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Division III
State of Washington

No. 32880-5-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SCOTT WOODWARD, Personal Representative of the ESTATE OF
VIRGINIA MAY WOODWARD; SCOTT WOODWARD and
CHRISTINE WOODWARD,

Plaintiffs-Respondents

v.

EMERITUS CORPORATION; BROOKDALE SENIOR LIVING
COMMUNITIES, INC.; FATIMAH AWAD and JOHN DOE AWAD;
MINDY ROSS and JOHN DOE ROSS,

Defendants-Appellants

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Vic L. VanderSchoor)

REPLY BRIEF

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I. INTRODUCTION

Woodward does not dispute that the estate's claims fall within the scope of the Agreement; that the Agreement was both optional and revocable; and that he had the opportunity to review the Agreement before (and after) he signed it. Nor does he dispute that the Agreement gives the parties the same rights regarding appointment of the arbitrator, selection of the venue, pre-hearing discovery, the admissibility of evidence, etc. In short, the Agreement will provide the parties with fair, efficient and less costly means to resolve Woodward's claims.

Woodward raises two primary arguments to avoid the Agreement. First, he claims the Agreement was misrepresented to him. But a court cannot invalidate a contract where, as here, the alleged misrepresentation contradicts the plain and unambiguous terms of the contract. Second, Woodward claims that AAA's Consumer Arbitration Rules cannot apply to cases of this kind. By their terms, however, the Rules can apply in any case if the parties so agree, and Woodward cannot show how the Rules' applicability here would deprive him of a fair forum for his dispute. None of Woodward's various other arguments have merit either.

The only aspect of the Agreement that could be construed as unenforceable is the attorney's fee term, and that could happen if, and only if, Woodward prevails on the VAS claim at arbitration. Woodward's

speculation that he might win is not fatal to Emeritus' motion to compel arbitration. Under clear Washington law, if that happens the result is severance of the attorneys' fee term, not the unenforceability of the Agreement in its entirety. This Court should reverse the trial court, and remand with directions to order arbitration of the estate's claims.

II. ARGUMENT

A. The Standard Of Review Is *De Novo*.

Woodward argues that this Court can affirm if substantial evidence supports a finding of procedural unconscionability. Woodward Br. at 14-18. Not so. Because the trial court could not and did not resolve the parties' factual dispute or weigh credibility, the *de novo* standard applies. A motion to compel arbitration is akin to a motion for summary judgment and, if the motion turns on disputed facts, a trial court cannot resolve the dispute by simply accepting one party's declaration over the other's; it must hold an evidentiary hearing. *Neuson v. Macy's Dep't Stores, Inc.*, 160 Wn. App. 786, 791-99, 249 P.3d 1054 (2011); *see also In re Weeks*, 242 S.W.3d 849, 862 (Tex. App. 2007) ("When faced with conflicting affidavits ... a trial court may not adjudicate defenses to enforceability of an arbitration agreement without an evidentiary hearing.").

The trial court understood this, and it ruled on Emeritus' motion without weighing the evidence or resolving the parties' factual dispute.

The court expressly noted that its denial of Emeritus’ motion mooted the need for an evidentiary hearing. 10/24/14 Hr. at 3 (“I really only need ... argument on the motion to compel arbitration. That probably will resolve the other [motion].”). And, indeed, the court’s order contained no findings on Woodward’s fraud in the execution theory. CP 384-86. Emeritus does not challenge the form of the order, *see* Woodward Br. at 17, because it was entirely proper. *Weiss v. Lonquist*, 153 Wn. App. 502, 513 n. 8, 224 P.3d 787 (2009) (proper for trial court not to enter findings of fact on motion to compel arbitration when “[n]othing in the record indicates that the trial court received testimony in relation to Lonquist’s motion”).¹

Where, as here, the trial court rules on a motion to compel without hearing evidence, the *de novo* standard of review applies. *Neuson*, 160 Wn. App. at 792-93; *Weiss*, 153 Wn. App. at 510; Emeritus Br. at 7-9. The cases cited by Woodward — *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003) and *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011) — are not to the contrary. These non-arbitration cases hold that the substantial evidence test may apply in those rare cases (*i.e.*,

¹ Woodward’s “invited error” makes no sense for this reason too. He claims Emeritus “invited” the trial court to resolve the parties’ factual dispute when it opposed Woodward’s motion for an evidentiary hearing. Woodward Br. at 17. But the trial court did not resolve that dispute, nor did it even rule on Woodward’s motion. Thus, the trial court erred when it refused to compel arbitration on other grounds; not when it weighed the parties’ conflicting declarations—something it simply did not do.

family law and contempt proceedings) where a trial court is permitted to, *and does*, weigh the evidence and make findings of fact based on a documentary record. *Id.* Neither thing happened here.

B. Woodward Cannot Show Procedural Unconscionability.

Woodward does not argue that the parties' agreement to arbitrate was "hidden in a maze of fine print" or that he lacked a "meaningful choice." *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 303-05, 103 P.3d 753 (2004). He can't. As Emeritus explained, and Woodward does not dispute, the Agreement is a simple, two page, stand-alone document that he did not have to sign in the first place and that gave him fifteen days to opt-out after he signed it. Emeritus Br. at 22-24; CP 45-46. Nor does he dispute that he was given an opportunity to read and ask questions about the Agreement. CP 286. Rather, as he did below, Woodward's procedural unconscionability argument rests entirely on claims of "fraud in the execution" and "procedural surprise." For the reasons set forth in Emeritus' opening brief and below, both arguments fail as a matter of law.

1. Woodward's Fraud Theory Fails As A Matter Of Law Because He Cannot Rely On Alleged Representations That Would Contradict The Terms Of The Agreement.

Woodward does not dispute that black-letter law holds that a party has a duty to read the contract he signs, and cannot later claim ignorance of its contents. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381-85,

745 P.2d 37 (1987). The same law says that a party cannot avoid the contract on the basis of fraud if the alleged representation contradicts “the legal effect of plain and unambiguous documents which a party has the opportunity to read.” *Id.* at 385 (“It requires little in the way of diligence to ascertain the truth of a representation made as to the legal effect of plain and unambiguous documents which a party has the opportunity to read.”); *see also Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 905, 247 P.3d 790 (2011) (“a party has no right to rely on an oral representation that contradicts unequivocal written evidence that demonstrates the falsity of the alleged representation”).

This rule is fatal to Woodward’s “fraud in the execution” theory. As Emeritus explained, even if the Court assumes that Ms. Ross spoke the words Woodward attributes to her, Woodward could not rely on them as a matter of law because they contradict the plain meaning of the Agreement. Emeritus Br. at 27-30. Woodward incredibly claims that “nothing in the content of the agreement ... would correct” his purported reliance on Ms. Ross’s alleged representation. Woodward Br. at 23. But no one who read the Agreement could mistake arbitration for a mere plan to “work it out face to face.” CP 238. The Agreement is clear: all disputes “shall be resolved exclusively by binding arbitration,” “conducted by a single arbitrator,” “governed by the laws of the state in which the Community is

located,” and may result in an award that can “be entered as a judgment in any court having jurisdiction.” CP 45-46.²

There is no merit to Woodward’s suggestion that the rule does not apply in cases of “fraud.” Woodward Br. at 22. While *Skagit State Bank* involved an innocent misrepresentation, the rule applies in both innocent and intentional misrepresentation cases. This is so because the element of justifiable reliance is common to both. See *Kwiatkowski v. Drews*, 142 Wn. App. 463, 481, 176 P.3d 510 (2008). Not surprisingly, Washington courts consistently apply the no-right-to-rely rule in cases of alleged fraud. *Id.*; *Williams v. Joslin*, 65 Wn.2d 696, 699, 399 P.2d 308 (1965); *Cornerstone*, 159 Wn. App. at 905-06; *Rainier Nat. Bank v. Clausing*, 34 Wn. App. 441, 446-47, 661 P.2d 1015 (1983). Thus, Woodward’s claim that “Ms. Ross intentionally misrepresented” the Agreement is irrelevant and, even if true, would not allow him to avoid its unambiguous terms.

Finally, although the no-right-to-rely rule makes it unnecessary to reconcile the parties’ competing declarations, if fraud were an exception to the rule, this Court’s only recourse would be to remand the case for an

² Woodward notes that the existence of a “special relationship” can sometimes give rise to procedural unconscionability, but does not actually argue that such a relationship existed here. Woodward Br. at 20. Nor could he. If there was such a relationship, it existed between Emeritus and its resident Virginia May Woodward—not between Emeritus and Scott Woodward, who dealt with each other strictly at arm’s-length.

evidentiary hearing and entry of findings of fact. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004). As discussed above, the trial court denied Emeritus’ motion to compel on other grounds without reaching this issue—nor could it have found clear and convincing evidence of fraud based on a single sentence in Woodward’s self-serving and disputed declaration. This Court can’t either. This Court should reject Woodward’s fraud in the execution theory as a matter of law.

2. There Is No “Procedural Surprise.”

Woodward conclusorily states that the Agreement constitutes a “procedural surprise,” citing the “conflicting terms as to the choice of law.” Woodward Br. at 24, 26. But Woodward never explains how they conflict or why they render the Agreement unconscionable. They don’t. As Emeritus showed, the Agreement’s two unambiguous choice-of-law terms clearly address two different things: the law governing arbitrability and the law governing the merits of the parties’ dispute. Emeritus Br. at 24-27. Under the FAA, the parties are free to choose both procedural and substantive law, *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002), and there is no conflict if their agreement reflects both. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995). Woodward ignores this authority and cites nothing to the contrary.

Certainly, this case is nothing like *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 306 P.3d 948 (2013). *Brown* found procedural surprise where the arbitration agreement was unclear about which AAA rules governed. But as Woodward concedes, Woodward Br. at 25, *Brown* was decided under California law, where cases have found procedural unconscionability where rules are referenced in, but not attached to, the agreement. *Id.* at 268 (citing *Harper v. Ultimo*, 113 Cal.App.4th 1402, 7 Cal.Rptr.3d 418 (2003)). There is no similar rule here; Washington courts routinely uphold arbitration agreements that merely invoke the rules and procedures of AAA. *See, e.g., Nail v. Consol. Res. Health Care Fund I*, 155 Wn. App. 227, 229 P.3d 885 (2010); *Everett Shipyard, Inc. v. Puget Sound Env't Corp.*, 155 Wn. App. 761, 231 P.3d 200 (2010).

In event, there's no ambiguity here. Woodward concedes that the Agreement's reference to "procedures in effect for consumer arbitration adopted by [AAA]," CP 45, invoke AAA's Consumer Arbitration Rules. And, for all the reasons explained in Emeritus' opening brief and below, the Rules can and do apply to the parties' dispute and are not substantively unconscionable. Woodward's suggestion that "unknown and unspecified procedures might apply" is specious. Woodward Br. at 26. As Emeritus pointed out, the Rules themselves permit *an objecting party* to ask the arbitrator to use different AAA rules. CP 322 (Rule R-1(e)). Woodward

cannot claim “procedural surprise” from a change in rules that Woodward himself would have to request and, presumably, want. In sum, there is no basis to invalidate the Agreement as procedurally unconscionable.

C. The Agreement Is Not Substantively Unconscionable.

Woodward largely ignores the stringent standard he must satisfy to invalidate the Agreement on the grounds of substantive unconscionability, and for good reason. He cannot show how the Agreement is “monstrously harsh” or “exceedingly calloused.” *Adler*, 153 Wn.2d at 344-45. Nor does Woodward adequately explain why, if any of the Agreement’s minor terms — specifically, its attorneys’ fee term — is unenforceable, the Court could not impose the “usual remedy” of severance so as to uphold the parties’ core agreement to arbitrate. *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013). It can and should.

1. The AAA Consumer Rules Can Apply To This Dispute.

The parties specifically chose to have their arbitration conducted in accordance with the Consumer Arbitration Rules. CP 45. Woodward argues that the Rules cannot apply to the parties’ arbitration because the Agreement is not a “consumer agreement” or, if they do apply, the Rules require the arbitrator to refer this dispute back to the trial court. *See* Woodward Br. at 9-10, 28, 43-47. Woodward is wrong on both points.

Nothing in the Consumer Arbitration Rules prohibits their use in this or any other kind of dispute. *See* Emeritus Br. at 13 n. 3. On the contrary, Rule R-1(a) states that the Rules will apply in any one of four *alternative* instances. Woodward highlights only the last two, which state that the Rules automatically control if the arbitration clause is contained in a “consumer agreement.” CP 320 (Rule R-1(a)(3) & (4)). What they also say, and what Woodward ignores, is that — even outside of a “consumer agreement” — the Rules control if the parties “have specified that these Consumer Arbitration Rules shall apply.” *Id.* (Rule R-1(a)(1)). Where the parties so agree, as they did here, application of the Rules is not predicated on the arbitration clause being part of a “consumer agreement.”³

Nor do the Consumer Arbitration Rules themselves require this matter to be “returned” to the superior court. Rule R-1(d) says that AAA will administer an arbitration only if it determines that the arbitration agreement “complies with the due process standards of these Rules and the Consumer Due Process Protocol,” and that if it does not, “either party may choose to submit its dispute to the appropriate court for resolution.”

³ Elsewhere, the Rules state: “When parties agree to arbitrate under these Rules, *or* when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration.” CP 321 (Rule R-1(b), emphasis added). Here, too, the Rules are clear that the Consumer Arbitration Rules can be voluntarily invoked by agreement for any kind of dispute.

CP 321. Woodward claims that an order compelling arbitration would be “futile” because, even if the Consumer Arbitration Rules applied, this screening rule would prohibit an arbitrator from hearing the case. Not so.

Woodward’s argument here fails for the same reason as before. He claims the Agreement violates AAA’s due process standards because the Rules can “only be used in contracts for ‘standardized, consumable goods or services.’” Woodward Br. at 44. But, as explained above, that claim is simply wrong. CP 320 (Rule R-1(a)(1)). Other than that flawed premise, Woodward cannot point to anything in the Agreement that would violate AAA’s Due Process Protocol. *See* CP 329-332. Nothing does. After all, by definition, an arbitration conducted in accordance with AAA’s own Rules, which is all the Agreement requires, will not violate AAA’s due process standards. In sum, the parties were free to choose, and an arbitrator is free to use, the Consumer Arbitration Rules.

2. The Consumer Arbitration Rules Are Fair.

Apart from his erroneous contention that the Consumer Arbitration Rules cannot apply to disputes of this kind, Woodward makes no real effort to explain how the procedures set forth in the Agreement and Rules are substantively unconscionable. They are not. The Agreement provides for a neutral arbitrator chosen by the parties; a right to be represented by counsel; and an arbitration hearing “at an agreed upon location” governed

by Washington law. CP 45-46. And, as Emeritus explained, *see* Emeritus Br. at 14, 15 & n. 4, the Rules allow the arbitrator to require both parties to produce documents and respond to others kinds of discovery — including depositions and expert disclosures — he or she determines is “necessary to provide for a fundamentally fair process.” CP 325 (Rule R-22).

No Washington court has ever held that an arbitration agreement is unconscionable because it gives the arbitrator discretion over discovery. *Cf. Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199, 203, 607 P.2d 856 (1980) (“arbitrators are the ones who should determine the nature and scope of the whole gamut of discovery.”). That’s not surprising; like the Consumer Arbitration Rules, Washington’s own arbitration act gives arbitrators complete discretion over discovery as fairness requires. RCW 7.04A.170(3) (“An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties ... and the desirability of making the proceeding fair, expeditious, and cost-effective.”).

More to the point, courts uniformly refuse to invalidate arbitration agreements as substantively unconscionable where, as here, they give the arbitrator discretion over discovery. *Booker v. Robert Half Intern., Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005); *Wallace v. Red Bull Distrib. Co.*, 958 F. Supp. 2d 811, 825 (N.D. Ohio 2013). In any event, as Emeritus also

explained, *see* Emeritus Br. at 14, any debate on the issue was laid to rest by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747 (2011), which held that, as a matter of FAA preemption, discovery limitations cannot support a finding of unconscionability. *Mansfield v. Vanderbilt Mortg. & Finance, Inc.*, 29 F. Supp. 3d 645, 656 (E.D.N.C. 2014) (“This argument has been squarely foreclosed by the Supreme Court.”); *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 1008 (N.D. Cal. 2012) (same); *Wallace*, 958 F. Supp. 2d at 824 (same).⁴

In the end, Woodward’s argument reduces to a pejorative claim that Emeritus is a “bad actor” when it comes to discovery. Woodward Br. at 12, 32-33. It is untrue and irrelevant. The Consumer Arbitration Rules give the arbitrator the same tools as a court to enforce discovery, *see* Emeritus Br. at 15, and, regardless, Woodward’s speculation about how an arbitrator might rule on discovery matters cannot support a finding of unconscionability. *Booker*, 413 F.3d at 77; *Freedman v. Comcast Corp.*, 988 A.2d 68, 89 (Md. App. 2010) (“Parties commonly agree to arbitrate

⁴ Our Supreme Court’s decision in *Gandee*, cited by Woodward, has nothing to do with the discovery limitations. *Gandee* simply rejected the notion that *Concepcion* somehow foreclosed it from invalidating an arbitration agreement because it was substantively unconscionable on numerous grounds that were not exclusive to arbitration. *Gandee*, 176 Wn.2d at 609-10. As *Concepcion* recognized, rules prohibiting limits on discovery are preempted because they “would have a disproportionate impact on arbitration agreements.” *Concepcion*, 131 S.Ct. at 1747.

under limited discovery, and to adopt appellant’s position would require us to speculate that he will be denied some fundamental—and unspecified—level of discovery.”). In sum, Woodward fails to show how or why the Consumer Arbitration Rules are substantively unconscionable.

3. The Arbitrator Fee Term Does Not Deprive Woodward Of An Adequate Forum For This Dispute.

Woodward abandons his argument below that the Agreement’s arbitrator fee-sharing term “creates a prohibitively expensive forum.” CP 266. He had no choice. Washington law is clear that where a party seeks to invalidate an arbitration agreement on the ground that it would be prohibitively expensive, that party bears the burden of producing evidence to show that he or she could not afford the cost. *Zuver*, 153 Wn.2d at 308-10 n. 6; *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009). As Emeritus explained, Woodward failed to produce any evidence regarding the estimated cost of arbitration, and no evidence showing that the estate could not afford to pay half of it. *See Emeritus Br.* at 16-19. Woodward concedes the point and changes his tune on appeal.

Instead of arguing that the Agreement will result in the estate paying an “unreasonably high” arbitrator fee, Woodward argues, for the first time, that AAA’s fees are “too low” to attract an agreeable arbitrator. *Woodward Br.* at 34-36. This argument is not only speculative, it assumes

the Consumer Arbitration Rules' \$1,500 per day fee applies. It does not, and Emeritus never argued otherwise. The Rules' fee schedule applies to AAA-administered arbitrations, for arbitrators appointed from AAA's National Roster. CP 323-326. There will be no AAA-arbitrator here because the Agreement requires that the arbitration be administered "in accordance with" AAA's rules — not that it be administered by AAA. CP 45; *cf. Gandee*, 176 Wn.2d at 605 (agreement "does not require arbitration with the AAA but only that the rules of the AAA be followed").

Moreover, as Emeritus also explained, *see* Emeritus Br. at 18 n. 5, AAA's Healthcare Policy Statement prevents AAA from administering this case in any event. *Nail*, 155 Wn. App. at 234-35. Importantly, this Court and numerous other courts have held that the inability of AAA to administer health care disputes will not invalidate an arbitration agreement nor will it preclude the parties' chosen arbitrator from using AAA's rules. *Id.*; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 759 S.E.2d 727, 731-33 (S.C. 2014); *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So.2d 1077, 1093 (Ala. 2005). Woodward does not dispute the point. In short, the Agreement permits the parties to select their arbitrator, and does not limit their selection to any particular hourly or daily fee. For this reason too, the Agreement gives Woodward an adequate forum for this dispute.

4. The Attorneys' Fee Term Is Severable.

Finally, Woodward argues, as he did below, that the Agreement's attorneys' fee term is substantively unconscionable because it conflicts with the estate's right to recover fees under the Vulnerable Adult Statute (VAS). *See* Woodward Br. at 36-40. If Woodward prevails on the VAS claim at arbitration, Washington law would entitle him to recover the estate's attorneys' fees. *See* Emeritus Br. at 20; *Adler*, 153 Wn.2d at 354-55; RCW 74.34.200(3).⁵ But that possibility does not compel a finding that the Agreement as a whole must be invalidated as unconscionable. The only issue is whether this Court can employ the "usual remedy" of severance, and enforce the Agreement without the attorneys' fee term. Woodward concedes that it can.

⁵ Woodward does not distinguish between the Agreement's arbitrator fee and attorneys' fee terms. As to the former, however, even if Woodward prevails on the merits, there is no conflict with the VAS. In *Adler*, as here, if the plaintiff prevailed at arbitration, his statutory claim would allow recovery of "the cost of suit including reasonable attorneys' fees." 153 Wn.2d at 353-54. The Court found the arbitration agreement's attorneys' fee term unconscionable because it would negate this statutory right to fees, but made no similar ruling with respect to the agreement's arbitrator fee-splitting term. In other words, the Court did not consider arbitrator fees to fall within the scope of the statute's reference to "cost of suit." Rather, as discussed above, an agreement to pay half the arbitrator's fees is unconscionable only if the plaintiff satisfies its burden of proving that he or she cannot afford to pay those fees, *id.*; *Zuver*, 153 Wn.2d at 308-10 — a burden Woodward concedes he did not satisfy here.

Courts are “loath to upset the terms of an agreement and strive to give effect to the intent of the parties,” especially where, as here, the agreement contains a severance clause. *Zuver*, 153 Wn.2d at 320. Only if unconscionable terms “pervade” an agreement can a court invalidate the whole. *Id.*; *Gandee*, 176 Wn.2d at 607. Conspicuously, Woodward does not argue that the attorneys’ fee term “pervades” the Agreement. He can’t. Washington courts have repeatedly held that an attorneys’ fee term (alone or with other terms) can be severed, and arbitration compelled under the remainder of the parties’ arbitration agreement. *See, e.g., Adler*, 153 Wn.2d at 359-60; *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 329-30, 211 P.3d 454 (2009). That is true here too.

Rather than dispute that the Agreement is enforceable without the attorneys’ fee term, Woodward returns to the same broken refrain that permeates his brief: AAA’s Consumer Arbitration Rules cannot be used in this dispute and, if they are “severed,” the Agreement cannot stand on its own. Woodward Br. at 40-43. For all the reasons explained above, the Rules can and do apply here, and there is no basis to invalidate them as substantively unconscionable. The question of whether the Rules can be severed from the Agreement is simply irrelevant. All that matters is that

the attorneys' fee term can be severed in the event Woodward prevails at arbitration—a point on which Woodward does not and cannot dispute.⁶

III. CONCLUSION

Emeritus' motion to compel arbitration should have been granted. The Agreement is neither procedurally nor substantively unconscionable. This Court should reverse and direct the trial court to order the parties to arbitrate the estate's claims.

RESPECTFULLY SUBMITTED this 17th day of April, 2015.

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By s/Ryan P. McBride

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⁶ Woodward's suggestion that Emeritus offered to "waive" the attorneys' fee term is simply wrong. Woodward Br. at 39. Because the law is so clear on this point, Emeritus has consistently argued that the term can be severed—although, of course, the result of severance and waiver is the same. See Emeritus Br. at 20-21; 10/24/14 Hr. at 9. What Emeritus did offer to waive (in the event it is found both unconscionable and non-severable) is the arbitrator fee-splitting term, Emeritus Br. at 19 n. 6—and it did so pursuant to well-settled Washington law. *Zuver*, 153 Wn.2d at 310 & n. 7; *Adler*, 153 Wn.2d at 354; *Walters*, 151 Wn. App. at 327.

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington and United States that on April 17, 2015, I caused a copy of the foregoing document to be served on the following person(s) in the manner indicated below at the following address(es):

Eric B. Eisinger, WSBA No. 34293	<input type="checkbox"/>	by CM/ECF
Bret Uhrich, WSBA No. 45595	<input checked="" type="checkbox"/>	by Electronic Mail
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DATED this 17th day of April, 2015, at Seattle, Washington.

s/Ryan P. McBride

Ryan P. McBride