

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DOCTOR'S ASSOCIATES, INC.,

Appellant,

v.

WAQAS SALEEMI & FAROOQ SHARYAR,

Respondents.

RESPONDENTS' ANSWERING BRIEF

Todd S. Baran, WSB #34637
Attorney for Respondents

Todd S. Baran
Todd S. Baran, PC
4004 SE Division St.
Portland, OR 97202-1645
503.230.2888

FILED
COURT OF APPEALS
DIVISION II
10 SEP 30 PM 12:30
STATE OF WASHINGTON
BY _____
DEPUTY

pm 9/28/10

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT RE: ARBITRABILITY ISSUES 5

 A. No Authority to Vacate 6

 B. No Usurpation of Arbitrator Authority 10

 C. The Dispute Resolution Provisions are Unconscionable . 18

 1. The Forum Selection Clause is Unconscionable . 19

 2. The Choice of Law Clause is Unconscionable . . 25

 3. The Remedies Limitation is Unconscionable . . . 27

 D. Any Error Was Harmless 31

 1. Removing the Remedy Limitation Was Not Harmful 32

 2. Directing the Arbitrator to Apply Washington Law Was Not Harmful 33

 3. Compelling Arbitration in Washington was Harmless 35

 E. Error Was Invited 36

IV. ARGUMENT RE: ATTORNEY FEE ISSUES 38

V. CONCLUSION	40
MOTION TO DISMISS	40
STATEMENT PURSUANT TO RAP 18.1(A)	40
IV. CONCLUSION	50
STATEMENT PURSUANT TO RAP 18.1(A)	50

TABLE OF AUTHORITIES

Cases

<i>Abel v. Austin</i> , 2010 WL 2132745 (Ky.App. May 28, 2010)	34
<i>ACF Property Management, Inc. v. Chaussee</i> , 69 Wash.App. 913, 850 P.2d 1387 (1993), <i>rev. den.</i> , 122 Wash.2d 1019, 863 P.2d 1353 (1993)	7
<i>Adler v. Fred Lind Manor</i> , 153 Wash.2d 331, 103 P.3d 773 (2004)	13
<i>American Nursery Products, Inc. v. Indian Wells Orchards</i> , 115 Wash.2d 217, 797 P.2d 477 (1990)	39
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440, 126 S.Ct. 1204, 163 L. Ed. 2d 1038 (2006) ..	12, 17
<i>Caruso v. Local Union No. 690</i> , 107 Wn.2d 524, 730 P.2d 1299 (1987)	31
<i>Coutee v. Barington Capital Group, L.P.</i> , 336 F.3d 1128, 1134-35 (9th Cir. 2003)	34, 35
<i>Davidson v. Hensen</i> , 135 Wash.2d 112, 954 P.2d 1327 (1998)	6
<i>Dix v. ICT Group, Inc.</i> , 160 Wash.2d 826, 161 P.3d 1016 (2007)	19, 25
<i>Doctor's Assocs., Inc. v. Casarotto</i> , 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)	12
<i>Estate of Stalkup v. Vancouver Clinic, Inc.</i> , 145 Wash.App. 572, 187 P.3d 291 (2008)	36

<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)	16, 17
<i>Hanson v. Shim</i> , 87 Wash.App. 538, 943 P.2d 322 (1997)	6
<i>Management Recruiters Intern., Inc. v. Bloor</i> , 129 F.3d 851 (6th Cir., 1997)	22-24
<i>Marassi v. Lau</i> , 71 Wn.App. 912, 859 P.2d 605 (1993)	38
<i>McKee v. AT&T Corp.</i> , 164 Wash.2d 372, 191 P.3d 845 (2008)	10-12, 15, 29
<i>Payless Car Rental System, Inc. v. Draayer</i> , 43 Wash.App. 240, 716 P.2d 929 (1986)	28
<i>Portland Ass'n of Credit Men v. Earley</i> , 42 Wash.2d 273, 254 P.2d 758 (1953)	25
<i>Rent-A-Center, West, Inc. v. Jackson</i> , 130 S.Ct. 2772, 78 USLW 4643 (2010)	17
<i>Scott v. Cingular Wireless</i> , 160 Wash.2d 843, 857, 161 P.3d 1000 (2007)	30
<i>State v. Britton</i> , 27 Wash.2d 336, 178 P.2d 341 (1947)	31
<i>Storetrax.com, Inc. v. Gurland</i> , 397 Md. 37, 51-53, 915 A.2d 991 (2007)	34
<i>Teufel Constr. Co. v. American Arbitration Ass'n</i> , 3 Wash.App. 24, 472 P.2d 572 (1970)	6, 9
<i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wash.2d 510, 210 P.3d 318 (2009)	29

<i>Townsend v. Quadrant Corp.</i> , 153 Wn.App. 870, 224 P.3d 213 (2009)	15
<i>Voicelink Data Services, Inc. v. Datapulse, Inc.</i> , 86 Wn. App. 613, 937 P.2d 1158 (1997)	36
<i>Walters v. A.A.A. Waterproofing, Inc.</i> , 151 Wash.App. 316, 211 P.3d 454 (2009)	13
<i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wash.2d 293, 103 P.3d 753 (2004)	30

Statutes

RCW 7.04.150	7
RCW 7.04A.200	8
RCW 7.04A.220	8
RCW 7.04A.230(e)	8-10
RCW 7.04A.250(3)	39-40
RCW 19.86.090	28, 39-40
RCW 19.100.160	19
RCW 19.100.180	28
RCW 19.100.190(1)	28
RCW 19.100.220	20
RCW 19.100.220(2)	25, 28

Rules

RAP 17.4(d) 40

I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Appellant (hereinafter “Franchisor”) asserts ten assignments of error. Assignments one through seven and nine challenge a single act of the Superior Court – the confirmation of the arbitration award in favor of Respondents (hereinafter “Franchisees”) and, conversely, the denial of Franchisor’s Motion to Vacate that award. These eight assignments present these issues:

- A. Does RCW 7.04A.230 authorize a Superior Court to vacate an arbitration award if the arbitration occurred pursuant to the terms of an allegedly erroneous order compelling arbitration?
- B. Did the Superior Court usurp the arbitrator’s authority by concluding that the choice of law, forum selection and damages limitations in the franchise agreements were not enforceable?
- C. Did the Superior Court correctly conclude that the choice of law, forum selection and damages limitations in the franchise agreements between Franchisor and Franchisees are unconscionable?
- D. If the choice of law, forum selection and damages

limitations in the franchise agreements between Franchisor and Franchisees are enforceable, was Franchisor harmed by the Superior Court's refusal to enforce those provisions?

E. Did Franchisor invite error?

The remaining assignments challenge the denial of attorney fees to Franchisor and the award of fees to Respondents (hereinafter "Franchisees").

II. STATEMENT OF THE CASE

Franchisees supplement Franchisor's statement of the case as follows:

In response to Franchisor's Motion to Compel Arbitration, Franchisees argued that the dispute resolution provisions in the franchise agreements were wholly void, and, thus, that no arbitration should occur. CP 83. During the colloquy on the motion, counsel for Franchisor asked the Superior Court to compel arbitration even if it concluded that some parts of the dispute resolution provisions of the franchise agreements were unenforceable.

MR. BRANFELD: * * * * Therefore, we would request very simply that you order this matter go before arbitration. We believe it should take place in Connecticut. If you should choose and say that Connecticut is an improper forum, then it can take place in the state of

Washington. But the long and short of it, the essence of this dispute must be resolved in arbitration and not in Superior Courts. RP 16 (9/19/08).

The Superior Court granted Franchisor's request to sever the forum selection clause and order arbitration.

THE COURT: Well, I am going to find that the forum selection is unconscionable under this circumstance, and – but on the other hand, I am going to order that there be arbitration in the state of Washington. * * * * *. RP 17 (9/19/08).

During the argument on the Motion to Compel Arbitration, Franchisor's attorney also conceded that the dispute between Franchisor and Franchisee would be governed by Washington's Franchise Investment Protection Act (FIPA), RCW 19.100.10 *et seq.*

MR. BRANFELD: Your Honor, the first point that I'd like to make is that counsel misstated what the agreement provides. What it does say is that the laws in the state of Connecticut apply, but it goes on and it talks about the fact that the franchise act of the particular state will apply.

So there's no question that Washington's franchise law – Franchise Investment Protection Act will apply in this particular case. That's the first thing. RP 16 (9/19/08).

Franchisor did not immediately appeal the order compelling arbitration. Instead, Franchisor proceeded to arbitrate the claims in Washington.

After the arbitrator made an award that was unfavorable to Franchisor, it moved to vacate the award, arguing that the arbitrator, not the Superior Court, should have determined whether the dispute resolution provisions in the franchise agreements were unconscionable and, thus, unenforceable. According to Franchisor, “[i]n the instant case, there was a breach of the public policy that the arbitrator and not the court should decide all issues concerning the enforcement and interpretation of a contract.” CP 297. Franchisor reiterated:

Based on the foregoing, it is clear that the decision as to the enforceability of the contractual limitation on damages should have been left to the arbitrator, and not by the trial court.

Based on the foregoing, it is clear that the decision as to the enforceability of the contractual provision calling for the application of Connecticut law should have been addressed to and decided by the arbitrator, and not by the trial court.

Based on the foregoing, it is clear that the decision as to the enforceability of the contractual provision calling for an arbitration to be conducted in Connecticut should have been addressed to and decided by the arbitrator, and not by the trial court.

CP 300-301. Franchisor repeated this position during the argument on its

Motion to Vacate:

We know from the Townsend case that, again, the case that came down long after your original decision in September

of 2008, that once the court finds that the matter is arbitratable -- and, again, unless you find there is some form of substantive or procedural unconscionability, you must leave all other matters for the arbitrator.

RP 5 (1/22/10).

III. ARGUMENT RE: ARBITRABILITY ISSUES

The primary thrust of Franchisor's argument before the Superior Court, which Franchisor repeats here, is that the arbitrator, not the Superior Court, should have determined whether the dispute resolution provisions of the franchise agreements were enforceable. Franchisor also asserts that the Superior Court erroneously concluded that some of those provisions were unenforceable.

As explained below, the Superior Court was required to confirm the award because Franchisor did not identify any statute that authorized the Superior Court to vacate the award. There also was no error because the Superior Court, not the arbitrator, was authorized to determine whether the dispute resolution provisions in the franchise agreements were enforceable. The Superior Court also correctly concluded that some of those provisions could not be enforced. Even if the Superior Court erred in this regard, the error was not harmful, and, in two instances, was invited. For all of these reasons, this court should affirm.

A. No Authority to Vacate

This appeal was taken from an order denying Franchisor's Motion to Vacate the arbitration award. A court's authority to confirm, vacate, modify, or correct an arbitration award arises from statute. *Hanson v. Shim*, 87 Wash.App. 538, 545, 943 P.2d 322 (1997); *see also Davidson v. Hensen*, 135 Wash.2d 112, 118, 954 P.2d 1327 (1998). “[J]udicial review of an arbitration award is limited to the face of the award. In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified.” 135 Wash.2d at 118.

The statutory grounds for vacating an arbitration award are found solely in RCW 7.04A.230. No part of that statute authorizes a Superior Court to vacate an award based on an alleged judicial error in invalidating choice of law, forum selection, and damages limitation provisions in an arbitration agreement.

In its Motion to Vacate, Franchisor did not identify any statutory provision that authorized the Superior Court to vacate the award. Nor does Franchisor identify any such provision in its opening brief on appeal. Rather, Franchisor asserts that the Superior Court was authorized to vacate the award based on the decisions in *Teufel Constr. Co. v. American Arbitration Ass'n*, 3 Wash.App. 24, 27, 472 P.2d 572 (1970), and *ACF*

Property Management, Inc. v. Chaussee, 69 Wash.App. 913, 850 P.2d 1387 (1993), *rev. den.*, 122 Wash.2d 1019, 863 P.2d 1353 (1993).

In *Teufel* and *ACF*, Division I concluded that a Superior Court could refuse to confirm, or could vacate, an arbitration award if the claims that were arbitrated were beyond the scope of the arbitration agreement. Under those circumstances, the court concluded, the arbitration award would be void. In *ACF*, the court explained that former RCW 7.04.150 precluded a Superior Court from entering judgment on an arbitration award that was void and, thus, beyond the jurisdiction of the Superior Court.

Once the Superior Court determines that an arbitration award is void and, thus, beyond its jurisdiction to confirm, the court's inquiry ends. RCW 7.04.150 does not require the court to further determine whether any grounds exist for vacating, modifying, or correcting the award.

69 Wash.App. at 922-23. The decision in *ACF* was based on former RCW 7.04.150, which provided:

At any time within one year after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order *unless the award is beyond the jurisdiction of the court*, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and 7.04.170.... (Emphasis added).

According to the decision in *ACF*, the emphasized language in this statute

authorized a Superior Court to vacate an arbitration award based on a claim that was not subject to arbitration.

Former RCW 7.04.150 was superceded by RCW 7.04A.220. The latter statute, unlike former RCW 7.04.150, does not include the language that requires confirmation “*unless the award is beyond the jurisdiction of the court * * **.” Rather, it expresses that an award must be confirmed “unless the award is modified or corrected under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230.” Thus, unless one of the statutory grounds for vacating exists, the Superior Court must confirm the arbitration award.

RCW 7.04A.230 provides that a court can vacate an award if:

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing * * *.

This statute describes the circumstances underlying the decisions in *Teufel* and *ACF*. In both of those cases, the issue was whether a court could vacate, or refuse to confirm, an arbitration award that was based on a claim that was not arbitrable. Under RCW 7.04A.230(e), a Superior Court has that authority, provided the party who contests the award timely objects in the arbitration proceeding to the submission of a claim. Thus, the

adoption of RCW 7.04A.230(e), and the repeal of RCW 7.04.150, abrogate the basis for the decisions in *Teufel* and *ACF*. Now, a party to an arbitration can seek to vacate an arbitration award only by complying with RCW 7.04A.230.

RCW 7.04A.230(e) authorizes a Superior Court to vacate an arbitration award based on a claim that was not subject to arbitration if a party timely raised that objection in the arbitration. There is no evidence in this record that Franchisor presented any such objection. That being so, the Superior Court did not error in confirming the award.

Even if *Teufel* and *ACF* remained authoritative, those cases stand only for the proposition that a Superior Court can vacate an award if an arbitrated claim is beyond the scope of an arbitration agreement. In *Teufel*, the court concluded:

On appeal, appellants may challenge the jurisdiction of the Superior Court to entertain the arbitration proceedings for lack of a binding arbitration agreement or because the disputes are not arbitrable under the agreement.

3 Wash.App. at 27. Franchisor does not assert that the claims decided by the arbitrator were beyond the scope of the arbitration agreement. To the contrary, Franchisor sought to compel arbitration of those very claims.

Because the claims that were arbitrated were not beyond the jurisdiction of

the arbitrator, the arbitration award was not void for lack of jurisdiction, and was confirmable.

In sum, *Teufel* and *ACF* hold only that a Superior Court can vacate an arbitration award that is void for lack of jurisdiction. Because the award at issue here was within the arbitrator's jurisdiction, these decisions did not support Franchisor's Motion to Vacate. These decisions were also superceded by the adoption of RCW 7.04A.230(e), and the repeal of RCW 7.04.150. Franchisor does not provide any other statutory authority to support its Motion to Vacate. That being so, this court should affirm.

B. No Usurpation of Arbitrator Authority

In the Motion to Vacate, Franchisor asserted that it was the responsibility of the arbitrator, not the Superior Court, to determine whether the choice of law, forum selection and remedy limitations in the franchise agreements were enforceable. Because the trial court resolved those issues, Franchisor asserts that the Superior Court usurped the arbitrator's authority.

Franchisor's contention is squarely refuted by the decision in *McKee v. AT&T Corp.*, 164 Wash.2d 372, 191 P.3d 845 (2008). In that case, the Court recognized that unconscionability is a defense to the enforcement of an arbitration agreement, or part of an arbitration

agreement, and that it is the responsibility of a judge, not an arbitrator, to determine if an arbitration agreement is unconscionable. *Id.*, at 394-95.

The *McKee* decision arose out of AT&T's attempt to compel arbitration of a dispute based on contractual provisions that (1) required arbitration governed by the laws of New York, (2) imposed a two-year time limit for asserting claims, and (3) barred class actions. McKee opposed the motion to compel, asserting that the dispute resolution provisions in the agreement with AT&T were unconscionable. The Superior Court agreed; concluded that the unconscionable provisions were not severable from the remaining dispute resolution provisions; and refused to compel arbitration.

The Washington Supreme Court agreed that the choice of law provision, the two-year time limit for asserting claims, and the prohibition on class litigation were unconscionable. That Court also agreed that those provisions were not severable. Finally, that Court rejected AT&T's assertion that the Federal Arbitration Act required an arbitrator, not a judge, to determine issues of unconscionability.

As in *Scott*, this challenge is not preempted by section 2 of the FAA. *Scott*, 160 Wash.2d at 858, 161 P.3d 1000; 9 U.S.C. § 2. The FAA requires that we place arbitration agreements on the same footing as other contracts. *See, e.g., Doctor's Assocs.*, 517 U.S. at 687, 116

S.Ct. 1652. It does not require us to allow unconscionable restrictions on arbitration that are essentially exculpatory clauses in disguise. The FAA does not require us to uphold a class action waiver merely because it is embedded in an arbitration agreement. *See Scott*, 160 Wash.2d at 858, 161 P.3d 1000. Like any other contract, an arbitration agreement may be substantively unconscionable when it is used as a tool of oppression to prevent vindication of small but widespread claims. *See, e.g., id.* at 858-59, 161 P.3d 1000; *Luna*, 236 F.Supp.2d at 1179 (citing *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 465, 45 P.3d 594 (2002)).

164 Wash.2d at 395.

The *McKee* decision is consistent with federal case law. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L. Ed. 2d 1038 (2006), the held that a court of general jurisdiction may consider challenges to the validity of an arbitration clause. Generally applicable contract defenses, such as fraud, duress or unconscionability may be applied to invalidate dispute resolution provisions without contravening federal law. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996).

Following *McKee*, the Superior Court was authorized to determine if the dispute resolution provisions in the franchise agreements were unconscionable. After determining that some of those provisions were unconscionable, but that others were not, the Superior Court was not

required to compel the parties to arbitrate pursuant to the unconscionable provisions. To the contrary, the court could sever the unconscionable provisions and order the parties to arbitrate as if those provisions were not part of the contract. This process was approved by the decision in *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 103 P.3d 773 (2004), where the Court observed that severing unconscionable parts of an arbitration agreement can promote the public policy favoring arbitration. The Court adopted this Restatement rule governing severability:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

153 Wash.2d at 358, *quoting* 2 RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *accord Walters v. A.A.A. Waterproofing, Inc.*, 151 Wash.App. 316, 330, 211 P.3d 454 (2009).

The Superior Court applied this rule and determined that the unconscionable dispute resolution provisions in the franchise agreements could be severed, allowing arbitration to proceed in Washington under Washington law. The severance was also authorized by paragraph 11.c of the franchise agreements, which provides:

If, for any reason, any court, agency, or tribunal with valid jurisdiction in a proceeding to which we are a party decides in a final, non-appealable ruling, that a portion of this Agreement is contrary to, or in conflict with any applicable present or future law, rule, or regulation, after giving such portion the broadest legal interpretation possible, then that portion will be invalid and severable. CP 36.

Franchisor suggests that the Superior Court's ruling determined the merits of the dispute between Plaintiffs and defendant. A decision concerning what law governs a dispute, where a dispute must be arbitrated and what remedies are available does not resolve the merits of a dispute. If that were true, these parties would not have spent hundreds of thousands of dollars to prepare and present their claims in arbitration. And if that were true the decision in *McKee* would have been different. In that case, as here, a Superior Court determined that choice of law provisions and limitations on remedies were unconscionable and, thus, unenforceable. Because those determinations in *McKee* did not go to the merits of any claim, the Superior Court's determination that the choice of law, forum selection and remedies limitations in the franchise agreements were unenforceable did not go to the merits.

To the contrary, the *McKee* court observed that dispute resolution provisions that limit where a dispute is arbitrated, when it must be arbitrated, and what law applies are often unconscionable because such

provisions impede vindication of substantive rights and resolution of disputes on their merits. In that Court's words:

Limiting consumers' rights to open hearings, shortening statutes of limitations, limiting damages, and awarding attorney fees have absolutely nothing to do with resolving a dispute by arbitration. Courts will not be so easily deceived by the unilateral stripping away of protections and remedies, merely because provisions are disguised as arbitration clauses. The FAA does not require enforcement of unconscionable contract provisions.

164 Wash.2d at 395. The unconscionable dispute resolution provisions in the franchise agreements impeded the resolution of the claims on their merits. That being so, the Superior Court did not determine the merits of those claims by refusing to enforce the unconscionable provisions.

Franchisor contends that the Superior Court exceeded its authority based on the decision in *Townsend v. Quadrant Corp.*, 153 Wn.App. 870, 224 P.3d 213 (2009). In that case the court reaffirmed that "issues of substantive arbitrability, *i.e.*, whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." The division of responsibility for determining questions of substantive arbitrability (for the court) and

procedural arbitrability (for the arbitrator) does not aid Franchisor. *McKee* teaches that questions concerning forum selection, choice of law and limitations on remedies relate to substantive arbitrability. Following this authority, the Superior Court was authorized to determine whether the forum selection, choice of law and remedy limitations in the franchise agreements were unconscionable.

Franchisor also cites several cases for the proposition that defenses to a contract as a whole, as opposed to a challenge to a dispute resolution provision within a larger contract, must be addressed to the arbitrator. Franchisees did not challenge the validity of the franchise agreements as a whole. Because Franchisees only challenged the validity of the dispute resolution provisions, the Superior Court was authorized to address those challenges.

Finally, Franchisor's assertion that the arbitrator, not the court, was required to determine if the dispute resolution provisions were enforceable runs afoul of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In that case, the Court recognized that parties can agree, by contract, to submit questions concerning the validity of a dispute resolution provision to an arbitrator.

However, “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” *Id.* The Supreme Court recently reaffirmed this rule in *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 78 USLW 4643 (2010). In that case, the arbitration agreement specified that “[t]he Arbitrator ... shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” *Id.*, at 2777. That language was sufficient to reserve to the arbitrator threshold questions concerning the validity of the dispute resolution provisions.

No such clear and unmistakable language appears in the franchise agreements at issue here. The franchise agreements express that “disputes concerning the enforceability or scope of the arbitration clause shall be resolved pursuant to the Federal Arbitration Act, 9 U.S.C. § et seq. * * *.” CP 264. However, the FAA does not authorize the arbitrator to determine threshold questions of arbitrability. Under the FAA, such questions are for a court, not the arbitrator. *Buckeye Check Cashing, supra*. The only exception to this rule applies when the arbitration agreement expressly and unambiguously requires submission of arbitrability disputes to the

arbitrator. Because the franchise agreements do not do that, the Superior Court did not usurp the arbitrator's role. Stated otherwise, those agreements did not divest the Superior Court, or vest the arbitrator, with the authority to determine the validity of the dispute resolution provisions of the franchise agreements.

In sum, the Superior Court had the authority to determine whether any of the dispute resolution provisions in the franchise agreement were unconscionable. Upon determining that some of those provisions were unconscionable, that court also had the authority to strike the unconscionable provisions and order the parties to arbitrate pursuant to the dispute resolution provisions that were valid. Because that is precisely what the Superior Court did, that court did not err in denying the Motion to Vacate.

C. The Dispute Resolution Provisions are Unconscionable

Franchisor asserts that the Superior Court should have vacated the award because it erroneously concluded that the dispute resolution provisions were unconscionable. Because the forum selection, remedy limitation and choice of law provisions are unconscionable, there was no error.

1. The Forum Selection Clause is Unconscionable

A forum selection clause is unconscionable if enforcement would contravene a strong public policy of the state with the most significant relationship to the parties and the dispute.

We agree with the United States Supreme Court that “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”

Dix v. ICT Group, Inc., 160 Wash.2d 826, 836, 161 P.3d 1016 (2007).

Paragraph 10.a of the arbitration agreements requires the parties to arbitrate in Connecticut. CP 264. This forum selection clause is unconscionable because it conflicts with the public policy of Washington as codified in FIPA.

In Washington, the relationship between a franchisor and a franchisee is regulated by, and subject to, the provisions of FIPA. RCW 19.100.160 provides:

Any person who is engaged or hereafter engaged directly or indirectly in the sale or offer to sell a franchise or a subfranchise or in business dealings concerning a franchise, either in person or in any other form of communication, shall be subject to the provisions of this chapter, shall be amenable to the jurisdiction of the courts of this state and shall be amenable to the service of process under RCW 4.28.180, 4.28.185 and 19.86.160.

RCW 19.100.220 provides:

- (1) In any proceeding under this chapter, the burden of proving an exception from a definition or an exemption from registration is upon the person claiming it.
- (2) Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void. A release or waiver executed by any person pursuant to a negotiated settlement in connection with a bona fide dispute between a franchisee and a franchisor, arising after their franchise agreement has taken effect, in which the person giving the release or waiver is represented by independent legal counsel, is not an agreement prohibited by this subsection.
- (3) This chapter represents a fundamental policy of the state of Washington.

This statute, by its express terms, reflects a fundamental policy of this state. Franchise agreement provisions that conflict with, or seek to avoid, FIPA, contravene public policy and are unconscionable.

FIPA is implemented and enforced by the Department of Financial Institutions. That agency periodically issues statements that reflect the Department's interpretation of FIPA. One such statement is FIS-04, which reads:

Franchise Act Interpretive Statement FIS-04

RE: ARBITRATION SITE, RCW 19.100.180(1)

Question Presented:

May a franchisor in a franchise agreement require the franchisee to arbitrate in a state other than Washington?

Statutes:

RCW 19.100.180(1) requires that the parties to a franchise agreement deal with each other in good faith. Additionally, RCW 19.100.180(2) (h) renders it an unfair act or practice to impose on a franchisee by contract an unreasonable standard of conduct.

Discussion:

The franchisor must deal with the franchisee in good faith. Often the franchisor has much greater bargaining power than the franchisee. In such cases, the franchise agreement will require that every arbitration between the parties take place in a state other than Washington. Typically this is the home state of the franchisor and is many times very distant from Washington State. In these instances, the site of the arbitration outside the state of Washington is a non-negotiable contract clause. In which case, the franchisee will be required to arbitrate at a site which is not related to the subject matter of the arbitration and inconvenient to the franchisee and third party witnesses.

Recent court cases demonstrate that an agreement to arbitrate preempts judicial action which might be taken under the Franchise Investment Protection Act of Washington. However, these cases do not prevent the Franchise Investment Protection Act from determining when and under what circumstances it is fair and reasonable to include arbitration in the franchise agreement.

Conclusion:

The Securities Administrator finds that it is not in good faith, reasonable or a fair act and practice for a franchisor to require an arbitration clause in a franchise agreement that unfairly and non-negotiably sets the site of arbitration in a state other than the state of Washington. Based on this finding, the Securities Administrator finds acceptable a franchise offering that includes an arbitration agreement that provides for the site of arbitration: (1) in the state of Washington, (2) as mutually agreed upon at the time of arbitration, or (3) as determined by the arbitrator at the time of arbitration.

CP 96. In sum, the Department considers it bad faith, and contrary to FIPA, for an arbitration agreement to absolutely and non-negotiably require an out of state venue for arbitration. So should this court.

In its Motion to Vacate, Franchisor asserted that DFI's interpretive statement could not be used to avoid the forum selection clause based on the authority of *Management Recruiters Intern., Inc. v. Bloor*, 129 F.3d 851, 1997 Fed.App. 0340P (6th Cir., 1997). The issue in that case was not whether a forum selection clause conflicted with the public policy of Washington. Rather, the issue was whether FIPA expressly required arbitration of a franchise dispute in this state. That issue arose because a rider to the franchise agreement at issue there stated that the arbitration would occur in Washington "but only to the extent that local arbitration is a valid requirement of the Washington Franchise Investment Protection

Act, Wash. Rev.Code § 19.100 et seq. (“FIPA”), at the time of the arbitration * * *.” 129 F.3d at 853. Because FIPA did not expressly require arbitration to occur in Washington, the *Bloor* court concluded that arbitration in Washington was not required pursuant to the terms of the parties agreement. The court explained:

the Rider provision for a Washington forum is only triggered by a “valid requirement [] of the statute ” (emphasis added). FIS-4, by contrast, is the advisory opinion of a state bureaucrat—a far cry from the kind of legislative act we traditionally associate with the word “statute.”

Id., at 855.

The issue here is not whether FIPA expressly requires arbitration to occur in Washington. Rather, the issue is whether enforcing the forum selection clause that expressly requires arbitration to occur in Connecticut would contravene a strong public policy of Washington. *Bloor*, therefore, is inapposite. The Department has concluded that requiring out-of-state arbitration of a dispute governed by FIPA would contravene public policy. Certainly, the Department’s view does not bind this court, and, as the *Bloom* court recognized, is not statutory law. Nevertheless, for the reasons given by the Department, this court should conclude that a forum selection clause that requires arbitration of a claim governed by FIPA in a state

other than Washington contravenes a strong public policy of this state and, thus, is unconscionable.

For the foregoing reasons, *Bloor* does not support Franchisor's position. To the contrary, *Bloor* shows that the Superior Court was correct to order arbitration in Washington. The *Bloor* court explained that the FAA only allows a court to order arbitration in the state where the motion to compel arbitration is brought. "We agree with the majority of courts that have recognized that, where the parties have agreed to arbitrate in a particular forum, only a district court in that forum has jurisdiction to compel arbitration" in that forum. *Id.*, at p. 854.

As noted above, the franchise agreements provide that disputes concerning arbitrability are governed by the FAA. Franchisor moved the trial court to apply the FAA. CP 14. Under the FAA, as interpreted by *Bloor* and a majority of courts, only a court in Connecticut could compel the parties to arbitrate in that state. Because Franchisor filed its motion to compel in Washington, the Superior Court did not error by ordering the parties to arbitrate in this state.¹

1. Franchisees did not make this argument below. Nevertheless, this court must "affirm the trial court if proper legal grounds exist, in spite of the fact that it may have based its decision upon an erroneous reason." *Portland Ass'n of Credit Men v. Earley*, 42 Wash.2d (continued...)

Finally, Franchisor asserts that the evidence presented to the Superior Court was insufficient to establish unconscionability of the forum selection clause. This argument cannot be reconciled with *Dix*. In that case the Court explained that the determination “whether public policy precludes giving effect to a forum selection clause” presents a “pure question of law”, which this court must review *de novo*. 160 Wash.2d 826, 833-34. The public policy of a state emanates from its decisional and statutory laws. The record includes citations to those laws, and to an interpretive statement of the agency charged with implementing those laws. That is all that Franchisees needed to submit to support their argument that the forum selection clause contravenes public policy.

2. The Choice of Law Clause is Unconscionable

The Superior Court concluded that the choice of law provision was unconscionable because it sought to avoid the application of FIPA. This conclusion is supported by RCW 19.100.220(2), which provides:

Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void.

(...continued)
273, 277, 254 P.2d 758 (1953).

This conclusion is also supported by *McKee*. In that case the court declared an arbitration clause unconscionable because it included an impermissible choice of law provision. In that case, there was no statute, like FIPA, that prohibited the choice of law selection. Nevertheless, because the chosen forum had no interest in regulating the dispute, the court concluded that choosing the law of that forum was unreasonable.

Franchisor asserts that the choice of law clause would require the arbitrator to apply FIPA. Thus, Franchisor asserts, the choice of law provision is not unconscionable.

The choice of law clause provides:

This agreement will be governed by and construed in accordance with the substantive laws of the State of Connecticut, without reference to its conflicts of law, except as may otherwise be provided in this agreement. *The parties agree any franchise law or business opportunity law of the State of Connecticut, now in effect or adopted or amended after the date of this Agreement, will not apply to franchises outside of Connecticut.* (Emphasis added).

CP 37. According to Franchisor, the emphasized language required the arbitrator to apply a conflicts of law analysis to determine whether FIPA applied. That is not what the contract says. , it says that Connecticut substantive law will apply except as otherwise provided in the agreement.

The emphasized language is an exception that precludes application of Connecticut franchise law. But nothing in that exception authorizes an arbitrator to apply the substantive franchise law of any other state. To the contrary, the agreement plainly says that, but for the exception, Connecticut substantive law applies.

In short, a franchisee outside of Connecticut cannot invoke Connecticut franchise law, but must instead invoke other, general provisions of Connecticut law to prosecute or defend against an arbitrated claim. Because this choice of law clause does not require, or even permit, an arbitrator to apply FIPA, the Superior Court correctly concluded that this provision is unconscionable.

The Superior Court was not required, or authorized, to save this unconscionable clause by rewriting it to authorize the arbitrator to apply Connecticut law to some issues and Washington law to others. Rather, the Superior Court properly voided the entire choice of law provision, and then used conflicts of law principal to determine what state's laws applies. Franchisor concedes that those principals compel application of Washington law.

3. The Remedies Limitation is Unconscionable

Paragraph 10.g of the arbitration agreements incorporates the limitation of damages stated in paragraph 17. CP 35-36. Under paragraph 17, the maximum damages recoverable are the greater of (1) \$100,000, or (2) franchise and royalty fees paid during the three preceding years. CP 38. This limitation of liability contravenes RCW 19.100.190(1), which makes any violation of RCW 19.100.180 a *per se* violation of chapter 19.86 RCW, which is commonly known as the Consumer Protection Act (CPA). *Payless Car Rental System, Inc. v. Draayer*, 43 Wash.App. 240, 245, 716 P.2d 929 (1986). Under RCW 19.86.090, a prevailing plaintiff in a CPA case can recover “the actual damages sustained.”

By limiting the remedies available to Franchisees, the franchise agreements directly violate FIPA, including RCW 19.100.220(2), which provides:

Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void.

Under this statute, it is impermissible, and thus unconscionable, for a franchise agreement to include a provision that immunizes any person who is subject to the provisions of FIPA from the remedies available under

FIPA.

In *McKee*, the Court observed that dispute resolution provisions that limit what law applies are often unconscionable because such provisions impede vindication of substantive rights and resolution of disputes on their merits. In that Court's words:

Limiting consumers' rights to open hearings, shortening statutes of limitations, limiting damages, and awarding attorney fees have absolutely nothing to do with resolving a dispute by arbitration. Courts will not be so easily deceived by the unilateral stripping away of protections and remedies, merely because provisions are disguised as arbitration clauses. The FAA does not require enforcement of unconscionable contract provisions.

164 Wash.2d at 395. Because the remedy limitations in the franchise agreements impeded vindication of substantive rights, those limitations are unconscionable and, thus, unenforceable. The Superior Court correctly so held.

Franchisor predicates its contrary argument on *Torgerson v. One Lincoln Tower, LLC*, 166 Wash.2d 510, 210 P.3d 318 (2009). The remedies limitation at issue in that case appeared in a contract between equally sophisticated parties and were bi-lateral. The limitation also did not conflict with any statutory remedy, such as those available under the CPA and FIPA, enacted to prevent over-reaching by the dominant party to

the contract. *See* 166 Wash.2d 524, n. 2. Because of these facts, the *Torgerson* Court found the remedy limitation significantly different than the one-side remedy limitation clause it found to be unconscionable *Zuver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 103 P.3d 753 (2004), and the remedy limitation that sought to foreclose consumer rights that was at issue in *Scott v. Cingular Wireless*, 160 Wash.2d 843, 857, 161 P.3d 1000 (2007).

The remedy limitation at issue here bears the hallmarks of the clauses that were found to be unconscionable in *Zuver* and *Scott*. Like the clause at issue in *Scott*, the remedy limitation at issue here deprives a franchisee of statutory remedies available under the CPA. Like the clause at issue in *Zuver*, the remedy limitation at issue here is significantly lopsided.

Although the remedy limitation applies the same cap on the compensatory damages available to each party, it does not limit franchisor's right to seek non-monetary relief, such as termination of a franchise. Indeed, that is the remedy that Franchisor was seeking in the arbitration at issue here. Specifically, it sought to terminate three franchises, and deprive Franchisees of all of the equity and goodwill

associated with those businesses. CP 5; 72-73; 76. The monetary impact of a franchise termination can vastly exceed the \$100,000 compensatory damages cap that applies to a Franchisee's claim against Franchisor. The arbitrator found that, but for the wrongful termination, Franchisees could have sold the franchised stores for \$1,180,000. CP 290. By allowing Franchisor to seek a remedy with a monetary impact ten times greater than the \$100,000 compensatory damages cap that applies to a claim by a franchisee, the remedy limitation is unconscionably lopsided. *Torgerson*, therefore, is inapposite, and the decisions in *Zuver*, *Scott*, and *McKee* control. Under those authorities, the Superior Court correctly concluded that the remedy limitation in the franchise agreements is unconscionable.

D. Any Error Was Harmless

An error is harmless if the outcome of the proceeding would not have been different had the error not occurred. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 529-30, 730 P.2d 1299 (1987). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Britton*, 27 Wash.2d 336, 341, 178 P.2d 341 (1947). Applying these standards, none of the claimed

errors were harmful or, thus, require reversal.

1. Removing the Remedy Limitation Was Not Harmful

The Superior Court's rejection of the remedy limitation could have been harmful only if the arbitrator awarded damages that were not recoverable under that limitation. The arbitrator found that Franchisor's wrongful termination of three franchise agreements caused Franchisees to be unable to sell their three stores. CP 290, at ¶ 9. He concluded that Franchisor "shall pay to [Franchisees] 'compensatory damages' as that term is defined in section 17 of exhibit 52. They may choose either option." CP 290, at ¶ 2.

This award reflects that, despite the Superior Court's order, the arbitrator limited Franchisees to recovering the damages authorized under section 17 of the franchise agreements. That section provides two options: the greater of (1) \$100,000 of compensatory damages, or (2) franchise and royalty fees paid during the three preceding years. This is what the arbitrator was referring to when he indicated that Franchisees could "choose either option."

The arbitrator subsequently awarded Franchisees \$230,000 in compensatory damages. CP 291. This amount was within the remedy

limitation of section 17. In the arbitration, Franchisor was seeking to terminate three franchise agreements. CP 76 at ¶ 4. The arbitrator found that Franchisor wrongfully terminated three separate franchise agreements that authorized Franchisees to operate three separate stores. CP 288 at ¶ 5. Franchisor also sought damages for alleged violations of three separate franchise agreements. Franchisor demanded:

Please note that this is a violation of three separate franchise agreements; the remedies available to Subway® are applicable to each separate franchise. Cumulatively, your clients face a total of \$45,000 in penalties, plus 8% of each store's gross sales, as provided in 5.d.

CP 289 at ¶ 6. Because the arbitration concerned the wrongful termination of three separate contracts, Franchisees were entitled to recover their damages under each contract, up to the \$100,000 cap, for a total of \$300,000. Because the \$230,000 of compensatory damages awarded by the arbitrator fell within this amount, the Superior Court caused no harm by nullify the remedy limitation.

2. Directing the Arbitrator to Apply Washington Law Was Not Harmful

Before the Superior Court, and in this one, Franchisor conceded that its dispute with Franchisees was governed by FIPA. The arbitrator based his award entirely on FIPA. CP 289-90, at ¶ 8. Because Franchisor

concedes that FIPA applies, the order directing the arbitration to apply Washington law caused no harm.

Franchisor fails to identify a single provision of Connecticut substantive law² that differed from the substantive law of Washington, and which would have impacted the outcome of the arbitration. Such a showing is a predicate to establishing harm where, as here, a litigant asserts that a court or arbitrator applied the wrong substantive law. *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1134-35 (9th Cir. 2003) (arbitrator's erroneous choice of law was harmless where result would have been supported no matter which state's law applied); *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 51-53, 915 A.2d 991 (2007) (where outcome would not differ depending on choice of law, any error in choice is harmless); *accord Abel v. Austin*, 2010 WL 2132745 (Ky.App. May 28, 2010) (where statute of limitation in chosen forum was the same as statute applied by court, any error in choice of law is harmless).

[A] choice of law error sometimes has no effect on the outcome of a proceeding. Requiring the parties to re-arbitrate under such circumstances would substantially and unnecessarily burden both the parties and the

2. The choice of law issue only concerns substantive laws because the arbitration procedure was governed by the Commercial Rules of the American Arbitration Association. CP 35, at ¶ 10.a.

arbitration process.

Coutee, 336 F.3d at 1134, n. 6. Because Franchisor fails to identify any impact the choice of law had on the outcome of the arbitration, it would substantially and unnecessarily burden the parties and the arbitration process to vacate the award.

3. Compelling Arbitration in Washington was Harmless

The Washington arbitration was governed by AAA Commercial Arbitration Rules, and the arbitrator was selected from a panel of AAA arbitrators. The same AAA rules would have governed any arbitration in Connecticut, and the qualifications for a AAA arbitrator are nationally uniform. *See* <http://www.adr.org/si.asp?id=4223>. Thus, ordering the AAA arbitration to occur in Washington could have caused harm only if the location of the hearing prevented Franchisor from having access to evidence or witnesses. In support of the Motion to Vacate, Franchisor's attorney submitted a declaration. CP 236 - 239. Conspicuously absent from that pleading is any mention that the location of the arbitration impeded discovery or the presentation of evidence. Thus, Franchisor failed to establish that the location of the arbitration caused any harm.

Generally, the purpose of a contractual forum selection clause is to “enhance contractual predictability.” *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158 (1997). Where, as here, a dispute concerns a business located in Washington, is governed by Washington statutes, and involves highly unique facts, it is difficult to fathom how selection of a Washington forum would impede “contractual predictability.” Even if that could occur in these circumstances, the test for prejudicial error is outcome focused; error must impact the outcome of the case. Because the selection of Washington as the forum for the arbitration had no discernible, let alone substantiated, impact on the outcome of this dispute, any error in directing the parties to arbitrate here was harmless.

E. Error Was Invited

Invited error is unreviewable. *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wash.App. 572, 589, 187 P.3d 291 (2008) (invited error doctrine does not permit counsel to set up an error at trial and then complain of it on appeal). During the hearing on the motion to compel arbitration, Franchisor’s counsel sought to avoid nullification of the arbitration agreement *in toto*, and a resulting trial in the Superior Court, by

inviting that court to order the parties to arbitrate in Washington.

MR. BRANFELD: * * * * * Therefore, we would request very simply that you order this matter go before arbitration. We believe it should take place in Connecticut. If you should choose and say that Connecticut is an improper forum, then it can take place in the state of Washington. But the long and short of it, the essence of this dispute must be resolved in arbitration and not in Superior Courts. RP 16 (9/19/08).

The Superior Court granted Franchisor's request to sever the forum selection clause and order arbitration.

THE COURT: Well, I am going to find that the forum selection is unconscionable under this circumstance, and – but on the other hand, I am going to order that there be arbitration in the state of Washington. * * * * *. RP 17 (9/19/08).

Because the Superior Court did exactly what Franchisor invited the court to do – order arbitration to occur in Washington – the alleged error relating to that order was invited and unreviewable.

Likewise, so is the alleged error relating to the choice of law. In the Superior Court, Franchisor conceded that FIPA governed the dispute, and did not identify any other substantive law of Connecticut that could have any bearing on the dispute between these parties. Under these circumstances, the Superior Court could reasonably conclude that there was no dispute concerning the applicable law. Because Franchisor did not

act to dispel that conclusion after stipulating that FIPA applied, Franchisor invited any error relating to the choice of law.

IV. ARGUMENT RE: ATTORNEY FEE ISSUES

Franchisor's remaining assignment of error asserts that the Superior Court erroneously refused to award the attorney fees Franchisor incurred to compel arbitration.³ Franchisor's motion for those fees was joined with its motion to compel. CP 8. Because the motion was only partially granted, Franchisor was not entitled to fees.

This conclusion follows from the application of the substantially prevailing party rule recognized in *Marassi v. Lau*, 71 Wn.App. 912, 916, 859 P.2d 605 (1993). Although Franchisor obtained an order compelling arbitration, the arbitration did not occur on the terms requested by Franchisor. Specifically, the trial court did not order arbitration to occur in Connecticut, pursuant to Connecticut law, or with a limitation on remedies. As this appeal demonstrates, Franchisor considers the denial of that requested relief to be significant. It is not. Nevertheless, because Franchisor did not receive much of the relief that it requested in its Motion

3. There is no order denying Franchisor's request for fees. Nevertheless, as explained in Respondents' previously filed motion to dismiss, an order that does not grant requested relief impliedly denies that relief. By contesting the denial of its request for fees, it appears that Franchisor is relying on this principal.

to Compel, Franchisor was not the substantially prevailing party and was not entitled to fees. When both parties to a dispute prevail on major issues, neither qualifies as the prevailing party. *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 235, 797 P.2d 477 (1990).

Franchisor also assigns error to the award of fees to Franchisees by the Superior Court. This court should not consider this claimed error because it is not supported by the record. Franchisor has not identified where, in the record, the claimed error occurred. Indeed, Franchisor does not even address the merits of this assignment of error in its brief.

It appears that Franchisor is assigning error to the fees awarded by the Superior Court for the work Franchisor's counsel performed in that court relating to the confirmation proceedings and opposition to the Motion to Vacate. Because Franchisees successfully opposed the Motion to Vacate, and obtained confirmation of the award, the Superior Court properly awarded these fees based on RCW 19.86.090, and by RCW 7.04A.250(3), which authorizes an award of fees relating to proceedings to vacate or confirm an arbitration award.

V. CONCLUSION

The Superior Court properly confirmed the arbitration award, and did not error in denying the Motion to Vacate. If there was error, there was no harm. For both of these reasons, this court should affirm.

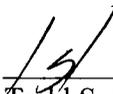
MOTION TO DISMISS

Pursuant to RAP 17.4(d), Franchisees move to dismiss this appeal as untimely filed. In support of this motion, Franchisees rely upon, and incorporate by reference, the briefs and authorities previously filed in this court in connection with their Motion to Dismiss Appeal their Motion to Modify Ruling.

STATEMENT PURSUANT TO RAP 18.1(A)

Franchisees seek attorney fees on appeal. This is based on RCW 19.86.090, which was the basis of the fee award by the arbitrator, and by RCW 7.04A.250(3), which authorizes an award of fees relating to proceedings to vacate or confirm an arbitration award.

DATED this 20th day of September, 2010.



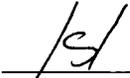
Todd S. Baran, WSB #34637
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2010, I served the foregoing RESPONDENTS' ANSWERING BRIEF upon the attorneys for all parties by depositing in the United States Post Office, Portland, Oregon, a full, true and correct copy thereof, with postage thereon prepaid, addressed to them at the addresses set forth below their names:

Garold E. Johnson
Kram, Johnson, Wooster & McLaughlin, P.S.
1901 "I" Street
Tacoma, WA 98405

Gary H. Branfeld
Branfeld & Associates, P.S.
5350 Orchard Street W, Ste 202
Tacoma, WA 98467



Todd S. Baran, WSB #34637
Attorney for Respondent