N.D. Cal. 2011) (*Concepcion* does not render arbitration agreements immune from state law unconscionability challenges).

Washington law invalidates arbitration clauses that are either procedurally or substantively unconscionable. See *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1256 (W.D. Wash. 2009).³ “Procedural unconscionability ‘relates to impropriety during the process of forming a contract’ and refers to ‘blatant unfairness in the bargaining process and a lack of meaningful choice.’” *Mattingly*, 157 Wn. App. at 388 (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975) and *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 518, 210 P.3d 318 (2009)). “Procedural unconscionability is determined in light of the totality of the circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were

³ See also *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, 392, 238 P.3d 505, 513 (2010) (refusing to enforce limitation of liability in warranty provision where “agreement’s formation was procedurally unconscionable”); also *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259 (9th Cir. 2005).

‘hidden in a maze of fine print.’” *Mattingly*, 157 Wn. App. at 388 (citation omitted); *see also Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004). If there are limitations on liability, those limitations “must be negotiated between the parties and set forth with particularity in a conspicuous manner.” *Schroeder*, 86 Wn.2d at 258.

The Superior Court properly determined that LHDR’s arbitration provision fails Washington’s procedural unconscionability test because LHDR’s “conduct with regard to ethical and professional disclosures regarding that material term were not met.” RP 34:11-15.

2. LHDR Failed to Make Disclosures Required By the Rules of Professional Conduct When Entering Into an Attorney Retainer Agreement

In Washington, attorney fee agreements that violate the Washington Rules of Professional Conduct are against public policy and unenforceable. *See Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186, 190 (2007) (citing *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004)). As such, attorneys who practice in this state are required to act consistent with their fiduciary obligations when entering into fee agreements. *See Wash. Rules of Prof’l Conduct R. 1.5(a)(9)* (hereinafter “RPC”) (West 2011) (a client must receive “a reasonable and fair disclosure of material elements of the fee agreement”). The requirements apply to all material elements of an attorney fee agreement.

An arbitration clause is a material term. *See* Washington State Bar Association (“WSBA”), Advisory Op. 1670 (1996). Thus, the Rules of Professional Conduct require that an attorney seeking to secure an agreement to arbitrate “must [provide] ... full disclosure to the client.” *Id.* (“[A]n arbitration provision in a fee agreement with a client... must be done only with full disclosure to the client.”) (emphasis added);⁴ *see also* *Smith v. Legal Helpers Debt Resolution, LLC*, No. 11-5054 RJB, 2011 U.S. Dist. LEXIS 153938, *2 (W.D. Wash. Oct. 24, 2011) (denying LHDR’s motion to compel arbitration under arbitration clause identical to the arbitration clause at issue in this case, finding the provision procedurally unconscionable where LHDR made no showing that it gave the plaintiff “a reasonable and fair disclosure of material elements of the fee agreement’s arbitration clause”); *and see* *Wong v. Michael Kennedy*, 853 F. Supp. 73, 80 (E.D.N.Y. 1994) (lawyer who drafts fee agreement stands in fiduciary relationship to client and has burden of showing agreement is fair, reasonable and fully known and understood by client); *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 10, 207 Cal. App. 3d 1501 (Cal. Ct. App. 1989) (finding “client must be ‘fully advised of the possible consequences of [an arbitration] agreement’ for agreement to be binding) (citing Cal. Compendium of Prof’l Responsibility, pt. IIA, State

⁴ The Washington Supreme Court gives persuasive weight to the Washington State Bar Association’s (“WSBA”) advisory opinions on the RPCs. *See, e.g., State v. Tracer*, 173 Wn.2d 708, 719, 272 P.3d 199, 204 (2012) (citing the WSBA’s Advisory Op. 1766 (1997) for authority on the interpretation of concurrent conflict of interest rules).

Bar Formal Op. No. 1977-47, p. 1)). At a minimum, the attorney must inform the client of all “the advantages and disadvantages of arbitration” such that the client has “sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement.” American Bar Association (“ABA”) Comm. on Ethics and Prof’l Responsibility, Formal Op. 02-425 (2002);⁵ *see also* RPC 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

Contrary to Appellants’ assertions, the disclosure requirements imposed on attorneys are not focused only on arbitration clauses. *See* Appellants’ Br. at 8 – 16. Rather, the requirements apply to all material elements of an attorney fee agreement. RP 31:20-23, 33:11 – 34:18. The Superior Court specifically found that the Washington Rules of Professional Conduct “require an affirmative duty on the part of the attorney to his or her client to disclose and explain material terms” and that here “the arbitration provision and defendants’ conduct with regard to ethical and professional disclosures regarding that material term were not met.” RP 33:24 – 34:15. The court properly relied on RPC 1.5(a)(9),

⁵ The Washington Supreme Court also gives persuasive weight to the ABA opinions on the ABA model rules of conduct. *See, e.g., Wright by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 198, 691 P.2d 564, 569 (1984) (citing ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 117 (1934) for authority on interpretation of when an attorney may communicate with non-speaking agents of a corporation represented by counsel without violating the rules of professional conduct).

which requires that a client receive “a reasonable and fair disclosure of material elements of the fee agreement.” RP 33:7-13 (emphasis added; quoting RPC 1.5(a)(9)). This rule applies explicitly to all “material elements” of a fee agreement, of which arbitration clauses are but one example. As another example, attorneys in Washington are similarly required to “fully disclose and explain” to clients how fees will be calculated and allocated under a fee agreement. *See, e.g., Luna v. Gillingham*, 57 Wn. App. 574, 581, 789 P.2d 801 (1990) (finding Washington has a “strong public policy... which requires counsel to fully disclose and explain the contingent fee agreement to the client” and citing RPC 1.5). The basis relied on by the Superior Court to find procedural unconscionability is general rule applicable to all material terms and not “unique to arbitration.” *See* Appellants’ Br. at 16. The court’s decision is based on the attorney-client relationship and attorney fee agreements as governed by the RPCs. RP 32:19 – 34:18. This is consistent with *Concepcion*.

The unenforceability of the subject arbitration clause, owing to procedural unconscionability, is not news to LHDR. In recent litigation brought against LHDR in the Western District of Washington, the Honorable Robert J. Bryan denied the defendants’ motion to compel arbitration under an identical arbitration provision secured under substantially similar circumstances. *See Smith*, 2011 U.S. Dist. LEXIS

153938 at *9, *21;⁶ *see also* CP 121. In that case, a standardized attorney retainer agreement with LHDR for debt settlement services was secured with a Washington consumer through marketing efforts of a third-party similarly situated to APFS. *Smith*, 2011 U.S. Dist. LEXIS 153938 at *2. Pursuant to its common course of business activity, LHDR had no contact whatsoever with the consumer prior to execution of the attorney retainer agreement. Neither LHDR nor the third-party marketer made any disclosure to the consumer regarding the arbitration provision found in the attorney retainer agreement. *Id.* at *20. Indeed, Judge Bryan found “[t]here is no evidence that Legal Helpers fulfilled their fiduciary obligations as lawyers or made any disclosures to Plaintiff here regarding the rights she was relinquishing when she agreed to arbitrate.” *Id.* Relying on RPC 1.5(a)(9) and finding both the WSBA Advisory Op. 1670 and ABA Formal Op. 02-425 to be persuasive, Judge Bryan found that “[t]he arbitration clause in the ARA is procedurally unconscionable under Washington law because of the manner in which the parties entered into

⁶ It is inconsequential that other courts “have recognized, LHDR’s arbitration clause is not hidden in fine print.” *See* Appellants’ Br. at 10 – 11 (citing *Guidotti v. Legal Helpers Debt Resolution, LLC*, 866 F. Supp. 2d 315 (D.N.J. 2011); *Smith v. Legal Helpers Debt Resolution LLC*, No. 11-5510, 2012 WL 2118132 (D.N.J. June 11, 2012); *Whitman v. Legal Helpers Debt Resolution, LLC*, No. 4:12-cv-00144-RBH, 2012 WL 6210591 (D.S.C. Dec. 13, 2012). None of the cases cite by Appellants considered the procedural unconscionability of LHDR’s arbitration clause with regard to the ethical and professional disclosures required of attorneys in the particular jurisdiction. *Id.* In Washington, such rules require attorneys to make full and fair disclosures when entering into fee agreements and LHDR failed to make such disclosures when it entered into a fee agreement with the Friels. RP 32:19 – 34:18.

the agreement to arbitrate, Plaintiff, the client, not having a reasonable opportunity to understand the clause in the circumstances....” *Id.* at *19-21.

LHDR, the law firm that contracted with the Friels, failed to make any disclosures to them regarding the ARA—including disclosures regarding the forfeiture of important rights like the right to discovery, to a jury trial, and the right to an appeal—let alone full disclosures regarding the disadvantages and adverse consequences that might result from agreeing to a mandatory arbitration provision. In fact, LHDR never had any contact with the Friels regarding the ARA or the arbitration provision. CP 43, 159 – 160.⁷ Defendant APFS sent Plaintiffs a standardized welcome packet, including LHDR’s ARA; APFS directed Plaintiffs to sign the documents, including LHDR’s ARA; and APFS directed Plaintiffs to return those signed documents, including the signed ARA, to APFS. CP 159 – 160. The arbitration provision was not negotiated and was never explained to the Friels in violation of LHDR’s fiduciary obligations. CP 121.

Thus, the Superior Court properly determined the arbitration clause in the ARA is procedurally unconscionable under Washington law because of the manner in which the parties entered into the agreement to

⁷ While there is a checklist of enrollment documents appearing with LHDR’s logo at the top, the ARA is notably omitted from that checklist. CP 189 – 190.

arbitrate. RP 32:11 – 34:18. The Superior Court’s order denying Appellants’ motion to compel arbitration should be affirmed.

3. The Washington Rules of Professional Conduct Do Not Have a Disproportionate Effect on Arbitration

Pursuant to the FAA’s savings clause, generally applicable contract defenses that do not have a disproportionate effect on arbitration are saved from preemption. *See Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1158-60 (9th Cir. 2013) (citing 9 U.S.C. § 2, and *Concepcion*, 131 S.Ct. at 1747). Washington’s contract defense of procedural unconscionability is generally applicable. *See generally Coneff*, 620 F. Supp. 2d 1248; *Mattingly*, 157 Wn. App. 376.

Washington’s Rules of Professional Conduct are also generally applicable. Attorneys who practice in Washington are required to act in a manner consistent with the Rules of Professional Conduct. *See* RPC 8.5 (“A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”). As set forth above, those rules require attorneys to provide clients with “a reasonable and fair disclosure of material elements of the fee agreement” and to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” RPC 1.5(a)(9) and 1.4(b). Appellants do not offer any authority for their contention that the RPCs require “special disclosures” when an arbitration clause is at issue.

See Appellants' Br. at 12 – 16. Instead, Appellants argue that because there is a WSBA Advisory Opinion applying the Rules of Professional Conduct to arbitration clauses in attorney fee agreements, but no similar advisory opinion applying the rules to forum selection or choice of law clauses in attorney fee agreements, the rules must not apply in the same way to forum selection or choice of law clauses. See *id.* at 13 – 14. Appellants' speculation is wrong and does not support their argument that the RPCs have a disproportionate effect on arbitration clauses.⁸

If anything, Appellants ask the Court to treat arbitration provisions found in attorney retainer agreements differently from other material terms in fee agreements. Indeed, the rules requiring attorneys to make full and fair disclosures regarding all material elements of a fee agreement apply unequivocally to disclosures of other material terms including for example

⁸ Appellants assert that in *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 890, P.2d 466 (1995), this Court rejected an argument similar to one the Friels advance. That case, however, is different from the facts and issues raised here. In *McClure*, the plaintiff, who was a limited partner in a partnership dispute, brought suit against the law firm for the general partner, Davis Wright Tremaine (“Davis Wright”). *McClure*, 77 Wn. App. at 313. The plaintiff alleged Davis Wright breached its fiduciary duty to disclose to the plaintiff and other limited partners, information about the general partner’s finances. *Id.* Davis Wright moved to compel plaintiff to arbitrate based on an arbitration clause contained in the limited partnership agreement, not based on an arbitration clause contained in an attorney retainer agreement. *Id.* at 313-14. The plaintiff alleged that Davis Wright owed him a fiduciary duty despite the lack of an attorney-client relationship, and that the firm owed him a duty to explain the full import of the arbitration clause contained in a partnership agreement. *Id.* at 318. This is wholly different from the present case in which LHDR undisputedly owed the Friels a fiduciary duty by virtue of their attorney-client relationship, and the arbitration clause at issue is contained in an attorney retainer agreement, which is governed by the Rules of Professional Conduct.

the attorney's fee itself, not just arbitration clauses. *See, e.g.*, WSBA Advisory Op. 2120 (2006) (finding "interest charges are material" element of fee agreement and failure to disclose that firm charges interest on all costs may violate RPC 1.5 and 1.4); WSBA Advisory Op. 898 (1985) ("fee agreement must meaningfully disclose to the client the terms and conditions of any fee agreement, [including] the standard by which the fee would be measured"); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-458 (2011) (modifications to an existing fee agreement must be "communicated to and accepted by the client" pursuant to Rule 1.4, 1.5 and 1.8).

Appellants do not dispute that an arbitration clause is a material term. "[T]here was no explanation [regarding the arbitration clause] because there was no direct contact by LHDR" and as a result, the requirements of the RPCs were not met. RP 34:6-15 (emphasis added). The same rules would have invalidated any material term in LHDR's ARA. *Id.*

"[*Concepcion*] cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration." *Chavarria v. Ralphs Grocery Co.*, ___ F.3d ___, 2013 WL 5779332, at *8 (9th Cir. Oct. 28, 2013). A "sensible reading" of the decision is that it only "outlaws discrimination in state policy that is unfavorable to arbitration." *Id.*

(quoting *Mortensen*, 722 F.3d at 1160)). Washington’s RPCs are not unfavorable towards arbitration; rather, they reflect a generally applicable policy of ensuring that attorneys fulfill their fiduciary obligations to clients. *See id.* at *9. Thus, the RPCs do not have a disproportionate effect on arbitration.⁹

B. The Superior Court Properly Relied Upon the Supreme Court’s Inherent Power to Regulate Attorney Conduct to Invalidate the Procedurally Unconscionable Arbitration Provision

It is well established that attorneys are regulated by the states in which they practice. In Washington, the Supreme Court “has an exclusive, inherent power to admit, enroll, discipline and disbar attorneys.” *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163, 169 (1984) (emphasis added). The Washington Supreme Court’s power to regulate the practice of law “is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the

⁹ While the Superior Court invalidated the arbitration clause in LHDR’s ARA based on procedural unconscionability, the Friels also assert the arbitration clause is substantively unconscionable because it is plagued with unconscionable provisions. CP at 174 – 176. The arbitration clause is substantively unconscionable because it fails to provide meaningful redress for Plaintiffs’ claims under the CPA by undermining their rights to attorneys’ fees and subjecting them to the additional risk of paying LHDR’s share of arbitration costs at the discretion of the arbitrator. It further contravenes the purpose of the CPA to permit an out-of-state, non-registered company to do business in Washington, include substantively unconscionable terms in an arbitration agreement and, when it gets caught, permit the company to “waive” its unconscionable terms so as to make the arbitration agreement conscionable. *See Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 607, 293 P.3d 1197 (2013) (“Parties should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver.”).

profession, and for the public good and the protection of clients.” *Seattle v. Ratliff*, 100 Wn.2d 212, 215, 667 P.2d 630, 632 (1983) (citation omitted; emphasis added).

This is the basis upon which the Superior Court relied for its decision “that the arbitration provision and the defendants’ conduct with regard to ethical and professional disclosures regarding that material term were not met.” RP 34:12-15. Appellants mistakenly assert the court relied on equitable grounds to invalidate LHDR’s procedurally unconscionable arbitration provision. *See* Appellants’ Br. at 16 – 18. In fact, the court explicitly relied on “the Court’s inherent supervisory power to ensure that lawyers conduct... themselves ethically and in compliance with the Rules of Professional Conduct.” RP 32:19 – 34:18 (emphasis added). That “equity jurisdiction gives rise to inherent authority of court,” does not render the converse true. *See* Appellants’ Br. at 17 (citing *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 206, 165 P.3d 1271 (2007)). Inherent authority is different than equity. That is, the Washington Supreme Court’s inherent power to regulate attorney conduct is not based on equitable authority. Indeed, the Washington legislature has codified the Court’s inherent powers, “in the enactment of the integrated bar act, [which] reposed in the supreme court the duty of promulgating rules governing admission to practice law and the discipline of attorneys.” *Application of Schatz*, 80 Wn.2d 604, 608,

497 P.2d 153 (1972) (quoting *In re Moody*, 69 Wn.2d 808, 811, 420 P.2d 374 (1966)); *see also* Wash. Rev. Code Ann. § 2.48.060 (board of governor’s powers to adopt rules of professional conduct subject to approval of the Supreme Court).

There is simply zero support for Appellants’ position that the Superior Court’s decision was based on equitable grounds.¹⁰ LHDR, a purported national law firm, entered into a retainer agreement with the Friels in Washington and was obligated to do so in compliance with this state’s Rules of Professional Conduct. LHDR failed to do so. Thus, the court’s decision to invalidate the arbitration provision because “it violates the ethical rules of the state of Washington” should be affirmed. RP 34:11-18.

C. The Superior Court Properly Decided the Validity of the Arbitration Clause Because the Friels’ Challenge is Specific to the Arbitration Provision and Is Not a Challenge to the Contract as a Whole

It is well established that the court, not the arbitrator, decides the enforceability of an arbitration clause. *See Buckeye Check Cashing, Inc.*

¹⁰ Appellants reliance on *Weidert v. Hanson*, 309 P.3d 435 (Wash. 2013) is misplaced. *See* Appellants’ Br. at 16. In that case, the trial court refused to compel arbitration “under an otherwise valid arbitration clause in the interest of judicial efficiency.” *Weidert*, 309 P.3d at 436. Here, the Superior Court determined that the arbitration agreement was invalid. Thus, the court did not refuse to compel “an otherwise valid arbitration agreement” based on equitable grounds. *Id.* Moreover, even if the Superior Court was acting in an equitable capacity, an arbitration clause can be invalidated on any ground “that exists at law or in equity for the revocation of a contract. *See* RCW 7.04A.060(1); 9 U.S.C. § 2.

v. Cardenga, 546 U.S. 440 (2006); see also *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000, 1001 (9th Cir. 2010) (“[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.”); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1120 (9th Cir. 2008) (“[C]ourts properly exercise jurisdiction over claims raising (1) defenses existing at law or in equity for the revocation of (2) the arbitration clause itself.”);¹¹ see also *Townsend*, 173 Wn.2d at 458-59 (because plaintiffs “did not claim that the arbitration clause itself was procured by fraud” but instead that the contract as a whole was fraudulently induced, the issue of arbitrability was for the arbitrator to decide). Indeed, under section 4 of the FAA, the federal court is instructed to order arbitration to proceed only “once it is satisfied that ‘the making of

¹¹ In construing the Washington’s UAA, “consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 457, 268 P.3d 917, 920 (2012) (discussing Wash. Rev. Code § 7.04A; internal marks and citations omitted). As the comments to the UAA explain, the act is intended to “incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA....” *Id.* (internal marks and citations omitted). Further, the FAA governs arbitration agreements in contracts involving commerce. See 9 U.S.C. § 2; see also *Allison v. Medicab Int’l, Inc.*, 92 Wn.2d 199, 202, 597 P.2d 380 (1979) (agreement between New York corporation and Washington resident constitutes interstate commerce).

the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (citing 9 U.S.C. § 4); *see also* Wash. Rev. Code Ann. § 7.04A.060(2) (West 2013) (“The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”).

In *Buckeye*, the Supreme Court established a framework for analyzing who—courts or arbitrators—should decide issues of arbitrability. The framework casts challenges to arbitration agreements into two categories: (1) those “challeng[ing] specifically the validity of the agreement to arbitrate,” and (2) those “challeng[ing] the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.” *Buckeye*, 546 U.S. at 444. When a challenge is to the validity of the arbitration provision, courts decide the validity issue. But when the “crux of the complaint is that the contract as a whole (including its arbitration provision)” is invalid, the arbitrator decides the validity question. *Id.* *Buckeye* held that “because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions

are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.” *Id.* at 446 (emphasis added).

Turning this holding on its head, Appellants argue that because the failure to disclose a material term in an attorney retainer agreement may “render the Retainer Agreement, as a whole, unenforceable,” the Friels’ challenge to LHDR’s failure to make disclosures regarding the arbitration provision amounts to a challenge of the entire contract. *See* Appellants’ Br. at p. 15, n.5. This argument grossly misapprehends *Buckeye* and, unsurprisingly, has been squarely rejected by courts that have considered the issue. *See Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 791 (8th Cir. 1998) (whether arbitration clause was fraudulently induced was for court to decide; while “underlying claim is for fraud in the inducement of the entire contract...that is not the issue with which we are faced today”); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 430 (5th Cir. 2004) (whether arbitration clause in lease was unconscionable was for court to decide; although lessee also challenged formation of entire contract, she independently challenged validity of the arbitration clause by pointing to state supreme court’s analysis of “identical clause”).

In *Bridge Fund*, the Ninth Circuit explained “[w]hat matters is the substantive basis of the challenge”—“as long as the plaintiff’s challenge to the validity of an arbitration clause is a distinct question from the validity of the contract as a whole, the question of arbitrability is for the court to decide....” *Bridge Fund*, 622 F.3d at 1002. Conversely, if “[t]he crux of the complaint ... makes clear that the challenge to the arbitration clause is the same challenge that is being made to the entire contract,” validity is decided by the arbitrator. *Id.* at 1001 (emphasis added); *see also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1271 (9th Cir. 2006) (“[W]here ... there are separate and independent claims specifically challenging enforcement of the arbitration provision, then the federal court will proceed to consider the challenge to arbitrability of the dispute.”) (emphasis added).

The Friels challenged the validity of the arbitration clause based on unconscionability, not based on the validity of the ARA as a whole. Primarily, the Friels argued that the arbitration clause is procedurally unconscionable because it is a material term that the attorneys failed to disclose. CP 171 – 174. That an attorney’s failure to make disclosures of material elements may also render the entire agreement unenforceable does not change the nature of the Friels’ challenge. The Friels’ challenges

were directed against the validity of the arbitration clause alone. CP 171 – 174; RP 32:19 – 34:18. The question of arbitrability was therefore properly decided by the Superior Court.

D. TMLG, MACEY, Aleman, Hyslip, and Searns, as Non-Signatories, Are Not Entitled to Enforce the Arbitration Clause in LHDR’s Attorney Retainer Agreement Because the Friels’ Claims Are Not Intertwined With and Do Not Arise out of the Contract¹²

It is well established that “arbitration 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.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588 (2002); *see also Satomi Owners Ass'n v. Satomi*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009). Contracts providing for arbitration are to “be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 590 (1960). As a general rule, non-signatories are therefore not allowed to enforce an arbitration agreement. *See Townsend*, 173 Wn.2d at 461. Equitable estoppel has been recognized as an exception to the general rule under “very narrow confines.” *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009) (citing *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006)); *see also Kramer v. Toyota Motor Corp.*, 705

¹² If this Court agrees that the arbitration agreement is procedurally unconscionable, then the Non-Signatory Appellants likewise cannot enforce the arbitration provision regardless of whether equitable estoppel is applicable here (it is not).

F.3d 1122 (9th Cir. 2013) (doctrine of equitable estoppel did not enable non-signatory to invoke arbitration clause). Indeed, the Ninth Circuit explained just this year: “[w]e have never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff, and we decline to expand that doctrine here.” *Rajagopalan v. Noteworld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (emphasis added). This court should also decline to expand the doctrine of equitable estoppel to permit the Non-Signatory Appellants to compel arbitration under LHDR’s procedurally unconscionable arbitration provision.

In *Mundi*, the Ninth Circuit explained the application of equitable estoppel to compel arbitration requires two elements: (1) a close relationship between the entities involved; and (2) claims that are intertwined with the underlying contract. *Mundi*, 555 F.3d at 1046 (citations omitted).

In *Mundi*, the court denied the motion to compel arbitration based on principles of equitable estoppel, focusing primarily on the second element. *Id.* at 1047. In that case, the widow of an insured borrower brought an action against the insurer for bad faith refusal to pay the proceeds of a credit life insurance policy to the insured’s lender following his death. *Id.* at 1043-44. Because the plaintiff’s claims against the insurer were not “intertwined with the contract providing for arbitration” and did not “arise out of or relate directly to” the contract, the *Mundi*

court held that the insurer (non-signatory) could not compel the plaintiff (signatory) to arbitrate based on principles of equitable estoppel. *Id.* at 1047 (internal marks omitted).

In the Ninth Circuit's recent decision in *Rajagopalan*, the court once again declined a non-signatory's request to invoke the doctrine. *Rajagopalan*, 718 F.3d at 847. In that case, a consumer entered a contract containing an arbitration provision with a debt-settlement company, similar to LHDR. *Id.* at 846. The consumer sued a different company, NoteWorld, which handled and processed the consumer's payments to the debt settlement company. *Id.* NoteWorld, a non-signatory to the contract between the consumer and debt-settlement company, sought to compel arbitration as a third party beneficiary to the contract and based on principles of equitable estoppel. *Id.* at 847. Even though NoteWorld's name was mentioned in the contract, the court found there was no evidence the consumer intended to designate NoteWorld as a beneficiary. *Id.* Moreover, because the consumer did not contend that NoteWorld breached any terms of any contract and instead advanced statutory claims separate from the contract, NoteWorld was precluded from invoking the arbitration provision as a non-signatory. *Id.* at 847-48. For the same reasons, the Superior Court properly concluded the Non-Signatory Appellants cannot compel the Friels to arbitrate their claims.

The Friels' claims are separate from the ARA. Indeed, the Friels have not brought a breach of contract claim. CP 48 – 58. The primary allegations underlying all of the Friels' claims are based on Appellants' unlawful practice of charging fees to Washington consumers that grossly exceed the limitations imposed by the MBPA and CLA. *Id.* Thus, the Non-Signatory Appellants' assertion that the Friels' claims are “founded in and intimately connected with the [ARA]” is demonstrably false. *See* Appellants' Br. at p. 22. Like the plaintiff's claims in *Mundi*, the resolution of the Friels' claims here “do[] not require the examination of any provision of the [contract providing for arbitration].” *Mundi*, 555 F.3d at 1047.

The cases cited by the Non-Signatory Appellants are consistent with the Superior Court's ruling. *See* Appellants' Br. at p. 20, 22 n.6 (citing *Kramer*, 705 F.3d at 1128-29; *Townsend*, 173 Wn.2d at 461). In *Townsend*, the purchasers of Quadrant homes brought an action against Quadrant homes and its parent corporations for claims related directly to their purchase and sale agreements (“PSA”), which contained an arbitration clause. *Townsend*, 173 Wn.2d at 454. In addition, some of the purchasers brought identical claims on behalf of their minor children. *Id.* The court rejected the plaintiffs' argument that the claims on behalf of their minor children were not subject to arbitration because the children were non-signatories to the PSA, finding “two of the causes of action

alleged by the parents and their children relate directly to the PSAs, including an allegation of breach of warranty and a request for rescission.” *Id.* at 461.

In *Kramer*, the Ninth Circuit specifically found the doctrine of equitable estoppel was inapplicable. *Kramer*, 705 F.3d at 1128-33. In that case, the plaintiffs brought an action against Toyota and its affiliated dealers alleging the vehicles plaintiffs purchased had defective braking systems. *Id.* The plaintiffs had entered into purchase agreements with their respective Toyota dealerships, which included arbitration provisions that clearly identified who could elect to arbitrate, namely the plaintiffs or the dealerships. *Id.* at 1125. Toyota, the manufacturer defendant, sought to compel arbitration under the purchase agreements. *Id.* The Ninth Circuit rejected Toyota’s argument that it was entitled to enforce the arbitration clause as a non-signatory based on principles of equitable estoppel. *Id.* at 1128-33. The court found the plaintiffs’ claims were not intertwined with the underlying contractual obligations of the purchase agreements and that “the allegations of collusion [between Toyota and the dealerships] are not ‘inextricably bound up with the obligations imposed by the agreement containing the arbitration clause.’” *Id.* at 1133.

Here, the facts and claims are different from those alleged by the plaintiffs in *Townsend*. The Friels do not bring any contract claims and are not seeking to receive “the benefit of the bargain” in the transaction

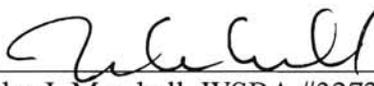
with LHDR. Likewise, the Friels' allegations of collusion between LHDR and the Non-Signatory Appellants are independent of the obligations imposed by the ARA. The Friels have no duties or obligations to the Non-Signatory Appellants under the ARA. Therefore, the Friels do not simultaneously invoke the duties and obligations of the Non-Signatory Appellants under the ARA, because they have none, while seeking to avoid arbitration. Thus, as in *Kramer*, "the inequities that the doctrine of equitable estoppel is designed to address are not present." 705 F.3d at 1134.

V. CONCLUSION

For the foregoing reasons, the Friels respectfully request this Court affirm the Superior Court's denial of Appellants' motion to compel arbitration.

RESPECTFULLY SUBMITTED AND DATED this 4th day of November, 2013.

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DECLARATION & PROOF OF SERVICE

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DATED this 4th day of November, 2013.



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