

**FILED**

APR 12 2012

COURT OF APPEALS  
DIVISION III  
SEATTLE, WASHINGTON  
By \_\_\_\_\_

No. 301419

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**WASHINGTON STATE COURT OF APPEALS  
DIVISION III**

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KARLA BERSANTE and BRAND BERSANTE, together and as the  
marital community which they together comprise,

Respondents,

v.

NOTEWORLD, LLC, d/b/a Noteworld Servicing Center, a Delaware  
limited liability company; and FREEDOM DEBT CENTER, a California  
corporation,

Appellants.

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**REPLY BRIEF OF APPELLANT FREEDOM DEBT CENTER**

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## I. INTRODUCTION

This is an appeal from an order denying a motion to compel arbitration. The trial court below denied the motion to compel arbitration in response to an unconscionability argument advanced by the Bersantes, even though the Bersantes submitted no evidence of any kind showing that they would be unconscionably burdened by having to try their case under American Arbitration Association rules<sup>1</sup> in Orange County, the appellants' principal place of business. Nor did the trial court sever provisions of the arbitration clause from the remainder of the agreement, a practice consistent with the severability clause in the Agreement and the state and federal policies favoring arbitration of disputes.

On appeal, Appellants Noteworld et al ("Freedom") demonstrated that the trial court's decision was inconsistent with state and federal law in a variety of respects. Surprisingly, the Bersantes do not address a single issue raised by Freedom in this appeal. They take the twofold position that (1) the "savings clause" of the Federal Arbitration Act, 9 U.S.C. § 2, allows the trial court to invalidate the entire contract in response to a motion to compel arbitration, and (2) given the public policies behind the Debt Adjustment Act, ch. 18.28 RCW, arbitration (especially arbitration outside the state), is improper and the trial court

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<sup>1</sup> The Agreement requires the parties to follow AAA rules, but it does not require them to pay AAA fees or actually conduct the arbitration before a AAA arbitrator.

could *per se*, without any evidence of actual burdens on the Bersantes, invalidate the arbitration clause.

These points are wrong as a matter of established law. Both state and federal cases point out the limited role of the trial court in a motion to compel arbitration. These cases are discussed below.

This Court's review of an order denying a motion to compel arbitration is *de novo*,<sup>2</sup> Freedom is concerned that this Court may identify an alternative ground for affirmance. Because the Brief submitted by the Bersantes does not present any such alternative grounds, if this Court is inclined to look beyond the scope of the Bersantes' brief for such grounds, Appellants respectfully request this Court to grant an additional opportunity to brief whatever issue this Court finds significant. Otherwise, Freedom relies upon its opening Brief herein, and shall address, in so far as it can, only the points and authorities argued by the Bersantes.

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<sup>2</sup> *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007), citing *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

## II. RE-STATEMENT OF THE CASE IN REPLY

### A. Statement of Facts.<sup>3</sup>

On August 29, 2009, the Bersantes signed a Debt Settlement Agreement (the “Agreement”) with Freedom Debt Center (“Freedom”). CP 7-10. The Agreement recites that Freedom is located in Irvine, California, which is located in Orange County. CP 6. The Bersantes’ Complaint acknowledges that Orange County is Freedom’s principal place of business. *Id.*

Directly above the Bersantes’ signatures are the two clauses at issue on this appeal. The first is Paragraph 11, the arbitration clause. It states the following:

**11. ARBITRATION.** All disputes or claims between the parties related to this Agreement shall be submitted to binding arbitration in accordance with the rules of American Arbitration Association within 30 days from the dispute date or claim. Any arbitration proceedings brought by Client shall take place in Orange County, California. Judgment upon the decision of the arbitrator may be entered into any court having jurisdiction thereof. The prevailing party in any action or proceeding related to this Agreement shall be entitled to recover reasonable legal fees and costs, including attorney’s fees which may be incurred.

CP 17. The second clause is the severability clause, which states:

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<sup>3</sup> The Bersantes claim in their “reply brief” that it is undisputed that Freedom Debt Center is a “debt adjuster” and that it charged excessive and illegal fees. This is inaccurate. The business model used by Freedom is similar to one found not to constitute “debt adjusting” as a matter of law in *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 499, 256 P.3d 321 (2011) (“whether Freedom and similar debt settlement companies are actually debt adjusters who are debt adjusting, however, is ultimately a factual question...”).

**15. SEVERABILITY.** If any of the above provisions are held to be invalid or unenforceable, the remaining provisions will not be affected.

*Id.* The Bersantes became disenchanted with their Agreement with Freedom, and brought the instant lawsuit, claiming that Freedom violated the Consumer Protection Act and ch. 18.28 RCW.

**B. Procedures Below.**

After the Complaint was filed, Freedom moved the trial court for an order compelling arbitration and to stay proceedings pending the outcome thereof. CP 55. The Bersantes submitted a brief, CP 58, but did not submit any evidence on the question whether the arbitration clause was unconscionable.

The Bersantes simply argued that the venue provision in the arbitration clause was unconscionable because “In effect, [it would allow] Freedom [to] violate Washington laws with impunity knowing that it is highly unlikely that its customers would be able to pursue any legal action against them if the arbitration would have to be pursued in the state of California.” CP 62. The Bersantes’ argument was, essentially, that the limited resources of consumers seeking debt relief and the allegedly high cost of arbitrating a consumer protection claim in California made arbitration of consumer claims under ch. 18.28 RCW and 19.86 RCW unconscionable. This was a *per se* argument, wholly unsupported by affidavits.

The Bersantes also claimed that the arbitration clause was not applicable because “the Bersantes are not seeking to enforce the contract,” CP 59, and because the Agreement is “void” under Washington law; “since the entire contract is void, the arbitration clause ... is void as well,” they argued. CP 60.<sup>4</sup> Finally, the Bersantes claimed that public policy was repelled by forcing them to arbitrate these consumer related disputes. No authority was provided to the trial court in support of these arguments.

The trial court agreed with the Bersantes, and denied the motion. This appeal followed.

### III. ARGUMENT

#### A. Summary of Argument.

The Brief filed by the Bersantes argues that 9 U.S.C. § 2 allows the trial court to refuse to enforce an arbitration clause if the court finds “the Agreement” is unconscionable. But *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), reveal this argument to be incorrect. In both cases, the Supreme Court held that the role of the trial court on a motion to compel arbitration is quite limited; under

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<sup>4</sup> This overlooks controlling law, holding that “challenges to the contract as a whole, either on a ground that directly affects the entire agreement...or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid...are considered by the arbitrator in the first instance.” *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9<sup>th</sup> Cir. 2008) quoting *Buckeye Check Cashing, infra*, 546 U.S. at 444, 445-46; 9 U.S.C. § 2. RCW 7.04A.060 is to the same effect. *Townsend v. Quadrant Corp.*, 153 Wn.App. 870, 224 P.3d 838 (2009).

the “separability” philosophy adopted in *Prima Paint* and *Green Tree* but overlooked by the Bersantes, the trial court may only determine whether the *arbitration clause* itself is unconscionable—the question whether the overall contract is unconscionable is for the arbitrator, not the court. Washington law is to the same effect—as it must be, in any case involving interstate commerce, given the preemptive effect of the Federal Arbitration Act. *Satomi Owners Ass’n. v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009) (acknowledging FAA preemption).

The Bersantes also argue that their allegations of violations of the Consumer Protection Act and the Debt Adjustment Act make this case somehow not susceptible of arbitration. This argument overlooks the long line of precedent holding that statutory claims are arbitrable.<sup>5</sup> Indeed, only *Congress* can create a

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<sup>5</sup> See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-227, in which the Court, citing several cases, emphatically dismisses any notion that citation to an important statute rendered arbitration agreements less enforceable:

This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights. As we observed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals” should inhibit enforcement of the Act “ ‘in controversies based on statutes.’ ” 473 U.S., at 626-627, 105 S.Ct., at 3354, quoting *Wilko v. Swan, supra*, 346 U.S., at 432, 74 S.Ct., at 185. Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that “would provide grounds ‘for the revocation of any contract,’ ” 473 U.S., at 627, 105 S.Ct., at 3354, the Arbitration Act “provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.” *Ibid.*

blanket exception to the rule that agreements to arbitrate are enforceable. State-created efforts to carve out classes of cases less subject to arbitration are inherently suspect, and have been overruled by the Supreme Court.<sup>6</sup>

The principal issue below was whether the Bersantes had come forward with sufficient evidence of unconscionability to satisfy state and federal cases on the subject. That is, if a party who has signed an agreement containing an arbitration clause wishes to escape its promise on the ground that the clause is unconscionable, that party has the burden to come forward with actual evidence of the allegedly-unconscionable burdens. Freedom carefully briefed this issue in its opening brief, but the Bersantes do not respond at all. Freedom will not repeat its briefing, but sets out the authorities on which it relies in the margin.<sup>7</sup>

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The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.

<sup>6</sup> *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *see also Marmet Health Care Center, Inc. v. Brown*, 132 U.S. 1201 (2012).

<sup>7</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 519, 210 P.3d 318, 323 (2009); *see also M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn.App. 819, 833-34, 970 P.2d 803 (1999) (noting lack of evidence that plaintiff was unwilling to enter challenged agreement), *aff'd*, 140 Wn.2d 568, 998 P.2d 305 (2000). *See also Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 2008-Ohio-938, 884 N.E.2d 12 (2008) (applying the *Green Tree* rationale to state-law claims and declining to find unconscionability where the plaintiff failed to present evidence of prohibitive costs); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004) (requiring party claiming that arbitration is cost-prohibitive to “present specific evidence of likely arbitrator’s fees and its financial inability to pay those fees,” including the claimant’s “particular financial situation”); *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) (\$125 filing fee was

If this Court has any doubts on the subject, Freedom will agree to waive the venue provision, although Freedom believes that it is rational—Orange County, California, is Freedom’s principal place of business. Any unconscionable provision can be severed, of course (and this Agreement contains a severability clause, quoted in full above), but the trial court did not even attempt to do so.

**To summarize:** the trial court committed error by refusing to enforce the arbitration agreement signed by the Bersantes. The trial court should have granted the motion to compel arbitration, because the Bersantes did not produce any evidence of unconscionability. The Bersantes’ arguments in response to this appeal do not withstand scrutiny and should be rejected by this Court.

**B. Scope of Review.**

On review of a trial court’s denial of a motion to compel arbitration, the party opposing arbitration has the burden of showing that the arbitration clause is unenforceable or inapplicable. *Otis Housing Ass’n, Inc. v. Ha*, 165 Wn.2d 582,

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not unconscionable); *Pan Am Flight 73 Liaison Group v. Dave*, 711 F. Supp. 2d 13 (D.D.C. 2010), aff’d, 2011 WL 1544670 (D.C. Cir. 2011) (“The Davé’s allegation that the costs of arbitration are prohibitive fares no better. A party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs. The Davés contend that the arbitration agreement’s terms regarding costs are unreasonably favorable to ... the LG. But they offer no specific facts, as they must, to support this conclusion — for example, the expected cost difference between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. Indeed, arbitration may be a less costly alternative to formal litigation.”), citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (“Arbitration agreements allow parties to avoid the costs of litigation”).

587, 201 P.3d 309 (2009); *see also Townsend v. Quadrant Corp.*, 153 Wn.App. 870, 224 P.3d 818 (2009).

Appellate review of an order denying a motion to compel arbitration is *de novo*. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007), citing *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). This Court may reach any decision the trial court could have reached on this record. However, if this Court is interested in any issue not addressed by the Bersantes, and accordingly not argued in this Reply Brief, an opportunity to address the issue is respectfully requested.

The Bersantes argue that their challenge is to the contract as a whole, not just to the arbitration clause. But this presumes that the courts decide whether the contract as a whole is enforceable. Division One recently held in *The Heights at Issaquah Ridge Owners' Assoc. v. Burton Landscape Group, Inc.*:

Courts resolve the threshold legal question of arbitrability of the dispute by examining the arbitration agreement without inquiry into the merits of the dispute. If the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end. Washington State has a strong public policy favoring arbitration of disputes.

148 Wn.App. 400, 403-04, 200 P.3d 254 (2009) (citing *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 454, 45 P.3d 594 (2002) (quoting *Perez v. Mid-*

*Century Ins. Co.*, 85 Wn.App. 760, 765, 934 P.2d 731 (1997)). Similarly, our

Supreme Court has noted in reviewing a motion to compel arbitration:

Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which *on its face* is governed by the contract.

*Peninsula Sch. Dist. No. 401 v. Pub. Sch. Employees of Peninsula*, 130 Wn.2d 401, 413, 924 P.2d 13 (1996) (quoting *Council of County & City Employees v. Spokane County*, 32 Wn.App. 422, 424-25, 647 P.2d 1058 (1982) (citations omitted) (alteration in original).

Further, courts resolve any doubts in favor of arbitrability. *Peninsula Sch. Dist. No. 401*, 130 Wn.2d at 413-14, 924 P.2d 13. See also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); see also *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (“the presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’”) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25). The Bersantes bore a heavy burden to take the proper role of the arbitrator and hand it to the courts, by showing that the arbitration clause itself is unenforceable.

The Bersantes have not met their burden to demonstrate the unenforceability of the arbitration clause to which they agreed, and this Court should, accordingly, reverse.

**C. The Bersantes Overlook the Separability Doctrine, as Set Forth in *Prima Paint*, *Buckeye Check Cashing*, and Other Cases, a Fatal Omission.**

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, applies to all arbitration agreements impacting interstate commerce, and preempts state laws inconsistent with its provisions and policies. *See, e.g., Preston v. Ferrer*, 552 U.S. 356, 353-354 (2008), citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-403 (1967), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). Section 2 of the FAA states:

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

9 U.S.C. § 2 (emphasis supplied). This statute “declares a national policy favoring arbitration” of claims that parties contract to resolve in that manner. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

*Prima Paint* also teaches that the courts must focus solely on the arbitration clause when determining arbitrability, and may not deny a motion to

compel arbitration if the contract as a whole, but not the arbitration clause specifically, is invalid. This is called the “separability doctrine,” which the Bersantes seem to have missed; under *Prima Paint* and its progeny, it is emphatically not the role of the courts to decide whether the contract as a whole is unenforceable. The court must focus solely upon the arbitration clause itself, and if that clause is not unconscionable (which, on this record, there is no evidence to prove), then an order compelling arbitration is appropriate.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006), the Court stated:

*Prima Paint* and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, *unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance*. Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of those holdings. Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. *The challenge should therefore be considered by an arbitrator, not a court.*

In declining to apply *Prima Paint's* rule of severability, the Florida Supreme Court relied on the distinction between void and voidable contracts. “Florida public policy and contract law,” it concluded, permit “no severable, or salvageable, parts of a contract found illegal and void under Florida law.” *Prima Paint* makes this conclusion irrelevant. That case rejected application of state severability rules to the arbitration agreement *without discussing* whether the challenge at issue would have

rendered the contract void or voidable. Indeed, the opinion expressly disclaimed any need to decide what state-law remedy was available ....

*Buckeye Check Cashing, supra*, 546 U.S. at 446 (some citations omitted) (some emphasis in original).

By simply arguing that they are seeking invalidation of the contract as a whole (the argument below), or arguing that 9 U.S.C. § 2 permits a trial court to consider challenges to the contract *as a whole*, the Bersantes overlook *Prima Paint* and its progeny, including *Buckeye Check Cashing, supra*. Their failure to address *Prima Paint* at all demonstrates a fundamental misapprehension of applicable law, and is fatal to their case.

**D. Both Federal and State Cases Reject the Position Taken By Respondents that Mere Allegations of Substantive Unconscionability Suffice to Allow an Otherwise-Valid Arbitration Clause to be Rejected.**

The decisions holding that a party cannot escape an arbitration clause by merely alleging its unconscionability are many, some of which are cited in Footnote 5 above. *See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); additional decisions are cited below.<sup>8</sup> In *Woodall v. Avalon Care*

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<sup>8</sup> *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 2008-Ohio-938, 884 N.E.2d 12 (2008) (applying the *Green Tree* rationale to state-law claims and declining to find unconscionability where the plaintiff failed to present evidence of prohibitive costs); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004) (requiring party claiming that arbitration is cost-prohibitive to “present specific evidence of likely arbitrator’s fees and its financial inability to pay those fees,” including the claimant’s “particular financial

*Center-Federal Way, LLC*, 155 Wn.App. 919, 231 P.3d 1252 (2010), and *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346-47, 103 P.3d 773 (2004), the court held that a party asserting the unconscionability of an arbitration agreement bears the burden of proof. This burden may, in a proper case, be met by showing (by evidence placed in the record) that arbitration would be prohibitively expensive. See also *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004), citing *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 45 P.3d 594 (2002).

In *Mendez*, but not in *Zuver* or *Woodall*, the party opposing arbitration established that the arbitration agreement was prohibitively expensive. See *Zuver*, 153 Wn.2d at 307-308 (“*Zuver* has failed to meet her burden to produce evidence showing that [the arbitration clause] makes arbitration prohibitively expensive”); *Woodall, supra* (“the lack of any evidence of the estate’s resources supports the conclusion that Clifford failed to meet his burden” of proving prohibitive expense of arbitration). Here, the Bersantes failed to produce any evidence of prohibitive expense or inability to pay. This lack of evidence is fatal to their argument on appeal.

Thus under both state and federal law, the trial court committed error by declining to compel arbitration. The arbitration clause is not unconscionable, and there was no proof that it was before the court below.

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situation”); *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) (\$125 filing fee was not unconscionable)

**E. The Arbitration Clause at Issue Herein is not Unconscionable; if it were, the Remedy is Severance of the Offending Provisions.**

Unconscionability is a question of law for the courts. *Zuver, supra*, 153

Wn.2d at 302-303. The court added:

It is black letter law of contracts that the parties to a contract shall be bound by its terms. *See Nat'l Bank of Wash. v. Equity Investors, L.P.*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973). *Zuver* argues that she should be exempt from the terms of the contract with her employer here because it is both procedurally and substantively unconscionable. "The existence of an unconscionable bargain is a question of law for the courts." *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995) (citing *Mieske v. Bartell Drug Co.*, 92 Wn. 2d 40, 50, 593 P.2d 1308 (1979)). In Washington, we have recognized two categories of unconscion-ability, substantive and procedural. *Id.* (citing *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). "Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh." *Schroeder*, 86 Wn.2d at 260, 544 P.2d 20. " **'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability.**" *Nelson*, 127 Wn.2d at 131, 896 P.2d 1258 (quoting *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 16 Wn.App. 439, 444, 556 P.2d 552 (1976)). Procedural unconscionability is "the lack of meaningful choice, considering all the circumstances surrounding the transaction including "[t]he manner in which the contract was entered," **whether each party had "a reasonable opportunity to understand the terms of the contract,"** and whether "the important terms [were] hidden in a maze of fine print."'" *Id.* at 131, 896 P.2d 1258 (quoting *Schroeder*, 86 Wn.2d at 260, 544 P.2d 20 445, 449 (D.C.Cir.1965))). We have cautioned that "these three

factors [should] not be applied mechanically without regard to whether in truth a meaningful choice existed.” *Id.* 153 Wn.2d at 302-303 (emphasis supplied).

The courts indulge every presumption in favor of the enforceability of an arbitration provision. *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn.App. 316, 211 P.3d 454 (2009); *Verbeek Properties, LLC v. Greenco Environmental, Inc.*, 159 Wn.App. 82, 87, 246 P.3d 205 (2010). The Bersantes thus are faced with a heavy burden to show that this arbitration clause was substantively (monstrously harsh) and procedurally (lack of meaningful choice) unconscionable. They cannot do so.

**Beginning with procedural unconscionability:** The record is undisputed that the Bersantes had a very reasonable opportunity to understand the terms of the Agreement; it was mailed to them, they signed it and sent it back. The arbitration provision is not buried in a maze of fine print—it is in the same type face as the rest of the Agreement, the word “ARBITRATION” is clearly denoted, and it appears on the signature page, a short distance above the Bersantes’ signatures.<sup>9</sup> The trial court did not find procedural unconscionability, nor could it have done so on this record.

**Substantive unconscionability:** A clause in an agreement is substantively unconscionable when it is “monstrously harsh” or “shocking to the conscience.”

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<sup>9</sup> Parties to a contract have a duty to read it. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.app. 841, 158 P.3d 1265 (2007).

*Zuver, supra*, 153 Wn.2d at 303. In the *Zuver* case, the Court looked at the allegedly unconscionable provisions in context; it required proof that the provision in question was at least “overly harsh” in order to find unconscionability. *See* 153 Wn.2d at 309, declining to find a fee-splitting provision, like the one at issue here, unconscionable absent evidence (comparable to the affidavits and information produced by the plaintiff in *Mendez, supra*) that *Zuver*, the plaintiff, could not afford it. In addition, the Court noted that Airtouch’s offer to “defray the cost of arbitration” mooted the issue. *Id.*<sup>10</sup>

In *Zuver*, as in other cases, where the court found an unconscionable provision in an arbitration provision, especially where the contract contained a severability clause, the remedy applied was severance and enforcement, not invalidation of the entire arbitration agreement.<sup>11</sup> *Walters v. A.A.A.*

*Waterproofing, Inc., supra*, 151 Wn.App. at 329-330, citing *Zuver* and *Adler*, both *supra*, teaches that severance is the preferred remedy if the court finds a provision unconscionable. *Walters* notes that “severability is particularly likely when the

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<sup>10</sup> *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (“Arbitration agreements allow parties to avoid the costs of litigation”). **Arbitration can be cheaper than litigation.**

<sup>11</sup> Indeed, the one Washington Supreme Court decision holding that the unconscionable portions of the arbitration clause could not be severed, *McKee v. AT & T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008) is clearly distinguishable. The Court found (as had the trial court) both procedural and substantive unconscionability—the McKees had not been given a copy of the dispute resolution portion of their contract—and there were four different unconscionable portions of the agreement to arbitrate. *McKee*, 164 Wn.2d at 402.

agreement includes a severability clause.” 151 Wn.App. at 330. This contract does.

The trial court failed to sever the allegedly-unconscionable provisions from the rest of the arbitration agreement, and enforce the agreement without the unconscionable provision. This was error.

**F. Statutory Claims Are Subject to Arbitration.**

The Bersantes argue that the fact that they seek remedies under two Washington statutes, ch. 18.28 RCW and ch. 19.86 RCW, affects the arbitrability inquiry. They are mistaken.

In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-227 (1987), the Court emphatically dismissed any notion that arbitration agreements should not be applied to claims brought under a statute:

**This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.** As we observed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals” should inhibit enforcement of the Act “ ‘in controversies based on statutes.’ ” 473 U.S., at 626-627, 105 S.Ct., at 3354, quoting *Wilko v. Swan, supra*, 346 U.S., at 432, 74 S.Ct., at 185. Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that “would provide grounds ‘for the revocation of any contract,’ ” 473 U.S., at 627, 105 S.Ct., at 3354, the Arbitration Act “provides no basis for disfavoring agreements to arbitrate statutory claims by

skewing the otherwise hospitable inquiry into arbitrability.”

*Ibid.*

**The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims.** Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. (Emphasis supplied.)

Washington cases are to the same effect. For example, the Washington Law Against Discrimination does not require a judicial forum. *Adler v. Fred Lind Manor, supra*, 153 Wn.2d at 342-43. Surely the WLAD is not less important to public policy than the Consumer Protection Act.

Freedom fears that a desire to protect consumers may lead a court to run afoul of *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), in which the Court cautioned against state efforts to exempt any category of consumer litigation from arbitration clauses governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. *See also Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012), to the same effect. Freedom believes that, if the courts of this State carve out consumer protection claims from the duty to arbitrate – even by making it easier for consumers than others to prove unconscionability of arbitration clauses – the federal policy favoring arbitration, as announced in *Concepcion*, will be violated.

Under the Federal Arbitration Act, claims made under a wide range of statutes have been held subject to arbitration. In *Shearson/American Express, Inc. v. McMahon, supra*, the Court required arbitration of disputes arising under the Securities and Exchange Act and the Racketeer Influenced Corrupt Organizations Act. Surely, again, the Washington CPA and Debt Adjustment Statutes are not so special as to require a judicial forum, where these significant laws did not.

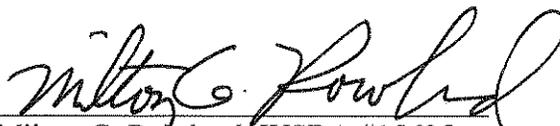
Accordingly, Freedom respectfully requests this Court to reverse and remand for entry of an order compelling arbitration.

#### IV. CONCLUSION

Based upon the foregoing, Appellants respectfully request this Court to reverse, with directions to the trial court to compel arbitration of the disputes raised herein.

RESPECTFULLY SUBMITTED this 11th day of April, 2012.

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