71625-5 71625-5

NO. 71625-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

MICHAEL ROMNEY; FARON BAUER; and KRISTEN CHILDRESS, individually and on behalf of all others similarly situated,

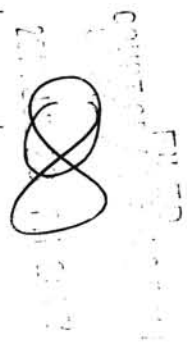
Respondents,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation; FRANCISCAN HEALTH SYSTEM, a Washington Corporation; FRANCISCAN HEALTH VENTURES, a Washington Corporation; FRANCISCAN NORTHWEST PHYSICIANS HEALTH NETWORK, LLC, a Washington Corporation; and CATHOLIC HEALTH INITIATIVES, a Colorado Corporation,

Appellants

APPELLANTS' BRIEF



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I. INTRODUCTION

Plaintiffs/Respondents are medical professionals formerly employed by appellant Franciscan Medical Group (FMG) under individual employment contracts that included agreements to arbitrate all employment-related disputes between the parties. They sued FMG and several affiliated entities,[1] alleging various employment-law claims on behalf of themselves and a purported class. At the outset of the case, Plaintiffs moved to invalidate the Arbitration Agreements. FMG cross-moved to compel arbitration. The superior court granted Plaintiffs' motion and invalidated the Arbitration Agreements, apparently determining they lacked consideration. The court also (1) determined unspecified portions of the Arbitration Agreements were substantively unconscionable, even though Washington courts have upheld virtually identical arbitration provisions, and (2) refused to sever those unspecified portions, even though the Arbitration Agreements called for severance of any provisions found to be unconscionable.

The issues presented are whether the Arbitration Agreements, signed and agreed to by Plaintiffs and containing provisions unlike those

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[1] Although Plaintiff/Respondents sued all of the Respondents identified in the caption, for convenience this brief references their actual employer, FMG, as if it was the sole defendant.

previously found unconscionable under Washington law, are valid and enforceable and whether Plaintiffs should be compelled to arbitrate their employment-related claims pursuant to those enforceable agreements.

II. ASSIGNMENT OF ERROR

The superior court erred when it granted Plaintiffs' Motion to Void and Invalidate Arbitration Addendums and denied Defendants' Motion to Compel Arbitration in an order dated January 24, 2014, and when it denied Defendants' Motion for Reconsideration in an order dated February 11, 2014. CP 255-58, 551-53.[2]

II. ISSUES

1. Are Arbitration Agreements containing provisions that (1) allow a plaintiff to recover all damages available under applicable law; (2) allow a plaintiff to recover costs and fees available under applicable law; (3) shift the cost of arbitration to the employer if a plaintiff is unable to pay; (4) do not require confidential arbitration, and, (5) contain severability provisions, all of which are materially different from provisions declared substantively unconscionable under Washington law, valid and enforceable?

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[2] The Clerk's Papers are cited herein as "CP ___" and the Report of Proceedings as "RP ___."

2. If the Arbitration Agreements are valid and enforceable, should Plaintiffs be compelled to arbitrate their employment-related claims?

IV. STATEMENT OF THE CASE

Plaintiffs Michael Romney, Faron Bauer, and Kristen Childress were hired by FMG in 2007. CP 39, ¶ 2; 75, ¶ 2; 111, ¶ 2. Drs. Romney and Bauer were hired as prompt care physicians and Ms. Childress was hired as an advanced registered nurse practitioner. *Id.* At the start of their employment, each signed Arbitration Agreements,[3] attached as Addenda to their respective Employment Agreements, in which they agreed to arbitrate "all disputes arising out of or related to the Employment Agreement, [their] employment by FMG, and/or [their] separation from employment with FMG." *See id.* at 289-90, 407-08, 502-03.

Plaintiffs' Employment Agreements were for fixed terms: Romney's initial Employment Agreement expired after three years, *see id.* at 273 ¶ 5.1, Bauer's initial part-time/on call Employment Agreement expired after ninety days,[4] *see id* at 391 ¶ 5.1, and Childress's initial

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[3] While the terms of Plaintiffs' Employment Agreements differ, the Arbitration Agreements to Plaintiffs' Agreements are identical.

[4] Following expiration of this initial agreement, Bauer entered into a new agreement with a term of three years. *See* CP 412 ¶ 5.1.

Employment Agreement expired after three years. *See id.* at 489 ¶ 5. The Employment Agreements did not renew automatically.

From 2007 to 2013, on multiple occasions when renewing their Employment Agreements at times near to or following their expiration, Plaintiffs signed and agreed to the terms of the Arbitration Agreements: Dr. Romney agreed to arbitrate employment claims on five occasions, Dr. Bauer on four occasions, and Dr. Childress on three occasions. *Id.* at 266-67, ¶¶ 3-5. Each time, Drs. Romney, Bauer, and Childress initialed and signed the Arbitration Agreements. *See id.* at 289-90, 309-10, 333-34, 354-55, 378-79 (Romney); 407-08, 428-29, 450-51, 475-76 (Bauer); 502-03, 526-27, 548-49 (Childress). During this time, the provisions of the Arbitration Agreements remained, in all material respects, identical. None of the Plaintiffs ever objected to the Arbitration Agreements as a whole or to any of the individual provisions of the agreements to arbitrate. *See id.* at 266-67, ¶¶ 3-5.

On November 13, 2013, instead of complying with the terms of the Arbitration Agreements and initiating arbitration, Plaintiffs filed this lawsuit as proposed class representatives seeking to recover for alleged violations of Washington wage statutes RCW 49.48 *et seq.* and 49.52 *et seq.* *See* CP 1-11. Romney and Bauer also made individual, non-class claims for wrongful discharge in violation of public policy. *Id.* at 9-10.

A. The Terms Of The Arbitration Agreements

1. Arbitration Of Employment-Related Claims

The Agreements signed by Plaintiffs and FMG require both parties to arbitrate all employment-related claims. The Arbitration Agreements provide that "[t]his Addendum requires *You and FMG* to arbitrate all Claims (as defined below) between You and FMG." CP 63, 99, 135 (emphasis added). Section 2 of the Arbitration Agreements reiterates the mutuality, providing that "*You and FMG each agree* that all Claims between You and FMG . . . shall be exclusively decided by arbitration governed by the Federal Arbitration Act." *Id.* (emphasis added).

Section 1 of the Arbitration Agreement defines the term "Claims" as "all disputes arising out of or related to the Employment Agreement, your employment by FMG, and/or your separation from employment with FMG." *Id.* The definition expressly lists examples of covered claims in all capital letters, including "DISCRIMINATION, SEXUAL HARASSMENT, RETALIATION, NEGLIGENCE, *UNPAID WAGES* OR *WRONGFUL DISCHARGE*." *Id.* (emphasis added). Exclusions from the term "Claims" are also noted, including disputes relating to workers' compensation or health benefits. *Id.* These exclusions have been part of the Arbitration Agreements from the first time Plaintiffs signed and agreed to them. *See id.* at 289, Sec. 1; 407, Sec. 1; 502 Sec. 1.

2. Remedies Under The Arbitration Agreements

The Arbitration Agreements allow an arbitrator to provide the parties with the same remedies for their claims as are available in court, namely any relief that would make a party whole, in addition to other relief as required by law. CP 63, Sec. 2; 99, Sec. 2; 135, Sec. 2. Under the Arbitration Agreements, an arbitrator cannot award Plaintiffs or FMG "punitive, exemplary, consequential or incidental damages" unless he or she is required to do so by law. *Id.* Stated affirmatively, an arbitrator has the authority to award either party punitive, exemplary, consequential, or incidental damages when the award of such damages is required by law.

3. Arbitration Costs

The Arbitration Agreements also provide for an equal apportionment of the costs of arbitration between Plaintiffs and FMG, subject to an exception that requires FMG to "bear *all* costs" if Plaintiffs can show the arbitrator "the costs of the arbitration would effectively prevent [them] from pursuing [their] Claim[s]. CP 63, Sec. 3; 99, Sec. 3; 135 Sec. 3. Furthermore, when employees contend they cannot pay their share, as the Plaintiffs here claim, FMG must "bear the costs of the arbitration pending the Arbitrator's determination." *Id.* No other action is required to shift the burden of arbitration costs to FMG; employees need

only contend the costs of arbitration would prevent them from pursuing covered claims. *See id.*

4. Attorneys' Fees

Section 3 of the Arbitration Agreements specifically permits an arbitrator to award attorneys' fees and costs when required by law.[5] CP 63, 99, 135. Absent a fee-shifting requirement in an applicable statute, the Arbitration Agreements adopt the American rule—each party shall bear his or her own attorneys' fees and costs. *See id.*

5. Confidentiality

The Arbitration Agreements contain no provisions mandating or even mentioning confidentiality. Instead the Arbitration Agreements provide that arbitration of employment disputes will be governed by the "American Arbitration Association's ["AAA"] National Rules for the Resolution of Employment Disputes." CP 63, Sec. 2; 99, Sec. 2; 135, Sec. 2. The AAA's rules provide that "an arbitrator shall maintain the confidentiality of the arbitration." *Id.* at 187. Both the language of the AAA's rule and the Arbitration Agreements, however, allow the parties to

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[5] As noted, *infra*, the Washington wage statutes under which Plaintiffs bring their claims contain mandatory fee-shifting provisions. *See infra* Part V.D.3. Should the Plaintiffs prevail on these wage claims in arbitration, an arbitrator would be required to award Plaintiffs attorneys' fees and costs under the Arbitration Agreements.

agree to different or additional arbitration procedures. *See id.* In fact, FMG offered to waive the AAA confidentiality rule, as AAA's rules permit. *See id.* at 187, 244.

6. Severability

The Arbitration Agreements provide that if "any portion of this Addendum is adjudged by any court to be void or unenforceable in whole or in part, such adjudication shall not affect the validity and enforceability of the remainder of the Addendum." CP 63-64, Sec. 4; 99-100, Sec. 4; 136, Sec. 4.

B. The Parties' Motions And The Superior Court's Rulings

Contemporaneously with the filing of this lawsuit, Plaintiffs filed a motion requesting that the superior court invalidate the Arbitration Agreements. CP 12-37. In response, Defendants sought an order from the superior court compelling Plaintiffs to arbitrate.[6] *See id.* at 169-89.

Following oral argument on January 24, 2014, the superior court issued an opinion from the bench. In reciting some of the facts from the bench, the trial court judge noted she was not adopting the facts "in a fact-

[6] Although the Arbitration Agreements contain a forum selection clause requiring any civil lawsuit to compel arbitration be brought in Pierce County, Washington, *see* CP 63, Sec. 3; 99, Sec. 3; 135, Sec. 3, Defendants agreed to waive any argument that jurisdiction lay exclusively in Pierce County and to proceed in King County Superior Court.

finding manner as all true and correct," but rather was noting those facts she believed to be important to consider as part of her decision. *See* RP at 28:11-29:24, 30:24-31:16. In this recitation, the court noted, in signing the Employment and Arbitration Agreements at issue in this case, Plaintiffs were summarily presented with the contracts and "told to sign or leave," without opportunity for negotiation. *Id.* at 28:25-29:4, 30:24-31:4. The court was concerned that, because Plaintiffs were already employees, "they were placed in an untenable situation [of] either you sign [the contract] or you are unemployed." *Id.* at 31:13-16. Additionally, although the Plaintiffs never argued the Employment Agreements or Arbitration Agreements were invalid for lack of consideration (and this issue was never briefed by the parties), the superior court expressed concern the contracts at issue were not supported by consideration. *Id.* at 31:4-7.

Based on this view of the facts, the superior court found the Arbitration Agreements were "overly one-sided", "patently unfair and harsh", and lacked mutuality. *Id.* at 31:16-20. The superior court did not specify which provisions of the Agreements it found unconscionable, and thus did not articulate specific reasons for why any provision at issue was unconscionable. Finally, despite the fact the Arbitration Agreements contained severability clauses, the superior court declared without explanation that the unspecified unconscionable provisions could not be

severed from the rest of the Arbitration Agreements, and the Arbitration Agreements would be voided in their entirety. *Id.* at 31:23-32:4.

FMG timely sought reconsideration, based in part on the superior court's reliance on a supposed lack of consideration, a legal argument neither raised nor briefed by the parties. CP 259-65. By order dated February 11, 2014, the superior court denied the motion for reconsideration. *Id.* at 551-53.

Because the "right to arbitrate is a 'substantial right' under RAP 2.2(a)(3)," a party may appeal as a matter of right from a superior court order denying a motion to compel arbitration. *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 43-44, 17 P.3d 1266 (2001). Respondents timely filed a notice of appeal on March 13, 2014. CP 554-63.

V. ARGUMENT

A. Review Is *DeNovo*

When a lower court denies a party's motion to compel arbitration, this Court reviews that decision *de novo*. *See Zuver v. Airtouch Commn's, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). This Court has recognized that "Washington has long favored arbitration of disputes . . . ." *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 901, 28 P.3d 823 (2001). Plaintiffs, as the parties opposing arbitration, bear the burden of showing the Arbitration Agreements are unenforceable. *Zuver*, 153 Wn.2

at 302 (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)).

B. The Superior Court Erred When It Ignored The Strong Public Policy Favoring Arbitration.

Arbitration Agreements in the employment context are governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14. *See Zuver*, 153 Wn.2d at 301 (2004) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)). Indeed, the agreements here specifically provide all claims between Plaintiffs and FMG "shall be exclusively decided by arbitration governed by the Federal Arbitration Act." CP 73, 99, 135. Under the FAA, written Arbitration Agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. In enacting the FAA, Congress intended to overcome the reluctance of some courts to enforce Arbitration Agreements. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (stating that "the basic purpose of the Federal Arbitration Act is to enforce agreements to arbitrate").

The FAA establishes a "liberal federal policy favoring Arbitration Agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (quoting *Moses H. Cone Mem'l*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). Washington courts have agreed with this statement, noting that "arbitration is favored as a matter of policy under the FAA." *Hill v. Garda CL NW., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013). Washington courts have also noted that the law of the state strongly favors arbitration of disputes. *Zuver*, 153 Wn.2d at 301 n.2 (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 51, 42 P.3d 1265 (2002); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002); *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997)).

This liberal policy favoring arbitration effectively creates "a body of federal substantive law of arbitrability, applicable to any Arbitration Agreement within the coverage of the [FAA]." *Zuver*, 153 Wn.2d at 301 (internal quotation marks removed) (quoting *Moses H. Cone*, 460 U.S. at 24). State courts, like federal courts, must "enforce this body of substantive arbitrability law." *Id.* (citing *Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987)). Indeed, as the Washington Supreme Court has stated, "[c]ourts must indulge *every* presumption 'in favor of arbitration, whether the problem at hand is construction of the contract language itself . . . or a like defense to

arbitrability.'" *Id.* at 301 (emphasis added) (quoting *Moses H. Cone*, 460 U.S. at 25).

C. The Superior Court Erred In Invaliding The Arbitration Agreements Based On A Supposed Lack Of Consideration.

The superior court erred in basing its ruling on an assumed lack of consideration for the Employment and/or Arbitration Agreements at issue in this case. Plaintiffs have never argued the Employment Agreements or Arbitration Agreements were not supported by consideration and, in fact, premise their wage claims on the amount of pay owed to them under their Employment Agreements. *See* CP 4-5, ¶¶ 27-31. More specifically, in Paragraph 43 of their Class Action Complaint, Plaintiffs allege "Defendants formed binding and enforceable contracts (the . . . Employment Agreements) with Plaintiffs." *Id.* at 8, ¶ 43. FMG has never disputed this proposition.

Even if consideration were at issue, the Agreements here are clearly supported by consideration because Plaintiffs and FMG exchanged reciprocal promises when entering into the Agreement. "A traditional bilateral contract is formed by the exchange of reciprocal promises. The promise of each party is consideration supporting the promise of the other." *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 74, 199 P.3d 991 (2008) (quoting *Govier v. N. Sound Bank*, 91 Wn. App.

493, 499, 957 P.2d 811 (1998)) (quotation marks omitted). Separate consideration is not required for arbitration clauses when the contract as a whole is supported by consideration. *See Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 359, 85 P.3d 389 (2004), *review granted & cause remanded on other grounds*, 153 Wn.2d 1023, 108 P.3d 1227 (2005).

In its oral decision, the superior court noted it was "bothered by the fact the plaintiffs were already employees when they were presented with [the Employment Agreements] in the sense they were told to sign or leave." RP 31:1-4. The court then questioned whether the Agreements were supported by consideration. *Id.* at 31:4-7. The factual premise upon which the superior court relied is flawed: Plaintiffs were not surprised with new Employment Agreements because their prior Employment Agreements, which contained identical arbitration provisions, were about to expire. In entering into new Employment Agreements, Plaintiffs and FMG exchanged new, reciprocal promises. Furthermore, Plaintiffs had entered into new Employment Agreements, substantially similar to the Agreements at issue in this case and with virtually identical Arbitration Agreements, at or near the time of expiration of each of their prior

Employment Agreements.[7] *See* CP 266-67, ¶¶ 3-5. Renewing their expiring Employment Agreements, along with the corresponding Arbitration Agreements, was not an unfamiliar process to the Plaintiffs. The Employment Agreements and Arbitration Agreements at issue in this case are supported by reciprocal promises between Plaintiffs and FMG and are, therefore, valid and enforceable.

D. The Superior Court Erred In Ruling That The Arbitration Agreements Are Unconscionable.

The superior court also ignored established Washington precedent when it found the Arbitration Agreements unconscionable. A contract term is substantively unconscionable only if "it is overly or monstrously harsh, is one-sided, shocks the conscience, or is exceedingly calloused." *Hill*, 179 Wn.2d at 55 (citing *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013)). The Arbitration Agreements signed and agreed to by the Plaintiffs on multiple occasions provide for a fair and equitable resolution of employment-related claims. The terms of the Arbitration Agreements are far from "monstrously harsh," "exceedingly calloused," "shocking to the conscience," or even "one-

[7] The superior court inexplicably ignored Plaintiffs' familiarity with the Employment Agreements, yet noted that it might view the contracts differently if Plaintiffs "were brand-new employees that knew what they were stepping into when they signed [these contracts]." RP 31:7-13.

sided." Instead, the Arbitration Agreements provide for an arbitral forum for the parties' employment-related claims that is equivalent to a judicial forum in all relevant respects. In fact, as discussed below, provisions virtually identical to those now at issue have been repeatedly upheld by Washington courts.

1. The Arbitration Agreements Are Mutual And Require Both FMG And Plaintiffs To Resolve Employment-Related Claims In Arbitration.

The superior court, in its brief oral opinion from the bench, erroneously declared the Arbitration Agreements lack mutuality and are, therefore, unconscionable, *see* RP 31:19-20, ignoring both the plain text of the Arbitration Agreements and settled Washington law. While an arbitration provision may be unconscionable if it is unilateral and "blatantly and excessively favors the employer," *Zuver*, 153 Wn.2d at 318, Arbitration Agreements are not required to impose the same obligations on each party to be valid. *See Walters*, 120 Wn. App. at 359. Indeed, "most courts have not ruled [an] arbitration clause invalid for lack of mutuality, even when the clause compelled one party to submit all disputes to arbitration but allowed the other party the choice of pursuing arbitration or litigation." *Id.*

Because the language of the Arbitration Agreements at issue here is mutual in virtually every respect, Plaintiffs argued other provisions in

Plaintiffs' Employment Agreements, outside the Arbitration Agreements, were relevant to the superior court's unconscionability analysis. *See* CP 17-18, 25-26, 198-203. Specifically, Plaintiffs referenced the Non-Competition and Non-Solicitation sections of the Employment Agreements, contained in separate Exhibits to the Employment Agreements for Plaintiffs Romney and Bauer, providing injunctive relief may be sought for "*any breach of this Exhibit F.*" *Id.* at 66, Section F.4; 102, Section F.4 (emphasis added).[8] Plaintiffs further relied on the FMG Specific Provisions, also contained in separate Exhibits to Romney and Bauer's Employment Agreements, which allow FMG to seek injunctive relief for "any breach or attempted breach of all the provisions of th[e] Agreement." *Id.* at 67, 103.[9]

These extrinsic provisions are irrelevant to this Court's unconscionability analysis. In determining whether a provision is substantively unconscionable, the Washington Supreme Court has repeatedly examined only the challenged provision, without reference to provisions outside the Arbitration Agreement. *See, e.g.*, *Hill*, 179 Wn.2d

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[8] Plaintiff Childress's Employment Agreement contains identical language. CP 123, Section 6.4. Childress's Agreement also contains similar language regarding breach of the "Records; Confidentiality; Proprietary Information" section. *See id.* at 125, Section 9.6.

at 57-58 (restricting analysis to three provisions in an arbitration clause); *Gandee*, 176 Wn.2d at 603-09 (restricting analysis to the language in an arbitration clause); *Zuver*, 153 Wn.2d at 307-19 (same). Although Washington courts have apparently never directly addressed whether provisions outside of an arbitration clause bear on determining unconscionability, other courts consider language outside the arbitration provisions only in certain, limited circumstances. For extrinsic provisions to be relevant, those provisions "*as applied*" must make the arbitration clause unconscionable. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 74, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). Alternatively, if an outside provision "*profoundly affects* the terms in the arbitration subsection," a court may examine that provision when determining arbitrability. *See AT&T Mobility II, LLC v. Pestano*, No. C07-05463, 2008 WL 682523, at *5 (N.D. Cal. Mar. 7, 2008) (emphasis added).

Other courts have examined outside provisions in their unconscionability analysis only when those provisions affect the Arbitration Agreement itself, as when: (1) the outside provision contains language limiting liability or damages recoverable through arbitration, *see Kristian v. Comcast Corp.*, 446 F.3d 25, 47 (1st Cir. 2006); *Newton v. Am.*

[9] Childress's Employment Agreement does not contain an analogous provision.

Debt. Servs., Inc., No. C-11-3228EMC, 2012 WL 3155719, at *3 (N.D. Cal. Aug. 2, 2012); (2) the outside provision shifts fees in arbitration, *see In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1375-76 (11th Cir. 2012); *Newton*, 2012 WL 3155719, at *3; and (3) the outside provision effectively reduces the statute of limitations for bringing a claim in arbitration. *See Pestano*, 2008 WL 682523, at *5. In each of these situations, unlike the provisions cited by the Plaintiffs here, the outside provision related to the subjects actually covered by the arbitration clause, and thus directly affected a plaintiff's rights in arbitration.

Here, the Arbitration Agreements impose mutual requirements upon the parties, and the outside provisions in the Employment Agreements upon which Plaintiffs attempt to rely do not affect the Plaintiffs' claims in any way. The agreements provide: "This Addendum requires *You and FMG* to arbitrate all Claims . . . between You and FMG. CP 63, 99, 135. The Arbitration Agreements exclude "disputes related to worker's compensation claims or health benefits" from the requirement to arbitrate for both parties, allowing either party to pursue such a claim in court. *Id.* at 63, Sec. 1; 99, Sec. 1; 135, Sec. 1. In fact, the only situation which allows the employer the option to pursue a covered "Claim" in court, rather than in arbitration, is the unique situation when FMG has already been sued in court and may have a third-party claim against its

employee. *Id.* This provision does not blatantly and excessively favor FMG; it instead allows for speedy and efficient resolution of issues already the subject of ongoing litigation.

Nor does FMG's ability to seek injunctive relief in two limited situations, pursuant to provisions outside of the Arbitration Agreement, render the Arbitration Agreements unconscionable. Drs. Romney and Bauer's Employment Agreements allow FMG to bring a claim in court for injunctive relief involving "breach or attempted breach of all the provisions of [the Employment] Agreement," *id.* at 67, 103, or breach of the Non-Competition and Non-Solicitation provisions. *Id.* at 66. Sec. F.4; 102, Sec. F.4. Dr. Childress's Agreement has similar provisions. *See id.* at 123, Sec. 6.4; 125, Sec. 9.6. These provisions, which are not part of the Arbitration Agreements language, are irrelevant to the issue of unconscionability here because they do not affect the terms of the Arbitration Agreements as applied to this case. *See Rent-A-Center*, 561 U.S. at 74.

Despite Plaintiffs' attempts to argue otherwise, the Non-Competition and Non-Solicitation provisions and the FMG Specific provisions do not enable FMG to bring claims, as defined by the Arbitration Agreements, in court for employment-related disputes. Instead, as required by the Arbitration Agreements, FMG must bring these

claims in arbitration. In addition, and unlike the cases where courts have found outside provisions relevant to unconscionability, the Plaintiffs' Employment Agreements contain no provisions that would affect FMG's liability in arbitration of employment-related claims, limit the damages a plaintiff could recover under the Arbitration Agreements, shift fees, or reduce the time in which Plaintiffs could bring their claims in arbitration, or otherwise give FMG any advantage relative over Plaintiffs. In short, there is no reason for this Court to consider provisions outside of the Arbitration Agreements in its unconscionability analysis because the outside terms do not affect Plaintiffs' claims, or their ability to recover, in any way. Consequently, these provisions cannot render the Arbitration Agreements unconscionable.

2. The Arbitration Agreements Do Not Limit Or Alter Plaintiffs' Remedies For Their Employment-Related Claims.

The Arbitration Agreements entered into between Plaintiffs and FMG are valid and enforceable because they contain bilateral provisions allowing an arbitrator to award all damages "required by law" to either party. CP 63, Sec. 2; 99, Sec. 2; 135, Sec. 2. The Arbitration Agreements' provisions are not at all like provisions restricting damages courts have previously found to be unconscionable. For example, a provision completely barring an employee from "collecting any punitive or

exemplary damages for her common law claims but permits [the employer] to claim these damages" is unconscionable. *Zuver*, 153 Wn.2d at 318-19. Similarly, a provision will be invalidated where it "significantly curb[s] what an employee could recover against [an employer] compared to what the employee could recover under a statutory . . . claim." *Hill*, 179 Wn.2d at 56. In *Hill*, for example, the arbitration clauses limited plaintiffs' ability to recover back pay to a time period of two or four months, despite the fact the statute allowed for back pay from the date of injury through the date of judgment. *Id.*

No such limits exist here. While the Arbitration Agreements provide "[u]nless otherwise required by law, the Arbitrator shall not have the authority to award You or FMG any punitive, exemplary, consequential or incidental damages," CP 63, Sec. 2; 99, Sec. 2; 135, Sec. 2, this language does not limit Plaintiffs' right to damages. It instead requires an arbitrator to award damages allowed by law, and only limits those damages *in addition* to what the law or applicable statute allows.[10]

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[10] For example, if a claim was made pursuant to the federal Age Discrimination in Employment Act, the arbitrator would not have authority to award emotional distress damages, since that type of award is not allowed by the statute. *See Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1316 (9th Cir. 1982). Additionally, an arbitrator would not have the authority to award nominal, exemplary, or punitive damages to a plaintiff bringing a claim under the Washington Law Against Discrimination. *See Martini v. Boeing Co.*, 137 Wn.2d 357, 971 P.2d 45

Nothing in this language limits the employees' right to recover any damages available under the statute.

Plaintiffs argued below the provision should be interpreted as invalid because "there are no laws *mandating* the imposition" of certain damages. *Id.* at 27. But if a plaintiff suffers damages under the statutes Plaintiffs bring their claims under (or any statute), the law requires damages be awarded. Indeed, RCW 49.52.070 specifically provides "[a]ny employer . . . who shall violate any of the provisions of RCW 49.52.050 (1) and (2) *shall* be liable in a civil action by the aggrieved employee . . . for twice the amount of the wages unlawfully rebated or withheld by way of *exemplary damages*." RCW 49.52.070 (emphasis added). Thus, because the applicable statutory language here mandates the award of exemplary damages, an arbitrator would be compelled to award exemplary damages to Plaintiffs under the Arbitration Agreements.

Plaintiffs also rely heavily on a footnote in *Hill v. Garda CL Northwest, Inc.* in support of their argument that the Arbitration Agreements unconscionably limit Plaintiffs' ability to recover damages. There are, however, clear differences between the language and intent of

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(1999) (stating that the WLAD provides a person who has been discriminated against "with a remedy for full compensatory damages, excluding only nominal, exemplary or punitive damages").

the Arbitration Agreement at issue in that case and the Arbitration Agreements at issue here. *See* CP 28, 204. In *Hill*, the employer attempted to limit its liability in arbitration by allowing employees to recover only two or four months' of back pay, even if their claims covered a greater time period. *See* 179 Wn.2d at 53. Because a "specific 'period of recovery' [was] not contemplated by the applicable statutes," the Washington Supreme Court found there was no "satisfactory backstop" to the provision and declared it unconscionable. *Id.* at 55-56 & n.4.

The Arbitration Agreements at issue here differ significantly. *See* CP 28, 204. Contrary to Plaintiffs' suggestion, the language in the Arbitration Agreements here show no intent to limit what Plaintiffs may recover, unlike the provision in *Hill*. Instead, the Arbitration Agreements merely prevent an arbitrator from allowing a party to recover damages that would not be available to that party in a judicial proceeding. For example, and as noted *supra*, at n. 11, even if an arbitrator believed punitive damages would be warranted in a case brought under the Washington Law Against Discrimination, the arbitrator could not award punitive damages to a plaintiff because such damages are unavailable in a judicial forum. *See Martini*, 137 Wn.2d at 368. Furthermore, the wage statutes here specifically contemplate the types of damages a plaintiff may recover. *See, e.g.*, RCW 49.52.070 (providing that an employer shall be liable to an

employee for exemplary damages for violation of RCW 49.52.050). Thus, the statute here provides a "satisfactory backstop," thereby satisfying the *Hill* court's concern. *See* 179 Wn.2d at 56 n.4.

In those situations where Washington courts have found a damages provision in an Arbitration Agreement to be unconscionable, the offending provision has either eliminated a category of damages, entirely restricted an employee to recovering only a small portion of actual damages that would otherwise be available in court, or limited damages for only one party. The Arbitration Agreements at issue here, in contrast, contain bilateral provisions allowing both FMG and Plaintiffs to recover the same damages in arbitration that would be available to them in court. The Arbitration Agreements are, therefore, valid and enforceable, and this Court should reverse the decision of the superior court and compel Plaintiffs to arbitrate.

3. Plaintiffs May Recover Fees And Costs Under The Arbitration Agreements Just As Though Their Claims Were Brought In Court.

While Washington courts have expressed concern over Arbitration Agreements that limit the arbitrator's ability to award attorneys' fees to either party, the Arbitration Agreements at issue here do not contain any such limitation. In fact, they specifically allow the arbitrator to award fees to the prevailing party. The Washington Supreme Court in *Zuver*

specifically found that an analogous provision, stating a "prevailing party in any arbitration *may* be entitled to receive reasonable attorney's fees," was not unconscionable. *Zuver*, 153 Wn.2d at 311-12 (internal quotation marks omitted).

Here, the language of the arbitration provision similarly allows an arbitrator to award attorneys' fees and other costs as "required by law." CP 63, Sec. 3; 99, Sec. 3; 135, Sec. 3. Plaintiffs here bring claims pursuant to RCW 49.48 *et seq.* and RCW 49.52 *et seq.* These statutes provide reasonable attorneys' fees "*shall* be assessed" when a plaintiff brings a successful wage claim. RCW 49.48.030 (emphasis added). Additionally, RCW 49.52.070 provides that an employer violating the statute "*shall* be liable" for damages, "together with costs of [the] suit and a reasonable sum for attorney's fees." RCW 49.52.070 (emphasis added). Both statutory provisions require awards of attorneys' fees by using the word "shall" rather than "may." An arbitrator would thus be required to award fees to Plaintiffs, should they prevail on their wage claims.

4. The Arbitration Agreements Do Not Require Plaintiffs To Split The Costs Of Arbitration If Doing So Would Prevent Them From Pursuing Their Claims.

The superior court inexplicably agreed with Plaintiffs' erroneous argument the Arbitration Agreements are unconscionable because they shift the costs of arbitration to Plaintiffs. As the Washington Supreme

Court recently noted in *Hill*, a provision requiring the parties to split the costs of arbitration is valid and enforceable unless a party can show "such fees would prohibit it from bringing its claims." *See* 179 Wn.2d at 57.

The Arbitration Agreement provision here complies with *Hill* by requiring an arbitrator to shift *all* costs of arbitration to FMG if Plaintiffs cannot afford their portion of the costs. *See* CP 63, Sec. 3; 99, Sec. 3; 135, Sec. 3. Consequently, it is unlike those provisions previously declared unconscionable under Washington law. The Arbitration Agreements provide "You and FMG shall equally share all costs of arbitration . . . *unless* you prove to the Arbitrator that the costs of the arbitration would effectively prevent you from pursuing your Claim." *Id.* This language thus specifically addresses the problem envisioned by the courts and ensures no plaintiff will be precluded from bringing a claim because of cost.

In addition to allowing an arbitrator to shift all arbitration costs to FMG, the Arbitration Agreements also provide FMG must "bear the costs of the arbitration pending the Arbitrator's determination." *Id.* This language serves as an additional safeguard to Plaintiffs' ability to bring their claims in arbitration. As soon as Plaintiffs even contend they are unable to pay their share of the costs, as they have done here, FMG must immediately pay any incurred arbitration costs (including, presumably, the

filing fees). Because the Arbitration Agreements require FMG to shoulder more burden than Plaintiffs and safeguards Plaintiffs' ability to pursue their claims regardless of their financial resources, the superior court erred when it found the Arbitration Agreements unconscionable in this respect.

5. The Arbitration Agreements Do Not Mandate Confidential Arbitration, And Defendants Have Already Agreed To Arbitrate Plaintiffs' Claims Openly.

Despite FMG's offer to arbitrate openly—something entirely permissible under the Arbitration Agreements—Plaintiffs continually argued below the Arbitration Agreements mandate confidentiality. In Washington, parties are free to contract for confidentiality, and many Arbitration Agreements containing confidentiality provisions have been enforced. *See Zuver*, 153 Wn.2d at 314. The Washington Supreme Court has noted confidential arbitrations are an exception to the requirement under the Washington Constitution that judicial proceedings be open and public. *See Barnett v. Hicks*, 119 Wn.2d 151, 159, 829 P.2d 1087 (1992). Despite parties' ability to contract for confidentiality, courts may find an Arbitration Agreement in an employment or consumer context that *mandates* confidentiality suspect. *See McKee v. AT&T Corp.*, 164 Wn.2d 372, 398, 191 P.3d 845 (2008); *Zuver*, 153 Wn.2d at 315.

Here, even though confidential arbitration is permissible under Washington law, the Arbitration Agreements do not require it. In fact, the

Arbitration Agreements contain no provisions even mentioning confidentiality. Rather, the agreements note the parties will arbitrate their employment disputes pursuant to the "American Arbitration Association's ["AAA"] National Rules for the Resolution of Employment Disputes, *and/or such other procedures as the parties agree to.*" CP 63, Sec. 2; 99, Sec. 2; 135, Sec. 2 (emphasis added). The AAA's rules provide "an arbitrator shall maintain the confidentiality of the arbitration . . . *unless the parties agree otherwise.*" CP 187 (emphasis added). Both the language of the AAA's rule and the language of the Arbitration Agreements allow the parties to arbitrate without confidentiality.

Furthermore, from the outset of this case and pursuant to the terms of the Arbitration Agreements, Defendants have offered to agree to non-confidential arbitration. *See id.* When a defendant moots a plaintiff's unconscionability argument as to a particular arbitration provision, the Washington Supreme Court has declined to consider that provision in its unconscionability analysis. *See Zuver*, 153 Wn.2d at 309-10. In *Zuver*, the employer offered to defray the costs of arbitration. *Id.* at 310. Although the plaintiff argued the court should not consider such an offer, the Washington Supreme Court refused to ignore the employer's offer and declared the employee's claim of unconscionability as to that provision moot. *Id.* at 310 & n.7. Because Defendants here have likewise rendered

Plaintiffs' arguments regarding confidentiality moot, this Court must compel the Plaintiffs to arbitration.

E. The Superior Court Erred When It Refused To Honor The Parties' Intentions And Sever Any Unconscionable Provisions.

Although FMG maintains the Arbitration Agreements are valid and enforceable, FMG also believes the superior court separately erred when it disregarded the severability clause in the Arbitration Agreements and failed to strike the provisions it found unconscionable. "Courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties." *Zuver*, 153 Wn.2d at 320 (citing *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). When parties agree to a severability clause within their Arbitration Agreement, courts will generally strike any unconscionable provisions and enforce arbitration. *Id.* A court may refuse to honor the parties' intent expressed through a severability clause only when "unconscionable provisions . . . *pervade* an agreement." *Id.* (emphasis added).

"Pervade" is a difficult standard to meet.[11] Here, the parties have agreed to a severability clause providing "[i]f any portion of this Addendum is adjudged by any court to be void or unenforceable in whole or in part, such adjudication shall not affect the validity and enforceability of the remainder of the Addendum." CP 63-64, Sec. 4; 99-100, Sec. 4; 135-36, Sec. 4. Through this provision, the parties have expressed their intent the agreements be enforced, without the unconscionable provisions.

Plaintiffs here are unable to show even a single unconscionable provision, much less that unconscionable provisions "pervade" the Arbitration Agreements. The Arbitration Agreements are detailed and contain four sections spanning two pages, as opposed to the brief Arbitration Agreements the courts have declined to enforce previously. *See, e.g.*, *Gandee*, 176 Wn.2d at 607. As in *Zuver*, where the Washington Supreme Court severed unconscionable provisions so it could honor the parties "explicitly expressed . . . intent" to arbitrate, *see* 153 Wn.2d at 320, this Court could easily honor the parties' intent to arbitrate here by following the unambiguous severability clause, and severing any

[11] In *Gandee v. LDL Freedom Enterprises, Inc.*, the Washington Supreme Court found that when a "short, four-sentence arbitration clause contain[ed] three unconscionable provisions," the unconscionable provisions "pervade the entire clause." 176 Wn.2d at 607.

unconscionable provision, thereby enforcing the remainder of the Arbitration Agreements.

F. The Arbitration Agreements Are Not Procedurally Unconscionable, And The Superior Court Erred In Considering Such A Theory When The Issue Was Not Fully Briefed By The Parties.

In oral decision, the superior court emphasized the circumstances of contracting, a consideration related only to procedural unconscionability. This theory was not fully briefed by the parties, as Plaintiffs focused their arguments on substantive unconscionability. *See* CP 24. Furthermore, the superior court ignored evidence that clearly established the Arbitration Agreements are not unconscionable under any theory.

In a procedural unconscionability analysis, the manner in which the parties entered into the contract, whether a party had reasonable opportunity to understand the contract's terms, and whether important terms were hidden in a maze of fine print are considerations. *See Zuver*, 153 Wn.2d at 303-04. When a party is sophisticated, has time to "read and consider the agreement before signing," and the agreement is not hidden in fine print, the Washington Supreme Court has found no evidence of "procedural oppression." *Brown v. MHN Gov't Servs., Inc.*, 178 Wn. 2d 258, 267 (2013). Even contracts of adhesion are not deemed

procedurally unconscionable automatically. *Zuver*, 153 Wn.2d at 304 (citing *Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 393 (1993)).

Here, Plaintiffs cannot show the Arbitration Agreements are procedurally unconscionable. Like the plaintiffs in *Brown v. MHN Government Services, Inc.*, 178 Wn. 2d at 267, who were educated professionals, Plaintiffs here are sophisticated parties who had time to review the Arbitration Agreements before agreeing to be bound by their terms. *See* CP 249, ¶ 4. In addition, as the superior court acknowledged, *see* RP 29:4-12, the Arbitration Agreements specifically advise employees, in bolded, capital letters, of their right to seek legal advice prior to signing the Arbitration Agreements, an opportunity that would have been available to Plaintiffs in this case. *See id.* at 63, 99, 135. Furthermore, despite the superior court's suggestion Plaintiffs were presented with a contract with unfamiliar terms, *see* RP 31:7-13, Plaintiffs had previously agreed to the same Arbitration Agreements over and over again, throughout their employment with FMG, and they chose to again agree to and execute the Arbitration Agreements at issue here. *See* CP 266-67, ¶¶ 3-5.

The Arbitration Agreements also do not attempt to hide important provisions in "fine print." Instead, they draw attention to important

provisions by using all capitals to list what kinds of claims are covered by the Arbitration Agreements and emphasize that disputes will be resolved by an arbitrator and not through the court system. *See* CP 63, 99, 135. Plaintiffs cannot demonstrate the Arbitration Agreements are procedurally unconscionable. This Court should, therefore, enforce the agreements.

G. This Court should also compel Plaintiffs to arbitrate their claims against the non-signatory Defendants.[12]

Washington courts have recognized that non-parties to Arbitration Agreements may compel arbitration based on "the doctrine of equitable estoppel or under normal contract and agency principles." *McClure v. Tremaine*, 77 Wn. App. 312, 317, 890 P.2d 466 (1995) (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993); *Am. Ins. Co. v. Cazort*, 316 Ark. 314, 321, 871 S.W.2d 575 (1994)). When claims against a parent company and its subsidiary are "based on the same facts . . . and are inherently inseparable, a court may order arbitration of claims against the parent even though the parent is not a party to the Arbitration Agreement." *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 889, 224 P.3d 818 (2009) (citing *J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA*, 863 F.2d 315, 320-21 (4th Cir. 1988)). Additionally, other courts have allowed sister corporations to invoke

[12] The superior court did not reach this issue.

arbitration under a similar test. *See, e.g.*, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *see also T-Mobile USA, Inc. v. Montijo*, No. C12-1317RSM, 2012 WL 6194204, at *3 (W.D. Wash. Dec. 11, 2012) (discussing cases where non-signatory entities with a corporate relationship to a signatory party were allowed to compel arbitration).

In this case, the other defendants may enforce the Arbitration Agreements even though they were not signatories to the Arbitration or Employment Agreements. Plaintiffs' claims against all Defendants are based on the same facts. Although the other Defendants are not proper parties to this litigation, as they did not employ Plaintiffs, to the extent Plaintiffs seek to recover from them for alleged wrongdoing in their employment, the other Defendants are entitled to the benefit of the Arbitration Agreements. Plaintiffs should be compelled to arbitrate the entire dispute with FMG and the non-signatory Defendants.

VI. CONCLUSION

The superior court erroneously found the Arbitration Agreements to be unconscionable. In doing so, it ignored not only the strong state and federal public policy favoring arbitration and Washington precedent, but the plain language of the Arbitration Agreements themselves. The provisions at issue here are materially different from the language

contained in arbitration provisions previously found unconscionable under Washington law and, in fact, more closely resemble those provisions found to be enforceable by courts in this state. Because the Arbitration Agreements are not unconscionable, and because strong state and federal public policy demands Plaintiffs' claims be arbitrated, this Court should reverse the judgment below and compel arbitration.

Respectfully submitted this 28th day of July, 2014

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

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Dated this 28th day of July, 2014, at Seattle, Washington.

Gerri Downs
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