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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their marital community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community and on behalf of their minor children, NIKLAS and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community and on behalf of their minor children, COLTON and HANNAH,

Plaintiffs/Respondents,

vs.

THE QUADRANT CORPORATION, a Washington Corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington Corporation; and WEYERHAEUSER COMPANY, a Washington Corporation,

Defendants/Appellants.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. RESPONDENTS' STATEMENT OF THE CASE

A. Background Facts.

This lawsuit involves claims against defendants/appellants The Quadrant Corporation ("Quadrant"), Weyerhaeuser Real Estate Company ("WRECO"), and Weyerhaeuser. The defendants design, develop, build and market "planned residential communities" throughout western Washington. CP 9. Quadrant is a wholly-owned and controlled subsidiary of WRECO and is the largest homebuilder in the state of Washington, having designed, built, marketed and sold thousands of homes in the Puget Sound region. CP 9. WRECO is a wholly-owned and controlled subsidiary of Weyerhaeuser. CP 9.

B. The Townsend/Ysteboe Class Action Complaint.

In December 2007, plaintiffs Donia Townsend and Bob Perez and Paul and Jo Ann Ysteboe filed a class action complaint against Quadrant, WRECO, and Weyerhaeuser. CP 3-27. Plaintiffs allege that Quadrant's practice of allowing only 54 working days for the construction of a home (regardless of weather and site conditions) results in shoddy workmanship and excessive moisture in the homes. The excessive moisture promotes the growth of dangerous mold and the poor construction practices

create unhealthy air quality within the homes. CP 9-11. Plaintiffs allege that the defendants have known of these problems for years, but have not changed their practices and instead secreted these problems from potential and actual Quadrant home buyers and their families. CP 11-16. Plaintiffs allege that the defendants specifically knew from investigations conducted by their own experts that excessive moisture and mold problems existed in hundreds of Quadrant homes. Defendants' experts advised Quadrant of the excessive moisture in wood and other building materials in the homes and warned defendants of the potential for serious health hazards associated with mold and dangerous air quality in the homes being sold to unsuspecting families. CP 10.

Based on these and other allegations, Plaintiffs assert on behalf of themselves, and similarly affected Quadrant homeowners and their families, causes of action for outrage, fraud, violation of Washington's Consumer Protection Act, negligence resulting in bodily injury and property damage, and negligent misrepresentation. Plaintiffs allege, among other things, that the defendants: (1) fraudulently and/or negligently failed to properly investigate and remediate mold, fiberglass and other known contamination problems in Quadrant homes; (2) fraudulently or

negligently misrepresented and/or failed to inform Quadrant homeowners of these known conditions; (3) fraudulently or negligently misrepresented the nature of defendants' investigation into the contamination and health hazards posed by it; (4) negligently caused bodily injury and property damage; and (5) that defendants' misconduct amounted to outrage under Washington Law. CP 16-24. In addition, Plaintiffs seek rescission of their Purchase and Sale Agreements (PSAs) with Quadrant, remedies for breach of warranty, and a judicial declaration that Quadrant's arbitration provisions are unconscionable and unenforceable. CP 24-26.

C. Quadrant Moves to Compel Arbitration While Weyerhaeuser and WRECO Move for Summary Judgment on the Merits.

In January 2008, weeks after Plaintiffs filed their complaint, Quadrant moved to stay the proceedings and compel arbitration. CP 28-35. The same day, defendants Weyerhaeuser and WRECO filed a motion for summary judgment seeking dismissal of all of the Plaintiffs' claims on the merits with prejudice. CP 790-801. Plaintiffs opposed both motions. CP 82-92; 921-29. The trial court denied Weyerhaeuser and WRECO's motions for summary judgment in February 2008. CP 342. Weyerhaeuser and WRECO

moved for reconsideration and the trial court denied this motion in March 2008. CP 986-1000; 1001-02.

D. Plaintiffs Challenge Quadrant's Arbitration Provision as Unconscionable and Unenforceable.

In opposition to Quadrant's motion to compel arbitration, Plaintiffs challenged the arbitration clause as procedurally and substantively unconscionable and obtained by fraud. CP 83; 87-90; 122-26. Plaintiffs testified in declarations that Quadrant failed to inform them of facts material to their decision to agree to the arbitration provision and secreted and misrepresented information regarding previous litigation against defendants arising from the systemic problems in Quadrant homes. CP 124; 132-33; CP 139. Plaintiffs testified that they would never have agreed to the arbitration provision if they had known the truth. Id.

Plaintiffs further testified that they were presented with Quadrant's "proprietary" Purchase and Sale Agreement on a "take-it-or-leave-it" basis (CP 134; 140); that when asked, Quadrant's sales representative informed them that the arbitration clause was non-negotiable (CP 134); that Quadrant employed high-pressure sales tactics including telling Plaintiffs that if they did not immediately enter a purchase and sale agreement, they would lose

the chance to purchase a Quadrant home (CP 133; 674; 681); that Plaintiffs were given no hard copy of the agreement to review (CP 133; 140); that Quadrant failed to identify the arbitration provision and that Plaintiff Ysteboe would have questioned the need for an arbitration provision given Quadrant's representations that the issues giving rise to prior lawsuits had been fixed (CP 140); and that in the case of Plaintiff Bob Perez, Quadrant did not provide him a copy of the executed agreement until 11 days after he signed it. CP 134.

Quadrant failed to respond to the substance of Plaintiffs' challenges to the arbitration clause and failed to present any evidence regarding the unconscionability of the arbitration provisions. CP 146-57.

E. The Lehtinen and Sigafos Families File Lawsuits Which are Consolidated with the Townsend / Ysteboe Class Action Lawsuit.

While Quadrant's motion to compel arbitration was pending in the *Townsend/Ysteboe* class action, Vivian and Tony Lehtinen, their minor children Niklas and Lauren, Jon and Christa Sigafos, and their minor children Colton and Hannah, commenced lawsuits against Quadrant, WRECO, and Weyerhaeuser alleging claims arising from the same course of misconduct giving rise to the

Townsend/Ystebøe class action. CP 232-52; 253-73.¹ The King County Superior Court consolidated the *Lehtinen* and *Sigafoos* lawsuits with the class action in February 2008. CP 143-44.

F. WRECO and Weyerhaeuser Move to Compel Arbitration Months After the Trial Court Denies Their Motions for Summary Judgment.

In September 2008, nearly nine months after the class action lawsuit was filed, seven months after the *Lehtinen* and *Sigafoos* cases were commenced, and six months after the trial court denied their motions for summary judgment and for reconsideration, Weyerhaeuser and WRECO moved to compel arbitration of the consolidated cases. CP 213-25. Quadrant also moved to compel arbitration of the *Lehtinen* and *Sigafoos* lawsuits. CP 197-212.

In response, Plaintiffs again challenged the enforceability of the arbitration provision as being procedurally and substantively unconscionable. CP 691-96; CP 711. Plaintiffs Vivian Lehtinen and Jon Sigafoos testified in declarations that they were presented with Quadrant's "proprietary", electronic Purchase and Sale Agreement on a "take-it-or-leave-it" basis and were not allowed to

¹ These additional cases are styled *Lehtinen v. The Quadrant Corporation, et al.*, King County Superior Court Cause No. 08-2-03611-1 SEA and *Sigafoos v. The Quadrant Corporation, et al.*, King County Superior Court Cause No. 08-2-03613-8 SEA.

make any modifications to the agreement. CP 674; 680-81. They also testified that they were not allowed to question or seek advice, regarding its provisions (CP 674; 681), and that Quadrant used high-pressure tactics to force Plaintiffs to sign the agreements immediately. CP 674-75; 680. In the case of Vivian and Tony Lehtinen, Quadrant did not even provide them with a copy of the agreement prior to signing—rather, they were provided only with the signature page and testified that they were pressured to sign it. CP 674-75. Plaintiffs also testified that they did not receive a copy of the agreement to take home after signing it. CP 674; 681.

Vivian Lehtinen and Jon Sigafos further testified that Quadrant withheld from them information regarding the company's investigations into the unhealthy conditions in Quadrant homes and about the prior litigation against the defendants. Plaintiffs testified that had they been informed of this information, they would not have agreed to the arbitration provision. CP 673-74; 679-80. Defendants again failed to respond to Plaintiffs' evidence that the arbitration provision is unconscionable and unenforceable. CP 722-27; CP 728-33.

G. Court Denies Motions to Compel Arbitration and Defendants Submit a Proposed Order Inconsistent With The Issues and Arguments Before The Court.

On December 2, 2008, the trial court denied the defendants' motions to compel arbitration following a hearing. CP 735. The defendants then submitted a proposed order. CP 734-35. Despite the fact that the Plaintiffs challenged the enforceability of the arbitration clause, defendants' order included a proposed finding/conclusion that "[t]here are disputes of fact concerning whether plaintiffs' Residential Real Estate Purchase and Sale Agreements with Quadrant were negotiated contracts or contracts of adhesion." CP 735.

Defendants' proposed order also included a finding/conclusion regarding the arbitrability of what defendants described as Plaintiffs' claims for "subsequent remedial costs due to construction defects":

As a matter of law, the arbitration clauses in the plaintiffs' Residential Real Estate Purchase and Sale Agreements with Quadrant do not apply to plaintiffs' claims regarding subsequent remediation costs due to construction defects.

CP 735. The defendants proposed this language despite the fact that no such issue was briefed or argued to the court. CP 28-33; 82-93; 97-111; 112-30; 146-57; 197-209; 213-25; 685-703; 707-18;

722-27; 728-33. The trial court later signed the defendants' proposed order. CP 734-35. Quadrant, WRECO, and Weyerhaeuser now appeal from this order denying their motions to compel arbitration. CP 737-41.

II. SUMMARY OF ARGUMENT

The trial court properly denied Quadrant, WRECO, and Weyerhaeuser's motions to compel arbitration. Plaintiffs established the unconscionability and unenforceability of the arbitration provisions through uncontroverted evidence. None of the Plaintiffs' claims against any defendant may be arbitrated. Furthermore, WRECO and Weyerhaeuser waived any asserted right to arbitrate by moving for summary judgment at the outset of this case. Plaintiffs' claims do not rely upon or seek to enforce the terms of Quadrant's Purchase and Sale Agreements and include claims of nonsignatory children for personal injuries, tort claims based on post-contract formation misconduct, and other claims that are not subject to arbitration under Washington law.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review and Relevant Authorities.

This Court reviews a trial court's decision denying a motion to compel arbitration *de novo*. Zuver v. Airtouch Communications,

Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004). The burden of proof is on the party seeking to avoid arbitration. McKee v. AT & T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008). When the validity of an agreement to arbitrate is challenged, courts apply ordinary state contract law. McKee, 164 Wn.2d at 383. General contract defenses such as unconscionability may invalidate arbitration agreements. Id.; RCW 7.04A.060(1). Unconscionability is also a question of law reviewed *de novo*. McKee, 164 Wn.2d at 383. This Court may affirm on any basis established by the pleadings and supported by the record, even if the trial court did not consider the argument. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

B. Plaintiffs Established Unconscionability and Unenforceability of the Arbitration Provisions.

The Appellants' primary argument on appeal is that the trial court erred "in denying arbitration on the basis that the PSAs [Purchase and Sale Agreements] may be invalid adhesion contracts." Brief of Appellants at 11, 13-18. Relying on the "findings" / "conclusions" that they drafted and submitted, the Appellants argue that the trial court erroneously ruled on the enforceability of the purchase and sale agreements as a whole (a

matter they contend is reserved for the arbitrator), rather than the enforceability of the arbitration clauses. This argument is meritless.

1. The “Findings” and “Conclusions” Relied Upon By Appellants Are Superfluous on De Novo Review and Constitute Invited Error.

Any “findings” or “conclusions” in the trial court’s order denying arbitration are superfluous on *de novo* review. By rule, findings and conclusions are unnecessary when ruling on a motion such as a motion to compel arbitration. CR 52(a)(5)(B). Superfluous findings and conclusions should be disregarded where the appellate court’s review is *de novo*. See e.g. Duckworth v. Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); Adams v. Dep’t of Soc. & Health Servs., 38 Wn. App. 13, 15, 683 P.2d 1133 (1984). Moreover, any “findings” or “conclusions” contained in the trial court’s order should not be considered on appeal because they were drafted by the appellants and constitute invited error. Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

The Appellants’ reliance on the trial court’s “findings” or “conclusions” is also misplaced because it is contrary to the record. As discussed below, the Plaintiffs challenged the validity and enforceability of the arbitration clauses—not the Purchase and Sale

Agreements.² Plaintiffs' challenges to the arbitration clause on grounds of procedural and substantive unconscionability presented an issue for the trial court—not an arbitrator—to decide. RCW 7.04A.060. Ample, uncontroverted evidence supported the trial court's denial of arbitration in these cases.

2. Under Washington Law, The Court Determines Whether an Arbitration Clause is Enforceable.

Washington's Uniform Arbitration Act ("UAA") unequivocally provides that the trial court (not the arbitrator) determines whether an arbitration clause is enforceable and if so whether a particular claim is subject to arbitration:

Validity of agreement to arbitrate.

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

RCW 7.04A.060 (emphasis added).

² The Appellants' reliance on the trial court's "finding" regarding the arbitrability of "claims regarding subsequent remediation costs due to construction defects" is similarly misplaced. As the record reflects, Plaintiffs never argued that they were making such a claim and no argument was presented regarding the arbitrability of such claims. See CP 82-93; 112-40; 685-703; 707-18.

Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement [to arbitrate], it may not order the parties to arbitrate.

RCW 7.04A.070(1) (emphasis added).

Both the Washington Supreme Court and this Court have confirmed that the trial court determines the validity and scope of an arbitration provision. McKee v. AT & T Corp., 164 Wn.2d 372, 394, 191 P.3d 845 (2008) (“when the validity of the arbitration agreement itself is at issue, the courts must first determine whether there was a valid agreement to arbitrate.”)³

3. Under Washington Law, Procedural or Substantive Unconscionability Render an Arbitration Clause Unenforceable.

Washington law has long recognized both procedural and substantive unconscionability as distinct defenses to the validity and enforceability of contracts. Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 303 103 P.3d 753 (2004). Contrary to Appellants’ suggestion, evidence of either form of unconscionability

³ See also Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc., 138 Wn. App. 203, 213-14, 156 P.3d 293 (2007) (“whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties.”); Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 103 P.3d 753 (2004) (analyzing whether arbitration agreement is unconscionable).

alone is sufficient to invalidate an agreement to arbitrate. As our Supreme Court explained in Zuver,

We have not explicitly addressed whether a party challenging a contract must show both substantive and procedural unconscionability. Our decisions in Nelson and Schroeder, however, analyze procedural and substantive unconscionability separately without suggesting that courts must find both to render a contract void.

Zuver, 153 Wn.2d at 303 n. 4. As the Zuver Court noted, decisions of both this Court and federal courts applying Washington law hold that a party may establish unconscionability on either procedural or substantive grounds. Zuver, 153 Wn.2d at 303 n. 4.⁴

Appellants cite no authority holding that procedural unconscionability alone is insufficient to invalidate an arbitration agreement and none exists. Indeed, such a ruling would render evidence of procedural unconscionability irrelevant. It would also contradict the clear language of RCW 7.04A.060(1), which expressly provides that arbitration agreements are subject to the same legal and equitable defenses as contracts.

⁴ Citing Luna v. Household Fin. Corp. III, 236 F.Supp.2d 1166, 1173 (W.D. Wash. 2002) (“under Washington law a contract may be invalidated on procedural unconscionability or substantive unconscionability grounds”) and Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 898, 28 P.3d 823 (2001) (party seeking to avoid enforcement of an arbitration agreement on grounds of procedural unconscionability only).

4. Plaintiffs Established that Quadrant's Arbitration Clause is Procedurally Unconscionable.

Procedural unconscionability exists where there is “the lack of a meaningful choice, considering all the circumstances surrounding the transaction including ‘[t]he manner in which the contract was entered,’ whether the party had ‘a reasonable opportunity to understand the terms of the contract’ and whether ‘important terms [were] hidden in a maze of fine print.’” Adler v. Fred Lind Manor, 153 Wn.2d 331, 345, 103 P.3d 773 (2005) (quoting Schroeder v. Fageol Motors, Inc., 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). Evidence of deceptive sales practices, fraud, misrepresentation, undue influence, duress, high pressure tactics, overreaching, fine print, or otherwise taking advantage of a necessity or weakness of a party may support a claim of unconscionability. Montgomery Ward & Co. v. Annuity Bd. of The Southern Baptist Convention, 16 Wn. App. 439, 445, 556 P.2d 552 (1976) (cited in Adler, 153 Wn.2d at 351).

Courts also recognize that contracts of adhesion may be procedurally unconscionable. Adler, 153 Wn.2d at 348. Whether an agreement is one of adhesion is determined under a three factor test. Adler, 153 Wn.2d at 347. The factors are: whether the contract is a standard form printed contract; whether it was prepared by one party

and submitted to the other on a “take-it-or-leave-it basis”; and whether there is a lack of true equality of bargaining power between the parties.” Adler, 153 Wn.2d at 347.

No single factor alone is dispositive, and it is not required that all factors be present to deem an agreement unconscionable— “Rather, the key inquiry for finding procedural unconscionability is whether [a party claiming unconscionability] lacked meaningful choice.” Zuver, 153 Wn.2d at 305.

In this case, the Plaintiffs submitted uncontroverted evidence establishing the procedural unconscionability of the arbitration provisions. Like the plaintiff in Zuver, Plaintiffs were provided with Quadrant’s own, proprietary Purchase and Sale Agreement and its arbitration provision on a “take-it-or-leave-it basis”. CP 133-34; 140; 674; 680-81. Plaintiffs testified that Quadrant represented that the arbitration agreement and other terms of the contract were “standard” or “boilerplate” and were not subject to negotiation, modification, or deletion. CP 134; 140; 674; 680-81. Plaintiffs testified that Quadrant representatives told them that in order to purchase a Quadrant home, they were required to agree to all of the terms of the agreements without modification. CP 134; 140;

674; 680-81. This evidence of an adhesive agreement was undisputed.

Plaintiffs also testified regarding their lack of meaningful choice to assent to the arbitration clauses. Plaintiffs submitted uncontroverted evidence of their inability to review and question the arbitration clause (and the rest of the PSAs) before signing. CP 133-34; 140; 674-75; 680-81. They also testified that defendants withheld material information from them that rendered them unable to meaningfully decide to consent to the arbitration clause and whether to even purchase a Quadrant home. CP 132-33; 139-40; 673-74; 679-80.

In Zuver, the Supreme Court determined that the plaintiff in that case had been afforded a reasonable opportunity to understand and question the terms of the arbitration agreement where she had been given it 15 days prior to signing it. Zuver, 153 Wn.2d at 306. By sharp contrast, Quadrant provided the Plaintiffs in these cases with the PSAs, including the arbitration clauses, at their initial sales appointment and informed them that they must immediately agree to Quadrant's terms. CP 133-34; 140; 673-74; 680-81. Quadrant told Plaintiffs that unless they signed immediately, they would not be able to purchase a Quadrant lot and home. CP 133; 674; 681. Plaintiff

Bob Perez testified that he and his wife were forced at their initial sales appointment (lasting less than 4 hours) to decide to purchase a Quadrant home, to select their lot, to execute the purchase agreement, to choose the model of home and its elevation, and to decide its exterior color scheme. CP 133. Plaintiff Vivian Lehtinen testified that the sales appointment process similarly “took less than a few hours” and that Quadrant “deliberately created a sense of extreme urgency and rushed us through the execution [of the PSA] process”. CP 674. Mrs. Lehtinen was told that if she did not agree to purchase a Quadrant home during the initial sales appointment, Quadrant would bump her to the end of the sales list, that she would lose the lot she desired, and that Quadrant would raise the price of the home by \$5,000 to \$10,000 if she and her husband hesitated to purchase. CP 674. This uncontroverted evidence of high pressure tactics supported Plaintiffs’ claim of procedural unconscionability. Montgomery Ward & Co., 16 Wn. App. at 445.

Plaintiffs also testified about their lack of a reasonable opportunity to see and understand the arbitration clause. Plaintiffs Bob Perez and Donia Townsend and Paul and Jo Ysteboe were only provided with an electronic version of the agreement shown on a computer screen at the Quadrant representatives’ desks. CP

132; 140. Plaintiffs were not given a hard copy to read, question, mark-up or take to a lawyer to review. CP 133, 140. Plaintiffs further testified that Quadrant's representatives failed to discuss the terms of the agreements (CP 140), and failed to identify the arbitration provision (CP 674; 680), or told them the arbitration provision was "just part of the process" and "standard stuff". CP 134. This evidence was also undisputed.

The record also supports a determination that the arbitration provisions were effectively hidden in a maze of fine print. Notably, the arbitration agreement considered by the court in Zuver, was contained in a stand-alone, one page document that was clearly labeled "**ARBITRATION AGREEMENT**", appearing in bold, underlined font. Zuver, 153 Wn.2d at 306. By comparison, Quadrant's arbitration provision is not set apart from the underlying contract—it appears in the same size and type of font as the myriad of other provisions and it is presented on the last page of a ten page agreement. See e.g. CP 39-48; 50-59.

Plaintiffs Bob Perez, Paul Ysteboe, and Jon Sigafos also testified that they inquired about prior homeowner lawsuits against Quadrant and that Quadrant failed to tell them the true nature of those claims or that defendants knew that their 54 day construction

process resulted in dangerous air quality conditions in Quadrant homes. CP 132; 139; 681. Plaintiffs testified that had Quadrant disclosed this information to them, they would not have agreed to arbitrate any potential disputes with Quadrant (let alone purchase a home from the company). CP 132-33; 139; 673-74; 679-81. This uncontroverted evidence established that Plaintiffs lacked a true, meaningful choice as to whether to agree to the arbitration clause contained in Quadrant's proprietary Purchase and Sale Agreement and fully supports a determination that Quadrant's arbitration clause is procedurally unconscionable. Zuver, 153 Wn.2d at 305; Montgomery Ward & Co., 16 Wn. App. at 445.

Finally, Plaintiffs testified that they were not provided a copy of the agreement in a timely fashion even after they had been pressured to execute it. CP 134; 674; 681. In the instance of Plaintiff Bob Perez, he and his wife did not receive a copy of the signed agreement until 11 days after signing it. CP 134. As the Zuver Court recognized, the lack of the ability to review an agreement after execution can further deprive a party of a reasonable opportunity to consider its terms. Zuver, 153 Wn.2d at 306 (citing Luna, 236 F.Supp.2d at 1176 (three-day rescission period provided parties with a reasonable opportunity to consider agreements terms)). Plaintiffs

here were denied an opportunity to timely review the agreement even after they had signed it. This is particularly troubling where Quadrant required the Plaintiffs to waive their statutory rights to revoke their offers to purchase and their rights to receive a statutory disclosure regarding the conditions of the property. See CP 645.

Plaintiffs submitted substantial, undisputed evidence of procedural unconscionability below. This Court can and should affirm the trial court's denial of the motions to compel arbitration on this basis alone.

5. Plaintiffs Also Demonstrated That Quadrant's Arbitration Provision is Substantively Unconscionable.

i. **Arbitration Provision Is Substantively Unconscionable If It Requires Plaintiffs to Litigate Their Claims in Multiple Forums.**

Plaintiffs also established that Quadrant's arbitration provision is substantively unconscionable and invalid. Substantive unconscionability exists when the provisions of a contract are "one-sided" or "overly harsh" and result in it being "shocking to the conscience" or "exceedingly calloused." Adler, 153 Wn.2d at 344-45. Prohibitive costs of arbitration can render an arbitration provision unenforceable based on principles of equity. See Adler, 153 Wn.2d

at 352-55; Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 45 P.3d 594 (2002). In Mendez, this Court recognized that while

Washington's policy favoring arbitration is grounded on the proposition that arbitration allows litigants to avoid the formalities, expense and delays inherent in the court system. . . . This policy is defeated when an arbitration agreement triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims.

...
Avoiding the public court system to save time and money is a laudable societal goal. But avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable. Goals favoring arbitration of civil disputes must not be used to work oppression. When the goals given in support of contract clauses like this are used as a sword to strike down access to justice instead of as a shield against prohibitive costs, we must defer to the overriding principal of access to justice.

Mendez, 111 Wn. App. at 464, 465.

Plaintiffs' uncontroverted declaration testimony establishes that Plaintiffs would suffer significant financial burdens if required to pursue their claims in multiple forums. CP 134, 140, 675, 681. Even if Quadrant's arbitration clause was valid, and any of the Plaintiffs' claims were subject to it, the result would be to require multiple proceedings in multiple forums. Plaintiffs would be forced to incur the oppressive expense of discovery and adjudication in multiple forums in order to be made whole. This includes, but is not limited to, duplicative costs to procure the attendance of the same witnesses at

multiple proceedings, the costs to prepare pre-trial and trial and pre-arbitration and arbitration materials and exhibits, and the costs to take leave from their jobs to participate in multiple adjudications. CP 134, 140, 675, 681. Quadrant should not be permitted to use its arbitration provision to deny Plaintiffs their right to access the courts and to seek complete redress in a single proceeding in a single forum.

ii. Quadrant's Arbitration Provision Effectively Prohibits A Single Class Action and Is Unenforceable.

Washington courts have held that when contract provisions preclude class action lawsuits under our state's Consumer Protection Act, either by their express terms or in effect, the provisions are void and unenforceable because they violate the public policy behind the CPA. Scott v. Cingular Wireless, 160 Wn.2d 843, 161 P.3d 100 (2007) (holding that an arbitration provision that expressly precludes class action litigation violates public policy and is unconscionable); Dix v. ICT Group, Inc., 160 Wn.2d 826, 161 P.3d 1016 (2007) (holding that a forum selection clause that in effect precludes class action lawsuit violates public policy and is unenforceable).

The purpose of class action lawsuits is to provide a single, efficient mechanism for adjudication of the claims of many who

would otherwise not likely have effective access the justice to obtain resolution of their claims. Scott, 160 Wn.2d at 851-52. Our Supreme Court has long-recognized “that class actions are a critical piece of the enforcement of consumer protection law.” Scott, 160 Wn.2d at 853. The individual consumer’s ability to enforce the CPA and vindicate the public interest is a significant aspect of enforcement of the statute. Dix, 160 Wn.2d at 837.

Quadrant argued below that Dix is distinguishable because it involved “individually small consumer claims”. CP 725-26. This argument is meritless. The Dix Court stated that because “the costs and inconvenience of suit may be too great for individual actions . . . class suits are an important tool for carrying out the dual enforcement scheme of the CPA.” Dix, 160 Wn.2d at 837. It is the costs and related barriers that prevent consumers from being able to pursue claims on an individual basis that make the class action an important judicial vehicle for the enforcement of the CPA, not the relative value of the claimants’ damages.⁵

⁵ Below, Quadrant also relied on Stein v. Geonerco, 105 Wn. App. 41, 17 P.3d 1266 (2001) and Heaphy v. State Farm Mut. Auto. Ins., 117 Wn. App. 438, 72 P.3d 220 (2003) for the proposition that courts will enforce arbitration clauses in cases “not involving individually small consumer claims” even if class action status is affected. This is incorrect. Heaphy is not a CPA case and Stein simply rejected the argument that if arbitrable, some of the claims in that action should

In this case, Plaintiffs submitted uncontroverted testimony that the costs and inconvenience of having to pursue their individual claims in multiple forums would be significant. CP 134, 140, 675, 681. The same is true for the class claims. If the class is forced to arbitrate some claims and litigate others, the hundreds (if not thousands) of Quadrant homeowners and residents who make up the class will be effectively denied the ability to resolve their claims against Quadrant, WRECO and Weyerhaeuser in a single class action lawsuit. Just as requiring plaintiffs on an individual basis to adjudicate their claims in two forums undermines basic notions of equity and fairness, requiring a class of plaintiffs to adjudicate class claims in two forums undermines the essential purposes of the class action process. Quadrant's arbitration provision is substantively unconscionable to the extent that it could be applied to bar Plaintiffs from resolving their claims in a single class action and should not be enforced.

be arbitrated on a class basis, where plaintiff provided no statutory authority authorizing the same.

C. Even If There Is A Valid, Enforceable Arbitration Clause, None of the Plaintiffs' Claims Are Subject to Arbitration.

Policies favoring arbitration aside, Washington law is clear that parties are not required to arbitrate what they have not agreed to arbitrate. Todd v. Venwest Yachts, Inc., 127 Wn. App. 393, 397, 111 P.3d 282 (2005). Appellants contend that all of the Plaintiffs' claims (including those of the class representatives and all class members, minor children and other non-signatory family members) are subject to arbitration. This is incorrect.

1. Plaintiffs' Claims Against Quadrant, WRECO and Weyerhaeuser For Post-Contract Tortious Conduct Are Not Subject to Arbitration.

Even if enforceable, Quadrant's arbitration provision cannot subject plaintiffs' tort claims which arise out of appellants' *post-agreement tortious conduct* to arbitration. The arbitration clause is expressly limited to claims relating to the enforcement of the Purchase and Sale Agreements (i.e., Plaintiffs' promise to buy and Quadrant's promise to sell the home) and claims of property defects.

Plaintiffs have asserted many common and numerous claims which can in no way be construed to be associated with Quadrant's Purchase and Sale Agreement. These claims include:

- Claims for fraud and negligent misrepresentation arising from Quadrant's failure to fully investigate mold and particulate contamination in plaintiffs' and other Quadrant homes after the PSAs were signed;
- Claims for fraud and negligent misrepresentation arising from defendants' failure to abide by and implement the remediation protocols that its own experts developed;
- Claims for fraud and negligent misrepresentation arising from defendants' failure to disclose and inform plaintiffs and other class members that Quadrant homes were contaminated with mold and particulate contamination that could and did result in illness;
- Claims for fraud and negligent misrepresentation arising from Quadrant's failure to inform plaintiffs and others of the proper remedy for mold and particulate contamination; and
- Claims for outrage that arise out of defendants' intentional and negligent failures to disclose, investigate, and remediate, issues related to the mold and particulate contamination.

CP 3-27; 232-52; 253-73. None of these claims concern or rely upon the Purchase and Sale Agreements, or a breach thereof, nor are they construction defect claims. Indeed, these claims are available to every similarly affected Washington resident living in a Quadrant built home – even those who did not enter into a purchase and sale agreement with Quadrant. These claims are not based upon or related to the contract with Quadrant. There is no language in the arbitration clause insulating Quadrant (or WRECO or Weyerhaeuser)

from a jury trial for their intentional and negligent misconduct committed after Quadrant induced homeowners to sign the Purchase and Sale Agreements.

2. Plaintiffs' Claims Against WRECO and Weyerhaeuser Are Not Subject to Arbitration.

Appellants contend that all of the adults' and children's claims against WRECO and Weyerhaeuser are subject to arbitration despite the fact that WRECO and Weyerhaeuser have waived any right to seek arbitration and despite the fact that neither WRECO nor Weyerhaeuser are signatories to the Purchase and Sale Agreements. WRECO and Weyerhaeuser also overlook the fact that even if they had a right to seek arbitration as a non-signatories, they cannot compel the children to arbitrate their claims against any of the defendants.

i. **WRECO and Weyerhaeuser Waived the Right to Seek Arbitration By Moving For Summary Judgment On the Merits.**

This Court should conclude that WRECO and Weyerhaeuser waived any right to seek arbitration. It is well-established that a party to an arbitration clause may waive its enforcement. Ives v. Ramsden, 142 Wn. App. 369, 382, 174 P.3d 1231 (2008). A party

to an arbitration agreement expressly or impliedly waives the provision either by failing to invoke it when an action is commenced or by acting inconsistent with an intention to seek arbitration. B & D Leasing Co. v. Ager, 50 Wn. App. 299, 303, 748 P.2d 652 (1988). Where “waiver is accomplished by implication, it is an issue to be determined by the courts.” Naches Valley School Dist. No. JT3 v. Cruzen, 54 Wn. App. 388, 395, 755 P.2d 960 (1989), citing Geo. V. Nolte & Co. v. Pieler Const. Co., 54 Wn.2d 30, 34, 337 P.2d 710 (1959).

Under Washington law, a party waives arbitration by moving for summary judgment on the merits. Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wn. App. at 395-96; see also Kinsey v. Bradley, 53 Wn. App. 167, 171-72, 765 P.2d 1329 (1989) (applying FAA waiver standards to hold party “manifested a clear intent to utilize the judicial process rather than seek non-judicial resolution of arbitrable issues” through extensive motion practice resulting in dismissal of some claims). A party opposing arbitration is not required to demonstrate prejudice arising from the waiver of the right to arbitrate. Lake

Wash. School Dist. 414 v. Mobile Modules Northwest, Inc., 28 Wn. App. 59, 62, 621 P.2d 791 (1980).⁶

In Naches Valley, this Court held that the defendants waived the right to arbitrate by moving for summary judgment after another party had already raised the arbitration issue:

[W]e conclude that Cruzen, Hinze, and Smith waived arbitration with respect to their individual claims. . . . Specifically, the three teachers moved for summary judgment on the issue of the District's liability after the Association had already moved for summary judgment on the arbitration issue. The teachers' motion indicates an intent by them to proceed with the action rather than seek arbitration.

Naches Valley, 54 Wn. App. at 395-96 (citations omitted). Federal appellate courts similarly hold that a party waives its right to seek arbitration by moving for summary judgment on the merits because

⁶ Unlike Washington's waiver analysis, the waiver inquiry under the Federal Arbitration Act ("FAA") requires a showing of prejudice. Steele v. Lundgren, 85 Wn. App. 845, 849, 935 P.2d 671 (1997), quoting Kinsey v. Bradley, 53 Wn. App. 167, 169, 765 P.2d 1329 (1989). As Appellants concede, the FAA does not apply here: "[T]his appeal must be determined under Washington's UAA." Brief of Appellants at 19 n. 13. But even courts requiring evidence of prejudice before finding waiver of a right to compel arbitration have observed that a motion for summary judgment, in view of the time and expense associated with such litigation activity, "could not have caused anything but substantial prejudice to the [plaintiffs]." Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1162 (5th Cir. 1986) (citation omitted); accord Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 224 (3d Cir. 2007).

such conduct indicates the party's intent to utilize the judicial system rather than to pursue arbitration⁷.

Weyerhaeuser and WRECO unequivocally elected to proceed with litigation on the merits at same time that Quadrant moved to compel arbitration. Indeed, Quadrant, WRECO, and Weyerhaeuser are represented by the same counsel and it is no coincidence that the defendants' filed their motions on the same day. See CP 33; 801. By choosing to litigate, WRECO and Weyerhaeuser unequivocally waived any right they may have had to seek arbitration. They cannot now forum shop and seek to revisit in arbitration the issues decided by the trial court.

ii. Nonsignatories WRECO and Weyerhaeuser May Not Enforce Quadrant's Arbitration Clause.

Even if WRECO and Weyerhaeuser had not waived any right to arbitrate, Plaintiffs' claims against them cannot be subject to

⁷ See Kahn v. Parsons Global Servs., Ltd., 521 F.3d 421, 427, 428 (D.C. Cir. 2008) (defendant waived arbitration by submitting early summary judgment motion addressing merits); Kelly v. Golden, 352 F.3d 344, 349 (8th Cir. 2003); Ritzel Communications Inc. v. Mid-American Cellular Tel. Co., 989 F.2d 966, 969 (8th Cir. 1993) (a motion to dismiss touching the merits of a case "represents a substantial, active invocation of the litigation process", is inconsistent with the right to arbitrate); St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., 969 F.2d 585, 589 (7th Cir. 1992) (party waived right to arbitrate by moving for summary judgment and not asserting arbitration clause until after the court denied motions); accord Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 131 (2d Cir. 1997).

arbitration. WRECO and Weyerhaeuser are not signatories to the Purchase and Sale Agreements. WRECO and Weyerhaeuser's claim that they may seek to protect themselves from a public trial under Quadrant's contract is contrary to Washington law. The foreign authorities Appellants cite are also inapplicable.

In Washington, parties are not required to arbitrate what they have not agreed to arbitrate. Todd v. Venwest Yachts, Inc., 127 Wn. App. 393, 397, 111 P.3d 282 (2005). WRECO and Weyerhaeuser admit that they are not parties to the Purchase and Sale Agreements; that they have never had any contractual or other relationship of any kind with any of the Plaintiffs; and assert that they are "separate legal entities from Quadrant. CP 793; 797; 799. Despite these assertions below, WRECO and Weyerhaeuser now attempt to invoke Quadrant's arbitration provision to force Plaintiffs' claims into arbitration. This they cannot do.

The sole Washington authority cited by WRECO and Weyerhaeuser is McClure v. Davis Wright Tremaine, 77 Wn. App. 312, 316, 890 P.2d 466 (1995). McClure is inapplicable. In that case, this Court concluded that because the express language of the arbitration provision provided that a dispute arising from the agreement would be submitted to arbitration "upon the request of any

party involved”, the non-signatory law firm could compel arbitration. McClure, 77 Wn. App. at 315 (emphasis added). Unlike the arbitration provision in McClure, Quadrant’s arbitration provision contains no language allowing non-signatories to invoke arbitration. CP 48, 59, 178, 640.

WRECO and Weyerhaeuser’s reliance on the McClure court’s statement that a signatory to the agreement was “within his rights to have the matter settled in the manner prescribed by the Agreement” is also misplaced. McClure, 77 Wn. App. at 316. First, the Court’s statement is dicta. As the Court noted, “McClure appeal[ed] the trial court’s decision that his claim against Davis Wright was arbitrable”—not his claims against the signatory party. McClure, 77 Wn. App. at 316. Second, the contractual right of the signatory defendant in McClure (a party named Lewison) to compel arbitration has no bearing on whether non-signatories may (absent express contract language) compel arbitration pursuant to agreements to which they are not parties. There is simply no Washington authority to support Appellants’ contention that a non-signatory can compel arbitration where an arbitration clause lacks any language permitting non-signatories to do so.

**iii. Appellants' Out-of-State Authorities
Do Not Support Compelling
Arbitration of Plaintiffs' Claims.**

WRECO and Weyerhaeuser also rely a handful of cases from foreign jurisdictions, but these cases do not support the contention that the Plaintiffs' claims against these non-signatory defendants may be compelled to arbitration.

- a. *The Tort Claims of the Adults and Children Against WRECO and Weyerhaeuser Are Not Subject to Arbitration Under an "Inherently Inseparable" or "Inextricably Intertwined" Theory.*

Appellants rely on the Fourth Circuit's decisions in International Paper Co. v. Schwabedissen Maschinen v. Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000) and J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A., 863 F.2d 315, 320-21(4th Cir. 1988) for the proposition that under certain circumstances, courts may compel arbitration of claims against a non-signatory defendant when the claims against the signatory and non-signatory parties are "inherently inseparable." These cases are inapplicable and the more

recent case of Coots v. Wachovia Securities, Incorporated⁸ is more instructive.

In Coots, the Maryland District Court analyzed whether the minor children of a client of Wachovia Securities, who had held banking and brokerage agreements with the company, were equitably estopped from claiming that the arbitration clauses in the contracts were inapplicable to the children's tort claims against Wachovia. The Coots court rejected Wachovia's claim that the non-signatory children were bound by the arbitration clause because their claims were "inextricably intertwined" with or "inherently inseparable" from the contract. Coots, 304 F.Supp.2d at 699-701.

As Coots explained, the "inextricably intertwined" analysis is an equitable estoppel theory, "which precludes a party from asserting rights against another when his own conduct renders assertion of those rights contrary to equity." Coots, 304 F.Supp.2d at 699, 700, citing International Paper, 296 F.3d at 417-18 and J.J. Ryan, 863 F.2d at 321. The Coots court then expressly rejected the application of this analysis in the context of the parent-child relationship:

⁸ 304 F.Supp.2d 694, 700-01 (D. Md. 2003), vacated on other grounds, 114 Fed.Appx. 586 (4th Cir. 2004).

[T]he Fourth Circuit has never extended this [“inextricably intertwined” or “inherently inseparable”] exception beyond the corporate parent-subsidary setting. But to the extent that Wachovia argues that a parent-child relationship equates to a corporate parent-subsidary relationship – a debatable proposition – again this case is distinguishable . . . they are not, as in the corporate setting, derivative.

Coots, 304 F.Supp.2d at 700 (emphasis added), citing J.J. Ryan, 863 F.2d at 320-01 and International Paper, 296 F.3d at 418 n. 6.

Finally, the Coots court concluded that even if the analyses of International Paper or J.J. Ryan were applied, the children’s claims, which sounded in tort—not contract—could not be compelled to arbitration:

Finally, in a very practical sense, the children's claims cannot be considered “inextricably intertwined” or “inherently inseparable” from the Agreement. Their claim of conversion sounds in tort, not contract. They do not seek to enforce any provision of the contract. Wachovia's assertion of the contract by way of a defense cannot ipso facto create an “inherent inseparability” or “inextricable intertwining” of the claims and the contract. If this were allowed, the proponent of an arbitration clause would prevail every time simply by referring to the arbitration clause. The proposition falls of its own weight.

Coots, 304 F.Supp.2d at 700-01, citing J.J. Ryan, 863 F.2d at 320.

The children in this action have claims for personal injuries sustained as the result of the alleged intentional and negligent misconduct of the defendants. CP 3-5, 21-23; 232-34, 236, 247-48;

253-55, 257, 268-69. The children's claims are not claims based on the Purchase and Sale Agreements—they exist independent of the PSAs.⁹ The Appellants' reference to the adult Plaintiffs' claims for breach of warranty and rescission of the Purchase and Sale Agreements cannot *ipso facto* render the children's claims (or the claims of any other Plaintiff) "inherently inseparable" from or "inextricably intertwined" with the purchase and sale contracts.

Even if considered, International Paper is distinguishable from this case. There, the court observed that the plaintiff's "entire case hinge[d] on its asserted rights under the Wood-Schwabedissen contract [containing the arbitration clause]." International Paper, 206 F.3d at 418. Here, the child and adult Plaintiffs' claims for personal injuries and the adult's tort claims for fraud, misrepresentation, outrage are not contract claims and are

⁹ Appellants' contention that "the parents are the only named plaintiffs in this action" is not well-taken. The minor children of both the Lehtinen and Sigafos plaintiffs are named in the complaints and are identified as plaintiffs. CP 232, 234, 236; 253, 255, 257. Whether RCW 4.08.050 requires guardians for the minor plaintiffs to be appointed or not, this does not make the children any less named parties in this action. RCW 4.08.050 is "not jurisdictional" and does not void any judgment—it merely makes a judgment voidable at the option of the minor if a court determines that his or her interested were not protected to the same extent as if a guardian ad litem had been appointed. Newell v. Ayers, 23 Wn. App. 767, 771-72, 598 P.2d 3 (1979).

not inherently inseparable from the PSAs.¹⁰ Accordingly, the children are in no way “estopped” from avoiding the arbitration provisions. C.f. International Paper, 206 F.3d at 418.

J.J. Ryan is also distinguishable. There, the outcome was compelled by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As the J.J. Ryan court explained, the Convention “requires the federal policy in favor of arbitration to apply with ‘special force in the field of international commerce’”. J.J. Ryan, 863 F.2d at 319, quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The court further explained that the Convention required the court to “enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.” Id. (emphasis added).

In this case, the Plaintiffs’ personal injury and other tort claims do not arise from nor do they depend upon Quadrant’s proper performance of its obligations under the PSAs. The foreign cases cited by Appellants (which are contrary to Washington law) are inapplicable to the Plaintiffs’ personal injury claims and to the adult

¹⁰ Indeed, people living in Quadrant homes who did not buy the home from Quadrant could have personal injury claims against the defendants. Clearly, the tort claims are not connected to or derived from the contracts.

Plaintiffs' other tort claims. Quadrant, WRECO, and Weyerhaeuser cannot seek arbitration of Plaintiffs' tort claims.

b. The Claims of Nonsignatory Children Against Quadrant, WRECO and Weyerhaeuser Cannot Be Arbitrated.

In a related argument, Appellants also contend that the claims of the non-signatory children are arbitrable because the Purchase and Sale Agreements "form the underlying basis for the children's claims". This argument is meritless. None of the children were parties to a Purchase and Sale Agreement with Quadrant and their tort claims cannot be subject to arbitration.

Under Washington law, "[a] person who is not a party to an agreement to arbitrate may be bound to such agreement only by ordinary principles of contract and agency." Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 892, 895, 988 P.2d 12 (1999). In Powell, this Court held that a plaintiff who had been injured on a marine vessel could not be compelled to arbitrate his claims against the tortfeasor's insurer based on the policy's arbitration clause. The Powell Court explained, it is only "[w]hen a plaintiff bases its right to sue on the contract itself, not upon a statute or some other basis outside the contract, the provision requiring arbitration as a condition precedent to recovery must be observed." Powell, 97

Wn. App. at 896-97 (emphasis in original), quoting Aasma v. American S.S. Owners Mut. Protection and Indem. Ass'n, 95 F.3d 400 (6th Cir. 1996).

The claims of the minor children in this action are for personal injuries sustained as the result of the alleged intentional or negligent conduct of the defendants. CP 3-5, 21-23; 232-34, 236, 247-48; 253-55, 257, 268-69. These are tort claims, not contract claims. They are also not claims through which the children are asserting rights based on the agreements between their parents and Quadrant. Indeed, the Purchase and Sale Agreements are immaterial to the children's claims. Because the PSAs are not "the underlying basis for all of the [non-signatories'] claims", the reasoning of In re Jean F. Gardner Amended Blind Trust, 117 Wn. App. 235, 239, 70 P.3d 168 (2003) is similarly inapplicable.

For the same reasons, Trimper v. Terminix Int'l Co., 82 F.Supp.2d 1 (N.D.N.Y 2000) also does not apply here. In Trimper, the court held that the tort claims of the plaintiff's children were subject to arbitration under the terms of the service agreement authorizing Terminix's application of insecticide at the plaintiffs' residence. As the court explained, "the tort claim here does not fall beyond the scope of the contractual relationship" because "[t]here

can have been no breach [of the service contract] without negligence [in the course of the performance of the contract work].”
Trimper, 82 F.Supp.2d at 4-5.

c. None of the Adults’ and Children’s Claims Against WRECO and Weyerhaeuser Are Subject to Arbitration Under a “Concerted Misconduct” Theory.

WRECO and Weyerhaeuser also contend that the Plaintiffs’ claims against them (both those of the adults and minor children) are subject to arbitration because the signatory Plaintiffs have alleged “concerted misconduct” on the part of signatory Quadrant and non-signatories WRECO and Weyerhaeuser. The Appellants’ reliance on Grigson v. Creative Artists Agency, LLC., 210 F.3d 524 (5th Cir. 2000) is misplaced. Grigson is not the majority view and most courts reject it. See In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007). Moreover, under Grigson, arbitration of claims against non-signatories is permitted in only the most limited circumstances:

First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. . . . Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

Grigson, 210 F.3d at 527¹¹, quoting MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999) (emphasis in original).

In the case of In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007), the Texas Supreme Court surveyed the treatment of Grigson by federal courts. The court concluded that nonsignatory corporate defendants which are affiliates of signatory defendants in the same litigation cannot compel plaintiffs to arbitrate claims against the affiliates even when the plaintiffs had alleged a conspiracy or “concerted misconduct” among the defendants.

In Merrill Lynch, the plaintiffs were investors who had multiple accounts with Merrill Lynch under numerous agreements, some of which contained arbitration clauses. Plaintiffs sued certain Merrill Lynch corporate entities, including a trustee, a life insurance company and others. The trustee and insurance company defendant had contracts with plaintiffs that did not contain arbitration clauses. The plaintiffs had however transferred funds from their Merrill Lynch accounts to the trust account in order to pay premiums to the insurer. The insurer then paid a commission on the sale back to Merrill Lynch.

¹¹ Plaintiffs’ complaints clearly do not “rely on the terms of the written agreement in asserting [their] claims against [WRECO and Weyerhaeuser]”, the so-called “direct benefits” prong of Grigson. WRECO and Weyerhaeuser rely on the “concerted misconduct” theory only.

After plaintiffs sued all of the entities involved except Merrill Lynch, the defendants moved to stay the litigation and compel arbitration.

In addressing whether the trustee and insurer could compel the plaintiffs to arbitrate their claims pursuant to the plaintiffs' agreements with Merrill Lynch, the court rejected Grigson and observed that few courts have followed it. The court refused to compel arbitration:

ML Life and ML Trust also assert that they can invoke Merrill Lynch's arbitration agreements through an estoppel theory based on substantially interdependent and concerted misconduct. . . . But we have never compelled arbitration based solely on substantially interdependent and concerted misconduct, and for several reasons we decline to do so here.

First, the United States Supreme Court has never construed the Federal Arbitration Act to go this far. It has repeatedly emphasized that arbitration "is a matter of consent, not coercion," that the Act "does not require parties to arbitrate when they have not agreed to do so," and its purpose is to make arbitration agreements "as enforceable as other contracts, but not more so." Thus, arbitration is not required merely because two claims arise from the same transaction, as the Court made clear in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

...
While the Fifth Circuit has recognized concerted-misconduct estoppel, the theory is far from well-settled in the federal courts. Despite hundreds of federal appeals involving arbitration, it appears in only 10 reported opinions. In the two leading cases, Grigson v. Creative Artists Agency L.L.C., supra, 210 F.3d 524, and MS Dealer Service Corp. v. Franklin, supra, 177 F.3d 942, the Fifth and Eleventh Circuits held that both direct-benefits and concerted-misconduct estoppel were

present, so it is unclear what the latter theory added to the result. Of the remainder, the theory was found inapplicable in 4, and it was not reached in 2 more. In only 2 cases did the result hinge on the exception--and in those the Fifth Circuit compelled arbitration in one and refused to do so in the other.

...

In the latter case, Hill v. G E Power Systems, Inc., 282 F.3d 343, 349 (5th Cir. 2002), the Fifth Circuit found that "Grigson's second prong is met" (direct-benefits being the first estoppel prong and concerted-misconduct the second), and at the same time that "the district court did not abuse its discretion" in refusing to compel arbitration because "the district court is better equipped to make the call than this court, and we do not lightly override that discretion." But the right to a jury trial is not discretionary. Nor is the right to have an arbitration contract enforced. If the parties have not agreed to arbitration, no trial court has discretion to make them go; if they have agreed to arbitration, no trial court has discretion to let one wriggle out.

Merrill Lynch, 235 S.W. 3d at 191-93 (emphasis added; citations omitted and altered). The court then soundly rejected the "concerted misconduct" theory of equitable estoppel:

...while Texas law has long recognized that nonparties may be bound to a contract under traditional contract rules like agency or alter ego, there has never been such a rule for concerted misconduct. Conspiracy is a tort, not a rule of contract law. And while conspirators consent to accomplish an unlawful act, that does not mean they impliedly consent to each other's arbitration agreements. As other contracts do not become binding on nonparties due to concerted misconduct, allowing arbitration contracts to become binding on that basis would make them easier to enforce than other contracts, contrary to the Arbitration Act's purpose.

Merrill Lynch, 210 F.3d at 194 (emphasis added).

Non-signatories WRECO and Weyerhaeuser cannot compel arbitration simply because Plaintiffs allege collusion among defendants. The language of Quadrant's arbitration provision certainly does not contemplate arbitration of claims against third parties and Grigson should be rejected. The mere fact that Plaintiffs' claims include allegations that WRECO, Weyerhaeuser, and Quadrant engaged in collusion or conspiratorial misconduct is no basis for defendants to avoid a public trial of the claims against them. Such a result only rewards corporate conspirators by allowing them to deny those they have harmed their right to a jury trial.

Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 47 (1st Cir. 2008) also fails to support Appellants' position. As the Appellants concede, Sourcing Unlimited is simply another application of the "inextricable intertwined" theory of equitable estoppel. Brief of Appellants at 24-25, quoting Sourcing Unlimited, 526 F.3d at 47. In Sourcing, "Jumpsource's claims either directly or indirectly invoke[d] the terms of the Jumpsource-ATL Agreement". Sourcing Unlimited, 526 F.3d at 47.

As discussed earlier, virtually all of Plaintiffs' claims are based on post-PSA formation conduct on the part of Quadrant, WRECO, and Weyerhaeuser. The Purchase and Sale Agreements

merely obligated Plaintiffs to purchase, and Quadrant to sell, the subject homes on specified terms. The Plaintiffs' numerous claims relating to defendants' post-Agreement, tortious conduct do not give rise to "claims based on the contract". These claims sound in tort, not contract. They do not seek to enforce any provision(s) of the PSAs. Coots, 304 F.Supp.2d at 700-01. For these reasons, as set forth above, neither the claims of the non-signatory children nor the adults' claims for tortious conduct can be subject to arbitration.

2. Adult Plaintiffs' Claims Challenging the Validity and Enforceability of the Purchase and Sale Agreements Are Not Subject to Arbitration.

The Plaintiffs' claims for rescission of the Purchase and Sale Agreements are also not subject to arbitration under this court's analysis in Nelson v. Westport Shipyard, Inc., 140 Wn. App. 102, 114, 163 P.3d 807 (2007). Although Plaintiffs made this argument in the trial court, Appellants do not address it on appeal. CP 119-21; 700-01.

In Nelson, the plaintiff brought numerous causes of action relating to his termination from Westport Shipyard. The claims included a challenge to the validity and enforceability of a shareholder agreement which contained an arbitration clause.

Westport moved to compel arbitration under Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), in which the United States Supreme Court held that under the Federal Arbitration Act, challenges to the enforceability of an arbitration clause must be arbitrated. See Nelson, 140 Wn. App. at 108-09.

In Nelson, this Court rejected blanket application of Buckeye and held that the claims challenging the validity and enforceability of the agreement must be litigated in court because the arbitration clause lacked any express language subjecting those claims to arbitration. Nelson, 140 Wn. App. at 114. The Nelson Court reasoned that unlike the agreement in Buckeye, the arbitration clause at issue did not expressly extend to claims regarding the validity, enforceability, or scope of the contract. The Court also distinguished the arbitration clause from that in Buckeye because it did not invoke the Federal Arbitration Act (FAA) and the agreement had no connection to interstate commerce:

Unlike the provision in Buckeye, the 2004 Shareholders Agreement arbitration clause does not expressly encompass disputes about the validity, enforceability, or scope of the Agreement as a whole; nor does it encompass disputes about the validity, enforceability, or scope of the arbitration clause in particular. In our view, this distinction is critical to our holding that Buckeye does not apply here.

Nelson, 140 Wn. App. at 114. Noting that the agreement at issue was governed by Washington law, this Court held that the claims challenging the validity and enforceability of the entire agreement, and those challenging the validity of the arbitration clause, were to be litigated. Nelson, 140 Wn. App. at 114-15.

Nelson, not Buckeye controls here. Just as in Nelson, Quadrant's arbitration provision also does not contain any express language that claims challenging its validity, enforceability, or scope, or challenges to the PSAs as a whole, are subject to arbitration. CP 48, 59, 178, 640. The arbitration provision also lacks any invocation of the FAA and lacks any indication that the agreement implicates interstate commerce.¹² Consistent with the analysis in Nelson, Plaintiffs' claims challenging the validity and enforceability of the entire purchase and sale agreement are not subject to arbitration and must be litigated in court.¹³

¹² Notably, Defendants have never contended that the FAA applies in this action and it clearly does not. As they concede, "this appeal must be determined under Washington's UAA." Brief of Appellants at 19 n. 13.

¹³ In the trial court, Quadrant argued that Nelson does not apply "because it arose under Washington's previous arbitration statute". CP 724 n. 4. Contrary to Quadrant's statement, Washington's arbitration statutes, including RCW 7.04A.060(3), were enacted in 2005 and were not amended following this Court's decision in Nelson. See RCWA 7.04A.060.

3. Appellants Are Not Entitled to the Imposition of a Stay By This Court of Non-Arbitrable Claims On Remand.

Finally, Appellants contend that this Court should stay further trial court proceedings of the claims that must be tried to a jury pending an arbitration of some unidentified claims. The Appellants offer no authority that supports this request and it should be rejected.

Appellants cite RCW 7.04A.070(6) as a basis for this Court to stay litigation after the appeal is concluded. The statute in no way supports the Appellant's request for a stay of trial court proceedings of non-arbitrable claims pending arbitration. The statute merely states that if a claim is subject to arbitration, the trial court shall stay that claim and may sever an arbitrable claim from remaining claims. RCW 7.04A.070(6). Nowhere does the UAA state that claims which are not subject to arbitration are to be stayed during an arbitration.

RAP 12.2 also does not support the Appellants' request. Nothing in the rule suggests that this Court can or should remand the claims in this case to the trial court and instruct it to stay litigation pending the conclusion of any arbitration. Indeed, the Appellants cite no language from the rule or judicial decision in which an appellate court has invoked RAP 12.2 to direct the trial court on how to manage litigation properly before it.

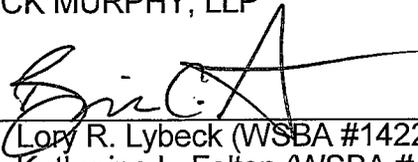
Even if such authority existed, the Appellants' request is premature and improper. The trial court denied the motions to compel arbitration and there are no claims presently subject to arbitration. Unless and until this Court determines otherwise, Appellants can offer nothing but speculation as to the claimed "benefits" of a stay of litigation, which also prevents the Plaintiffs from providing a meaningful response to this argument. Appellants' request for this Court to impose a stay of claims to be litigated on remand is unsupported, premature, and if granted would work a significant injustice on the Plaintiffs, who have already been forced to wait well over a year to even begin to pursue their claims. The Appellants' request for a stay should be denied.

IV. CONCLUSION

For all of the reasons set forth above, Quadrant, WRECO, and Weyerhaeuser are not entitled to compel arbitration of the Plaintiffs' claims. This Court should affirm the trial court's denial of the Appellants' motions to compel arbitration and their request for a stay of litigated matters on remand.

Respectfully submitted this 23rd day of March, 2009.

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CERTIFICATE OF SERVICE

Brief of Respondents / Plaintiffs - 5 1

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I hereby certify that on this date the undersigned caused copies of the documents identified below to be sent with messenger service to be served on March 23rd, 2009, as indicated on the following persons:

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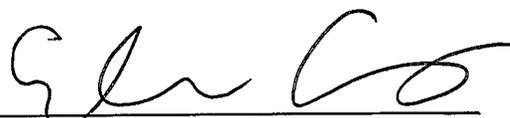
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Mercer Island, Washington, this 23rd day of March, 2009.



Elizabeth Curtis
Legal Assistant