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COURT OF APPEALS
DIVISION ONE
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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' REPLY BRIEF

Michael F. Madden, WSBA #8747
Bennett Bigelow & Leedom, P.S.
601 Union Street, Suite 1500
Seattle WA 98101
(206) 622-5511

Karen R. Glickstein, MO Bar #37083
(*pro hac vice*)
Polsinelli, P.C.
900 W. 48th Place, Suite 900
Kansas City, MO 64112-1895
(816) 753-1000
ATTORNEYS FOR APPELLANTS

COPY

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I. INTRODUCTION

Because Respondents/Plaintiffs ("Plaintiffs") have failed to show that *any* provision in the Arbitration Agreements is substantively or procedurally unconscionable—much less that such provisions pervade the agreements, they should be compelled to honor their agreement to arbitrate. Unlike arbitration agreements previously found unconscionable by Washington courts, the Arbitration Agreements between Franciscan Medical Group ("FMG") and Plaintiffs (1) bind both the employee and employer to arbitration of employment-related claims; (2) do not give either party unilateral access to the courts; (3) require a neutral arbitrator to award all damages, costs, and fees available under applicable laws; (4) require FMG to bear the costs of arbitration if Plaintiffs cannot; and (5) do not mandate confidentiality. Because the Arbitration Agreements are valid and enforceable, this Court should reverse the decision of the superior court.

II. ARGUMENT IN REPLY

A. The Liberal Policy Favoring Arbitration Recognized By Washington Courts Requires That This Court Indulge Every Presumption In Favor Of Arbitration.

Contrary to Plaintiffs' argument, the Federal Arbitration Act applies here and requires this Court to presume arbitrability of Plaintiffs' claims. *See Zuver v. Airtouch Comm'ns, Inc.*, 153 Wn.2d 293, 302, 103

P.3d 753 (2004). Not only must courts presume arbitrability, "[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 Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983)); *see also Saili v. Parkland Auto Ctr., Inc.*, 181 Wn. App. 201, 329 P.3d 915, 917 (2014) (noting that Washington's public policy also requires courts to "'indulge every presumption in favor of arbitration'") (quoting *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010)).

Because state and federal policy favor arbitration, courts may only invalidate arbitration agreements on grounds that do not uniquely disfavor arbitration. *See Zuver*, 153 Wn.2d at 302 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Plaintiffs, as the parties opposing arbitration, bear the burden of showing the Arbitration Agreements are unenforceable. *See id.* Plaintiffs cannot meet this heavy burden. Under the "liberal federal policy favoring arbitration agreements" established by the Federal Arbitration Act, *see Moses H. Cone*, 460 U.S. at 24, as well as Washington's own public policy favoring arbitration, *see Saili*, 329 P.3d at 917, this Court must compel arbitration.

B. The Arbitration Agreements Are Not Substantively Unconscionable Under Washington Law.

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 v. Garda CL NW., Inc.*, 179 Wn.2d 47, 55, 308 P.3d 635 (2013) (citing *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013)). Because Plaintiffs cannot establish that the Agreements are substantively unconscionable under this test, this Court must compel arbitration of their claims. *See Zuver*, 153 Wn.2d at 302 ("It is black letter law of contracts that the parties to a contract shall be bound by its terms.") (citing *Nat'l Bank of Wash. v. Equity Investors, L.P.*, 81 Wn.2d 886, 912–13, 506 P.2d 20 (1973)).

1. The Arbitration Agreements Are Not One-Sided And Should Be Enforced.

a. The Arbitration Agreements Impose Mutual Obligations On The Parties.

Arbitration agreements are not required to impose the same obligations on each party to be valid. *See Zuver*, 153 Wn.2d at 317. Here, Plaintiffs complain that the Arbitration Agreements are "one-sided" merely because the parties' obligations under the Employment Agreements are not identical. As the *Zuver* court noted, however, "Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms—not that both

parties have identical requirements" under the contract.[1] *Id.* (citing *Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 434, 723 P.2d 1093 (1986)).

Although arbitration agreements need not impose the same requirements on all parties, the Arbitration Agreements at issue here do impose mutual ones. Plaintiffs and FMG are both required to arbitrate *all* employment-related claims. *See* CP 63, 99, 135 ("This Addendum requires *You and FMG* to arbitrate all Claims (as defined [in the Agreement]) between You and FMG." (emphasis added)).[2] By contrast, in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1173 (9th Cir. 2003) (applying California law), cited by Plaintiffs, the arbitration provision at issue specifically "applie[d] only to 'any and all employment-related legal disputes, controversies or claims of an [employee].'" Similarly, in *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002), also cited by Plaintiffs, a case arising in a consumer lending context, the arbitration provision at issue required any dispute to be resolved by arbitration, but allowed the lender to use the court system in

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[1] Plaintiffs inexplicably state that the *Zuver* court rejected the argument that arbitration provisions are not required to impose "mutual or identical obligations on both parties." *See* Resp's Br. 19. The plain language of the Washington Supreme Court states otherwise. *See Zuver*, 153 Wn.2d at 317.

[2] The Clerk's Papers are cited herein as "CP ___."

the foreclosure context to seek ancillary and preliminary remedies. Because a foreclosure claim was likely the only claim a lender would bring against a borrower, the court found the arbitration provision one-sided. *Id.* The Arbitration Agreement at issue here is clearly different: it encompasses virtually all claims brought by either party, *see* CP 63, § 1; 99, § 1; 135, § 1, and the few claims that are exempted include those likely to be brought by both the employee *or* the employer.

For example, the Arbitration Agreements exempt from arbitration "claims that arise out of or are subject to matters covered by the FMG Peer Review Policy."[3] *Id.* Claims regarding peer review would likely be brought by health care providers such as Plaintiffs and not by FMG. Thus, the Arbitration Agreements at issue here differ from those discussed in cases cited by Plaintiffs and do not impose a one-sided arbitration obligation.[4] Instead, both Plaintiffs and FMG are bound to arbitration, with only limited exceptions allowing both parties access to the courts. Plaintiffs' suggestion that FMG is somehow exempted from arbitrating its

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[3] The Arbitration Agreements also mutually exclude "disputes related to worker's compensation claims or health benefits" from arbitration. *See* CP 63, § 1; 99, § 1; 135, § 1.

[4] FMG has never "admitted" that the Employment Agreements impose arbitration obligations unilaterally upon Plaintiffs, as Plaintiffs contend. *See* Resp'ts Br. 26. Under the plain language of the Arbitration Agreements, Plaintiffs are able to pursue certain causes of action in court. *See* Apps. Br. 5, 19.

employment-related claims against Plaintiffs is based on an erroneous reading of the Employment Agreements.[5]

b. The Outside Provisions Cited By Plaintiffs Do Not Render The Arbitration Agreements One-Sided.

Because the language of the Arbitration Agreements is mutual in virtually every respect, Plaintiffs turn to portions of Plaintiffs' Employment Agreements, outside the Arbitration Agreement exhibit, to try to find unconscionability. *See* Resp'ts Br. 21. Specifically, Plaintiffs reference the separate Non-Competition and Non-Solicitation sections of the Romney and Bauer Employment Agreements, providing that injunctive relief may be sought for "any breach of this Exhibit," CP 66, § F.4; 102, § F.4,[6] as well as the separate FMG Specific Provisions of the Romney and Bauer Employment Agreements, which allow FMG to seek

[5] FMG has never "admitted" that it may sue Plaintiffs in court for all claims related to the Employment Agreement, as Plaintiffs contend. *See* Resp's Br. 21. Rather, FMG has always recognized that the arbitration agreement requires that any employment-related claim it may have against an employee must be pursued through arbitration. *See* Apps. Br. 20-21.

[6] Plaintiff Childress' Employment Agreement contains identical language. CP 123, § 6.4. Childress' Agreement also contains language allowing injunctive relief for a breach of the "Records; Confidentiality; Proprietary Information" section. *See id.* at 125, § 9.6.

injunctive relief for "any breach or attempted breach of all the provisions of th[e] Agreement." *Id.* at 67, 103.[7]

For such extrinsic provisions to be relevant to this Court's unconscionability analysis, they must make the arbitration clause unconscionable "*as applied.*" *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 74 (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). Otherwise, focus must remain on the arbitration provision itself.

Plaintiffs erroneously rely on *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008), to support their argument that provisions "outside" their Arbitration Agreements make the Arbitration Agreements unconscionable. *See* Resp's Br. 22-23. In *McKee*, the arbitration provision at issue not only limited attorneys' fee awards, but extrinsic provisions required consumers to reimburse attorneys' fees incurred by AT&T. 164 Wn.2d at 400. The outside provisions at issue in *McKee* essentially granted AT&T an award of attorneys' fees, despite the language in the

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

arbitration provision. The Washington Supreme Court understandably found the provision unconscionable. *Id.*

Here, unlike *McKee*, the extrinsic provisions in the Employment Agreements do not affect the parties' rights or obligations under the Arbitration Agreements. The limited provisions allowing FMG to seek *injunctive* relief[8] do not alter the Arbitration Agreements' mandate for both parties to arbitrate their non-injunctive claims. The Arbitration Agreements explicitly provide, in unequivocal terms, that: "This Addendum requires *You and FMG* to arbitrate all Claims . . . between You and FMG." CP 63, 99, 135. "Claims" is a defined term,[9] and does not include every claim that could arise between the parties. *Id.* 63, § 1; 99, §

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[8] Specifically, in a section entitled "Equitable Relief," Exhibit G to the Romney and Bauer Employment Agreements provides:

> FMG shall be entitled to injunctive and other equitable relief, including specific performance, in case of any such breach or attempted breach [of all the provisions of the Employment Agreement], in addition to such other remedies as may exist at law.

CP 67, 103. The Non-Competition and Non-Solicitation sections provide that injunctive relief may be sought for "any breach of this Exhibit." *Id.* at 66, § F.4; 102, § F.4.

[9] 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." CP 63, § 1; 99, § 1; 135, § 1. The definition expressly lists examples of covered claims, including claims for unpaid wages and wrongful discharge. *See id.*

1; 135, § 1. For example, the Arbitration Agreements exclude "disputes related to worker's compensation claims or health benefits" as well as disputes arising out of FMG's Peer Review Policy. *See id.* As noted, *supra*, these disputes are more likely to be brought by an employee than an employer—thus giving Plaintiffs (or employees in general) an option to pursue these matters outside of arbitration, and further emphasizing the plain fact that the agreements here are not "one-sided."

Just as Plaintiffs' ability to pursue a workers' compensation or peer review matter in court does not invalidate the arbitration agreements, FMG's ability to seek injunctive relief in two limited circumstances does not render the Arbitration Agreements' requirements as to non-injunctive claims unconscionable. The Arbitration Agreements themselves provide both parties access to the courts, and, consequently, these outside provisions cannot render the Arbitration Agreements one-sided. This Court need not consider provisions outside the Arbitration Agreements in its unconscionability analysis because these outside terms do not affect Plaintiffs' claims or their ability to recover.

c. The Outside Provisions Do Not Override The Mutual Obligations Of The Arbitration Agreements.

Plaintiffs intentionally misread the Employment Agreements to reach results that defy common sense. As noted, *supra*, Exhibit G to the

Romney and Bauer Employment Agreements ("FMG Specific Provisions") enables FMG to seek equitable relief in court.[10] Plaintiffs argue that this section somehow overrides the plain language providing mutuality of obligation to arbitrate contained in the Arbitration Agreement. But the intent is clear: FMG may seek "such other remedies as may exist at law" in those situations where other remedies are incidental to the equitable relief sought if the parties are in a judicial forum for the breach or attempted breach of the Employment Agreement. *See* CP 67, 103. Neither this provision nor the provisions for equitable relief contained in the Non-Competition and Non-Solicitation sections of the Agreements operate to exempt FMG from its arbitration obligations or grant FMG the right to bring any and all claims in a judicial forum. In fact, Plaintiffs urge this Court to interpret the contracts in a way that renders the obligation of FMG to arbitrate employment-related claims meaningless, a result prohibited by Washington courts. *See Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 129 Wn. App. 303, 312, 119 P.3d 854 (2005) ("Courts may not adopt a contract interpretation that renders a term absurd or meaningless.") (citing *Seattle–First Nat'l*

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[10] Arbitrators do not always have the ability to issue injunctive or other equitable relief. *See Riverside Publ'g Co. v. Mercer Publ'g LLC*, 829 F. Supp. 2d 1017, 1020 (W.D. Wash. 2011). Even where an arbitrator may issue such relief, a party may generally obtain injunctive relief from a court more quickly. *See id.*

Bank v. Westlake Park Assocs., 42 Wn. App. 269, 270, 274, 711 P.2d 361 (1985)).

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

a. An Arbitrator Is Required To Award All Damages Available Under The Law If Plaintiffs Prevail.

Despite Plaintiffs' assertions to the contrary, the damages-related language in the Arbitration Agreements at issue here is distinguishable from both the language and intent of the provision discussed in *Hill*. In *Hill*, the arbitration agreements prevented an arbitrator from awarding more than two or four months of backpay (depending on which agreement the employee signed). 179 Wn.2d at 55. The agreement also provided that this same limitation could be "disregarded if recovery is 'specifically mandated by federal or state statute or law.'" *Id.* at 56 n.4. The court noted that, because "[a] specific 'period of recovery' is not contemplated by the applicable statutes . . . there is not a satisfactory backstop to the damages limitation provision that renders it substantively fair." *Id.*

Unlike *Hill,* the Arbitration Agreements here do not impose or limit a period of recovery on Plaintiffs, or limit Plaintiffs' right to recover any damages available under the statute. Instead, the Agreements provide that "[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, § 2; 99, § 2; 135, § 2 (emphasis added). This language does not limit Plaintiffs' right to damages. It instead requires an arbitrator to award those damages allowed by law, and only limits those damages (to both employees *and FMG*) to the extent they go beyond what the law or applicable statute allows.[11] Nothing in this language imposes some period of recovery that is contrary to Washington statutes, or otherwise limits the Plaintiffs' right to recover any damages available under the statute.

Plaintiffs also erroneously argue that the Agreements prevent them from recovering exemplary damages. *See* Resp's Br. 30. The wage statutes upon which Plaintiffs base a portion of their claims specifically state, however, the types of damages a plaintiff may recover. The statute here, RCW 49.52.070 (providing that an employer "shall be liable" to an employee for exemplary damages for violation of RCW 49.52.050), provides a "satisfactory backstop." It specifically requires that exemplary damages be awarded to a successful plaintiff, obviating the *Hill* court's concern that an arbitrator may impose an unwarranted limitation. *See* 179

[11] For example, 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 (1999) (noting that remedies under the WLAD do not include nominal, exemplary or punitive damages).

Wn.2d at 56 n.4 (stating that because the wage statute at issue did not contemplate a specific period of recovery, arbitration agreement language allowing an arbitrator to disregard limitations on backpay awards if recovery is "mandated" by statute could not operate to save the otherwise unconscionable limitation provision).

Further, unlike *Hill*, the Arbitration Agreements here do not in any sense limit the amount Plaintiffs may recover. Instead, the Agreements merely prevent an arbitrator from allowing a party to recover damages that would not be available to that party in a judicial proceeding. Even if an arbitrator believed, for example, that punitive damages would be warranted in a case brought under the WLAD, the arbitrator may not award punitive damages to a plaintiff because those damages are not available in a judicial forum. *See Martini*, 137 Wn.2d at 368; *see also, supra*, n.11.

The *Hill* case does not require this Court to invalidate the parties' Arbitration Agreements. In the situations where Washington courts have found a damages provision in an arbitration agreement to be unconscionable, the offending provision has either: (1) eliminated an entire category of damages; (2) entirely restricted an employee to recovering only a small portion of actual damages that would otherwise be available in court; or (3) limited damages for only one party. The

Agreements here, in contrast, contain provisions allowing both FMG and Plaintiffs to recover the same damages in arbitration that would be available in court.

b. Plaintiffs Attempt To Draw A False Distinction Between "Provided" And "Required."

Plaintiffs again misread the plain language of the Arbitration Agreements, in an attempt to draw a distinction between the words "provided" and "required." *See* Resp's Br. 11. The Agreements provide:

> No Arbitrator shall have the power to alter your at-will employment status or to impose any limit on FMG's discretion to discipline or discharge any employee, except as otherwise provided by law. Unless 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, § 2; 99, § 2; 135, § 2. Plaintiffs argue that "provided" is somehow more permissive than "required," *see* Resp'ts Br. 11, but they fail to explain or cite to any authority supporting this interpretation. Either word may be used interchangeably in analysis of statutes. For example, if the law provides that attorneys' fees must be awarded to a plaintiff upon proving a successful wage claim, as the statutes under which Plaintiffs bring their claims so provide, a judge or arbitrator must award attorneys' fees. *See* RCW 49.48 *et seq.*; RCW 49.52 *et seq.* The same result is reached if a law "requires" an award of attorneys' fees.

Further, the words "provided" and "required" each apply equally to the parties in the Arbitration Agreements. *See* CP 63, § 2; 99, § 2; 135 § 2. Under the Agreements, arbitrators may not alter an employee's at-will status or impose limits on FMG's discretion relating to employee discipline or discharge, "except as *provided* by law." *Id.* (emphasis added). Pursuant to this provision, an arbitrator could determine that Plaintiffs were not at-will employees if applicable law provided an arbitrator with that power. Similarly, under the Agreements, an arbitrator shall not award an employee *or* FMG certain categories of damages, unless "required" to by law. *See id.*

3. Plaintiffs May Also Recover Fees And Costs Under The Arbitration Agreements.

The Arbitration Agreements at issue here specifically compel the arbitrator to award fees to the prevailing party, negating Plaintiffs' attempt to argue otherwise. Although Washington courts have previously signaled their concern with arbitration agreements which prevent employees from recovering statutorily available attorneys' fees, *see, e.g., Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004), the courts have enforced arbitration agreements stating simply that fees "may" be recovered. *See Zuver*, 153 Wn.2d at 311-12.

The Agreements here not only allow recovery of fees, as approved in *Zuver*, they compel an arbitrator to award attorneys' fees and other costs as "required by law."[12] CP 63, § 3; 99, § 3; 135, § 3. Since Plaintiffs here bring claims pursuant to RCW 49.48 *et seq.* and RCW 49.52 *et seq.*, both of which provide that reasonable attorneys' fees "*shall* be assessed" when a plaintiff brings a successful wage claim, *see* RCW 49.48.030 (emphasis added), nothing in these agreements would prevent an arbitrator from awarding attorneys' fees and costs—in fact, the opposite is true. 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." (emphasis added). If Plaintiffs succeed on their claims, the arbitrator will be required to award fees to Plaintiffs under both the language of the Arbitration Agreements and the language of the statutes. It is simply not true that the Agreements limit damages or fees available to Plaintiffs, and the Agreements cannot be found unconscionable on those grounds.

[12] For a discussion of the false distinction Plaintiffs draw between the words "provided" and "required," see *supra* Part B.2.b.

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

Plaintiffs' argument regarding the Arbitration Agreements' cost-related provision relies on *Hill*, a case in which the Washington Supreme Court found a mandatory fee-splitting provision unconscionable after the plaintiffs presented evidence to support their argument that the provision at issue "effectively prohibits employees from bringing claims in the arbitral forum." 179 Wn.2d at 56-57. The Agreements here differ from the arbitration provision discussed in *Hill* and the other state and federal cases cited by Plaintiffs.[13] Rather than mandating fee-splitting, the Agreements here *require* an arbitrator to shift *all* costs of arbitration to FMG if Plaintiffs cannot afford their portion of the costs. *See* CP 63, § 3; 99, § 3; 135, § 3. Indeed, from the moment Plaintiffs state that they cannot afford arbitration, FMG is required to bear all arbitration costs. *See id.* ("If you *contend* that the costs of arbitration would prevent you from pursuing your Claim, FMG *will bear* the costs of the arbitration pending the Arbitrator's determination.") (emphasis added). Thereafter, if an

[13] No cases cited by Plaintiffs concerned provisions that shift the costs of arbitration to an employer if the employee is unable to pay. *See Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1261; *Luna*, 236 F. Supp. 2d at 1171-72; *Gandee*, 176 Wn.2d at 602; *Adler*, 153 Wn.2d at 338. These cases each address mandatory fee-splitting provisions.

arbitrator determines that "the costs of the arbitration would effectively prevent you from pursuing your Claim . . . FMG would bear all costs." *Id.*

The language of the Arbitration Agreements cannot be interpreted to require Plaintiffs to split arbitration costs with FMG if they are unable to pay the costs of arbitration, and Plaintiffs' argument that the arbitration cost language is "prone to mischief" is nonsensical. *See* Resp's Br. 37. The language requiring FMG to pay the costs of arbitration, pending an arbitrator's decision regarding Plaintiffs' financial capabilities, is mandatory.[14] *See* CP 63, § 3; 99, § 3; 135, § 3. Plaintiffs' speculation that an arbitrator *may* determine they are financially able to split the costs of arbitration does not render the provision unconscionable. *See Zuver*, 153 Wn.2d at 312 (noting that "mere speculation" cannot serve as a basis for a finding of substantive unconscionability). Plaintiffs have failed to establish that this provision is substantively unconscionable because it is wholly different from those provisions discussed in the cases cited by Plaintiffs.

[14] As a result, a plaintiff would never be in the position of forgoing arbitration because he or she could not afford the filing fee.

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

No provision in the Arbitration Agreements mandates, or even mentions, confidential arbitration. *See* CP 63, 99, 135. Instead, the Agreements incorporate the American Arbitration Association's ("AAA") National Rules for the Resolution of Employment Disputes, which expressly allow the parties to agree to arbitrate openly. *See id.* at 187. From the inception of this litigation, FMG has offered to arbitrate Plaintiffs' claims openly.[15] *See id.* As recognized in *Zuver*, a court should consider an employer's offer to waive provisions a plaintiff-employee finds objectionable. *See* 153 Wn.2d at 309-10 (finding that an employer's offer to pay arbitration fees, instead of splitting the cost pursuant to the arbitration agreement, mooted the employee's argument that the fee-splitting provision was unconscionable).

[15] Confidentiality may be advantageous or required in a healthcare setting, however. Plaintiffs Romney and Bauer allege that they opposed treatment that they "reasonably believed jeopardized public health and safety." CP 2 ¶ 3. These allegations implicate Washington's peer review statute. *See* RCW 43.70.510. Information falling under the peer review privilege must generally be maintained as confidential. *See id.* 43.70.510(4); *see also Lowy v. PeaceHealth*, 159 Wn. App. 715, 722, 247 P.3d 7 (2011), *aff'd* 174 Wn.2d 769, 280 P.3d 1078 (2012).

Plaintiffs' reliance on *Gandee* is also misplaced. As Plaintiffs admit, the *Gandee* defendant offered to waive an arbitration agreement provision—but the offer was not made *until the appeal*. 176 Wn.2d at 608. The Washington Supreme Court found this to be an ineffective attempt at waiver. *Id.* at 608-09. In contrast, FMG offered to waive the confidentiality provision in the Arbitration Agreements from the time the provision was challenged, beginning in Defendants' Motion to Compel Arbitration submitted to the trial court last year. *See* CP 187. Although Plaintiffs wish to argue to the contrary, there is simply no factual or legal support for their allegation that the Arbitration Agreements are unconscionable due to a confidentiality requirement.

C. Even If This Court Finds Part(s) Of The Agreement Objectionable, The Agreements' Severability Clause Must Be Applied As Plaintiffs Have Failed To Show That Unconscionable Provisions "Pervade" The Agreements.

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).

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, § 4; 99-100, § 4; 135-36, § 4. Through this provision, the parties expressed their intent that the Agreements be enforced, even if a court is required to excise any unconscionable provisions.

Plaintiffs cannot show that even a single provision is unconscionable, much less that unconscionable provisions "pervade" the Arbitration Agreements. Unlike the Arbitration Agreements the courts have declined to enforce previously, the Agreements here are detailed and contain four sections spanning two pages. *See, e.g.*, *Gandee*, 176 Wn.2d at 607 (declining to enforce a four sentence agreement). In *Zuver*, the Washington Supreme Court examined an agreement similar in length to the Arbitration Agreement here. *See* 153 Wn.2d at 298-99. The court found that it could "easily excise" two unconscionable provisions, yet honor the parties "explicitly expressed . . . intent" to arbitrate. *See id.* at

320. As in *Zuver*, the parties' clear intent to arbitrate may be effected by severing any unconscionable provision, pursuant to the unambiguous severability clause, and enforcing the remainder of the Arbitration Agreements.

D. The Arbitration Agreements Are Not Procedurally Unconscionable Under Washington Law.

Showing procedural unconscionability is a demanding standard rarely applied in Washington and Plaintiffs have failed to meet the standard here. In determining whether an agreement is procedurally unconscionable, Washington courts examine whether the employee lacked meaningful choice in entering into the contract. *See Zuver*, 153 Wn.2d at 303-04. "At minimum, an employee who asserts an arbitration agreement is procedurally unconscionable must show some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, and/or that the terms of the agreement were set forth in such a way that an average person could not understand them." *Id.* at 306-07.

Plaintiffs here "had a meaningful choice" to enter into the Arbitration Agreements. *See id.* at 306. Although they contend otherwise, Plaintiffs were never pressured or rushed into signing the Arbitration

Agreements, and they had ample time to consider the Agreements' terms. In fact, 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.

In support of their coercion argument, Plaintiffs cite to Dr. Christine Lomotan as an example of a physician who attempted to negotiate a provision in her Employment Agreement and was thereafter terminated. *See* Resp's Br. 8. Like many of Plaintiffs' statements, this one tells only part of the story. Dr. Lomotan "moonlighted" at a clinic unaffiliated with FMG, and because the work violated the non-competition provisions of her Employment Agreement, she obtained FMG's permission to do so. CP 249-50 ¶ 11. Dr. Lomotan later asked to take on still more outside work. *See id.* at ¶¶ 9-11. FMG refused this request, as the work directly conflicted with FMG's business. *Id.* at ¶ 12. Dr. Lomotan then voluntarily resigned to pursue her outside activities full-time. *See id.* ¶ 13

Nor can Plaintiffs demonstrate "procedural surprise." Their citation to *Brown v. MHN Government Services, Inc.*, a case applying California law, is inapposite. The court in *Brown* found the arbitration agreement at issue procedurally unconscionable because it was unclear

which set of American Arbitration Association rules would apply to arbitrations under the agreement. 178 Wn.2d 258, 267, 306 P.3d 948 (2013). There is no such ambiguity here. *See* CP 63, § 2; 99, § 2; 135 § 2 (specifying that "the most current version of the [AAA]'s National Rules for the Resolution of Employment Disputes" will govern arbitrations brought pursuant to the Agreements). Plaintiffs cannot demonstrate that the Arbitration Agreements are procedurally unconscionable, and this Court should, therefore, enforce the Agreements.

E. This Court should also compel Plaintiffs to arbitrate their claims against the non-signatory Defendants.[16]

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)). Plaintiffs' failure to respond adequately to this argument, *see* Resp's Br.

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[16] Plaintiffs attempt to argue that the Arbitration Agreements require Plaintiffs to arbitrate *any* possible claims they may have against non-signatory FMG employees. *See* Resp's Br. 13. Plaintiffs specifically argue that they would be required to arbitrate a claim arising out of a car accident with a fellow FMG employee. *See id.* Again, Plaintiffs unreasonably interpret the language in the Agreement and ignore that "Claims" is a defined term, *see supra* n.9, and does not include car accidents.

47, concedes this point. *See, e.g.*, *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (determining that a party conceded an argument to which it failed to respond). This Court should, therefore, order Plaintiffs to arbitrate their claims against all Defendants.

III. CONCLUSION

Plaintiffs cannot establish that the Arbitration Agreements at issue are substantively or procedurally unconscionable. The Agreements are unlike arbitration agreements or provisions previously found unconscionable by Washington courts. Here, *both* Plaintiffs *and FMG* are bound to arbitrate employment-related claims like those brought by Plaintiffs here. Neither party receives unilateral access to the courts under the Agreements; and Plaintiffs' remedies in arbitration are no different than those available in the court system: a neutral arbitrator must award any damages, costs, and fees available under applicable laws. FMG must bear the costs of arbitration if Plaintiffs cannot, and confidentiality is not mandated. Even if any of these provisions are found objectionable, the parties have agreed to a severability clause, allowing the Court to sever any offending provision and enforce the remainder of the Agreements to honor the parties' clearly-stated intent to arbitrate. This Court should reverse the judgment below and compel arbitration.

Respectfully submitted this 29th day of September, 2014

BENNETT BIGELOW & LEEDOM, P.S.

By: s/Michael Madden
Michael Madden, WSBA #8747

POLSINELLI, P.C.

Karen R. Glickstein, MO Bar #37083

Attorneys for Petitioner

CERTIFICATE OF SERVICE

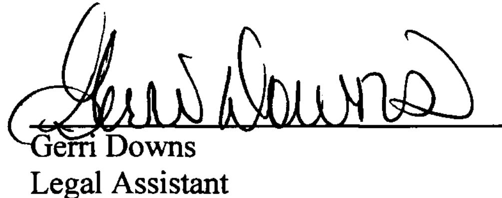
I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a 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:

Scott C.G. Blankenship, WSBA #21431	☐	Hand Delivered
Paul S. Woods, WSBA #42976	☐	Facsimile
Attorneys for Plaintiffs	☐	U.S. Mail
The Blankenship Law Firm, P.S.	☒	Email
1000 Second Ave, Ste. 3250		
Seattle, WA 98104		
Fax: (206) 343-2704		

email: sblankenship@blankenshiplawfirm.com
pwoods@blankenshiplawfirm.com

Attorneys for Plaintiffs

Dated this 29th day of September 2014, at Seattle, Washington.



Gerri Downs
Legal Assistant

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