Supreme Court No. 91680-1

Court of Appeals No. 71625-5 - I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner-Plaintiffs Michael Romney, Faron Bauer, and Kristen Childress respectfully request this Court to accept review of the Court of Appeals decision designated in Part II of this Petition.

II. DECISION FOR REVIEW

Petitioners seek review of a published decision by the Court of Appeals, Division I, in the above referenced case which was filed on February 17, 2015. Reconsideration was denied on March 17, 2015. The Court of Appeals Opinion to be reviewed is reproduced in the Appendix to this Petition.

III. ISSUES PRESENTED FOR REVIEW

In this case, Defendants drafted an arbitration agreement so one sided and misleading that hidden provisions within the employment contract actually exempt the employers from arbitration, affording them a public jury trial to sue employee-Plaintiffs. In contrast, Plaintiffs must confidentially arbitrate all claims, with substantial limitations to statutorily mandated employee remedies, because of terms this Court has found are prone to arbitrator mischief. Virtually the same terms and provisions have been found unconscionable by this Supreme Court.

This case is of vital importance to the citizens of Washington. Defendants discharged two experienced and respected medical doctors for attempting to protect the health and safety of Washington patients from harm by Defendants' impaired provider. Defendants also fired these

doctors for demanding overdue wages on behalf of Plaintiffs and the Putative Class.

The Superior Court voided the Arbitration Addendum ("Addendum") as unconscionable, carefully adhering to recent Washington Supreme Court precedent. The Court of Appeals, Division I, reversed and remanded for an Order compelling arbitration, failing to apply binding Washington Supreme Court precedent. Thus, Petitioner-Plaintiffs request this Court to review whether the Court of Appeal erred:

1. By failing to find substantively unconscionable an arbitration agreement that (1) covertly and unilaterally forces employee-Plaintiffs and putative class members to arbitrate their claims against Defendants while exempting Defendants from arbitration; (2) limits employee rights to statutory damages, without limitation to Defendants; (3) limits employees' right to statutory attorney fees; (4) forces employees to arbitrate their claims confidentially while unilaterally allowing Defendants a public jury trial; (5) forces employees to bear half the costs of arbitration for their claims while multi-billion dollar Defendants have access to a relatively free public court; and, (6) forces non-party employees to arbitrate suits against each other.

2. When it concluded that, even if the provisions were unconscionable, they could be severed where here at least six unconscionable provisions pervade the Addendum, severing them significantly alters it, and Defendants unconscionably exempted

themselves from arbitration with hidden provisions, requiring the entire Addendum be voided making it impossible to sever.

3. By allowing Defendants to waive enforcement of an unconscionable confidentiality provision only after Defendants lost on the issues at the trial court level, which ignores this Court's ruling in *Gandee v. LDL Freedom Enters., Inc.*, 117 Wn.2d 598, 608, 293 P.3d 1197 (2013), which expressly rejected this type of waiver in arbitration since it rewards and encourages employers to draft unconscionable agreements.

4. When it held that the Arbitration Addendums at issue in this case were not procedurally unconscionable when the provisions allowing employer-Defendants to seek unlimited relief from a jury were hidden in separate provisions of a 28 page document and denied employee-Plaintiffs a meaningful choice.

IV. STATEMENT OF THE CASE

A. Defendants fired Dr. Romney and Dr. Bauer for reporting unsafe clinical practices and for requesting payment of wages owed to themselves and other employees.

Dr. Romney, Dr. Bauer, and Dr. Childress were employed by Defendants and provided medical services at Defendants' Prompt Care facility. *CP 39, 75, 111.*[1] Plaintiffs excelled at their jobs, receiving no discipline, write-ups, or counseling, while being regarded by their peers and patients as outstanding medical providers. *CP 39-40, 75-76, 111.*

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

Defendants fired Dr. Romney and Dr. Bauer after they complained about another doctor's unsafe clinical practices and complained about Defendants not paying wages owed to themselves and to other physicians and medical providers. *CP 39-40, 75-76, 148.* Just prior to their terminations, Dr. Romney and Dr. Bauer had escalated their complaints and were told by Defendants' Human Resources that they would discuss their ongoing concerns regarding patient safety and unpaid compensation at an upcoming meeting. *CP 39-40, 76.* Two days before the meeting, however, Dr. Romney and Dr. Bauer were retaliatorily and preemptively fired for false reasons. *CP 156.*

Following their terminations, Dr. Romney and Dr. Bauer sued Defendants for retaliation and wrongful discharge in violation of Washington public policy and wage statutes. *CP 144-154.* All three Plaintiffs sued for unpaid wages under RCW 49.48 *et seq.* and 49.52 *et seq.*, individually and on behalf of a class of all other similarly situated physicians, physician assistants, ARNPs, and nurse-midwifes. *Id.*

B. Defendants forced Plaintiffs to sign unconscionable Arbitration Addendums as part of their employment agreements, misleadingly hiding the provisions that allowed Defendants to unilaterally retain their right to a jury.

Dr. Romney's and Dr. Bauer's employment with Defendants, including Franciscan Medical Group ("FMG"), was governed by a 28 page June 2011 "FMG Physician Employment Agreement," they were forced to sign, while Dr. Childress' was similarly required to sign a January 2012 "FMG Professional Provider Agreement." *CP 39, 45-71, 73,*

75, 81-107, 109, 111, 116-136, 215-216, 224, 228-229. The Agreements were presented as non-negotiable and submitted on a take it or leave it basis. *CP 215-216, 224, 228-229.* Sections of the Agreements allowing Defendants to retain their unlimited right to a jury trial were hidden from Plaintiffs in two sections separate from the Addendum. *CP 66-67, 102-103, 122-123.* Plaintiffs never intended to waive their right to an affordable forum or limit their rights and remedies should any disputes against their employers arise. *CP 40, 77, 112.*

1. The Addendum forces employees to arbitrate their claims while Defendants have the right to pursue unlimited relief against employees in front of a jury.

The Addendum and accompanying provisions in the Employment Agreements contain at least six unconscionable terms, which unilaterally force Plaintiffs and other employees to arbitrate their claims against Defendants and severely limits their ability to obtain damages, attorney fees, or bring their cases in an affordable, public forum. Misleadingly, the Addendum falsely appears to allow exceptions to mandatory arbitration for claims relating to Defendants' Peer Review Policy, worker's compensation claims, or health benefits. *CP 63.* However, legally employers are immune from suit for Peer Review or workers compensation claims. 42 U.S.C. § 11111 *et seq.* (making employers/peer review committees immune from suit for Peer Review actions); RCW 51.04.010 (abolishing lawsuits for workers compensation claims). And in the case of health benefits, those claims generally relate to third parties who are not parties to the arbitration agreement. Thus, this misleading

Addendum does not allow Plaintiffs to bring any claims against Defendants in front of a jury.

Importantly, while the Addendum purports to apply to both Defendants and employees, hidden in two separate places in the Agreement, FMG retains for itself the right to seek unlimited relief in court. *CP 66-67, 102-103, 122-123.* Indeed, the "FMG Specific Provisions" expressly allow Defendants to file a public lawsuit and demand a jury trial without any limitation as to relief:

> FMG shall be entitled to injunctive and other equitable relief, including specific performance, in case of any such breach or attempted breach, **in addition to such other remedies as may exist at law** . . . **The parties consent to exclusive jurisdiction and venue in the state and federal courts** sitting in County of Pierce, State of Washington.

CP 67, 103.

Similarly, Exhibit F ("Non-Competition and Non-Solicitation") of Dr. Romney's and Dr. Bauer's Agreements allows Defendants to seek relief against employees "in addition to any other remedy it may have in law or equity" in any "court of competent jurisdiction." *CP 66, 102.* FMG is also able to unilaterally bring claims for broad relief against Dr. Childress in a "court of competent jurisdiction." *CP 123.* As noted above, there are no similar provisions allowing Plaintiffs to initiate lawsuits in court. *CP 45-71, 81-107, 116-136.*

2. The Arbitration Addendum limits Plaintiffs' right to seek damages.

The Addendum unilaterally strips employees of damages and attorney fees and costs they are entitled to under Washington law, while simultaneously allowing Defendants to seek any and all relief against their employees. The Addendum prohibits awarding employees punitive, exemplary, consequential, or incidental damages unless such damages are *required* by law. *CP 63, 99, 135.* Similarly, in violation of RCW 49.48, 49.52, and common law and public policy, the Addendum only allows employees to recover attorney fees and costs if such an award is *required* by law, a standard prone to arbitrator mischief. *Id.*

In contrast, the preceding sentence of the Addendum states that "no arbitrator shall have the power to alter you at-will employment . . . except as *provided* by law," thus, highlighting that "punitive, exemplary, consequential or incidental damages" and attorney's fees and costs should not be awarded unless "*required* by law." In addition, Defendants hide two provisions allowing them any and all "**remedies available** to it under this Agreement or applicable law" in court. Thus, unlike Plaintiffs, Defendants may obtain any relief "provided" and "available," even if such relief is not "required" by law.

3. The Arbitration Addendum forces Plaintiffs to bear the costs of arbitration unless they can "prove" those costs would prevent them from pursuing a claim.

The Addendum also forces employees to bear half the costs of arbitration—an expense that far exceeds any costs the employees would

pay to pursue their claims in court. *CP 63, 99, 135.* Plaintiffs produced uncontested evidence that arbitration will carry an estimated cost in the six figures. *CP 139-140.* Unrebutted declarations prove this will significantly deter Plaintiffs from pursuing their claims. *CP 40-41, 77, 112, 140-141.*

4. The Arbitration Addendum forces Plaintiffs to confidentially arbitrate their claims.

The Addendum forces secrecy on Plaintiffs, tilting the scales in favor of Defendants and hiding a pattern of retaliation and unsafe practices from the public and other Plaintiffs. The Addendum forces arbitration "under the most current version of the American Arbitration Association's National Rules for the Resolution of Employment Disputes." *CP 63, 99, 135.* The AAA's Rules mandate that "[t]he arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." *CP 160.* Contrary to their assertion at the Court of Appeals, Defendants did not agree to waive confidentiality until after they lost at the trial court, unnecessarily forcing Plaintiffs to litigate this issue when confidentiality is unconscionable under this Court's prior rulings.

5. The Arbitration Addendum forces Plaintiffs to arbitrate any claims against other employees.

Finally, the Addendum forces Plaintiffs and other employees to arbitrate claims against each other including those FMG employees who have never entered into such agreements with each other. *CP 63, 99, 135.* As written, any disputes between Defendants' employees must be

arbitrated (e.g., a car accident between two FMG employees while employed).

C. The Court of Appeals erroneously reversed the Superior Court Order voiding the Arbitration Addendum as unconscionable.

Plaintiffs moved the Superior Court to strike the Addendum as unconscionable, and Defendants cross-moved to compel arbitration. *CP 12-37, 169-189.* On January 24, 2014, the Superior Court issued an oral ruling striking the Addendum as unconscionable for multiple reasons, including that "the contract is overly one-sided...patently unfair and harsh." *RP 31:17-19.* The court also found that the unconscionable provisions in the Addendum could not be severed and therefore the Addendum as a whole was unconscionable and void. *RP 31: 16-32:4.*

Defendants appealed to the Court of Appeals, Division I, which issued its opinion on February 17, 2015 reversing the trial court's ruling. In so doing, the Court ignored Washington Supreme Court precedent and held that the Addendum and the majority of the contested provisions are not unconscionable or could be severed, while also finding that the confidentiality issue is essentially moot because Defendants offered to waive it during appeal (only after the trial court held that confidentiality was unconscionable). The Court also erroneously held that the Addendum was not procedurally unconscionable. As explained below, however, the Court of Appeals' opinion misapplies and overlooks controlling Supreme Court precedent and is contrary to public policy. Plaintiffs therefore ask this Court to accept review of the Court of Appeals decision and reverse.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Addendum Plaintiffs were forced to sign in this case is the most one-sided arbitration agreement this Court has likely ever considered. Defendants drafted an arbitration agreement with hidden provisions within the employment contract that actually exempt the employers from arbitration. In contrast, Plaintiffs must confidentially arbitrate all claims, with substantial limitations to statutorily mandated employee remedies. Virtually the same terms and provisions have been found unconscionable by this Supreme Court.

Moreover, recent binding Washington Supreme Court precedent has held that virtually identical provisions applying to arbitration agreements as those at issue here were substantively unconscionable and voided the arbitration agreements. *See Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d598, 608, 293 P.3d 1197 (2013); *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008). Despite clear authority from this Court, the Court of Appeals failed to apply the law, found that any potentially unconscionable provisions could be severed, and that Defendant could waive certain unconscionable claims on for the first time on appeal. The Court of Appeals decision conflicts with binding Washington Supreme Court cases and should be reversed. RAP 13.4(b)(1).

In addition, by pretending to agree to mutual arbitration while hiding unconscionable provisions that reserved Defendants' right to a jury trial, Defendants unfairly attempt to curtail the rights of employees to a

fair and affordable public trial while Defendants retain the right for themselves to sue employees for all available relief in an affordable and public court. The Court of Appeals decision encourages employers like Defendants to draft monstrously harsh and one-sided employment agreements they know will discourage, and in some cases preclude employees from pursuing their rights, undermining the purpose of these laws. As such, this case involves an issue of substantial public interest under RAP 13.4(b)(4).

A. Under binding Supreme Court holdings, the Arbitration Addendum is one-sided and substantively unconscionable.

This Court has repeatedly held that a term in an arbitration agreement "is substantively unconscionable where it is 'one-sided or overly harsh...'" *Gandee*, 176 Wn.2d at 603, *quoting Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004); *see also Hill*, 179 Wn.2d at 55 (same); *Zuver v. Airtouch Communications*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004). In *Zuver*, the Court held that arbitration provisions that appear on their face to be bilateral are in fact unconscionable if they would have the impermissible *effect* of being overly one-sided. 153 Wn.2d at 318-319. The Court clarified that it was "not concerned here with whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so 'one-sided' as to render it patently 'overly harsh' in this case." *Id.* at n. 16.

Given this clear law, courts hold that arbitration provisions are unfairly one-sided and unenforceable if they allow an employer to institute

lawsuits against employees, while forcing employees to arbitrate their claims against the employer. In *Ingle v. Circuit City Stores, Inc.*, the Ninth Circuit held that "it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee." 328 F.3d 1165, 1173 (9th Cir. 2003)[2]; *see also Luna v. Household Fin. Corp. III,* 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002).

Here, Defendants admitted at the Court of Appeals that despite the Addendum, the 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.'" Appellants' Opening Brief at 20. Importantly, and contrary to the Court of Appeals' analysis, these provisions specifically allow Defendants to also pursue "**other remedies as may exist at law"** in court and are not limited to equitable relief. Thus, the Addendum seeks to impose a one-way arbitration obligation that only applies to Plaintiffs, while the "exclusive jurisdiction" for Defendants' claims lies in the state and federal courts. This is monstrously one-sided and unconscionable.

Disturbingly, Defendants (the drafters) actually concealed the clauses exempting themselves from arbitration in different sections of the Employment Agreements. *CP 66-67, 102-103, 122-123.* In *McKee*, this

[2] While the Ninth Circuit was evaluating the arbitration clause under California law, California applies a nearly identical standard when determining whether a contract is substantively unconscionable – whether it is "so one sided as to shock the conscience." *Ingle*, 328 F.3d at 1172.

Court struck down an arbitration agreement where a clause ***outside of the arbitration agreement*** granted AT&T a one-sided right not present in the arbitration agreement itself. 164 Wn.2d at 400. The Court held that this unilateral right (to collect fees) was unconscionable and, combined with three other unconscionable provisions, struck the arbitration agreement. *Id.* at 400, 402-03.[3] It violates Washington law and public policy to disregard provisions that unilaterally grant Defendants the substantive and fundamental right to a jury trial, especially when Defendants strategically concealed these provisions in separate sections of the Agreement.

B. The Addendum is unconscionable because it limits employees' right to collect damages and attorney fees

Under *Hill*, provisions in a contract limiting a party's right to recover damages and attorney fees are substantively unconscionable. Under the Addendum, Plaintiffs are limited in their ability to recover both. Indeed, Plaintiffs cannot recover "exemplary, consequential or incidental damages" *unless* awarding such damages is "***required***" by law. *CP 63, 99, 135.* Similarly, "each party *shall* bear his/her own attorneys' fees and other costs" "except as otherwise ***required*** by law." *Id.* Likewise, in *Adler*, the Court stated that arbitration provisions requiring parties to "bear their own respective costs and attorneys fees" undermine plaintiffs' statutory right to collect fees, and are therefore "substantively unconscionable." *Adler*, 153 Wn.2d at 355.

[3] The provision at issue was contained in Section 3 of the contract, entitled "INDEMNIFICATION," whereas the arbitration provision was contained in Section 7 of the contract. 164 Wn.2d at 400.

The Court of Appeals completely ignored *Hill*, failing to recognize that this Court has already found that this exact type of limitation on relief is "prone to mischief" and unconscionable. 179 Wn.2d at 56, n. 4. In *Hill*, an arbitration agreement stated that plaintiffs could not recover damages they would otherwise be entitled to, unless those damages were "specifically ***mandated*** by federal or state statute or law." 179 Wn.2d at 56. Because "mandate" and "require" are synonyms, this is essentially identical to the language in this Addendum, which prohibits awarding employees "exemplary, consequential or incidental damages" *unless* awarding such damages is "***required***" by law. *CP 63, 99, 135.*[4] In *Hill* this Court stated that such language, which prohibits damages unless mandated/required by law, "curb[s] what an employee could recover" and is unconscionable, reasoning that limiting an employee's ability to recover damages "mandated" by law was too equivocal and "prone to mischief." 179 Wn.2d at 56, n. 4.

Under *Hill*, it does not matter that the Addendum states fees may be awarded if "mandated/required" by law – it is prone to mischief, especially when applied in arbitration, which is unchecked by appellate courts. As this Court found in *McKee*, under a similar limitation on attorney's fees, "[i]f an arbitrator awarded even once cent less than the amount... requested (which arbitrators often do in attempting to find a

[4] See http://www.merriam-webster.com/dictionary/mandate, which in fact defines the verb "mandate" as "to officially require "something." *See also Bellevue School Dist. No. 405 v. Bentley*, 38 Wn. App. 152, 158, 684 P.2d 793 (1984) (terms in contracts are given their ordinary dictionary definition).

compromise), the attorney fees would not be available." *McKee*, 164 Wn.2d at 400. Such a limit "is substantively unconscionable." *Id.*

C. The Addendum is unconscionable under Hill v. Garda because it forces employees to pay half the costs of arbitration.

Requiring Plaintiffs to bear half the arbitration costs is substantively unconscionable. *See Hill*, 179 Wn.2d at 56-57; *Adler,* 153 Wn.2d at 353; *Gandee*, 176 Wn.2d at 605. Such a requirement is unconscionable when plaintiffs produce information explaining how such costs would prohibit them from pursuing claims. *Hill*, 179 Wn.2d at 57.

Here, Plaintiffs produced uncontested evidence that arbitration will carry an estimated cost in the six figures. *CP 139-140.* Requiring Plaintiffs to absorb half those costs would deter the three named Plaintiffs from bringing claims against Defendants. *CP 40-41, 77, 112, 140-141.* To require Plaintiffs to pay for these significant fees would significantly discourage victims of Defendants' unlawful practices from seeking relief.

D. The Addendum is unconscionable under *McKee* and *Zuver* because it forces employees to arbitrate their claims confidentially.

This Court explained in *McKee* that confidentiality blatantly benefits defendant-corporations while hampering plaintiffs:

> Secrecy conceals any patterns of illegal or abusive practices. It hampers plaintiffs in learning about potentially meritorious claims and serves no purpose other than to tilt the scales in favor of [the corporation]. It ensures that [the corporation] will accumulate a wealth of knowledge about arbitrators, legal issues, and tactics. Meanwhile, [individuals] are prevented from sharing discovery, fact patterns, or even work product, such as briefing, forcing them to reinvent the wheel in each and every claim, no matter how similar.

McKee, 164 Wn.2d at 398.

This is particularly true in the employment context, where requiring confidentiality in an arbitration agreement "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations." *Zuver*, 153 Wn.2d at 315. "[K]eeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim." *Id.*

Here, because intentional acts by Defendants against other employees are relevant and admissible to show motive or intent in Dr. Romney's and Dr. Bauer's wrongful discharge claims and to prove the intentional withholding of wages, it would be unconscionable to cloak such information in confidential proceedings. *Zuver*, 153 Wn.2d at 314. It is especially unconscionable here, where Defendants granted themselves the unilateral right to sue their employees in a public court of law.

As noted above, Defendants claimed to "waive" confidentiality, but not until the trial court had already voided the Addendum. Under *Gandee*, Defendants cannot "moot" this issue by "offering" to comply with court orders that have already stricken the confidentiality provision. In *Gandee* this Court held that companies cannot draft unconscionable provisions in arbitration agreements and then "offer" to waive the provisions on appeal, after they are found unconscionable. *Gandee*, 176 Wn.2d at 608. By the time a provision has been held unconscionable "[the company] has no choice but to 'waive'" the provision. *Id.* As the Court

stated, "[s]trong reasons exist for encouraging contracts to be conscionable at the time they are written." *Id.* Letting companies waive unconscionable provisions after-the-fact in an attempt to moot a challenge to the arbitration agreement:

> ...would encourage rather than discourage one-sided agreements and would lead to increased litigation. Any other approach is inconsistent with the principle that contracts—especially the adhesion contracts common today—should be conscionable and fairly drafted.

Id. at 608-09.

The Court of Appeals acknowledged that despite Defendants' claims to the contrary, they never offered or agreed to waive the confidentiality provision at the trial court, only doing so after the trial court concluded the Addendum was unconscionable. Opinion at 13. Nevertheless, the court blatantly ignored *Gandee*, not even citing to it, and found that the confidentiality clause was not unconscionable because Defendants could have waived it under the terms of the Addendum. This is exactly what *Gandee* forbids. Defendants cannot save unconscionable provisions unless they *actually* waive them prior to attempting to enforce them at the trial court. Here, Defendants made a strategic decision to try and enforce the unconscionable confidentiality provision and lost. Under *Gandee* they cannot waive the provision on appeal in order to save it.

E. The Addendum is unconscionable because it forces employees to arbitrate with coworkers who are not parties to the Addendum.

"[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Hill*, 179 Wn.2d at 53. Requiring

Plaintiffs and Class Members to submit any and all claims they may have against any of Defendants' employees to arbitration regardless of whether such claims relate to their employment is unconscionable. These employees never signed a contract with each other to arbitrate, and Defendants have no legitimate interest in forcing them to arbitrate claims against each other that, including claims that are completely unrelated to their employment. This provision is also substantively unconscionable.

F. The Addendum must be voided in its entirety because the unconscionable provisions pervade the Addendum.

Where severing unconscionable clauses would "significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause," severance is improper and the entire arbitration provision should be deemed void. *Gandee*,176 Wn.2d at 607. *See also Adler,* 153 Wn.2d at 358 (where unconscionable terms "pervade" an arbitration agreement, Washington courts regularly "refuse to sever those provisions and declare the entire agreement void."); *McKee*, 164 Wn.2d at 402-403; *Hill*, 179 Wn.2d at 55-58.

In *Hill,* the Court found only three provisions substantively unconscionable. *Hill*, 179 Wn.2d at 53-57. The Court held that "severing these clauses significantly alters both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause," and accordingly invalidated the entire arbitration clause. *Id.* at 58 (*quoting Gandee,* 176 Wn.2d at 607). In *McKee*, the Court invalidated an entire arbitration agreement based on only four unconscionable provisions. *McKee*, 164

Wn.2d at 402-403. Allowing severability when a contract is permeated with unconscionable provisions promotes abusive practices:

> Permitting severability . . . in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.

Id.

Contrary to this authority, the Court of Appeals held that provisions it identified as potentially unconscionable could simply be severed and/or not enforced. This, however, completely changes the contract, entirely altering which parties must arbitrate. The unconscionable provisions cannot be severed without "alter[ing] both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause." *Hill*, 179 Wn.2d at 58. Severing the six unconscionable provisions here would reward Defendants for overreaching and encourage companies to continue creating monstrously one-sided arbitration agreements with no threat of deterrence. The Addendum must be invalidated entirely.

G. The Arbitration Addendum is procedurally unconscionable.

Procedural unconscionability occurs when one party to a contract lacks "meaningful choice" in the negotiation and formation of that contract. *Zuver*, 153 Wn.2d at 304. This lack of choice may be revealed by the "manner in which the contract was entered," whether a party had "a reasonable opportunity to understand the terms of the contract," and when

important contract terms are hidden (like in "a maze of fine print"). *Id.* Even when these three factors do not reveal a lack of "meaningful choice," however, an arbitration agreement may still be procedurally unconscionable if it contains "procedural surprise," meaning the drafting party structured the contract in an unclear and deceptive manner. *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 267, 306 P.3d 948 (2013).

Here, Plaintiffs had no "meaningful choice" and were never given a chance to negotiate the terms of the Employment Agreements (including the Arbitration Addendum). In fact, Dr. Childress was specifically told that she could ***not*** negotiate the terms. *CP 215-216, 224, 228-229.* Dr. Romney and Dr. Bauer were threatened that Defendants would fire them and seek money from them if they did not quickly sign the Agreements. *Id.* Importantly, Defendants created a one-way arbitration agreement by hiding clauses that allowed them full relief in front of a jury for claims against their employees in separate sections of the Agreement, making the agreement unseverable. Plaintiffs never intended to waive their substantive rights to a jury trial while Defendants maintained for themselves the right to sue Plaintiffs publicly in an affordable forum in front of a jury. Defendants concealed these provisions outside the Addendum making it both procedurally and substantively unconscionable.

VI. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse the Court of Appeals, void the Arbitration Addendum, and remand this case back to the trial court.

DATED this 16th day of April, 2015.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that, on the below date, I caused delivery of a true copy of this document to the following:

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL ROMNEY; FARON BAUER; and KRISTEN CHILDRESS, individually and on behalf of all other similarly situated,	)	No. 71625-5-I
Respondents,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
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,	)	FILED: February 17, 2015
Appellants.	)	

TRICKEY, J. — Washington has a strong public policy favoring arbitration. Because of that clear policy, an employer-employee arbitration agreement will be upheld even if certain provisions of the agreement are substantively unconscionable so long as those provisions are severable.

The arbitration agreement allows plaintiff-employees to seek damages claimed as well as any attorney fees and costs "as required by law." The arbitration agreement at issue here is neither procedurally nor substantively unconscionable.

The employees' assertion that the agreement is substantively unconscionable because other sections of the employment contract permit the employer to seek limited judicial relief without affording the employees that same option is not well taken. Even

assuming the provisions the employees assert were unconscionable, those provisions are severable and do not impact the underlying agreement to arbitrate.

We reverse the trial court's determination that the arbitration agreement was invalid and remand to compel arbitration.

FACTS

Plaintiffs/Respondents Michael Romney, M.D., Faron Bauer, M.D., and Kristen Childress, A.R.N.P.[1] are former employees of Defendant/Appellant Franciscan Medical Group (FMG). Each entered into an employment contract with FMG that included agreements to arbitrate all employment related disputes between the parties. The employees brought suit against FMG for damages, statutory penalties, and equitable relief for wage violations on behalf of themselves and the class of physicians, medical assistants, and nurse practitioners. Romney and Bauer brought individual claims for being fired in retaliation for whistle-blowing and for losing their hospital privileges.

Romney, Bauer, and Childress filed suit in King County Superior Court and at the same time requested the court to find the arbitration agreement signed by each of the parties to be unconscionable. FMG moved to compel arbitration. The trial court found the arbitration addendum unconscionable, invalidated it, and denied FMG's motion to compel arbitration. FMG timely appeals.

ANALYSIS

The arbitration agreement provides that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, governs. Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as

[1] Childress has a doctorate in nursing practices and was hired as an Advanced Registered Nurse Practitioner. Clerk's Papers (CP) at 111.

exist at law or in equity for the revocation of any contract." The effect of this section is to create a body of substantive federal law on arbitration that state and federal courts must apply to arbitration agreements that fall under the FAA's coverage. Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987). Courts must indulge every presumption in favor of arbitration under the FAA. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), superseded on other grounds by 9 U.S.C. § 16(b)(1).[2]

Washington has a similar strong policy favoring arbitration. RCW 7.04A.060; Adler v. Fred Lind Manor, 153 Wn.2d 331, 342, 103 P.3d 773 (2004). This policy does not, however, lessen this court's responsibility to determine whether the arbitration contract is valid. Hill v. Garda CL Nw., Inc., 179 Wn.2d 47, 53, 308 P.3d 635 (2013). The agreement to arbitrate is a contract, the validity of which courts review absent a clear agreement to not do so. Hill, 179 Wn.2d at 53. Whether or not a contract is unconscionable is a preliminary question for judicial consideration.

This court reviews de novo a trial court's decision to compel or deny arbitration. Gandee v. LDL Freedom Enters., Inc., 176 Wn.2d 598, 602, 293 P.3d 1197 (2013); Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). The burden of demonstrating that an arbitration agreement is not enforceable is on the party opposing the arbitration. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

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[2] Under the FAA, an employer-employee arbitration agreement may be enforced in state court. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) (only transportation workers exempt from FAA); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (broad reach of FAA to contracts "evidencing a transaction involving commerce" constitutional under Commerce Clause).

Washington recognizes two types of unconscionability for invalidating arbitration agreements, procedural and substantive. McKee v. AT & T Corp. 164 Wn.2d 372, 396, 191 P.3d 845 (2008). Procedural unconscionabilty applies to impropriety during the formation of the contract; while substantive unconscionabilty applies to cases where a term in the contract is alleged to be one-sided or overly harsh. Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). Either is sufficient to void the agreement. Hill, 179 Wn.2d at 55.

Procedural Unconscionability

To determine whether an agreement is procedurally unconscionable, we examine the circumstances surrounding the transaction, including (1) "'the manner in which the contract was entered,'" (2) "'whether each party had a reasonable opportunity to understand the terms of the contract,'" and (3) "'whether the important terms were hidden in a maze of fine print,'" to determine whether a party lacked a meaningful choice. Nelson, 127 Wn.2d at 131 (internal quotation marks and alterations omitted) (quoting Schroeder v. Fageol Motors, Inc., 86 Wn.2d 256, 260, 544 P.2d 20 (1975)).

The employees argue that the agreement is procedurally unconscionable because they had no meaningful choice in negotiating and signing the contract. Romney's declaration asserts that he was never informed that he could negotiate any terms of either the employment agreement or arbitration addendum. In fact, he says that he was "strong-armed" because he was told that he could not work without a contract.[3] Bauer's declaration states that he knew of another physician who refused to sign the employment agreement and was no longer employed by FMG. Childress's declaration asserts that she attempted to negotiate both the wages and non-compete

[3] CP at 215.

clauses, but was informed that the contract was not modifiable. FMG presented each employee with the contract and asserted that it "is what it is."[4]

A contract is "procedurally unconscionable" when a party with unequal bargaining power lacks a meaningful opportunity to bargain, thus making the end result an adhesion contract. Adler, 153 Wn.2d at 348. Romney, in effect, is arguing that the agreement here is an adhesion contract. In determining whether a contract is one of adhesion, the court in Adler noted that the following factors require analysis:

> "(1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a take it or leave it basis, and (3) whether there was 'no true equality of bargaining power' between the parties."

153 Wn.2d at 347 (internal quotation marks omitted) (quoting Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993). The fact that a contract is an adhesion contract is relevant but not determinative. Zuver, 153 Wn.2d at 306-07. An adhesion contract is not necessarily procedurally unconscionable. Adler, 153 Wn.2d at 348. The key inquiry is whether the party lacked meaningful choice. Zuver, 153 Wn.2d at 305.

In Zuver, our Supreme Court found that an adhesion contract of employment was not procedurally unconscionable when the employee's argument rested solely on a lack of bargaining power. The court stated that more was needed:

> 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.

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[4] CP at 215.

153 Wn.2d at 306-07.

Here, the arbitration clause was not buried in fine print. The employees' reliance on Brown v. MHN Gov't Servs., Inc. (MHN), 178 Wn.2d 258, 306 P.3d 948 (2013), is misplaced. Applying California law, the Brown court found that procedural surprise was present because the arbitration agreement lacked clarity as to which set of American Arbitration Association (AAA) rules governed the arbitration. In Brown, the employer, MHN, itself, changed its positions several times over which set of AAA rules applied. Further, the Brown court noted that California had ruled that procedural unconscionability may exist where rules are referenced but not attached to the arbitration agreement. 178 Wn.2d at 268 (citing Harper v. Ultimo, 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418 (2003)).

No such change of position or lack of clarity is present here. It is merely that these are the terms of employment, which is permitted in Washington. See also Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1175 (W.D. Wash. 2002) ("Plaintiffs must demonstrate more than that the Arbitration Rider is an adhesion contract to support a finding that it is procedurally unconscionable."). Notably, here, the employees signed multiple employment contracts that contained the arbitration agreement addendum.

The employees cite California cases holding that where an agreement to arbitrate is identified as a condition of employment, as here, the court has found them to be procedurally unconscionable. Jackson v. TIC—The Indus. Co., 2014 WL 1232215, at *6 (E.D. Cal. 2014):

> In any event, because the agreement to arbitrate was clearly identified as a condition of employment with TIC, the Court finds this

> evidence of procedural unconscionability. See Armendariz [v. Found. Health Psychcare Serv., Inc.], 24 Cal.4th [83,] 114-15, 99 Cal. Rptr. 2d 745, 6 P.3d 669 [(2000)]; Martinez v. Master Protection Corp., 118 Cal. App. 4th 107, 12 Cal. Rptr. 3d 663 (2004) (finding an arbitration agreement procedurally unconscionable because it was a prerequisite of employment and the employee did not have an "opportunity to negotiate or refuse to sign the arbitration agreement").

The Jackson court noted that even where a term is found to be a contract of adhesion it "'only indicates that the agreement is somewhat procedurally unconscionable, not that it is unenforceable.'" 2014 WL 1232215, at *6 (quoting Naria v. Trover Solutions, Inc., 967 F. Supp. 2d 1332 (N.D. Cal. 2013). The court further noted:

> Here, Plaintiffs received the arbitration agreement in conjunction with their applications for employment, as well as in TIC's "Jobsite and Drug and Alcohol Policies" document. It is noteworthy also that each Plaintiff applied to and worked for TIC more than once and each time signed the application form with the above provisions and at least one time, but in some cases many times, signed the acknowledgment on the policies document indicating he/she had read the arbitration terms contained in the policies document and in the application and agreed to arbitrate claims related to the employment. . . . Given these circumstances, the suggestion that Plaintiffs were deprived by TIC of the ability to review or understand the arbitration agreement every single time they agreed to be bound by the arbitration agreement, is hard to accept.

2014 WL 1232215, at *6. The court found the agreement unconscionable only to a moderate degree.

Romney's reliance on these California cases is misplaced. California, unlike Washington, requires both procedural and substantive unconscionability to overturn an arbitration agreement. Because of this, California is more likely to find procedural unconscionability without also finding such procedure to be egregious. In other words, procedural and substantive unconscionability need not be present in the same degree and are considered on a sliding scale. Malone v. Superior Court, 226 Cal. App. 4th 1551, 1561, 173 Cal. Rptr. 3d 241 (2014); see also Ajamian v. CantorCO2e, LP, 203

Cal. App. 4th 771, 795-96, 137 Cal. Rptr. 3d 773 (2012) (without a showing of oppression or surprise the measure of procedural unconscionabilty is low and will be enforced unless the degree of substantive unconscionabilty is high).

Other states reviewing these so called adhesion employment contracts have found no procedural unconscionability. See, e.g., Melena v. Anheuser-Busch, Inc., 219 Ill.2d 135, 152, 847 N.E.2d 99, 109 (2006) (rejecting appellate court's finding that an agreement offered on a "take it or leave it" basis was unenforceable); Motsinger v. Lithia Rose-FT, Inc., 211 Or. App. 610, 615, 156 P.3d 156, 160 (2007) (arbitration agreement not product of deception or compulsion even though presented as a "take-it-or-leave-it" contract; it is nothing more than a showing of unequal bargaining power).

The key inquiry under Washington law is whether the employees lacked a meaningful choice. Here, as in other cases of employment, the employees could choose employment elsewhere. The arbitration clause is understandable and is printed in the same size font as the rest of the agreement under a bolded heading.

Romney's contention that employees had no time to consider the contract is not well taken, where, as here, the employees signed multiple employment agreements which contained the arbitration addendum. All three employees had a meaningful choice in entering the employment agreement.

Substantive Unconscionability

Substantive unconscionabilty exists when a provision in the contract is one-sided. Adler, 153 Wn.2d at 344. In determining if a contractual provision is one-sided or overly harsh, courts look at whether the provision is "'[s]hocking to the conscience,' 'monstrously harsh,' and 'exceedingly calloused.'" Adler, 153 Wn.2d at 344-45 (internal

quotation marks omitted) (quoting Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)). The terms of the agreement here are not so one-sided as to be labelled substantively unconscionable. In fact, the terms contained within the four corners of the arbitration agreement itself are mutual. Rather, the employees argue that the court should look to all provisions in the contract, including those outside the arbitration obligation to determine whether the agreement is one-sided.

Injunctive and Equitable Relief

The employees contend that the agreement to arbitrate is overly harsh because it requires employees to arbitrate all claims but allows FMG to seek limited relief in court. The employees cite to two exhibits in the contract: Exhibit F, entitled "**NON-COMPETITION AND NON-SOLICITATION**," and Exhibit G, entitled "**FMG SPECIFIC PROVISIONS**" of the employment contract, which permit FMG to seek injunctive relief and other remedies from a court of competent jurisdiction.[5] Exhibit F provides:

> Injunctive Relief. The parties agree that damages are an inadequate remedy for, and that FMG would be irreparably harmed by, any breach of this Exhibit F and that in addition to any other remedy it may have in law or equity, FMG shall be entitled to an immediate injunction or other appropriate order to restrain any breach thereof without the necessity of showing or proving any actual damage sustained thereby. The parties further agree and stipulate that the deposit in court of the sum of one hundred dollars ($100.00) shall constitute sufficient undertaking in lieu of a bond in order to obtain such an injunction or restraining order, and that said deposit is not a reflection of or an attempt to predict damages.

Exhibit G provides:

> Equitable Relief. The parties acknowledge and agree that, since a remedy at law for any breach or attempted breach of all the provisions of this Agreement shall be inadequate, FMG shall be entitled to injunctive and other equitable relief, including specific performance, in case of any such breach or attempted breach, in addition to such other remedies as may exist at law. The parties waive any requirement for the securing or

[5] CP at 66-67.

> posting of any bond in connection with the obtaining of any injunctive or other equitable relief. The parties consent to exclusive jurisdiction and venue in the state and federal courts sitting in County of Pierce, State of Washington and waive any objection to the jurisdiction of, or the venue of any action instituted in, such courts.

The employees argue that while the contract requires both parties' claims in these circumstances be arbitrated, the employment contract retains FMG's right to seek injunctive relief from a court of competent jurisdiction. Addressing an arbitration agreement involving a claim of substantive unconscionabilty, our Supreme Court stated: "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." Zuver, 153 Wn.2d at 317. Rather, as the Zuver court also stated, it is "the effect of [an] arbitration provision" that determines whether it "is so one-sided and harsh that it is substantively unconscionable." 153 Wn.2d at 317 n.16, 318. In short, substantive unconscionabilty does not concern "whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so 'one-sided' as to render it patently 'overly harsh.'" Zuver, 153 Wn.2d at 317 n.16 (quoting Shroeder, 86 Wn.2d at 256).

Neither of these clauses are at issue here. Nor do they impact the outcome of the current matter. Assuming without deciding that these clauses were unconscionable, they are easily severable from the agreement. The agreement itself provides 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."[6] Because severance is the usual remedy for allegations of unconscionable provisions, and the agreement itself provides for such severability,

[6] CP at 64.

courts are "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. As in McKee, we can easily give effect to the provisions of the arbitration agreement if the offending clauses were excised. 164 Wn.2d at 403. Unlike the cases cited by the employees, these provisions do not permeate the agreement.

Limitation of Right to Recover Exemplary Damages

Whenever an employer willfully and with intent to deprive an employee of any part of his or her wages, pays to that employee a lower wage than that which the employer is obligated to pay, the employee is entitled to exemplary damages of twice the amount of the wages unlawfully withheld. RCW 49.52.050(2), 070.

The arbitration agreement provides 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."[7] The employees argue that the arbitration agreement removes their ability to recover special damages as provided by the statute. They contend that the arbitration agreement's use of the word "required" somehow lessens the impact of "shall" as used in the statute. RCW 49.52.070.[8] We disagree. See, e.g., State ex rel. Linn v. Superior Court for King County, 20 Wn.2d 138, 154, 146 P.2d 543 (1944) (word "shall" is usually imperative or mandatory); BLACK'S LAW DICTIONARY (10th ed. 2014) ("shall" means has a duty to or more broadly is required to).

It is clear that the damages the employees seek are available under the statutes upon which their claims are based and as such would also be available under the arbitration agreement.

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[7] CP at 63.

Confidentiality

The employees contend the addendum is unconscionable under both McKee and Zuver because it requires employees to arbitrate their claims confidentially. The addendum incorporates AAA's National Rules for the Resolution of Employment Disputes. Those rules provide:

> 23. Confidentiality
>
> The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.

(Emphasis added.)

Confidential provisions in arbitration agreements have been upheld as an exception to the state constitutional requirement for public judicial proceedings. Barnett v. Hicks, 119 Wn.2d 151, 159, 829 P.2d 1087 (1992). Confidentiality provisions are routinely found in collective bargaining agreements. Zuver, 153 Wn.2d at 314 (citing Cole v. Burns Int'l Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997)).

In Zuver, the court found the confidentiality agreement unconscionable because

> [a]s written, the provision hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations. Moreover, keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus potentially discourages that employee from pursuing a valid discrimination claim.

153 Wn.2d at 315. In Zuver, the court found the confidentiality and remedies provisions in the employment contract to be substantively unconscionable because they excessively favored the employer and gave the employer significant legal recourse.

This is not the case here. Moreover, in Zuver, the court struck the unconscionable provisions rather than finding the entire agreement invalid. 153 Wn.2d at 322.

McKee involved a consumer dispute and the court found the policy of confidentiality to be in direct conflict with public policy, a policy particularly important when dealing with consumers. 164 Wn.2d 398-99.

Here, the confidentiality clause is not so one-sided because it provides for a release of confidentiality when the parties otherwise agree. FMG states it will agree to a release of the confidentiality if Romney prefers. FMG cites to the clerk's papers as evidence that it offered to waive the confidentiality provision but the record does not bear that out. Rather, FMG stated that it prefers confidentiality and will arbitrate on a non-confidential basis if required to do so by the court. However, FMG's briefing before this court states that "[d]efendants have offered to agree to non-confidential arbitration."[9] Even if the offer to release confidentiality was conditional below, FMG's briefing on appeal clearly indicates its consent to release confidentiality.

The employees equate FMG's agreement to agree to no confidentiality to a waiver of confidentiality and argue that such a waiver is not appropriate where the court finds the arbitration clause objectionable. But here, the arbitration clause is not objectionable. It permits the parties to agree to not apply the confidentiality clause and in fact prohibits such confidentiality where the law would prohibit it.[10]

The employees argue that other intentional acts by the defendants are relevant and admissible to show motive or intent. As such, those acts would be admissible under the rules of the AAA.

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[9] Appellant's Br. at 29.

[10] See, e.g., RCW 43.70.510(4) (documents maintained by quality improvement committee not subject to review or disclosure except as provided in certain civil actions).

Fee Sharing

The addendum provides:

> You and FMG shall equally share all costs of arbitration, including the fees of the American Arbitration Association and the appointed Arbitrator, unless you prove to the Arbitrator that the costs of the arbitration would effectively prevent you from pursuing your Claim; in that case FMG would bear all costs. 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.[11]

The employees contend that the addendum's fee-sharing provision is unconscionable under Hill v. Garda because it forces them to pay half the costs of arbitration. In Hill, the employees argued that similar provisos prevented employees from bringing claims in an arbitral forum because unions who represent the employees have no funds to pay for arbitration. 179 Wn.2d at 56. There, the provision required that "[t]he Union and the Company shall each pay one-half (1/2) of the fee charged by the arbitrator, the cost of the hearing room, the reporter's fee, per diem, and the original copy of the transcript for the arbitrator." Hill, 179 Wn.2d at 57. But this case and the other cases cited by the employees all involve mandatory fee splitting provisions.[12] Here, the arbitration clause specifically provides that where a plaintiff asserts that they cannot afford arbitration, FMG shall bear the costs of arbitration pending a determination by the arbitrator. The employees have made that claim so the arbitration will proceed with FMG bearing the costs until the arbitrator makes that determination.

Furthermore, the issue of affordability of arbitration has been addressed in several instances by this court and has been determined to be an issue that is "resolved

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[11] CP at 63.

[12] Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1261 (9th Cir. 2005); Luna v. Household Fin. Corp. III, 236 F. Supp.2d 1166, 1171-72 (W.D. Wash. 2002); Gandee, 176 Wn.2d at 602, 605; Adler, 153 Wn.2d at 338, 353; In re Checking Account Overdraft Litig., 685 F.3d 1269 (11th Cir. 2012).

case-by-case on the basis of specific, factual information rather than a per se rule." Walters v. AAA Waterproofing, Inc., 151 Wn. App. 316, 327, 211 P.3d 454 (2009).

The employees' contention that the agreement limits their right to recover attorney fees under the statute is without merit. The agreement specifically provides: "Except as otherwise required by law, each party shall bear his/her own attorneys' fees and other costs associated with any Claims between the parties."[13] Under any reading of that sentence, the employees would be entitled to attorney fees under RCW 49.52.070, which provides for an award of reasonable attorney fees and costs to a successful plaintiff-employee.

Parties Not Signatories

On appeal, the employees argue that the arbitration agreement attempts to bind other parties who are not signatories to the actual agreement. This was not addressed by the trial court below. However, for the sake of judicial economy, we address it here.

A party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document. Fisser v. Int'l Bank, 282 F.2d 231, 233 (2d Cir. 1960). Arbitration agreements may encompass non-signatories under contract and agency principles. Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006); Powell v. Sphere Drake Ins., P.L.C., 97 Wn. App. 890, 895, 988 P.2d 12 (1999). For arbitration purposes, employees are agents of the employer if the parties intended the agreement to apply to them or if the alleged liability arises out of the same misconduct alleged against the employer. McCarthy v. Azure, 22 F.3d 351, 357-58 (1st Cir. 1994).

[13] CP at 63 (emphasis added).

Where claims are based on the same set of facts and inherently inseparable, the court may order arbitration of claims against the party even if that party is not a party to the arbitration agreement. Townsend v. Quadrant Corp., 153 Wn. App. 870, 889, 224 P.3d 818 (2009), aff'd on other grounds by 173 Wn.2d 451, 268 P.3d 917 (2012).

Accordingly, we reverse the trial court and remand for an order compelling arbitration.

Trickey, J

WE CONCUR:

Schindler, J

Cox, J.

Appendix B

Exhibit 1

Unconscionable Provisions under Binding Supreme Court Precedent

EXHIBIT D
ARBITRATION ADDENDUM

NOTICE: This Arbitration Addendum ("Addendum") supplements and is made a part of the Physician Employment Agreement ("Employment Agreement") between Physician ("You") and FMG dated as of June 30, 2011. This Addendum requires You and FMG to arbitrate all Claims (as defined below) between You and FMG. This Addendum affects your rights to a trial by a jury. YOU MAY WISH TO SEEK LEGAL ADVICE BEFORE SIGNING THIS ADDENDUM.

Section 1: Definitions.

[redacted]

"Claims" means all disputes arising out of or related to the Employment Agreement, your employment by FMG, and/or your separation from employment with FMG. The term "Claims" includes, but is not limited to, any claim arising under the Employment Agreement, under federal, state or local law, under a statute such as Title VII of the Civil Rights Act of 1964, under a regulation or ordinance or under the common law, including but not limited to ANY CLAIM OF DISCRIMINATION, SEXUAL HARASSMENT, RETALIATION, NEGLIGENCE, UNPAID WAGES OR WRONGFUL DISCHARGE. "Claims" does not include disputes related to worker's compensation claims or health benefits. "Claims" also does not include, at the option of FMG, any claim by FMG against You based upon Your actions arising out of any claim against FMG by a third party brought in another legal proceeding and as to which FMG desires to join its claims against You into that third party proceeding. "Claims" also does not include claims that arise out of or are subject to matters covered by the FMG Peer Review Policy.

Section 2 Duty to Arbitrate and Arbitrator Authority.

By signing this Addendum, You and FMG each agree that all Claims between You and FMG, [redacted] shall be exclusively decided by arbitration governed by the Federal Arbitration Act before ONE NEUTRAL ARBITRATOR AND NOT BY A COURT OR A JURY. By signing this Addendum, You are waiving your right to a trial by jury. [redacted] and/or such other procedures as the parties agree to in writing. The NEUTRAL ARBITRATOR shall be selected through the American Arbitration Association, or as otherwise agreed to by the parties in writing. 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. [redacted] Federal law concerning evidentiary privileges shall be applied in all arbitration proceedings. All claims at common law shall be construed under the law of the state of Washington.

Section 3 Arbitration Procedure and Allocation of Costs and Fees.

Either You or FMG may initiate arbitration by delivering a written request to arbitrate to the other party listing the Claim(s) to be arbitrated. Requests to FMG shall be delivered Franciscan Medical Group, 1313 Broadway Street Ste. 200, Tacoma, WA 98402, Attn: President and Chief Medical Officer. Requests to You shall be delivered to your last known address on the books of FMG. [redacted] Unless otherwise agreed by the parties or ordered by the Arbitrator, the arbitration hearing shall take place in Tacoma, Washington. [redacted]

Section 4: Entire Agreement and Severability.

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"One-sided" arbitration obligation is unconscionable and void: *see Gandee*, 176 Wn.2d at 603; *Adler*, 153 Wn.2d at 344-45; *Hill v. Garda*, 179 Wn.2d at 55.

Arbitration obligation that appears bilateral but in practice is one-sided is void. *Zuver*, 153 Wn.2d at 318. *See also, McKee, Ingle & Luna.*

Must look at all provisions in contract, including those outside "arbitration section," to determine if arbitration obligation is one-sided. *See McKee*, 164 Wn.2d at 400 (Supreme Court struck arbitration agreement in part based on one-way fee shifting clause in separate section of the contract).

NOTE: see Exhibit 2, which exempts FMG from having to arbitrate claims it brings against employees.

Cannot force non-parties to the contract to arbitrate disputes: *see Hill v. Garda*, 179 Wn.2d at 53 (cannot force parties to arbitrate claims they have not agreed to arbitrate).

Cannot force employees to arbitrate confidentially (which is required under AAA Rules): *see Zuver*, 153 Wn.2d at 314-15 (confidentiality is unconscionable because it "hampers" employees' ability to prove their cases and "discourages" employees from pursuing "valid discrimination claim[s]"). *See also, McKee* 164 Wn.2d at 398, 399.

Cannot limit employee's right to recover exemplary/punitive damages or attorney fees/costs: *see Hill v. Garda*, 179 Wn.2d at 56; *Zuver*, 153 Wn.2d at 318 (can't limit exemplary/punitive damages); *Adler*, 153 Wn.2d at 355 (can't limit attorney fees/costs).

Unconscionable even if there is an exception for exemplary damages/fees that are "mandated" by law because such language could be used to limit employee rights and is "prone to mischief." *Hill v. Garda*, 179 Wn.2d at 56 n.4.

Cannot force employees to split arbitration costs and fees with employer: *see Hill v. Garda*, 179 Wn.2d at 56-57; *Adler*, 153 Wn.2d at 353; *Gandee*, 176 Wn.2d at 605.

When employee produces evidence that sharing arbitration costs would prohibit her from filing suit, cost-sharing must be struck as unconscionable. *Hill v. Garda*, 179 Wn.2d at 56-57. Here, Plaintiffs produced uncontested declarations that sharing arbitration costs would prohibit them from filing suit.

Cannot shift fees from employers to employees where law provides that only a prevailing employee can recover costs and fees, because that would be a "significant deterrent to employees" who would otherwise file suit to"vindicate their rights." *Brown*, 178 Wn.2d at 274. Also, under *Hill, McKee, & Gandee,* Plaintiffs have a statutory right to fee shifting. Making employees and consumers subject to potential fees of dominant parties like employers, deters the filing of claims, like these, that benefit the public interest and curb statutory rights.

Exhibit 2

Provisions Allowing FMG to Sue Employees in Court

EXHIBIT G
FMG SPECIFIC PROVISIONS

J-1 Visa Waiver Sponsorship/H-1B Status. FMG agrees to sponsor Physician for a J-1 waiver through the State of Washington, if such waiver is available. The parties specifically agree that a condition precedent to Physician's employment under the terms of this Agreement is his/her receipt of the J-1 Visa Waiver and H-1B status from the USCIS. In the event that the J-1 Visa Waiver and/or non-immigrant H-1B Status to permit employment authorization is not obtained by physician, all terms and conditions of this Agreement shall terminate immediately. The extent of FMG's financial obligation under this Section shall be limited to an amount determined to be reasonable by FMG, in its sole discretion, from time to time, and subject to all applicable statutes and regulations.

Setoff. Upon expiration or termination of this Agreement for any reason, Physician authorizes FMG, at its sole discretion and without demand or notice, to setoff any liability owed to Physician by FMG, including compensation hereunder, against any obligation owed by Physician to FMG, Hospital/Medical Center or their Affiliates. Physician agrees to complete any documentation that may be requested by FMG related to such setoff.

Non-competition and Non-solicitation. FMG will provide, and Physician will use, confidential business information, trade secrets, patient information and other valuable information belonging to FMG. The noncompetition and non-solicitation provisions set forth in *Exhibit F*, attached and made a part of this Agreement, are intended to protect the integrity of FMG and its Affiliates, the practices of the physicians who remain with FMG and its Affiliates and the value of practices acquired by FMG and its Affiliates.

Equitable Relief. The parties acknowledge and agree that, since a remedy at law for any breach or attempted breach of all the provisions of this Agreement shall be inadequate, FMG shall be entitled to injunctive and other equitable relief, including specific performance, in case of any such breach or attempted breach, in addition to such other remedies as may exist at law. The parties waive any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief. The parties consent to exclusive jurisdiction and venue in the state and federal courts sitting in County of Pierce, State of Washington and waive any objection to the jurisdiction of, or the venue of any action instituted in, such courts.

Further Assurances. The parties shall execute and deliver such other documents and perform such further acts as shall be reasonably necessary or convenient to carry out and effectuate all the terms and conditions of this Agreement.

Assignment. This Agreement is personal to each of the parties and no rights or duties may be assigned or delegated by either party without the prior written consent of the other, provided, however, that FMG may assign its rights and delegate its duties to any Affiliate or successor in interest of FMG.

Successors. This Agreement shall be binding upon and inure to the benefit of the parties to this Agreement and their respective heirs, administrators, executors, successors and permitted assigns.

Captions. The captions contained in this Agreement are not a part of this Agreement, are only for the convenience of the parties and do not in any way modify or amplify any of the terms, covenants, or conditions of this Agreement.

Expenses. Unless otherwise expressly provided in this Agreement, each party to this Agreement shall bear sole responsibility for all expenses incurred by such party in connection with this Agreement, including legal fees, whether or not the transactions contemplated by this Agreement are consummated.

The "*state and federal courts*" are the "*exclusive jurisdiction*" for any claim FMG brings against an employee for a "*breach or attempted breach, in addition to such other remedies as may exist at law.*"

The "Agreement" means the "Physician Employment Agreement," and includes all Exhibits to the Agreement (including the Arbitration Addendum).

FRANCISCAN MEDICAL GROUP (FMG) PHYSICIAN EMPLOYMENT AGREEMENT FOR PROMPT CARE / FAMILY MEDICINE W/O OB SERVICES

THIS PHYSICIAN EMPLOYMENT AGREEMENT (the "Agreement"), effective as of the June 30, 2011 ("Effective Date"), is by and between **FRANCISCAN MEDICAL GROUP (FMG)**, a Washington State non-profit corporation, and **MICHAEL ROMNEY, MD**, an individual ("Physician").

CP 45

Section 11. Entire Agreement. This Agreement (including any attached exhibits and schedules) contains the entire agreement between the parties concerning the subject matter of this Agreement, and supersedes all other and prior terms, covenants, representations, and agreements, whether oral or written. ***The parties specifically acknowledge that the provisions contained the "Additional Provisions" Exhibit H is expressly incorporated by reference made part of this Agreement.***

CP 50

1.12 Compliance with All Laws, Regulations, and Standards. Physician represents and warrants that his/her performance under the Agreement shall fully comply with all applicable federal, state, and local statutes, rules, regulations, accreditation standards, applicable standards of other professional organizations, and FMG's Requirements as defined below, and that it shall be deemed a material breach of the Agreement by Physician if he/she shall fail to comply with this representation and warranty. If such a breach is not cured in accordance with the Agreement, FMG may immediately terminate the Agreement without penalty and without limiting any other rights and remedies set forth in the Agreement. Specifically, but not by way of limitation, Physician represents and warrants that his/her performance under the Agreement shall comply with all applicable statutes, rules, regulations, accreditation standards, and other applicable standards of: Medicare; Medicaid; the Administrative Simplification requirements of the Health Insurance Portability and Accountability Act of 1996 and regulations promulgated thereunder, including the Standards for Privacy of Individually Identifiable Health Information and Security Standards for the Protection of Electronic Protected Health Information at 45 C.F.R. Parts 160 and 164; the security and privacy provisions of the American Recovery and Reinvestment Act of 2009, and the regulations promulgated thereunder, as all of these may be amended from time to time; other federal or state health programs; The Joint Commission; the National Committee for Quality Assurance; and any national standards applicable in the hospital or medical fields, as well as the Medical Staff bylaws, policies, and procedures, and all other rules and regulations established by FMG and/or the Medical Staff and applicable to performance under the Agreement (collectively, "FMG's Requirements"); and updates to incorporate any changes to such statutes, rules, regulations, accreditation standards, other applicable standards, and FMG's Requirements.

CP 70

"Breach of contract" claims that FMG may bring in court include claims that an employee violated any federal, state, or local statutes, rules, regulations, or standards.

They also include claims that an employee violated any of FMG's internal bylaws, policies, procedures, rules, or regulations.

Exhibit 3

Provisions Granting FMG Unlimited Legal and Equitable Remedies

EXHIBIT G
FMG SPECIFIC PROVISIONS

J-1 Visa Waiver Sponsorship/H-1B Status. FMG agrees to sponsor Physician for a J-1 waiver through the State of Washington, if such waiver is available. The parties specifically agree that a condition precedent to Physician's employment under the terms of this Agreement is his/her receipt of the J-1 Visa Waiver and H-1B status from the USCIS. In the event that the J-1 Visa Waiver and/or non-immigrant H-1B Status to permit employment authorization is not obtained by physician, all terms and conditions of this Agreement shall terminate immediately. The extent of FMG's financial obligation under this Section shall be limited to an amount determined to be reasonable by FMG, in its sole discretion, from time to time, and subject to all applicable statutes and regulations.

Setoff. Upon expiration or termination of this Agreement for any reason, Physician authorizes FMG, at its sole discretion and without demand or notice, to setoff any liability owed to Physician by FMG, including compensation hereunder, against any obligation owed by Physician to FMG, Hospital/Medical Center or their Affiliates. Physician agrees to complete any documentation that may be requested by FMG related to such setoff.

Non-competition and Non-solicitation. FMG will provide, and Physician will use, confidential business information, trade secrets, patient information and other valuable information belonging to FMG. The non-competition and non-solicitation provisions set forth in *Exhibit F*, attached and made a part of this Agreement, are intended to protect the integrity of FMG and its Affiliates, the practices of the physicians who remain with FMG and its Affiliates and the value of practices acquired by FMG and its Affiliates.

Equitable Relief. The parties acknowledge and agree that, since a remedy at law for any breach or attempted breach of all the provisions of this Agreement shall be inadequate, FMG shall be entitled to injunctive and other equitable relief, including specific performance, in case of any such breach or attempted breach, in addition to such other remedies as may exist at law. The parties waive any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief. The parties consent to exclusive jurisdiction and venue in the state and federal courts sitting in County of Pierce, State of Washington and waive any objection to the jurisdiction of, or the venue of any action instituted in, such courts.

Further Assurances. The parties shall execute and deliver such other documents and perform such further acts as shall be reasonably necessary or convenient to carry out and effectuate all the terms and conditions of this Agreement.

Assignment. This Agreement is personal to each of the parties and no rights or duties may be assigned or delegated by either party without the prior written consent of the other, provided, however, that FMG may assign its rights and delegate its duties to any Affiliate or successor in interest of FMG.

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Expenses. Unless otherwise expressly provided in this Agreement, each party to this Agreement shall bear sole responsibility for all expenses incurred by such party in connection with this Agreement, including legal fees, whether or not the transactions contemplated by this Agreement are consummated.

FMG "is entitled to" any form of "injunctive and other equitable relief," and any "such other remedies as may exist at law," any time against it claims an employee a "breach or attempted breach, in addition to such other remedies as may exist at law."
This leaves the door open for any conceivable equitable or legal claim against Plaintiffs, almost all relate to employment claims and conduct.

FMG reiterates that it can sue for an injunction or for "any other remedy it may have in law or equity" if it claims an employee breached the non-competition or non-solicitation clauses.

EXHIBIT F
NON-COMPETITION AND NON-SOLICITATION

F.1 Noncompetition During Physician's FMG Employment. In consideration of Physician's commitment to full time practice as an employed physician with FMG, Physician shall not moonlight or otherwise engage in consulting or non-FMG employment within a fifty (50) mile radius of any FMG location except with FMG's prior written consent which may be granted or refused in FMG's sole discretion. Physician shall not own (in whole or in part), manage or control, or participate in the ownership, management or control of, any corporation, partnership, limited liability company, sole proprietorship or other business entity that engages in the practice of medicine in competition with FMG.

F.2 Noncompetition Following Physician's FMG Employment. For a period of one (1) year after this agreement expires or terminates, Physician shall not, without FMG's prior written consent, which consent may be granted or refused in FMG's sole discretion, engage in the practice of medicine in an outpatient setting, whether directly or indirectly, and whether as sole proprietor, practitioner, agent, employee, independent contractor, advisor or consultant, in either of the following situations: (i) with two or more physicians employed by FMG within the previous 12 months, or (ii) with any medical practice group consisting of thirty (30) or more employed physicians providing medical services at any location either (1) in Pierce County, Washington or (2) within a ten-mile radius of any FMG clinic or Franciscan Health System hospital in either King County or Kitsap County.

F.3 Nonsolicitation. Physician shall not take any action to disrupt or attempt to disrupt the relationships, contractual or otherwise, between FMG and any third party, including, but not limited to, patients, suppliers, payors, or FMG employees. Prohibited activities under this Section F.3 include, without limitation, the following:

F.3.1 Soliciting any person as a patient who (i) is a current patient of FMG or (ii) who has been a patient of FMG at any time during Physician's FMG employment and for a two-year period following termination or expiration of this Agreement; notwithstanding the preceding sentence, an FMG patient shall not include any patient who was a patient of Physician prior to the Employment Date, provided that Physician shall have the burden of establishing that a patient is not an FMG patient.

F.3.2 Sending announcements or publications regarding Physician's new offices or employment affiliations to patients identified in the preceding Section F.3.1.

F.3.3 Removing FMG patient records from FMG's premises or possession. Following termination of this Agreement, if, as required by law, a patient makes a written request for the transfer of his/her patient records to Physician, FMG will, provide the patient's records (or copy thereof) to the patient or to Physician at a mutually convenient time during regular business hours; and

F.3.4 Taking, reproducing, using or distributing any list(s) or names of FMG's patients for the private benefit of Physician, or any third party or organization.

FMG and Physician agree that Physician may treat any patient so long as (1) such patient independently requests to be treated by Physician and such request is not the result of any solicitation by Physician, and (2) Physician otherwise complies with Section F.2 of this Agreement.

F.4 Injunctive Relief. The parties agree that damages are an inadequate remedy for, and that FMG would be irreparably harmed by, any breach of this Exhibit F and that in addition to any other remedy it may have in law or equity, FMG shall be entitled to an immediate injunction or other appropriate order to restrain any breach thereof without the necessity of showing or proving any actual damage sustained thereby. The parties further agree and stipulate that the deposit in court of the sum of one hundred dollars ($100.00) shall constitute sufficient undertaking in lieu of a bond in order to obtain such an injunction or restraining order, and that said deposit is not a reflection of or an attempt to predict damages.

F.5 Reformation. If the provisions of this Exhibit F are declared by a court of competent jurisdiction to exceed the time, geographic, occupational, or other limitations permitted by applicable law, then such provisions shall be deemed reformed to the maximum time, geographic, occupational, or other limitation held reasonable and enforceable by such court. The invalidity or non-enforceability of any provision of this Exhibit F in any respect shall not affect the validity or enforceability of the remainder of this Exhibit F or of any other provision hereunder.

Exhibit 4

Arbitration Addendum with one-sided, unconscionable provisions stricken

EXHIBIT D
ARBITRATION ADDENDUM

NOTICE: This Arbitration Addendum ("Addendum") supplements and is made a part of the Physician Employment Agreement ("Employment Agreement") between Physician ("You") and FMG dated as of June 30, 2011. [redacted] This Addendum affects your rights to a trial by a jury. **YOU MAY WISH TO SEEK LEGAL ADVICE BEFORE SIGNING THIS ADDENDUM.**

Section 1: Definitions.

[redacted] "Claims" does not include disputes related to worker's compensation claims or health benefits. "Claims" also does not include, at the option of FMG, any claim by FMG against You based upon Your actions arising out of any claim against FMG by a third party brought in another legal proceeding and as to which FMG desires to join its claims against You into that third party proceeding. "Claims" also does not include claims that arise out of or are subject to matters covered by the FMG Peer Review Policy.

Section 2 Duty to Arbitrate and Arbitrator Authority.

[redacted] shall be decided by arbitration governed by the Federal Arbitration Act before ONE NEUTRAL ARBITRATOR AND NOT BY A COURT OR A JURY. By signing this Addendum, [redacted] and/or such other procedures as the parties agree to in writing. The NEUTRAL ARBITRATOR shall be selected through the American Arbitration Association, or as otherwise agreed to by the parties in writing. 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. [redacted] Federal law concerning evidentiary privileges shall be applied in all arbitration proceedings. All claims at common law shall be construed under the law of the state of Washington.

Section 3 Arbitration Procedure and Allocation of Costs and Fees.

Either You or FMG may initiate arbitration by delivering a written request to arbitrate to the other party listing the Claim(s) to be arbitrated. Requests to FMG shall be delivered Franciscan Medical Group, 1313 Broadway Street Ste. 200, Tacoma, WA 98402, Attn: President and Chief Medical Officer. Requests to You shall be delivered to your last known address on the books of FMG. [redacted] in that case FMG would bear all costs. 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. [redacted] Unless otherwise agreed by the parties or ordered by the Arbitrator, the arbitration hearing shall take place in Tacoma, Washington. [redacted]

[redacted]

INITIALS _____

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Provisions that in practice force only employees to arbitrate claims are stricken, including any reference to employees having an obligation to arbitrate "all claims." *See Gandee*, 176 Wn.2d at 603; *Adler*, 153 Wn.2d at 344-45; *Hill v. Garda*, 179 Wn.2d at 55. *Zuver*, 153 Wn.2d at 318; *McKee*, 164 Wn.2d at 400 (Supreme Court struck arbitration agreement in part).

Provisions forcing non-parties to the contract to arbitrate disputes are stricken. *See Hill v. Garda*, 179 Wn.2d at 53.

Provision forcing employees to arbitrate confidentially (which is required under AAA Rules incorporated by reference here) is stricken: *See Zuver*, 153 Wn.2d at 314-15; *McKee* 167 Wn.2d at 398.

Provisions limiting employee's right to recover exemplary/punitive damages or attorney fees/costs are stricken. *See Hill v. Garda*, 179 Wn.2d at 56; *Zuver*, 153 Wn.2d at 318; *Adler*, 153 Wn.2d at 355.

Provision forcing employees to split arbitration costs and fees is stricken. *See Hill v. Garda*, 179 Wn.2d at 56-57; *Adler*, 153 Wn.2d at 353; *Gandee*, 176 Wn.2d at 605.

Provision stricken that would create a situation where employees could be forced pay for employers' fees/costs. *See Brown*, 178 Wn.2d at 274.

Severance is improper. Entire agreement is unconcionable due to lack of mutual arbitration obligation. *See Hill*, 179 Wn.2d at 55; *Gandee*, 176 Wn.2d at 603. Here, only employees must arbitrate. The agreement is entirely one-sided and void.
Also, entire arbitration agreement must be stricken because unconscionable clauses "pervade" the agreement. *See Hill*, 179 Wn.2d at 53-57 (entire agreement stricken when only 3 unconscionable provisions); *McKee*, 164 Wn.2d at 402-403 (entire agreement stricken when only 4 unconscionable provisions). As shown above, at least 7 clauses in this agreement are unconscionable.