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SUPREME COURT
OF THE STATE OF WASHINGTON

PATTY J. GANDEE, individually and on
behalf of a Class of similarly situated
Washington residents,

Plaintiff/Respondent,

v.

LDL FREEDOM ENTERPRISES, INC.
a/k/a LDL FREEDOM, INC. d/b/a
FINANCIAL CROSSROADS, a California
corporation; DALE LYONS, individually;
BETTE J. BAKER a/k/a LIZ BAKER,
individually; NATIONWIDE SUPPORT
SERVICES, INC., a California corporation;
and JOHN AND JANE DOES 1-5,

Defendants/Appellants.

No. 87674-6

RESPONDENT'S
SUBMISSION OF
ADDITIONAL AUTHORITY

Respondent submits the attached Memorandum in *Wheeler v. NoteWorld, LLC, Nationwide Support Services, Inc., and Freedom Debt Center, Inc.*, D.C. No. 2:10-cv-00202-LRS issued today (January 23, 2013) from the Ninth Circuit Court of Appeals affirming the denial of a motion to compel arbitration.

This decision pertains to the issue of whether, post-*AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), an arbitration agreement that is permeated with substantively unconscionable provisions may be invalidated under Washington law.

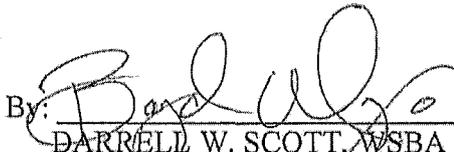
RESPONDENT'S SUBMISSION OF ADDITIONAL
AUTHORITY: 1

The arbitration agreement at issue in *Wheeler v. NoteWorld, LLC, et al.*, is the verbatim arbitration agreement at issue in the present case.

Also attached is the United States District Court, Eastern District of Washington Order Re: Motion to Compel Arbitration, which is the Order appealed from and provides context to this Memorandum. Respondent submits this additional authority pursuant to RAP 10.8, GR 14.1, Cir. R. 36-3 and FED. R. APP. P. 32.1.

Respectfully submitted this 23 day of January, 2013.

THE SCOTT LAW GROUP, P.S.

By: 
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Counsel for Plaintiff/Respondent

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 23rd day of January, 2013, I caused this Respondent's Submission of Additional Authority to be filed with the Supreme Court of the State of Washington and the same to be served, via email, to the following:

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s/ Boyd M. Mayo
Counsel for Plaintiff/Respondent

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APPENDIX 1

[Memorandum (9th Cir., Jan. 23, 2013)]

RESPONDENT'S SUBMISSION OF ADDITIONAL AUTHORITY

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 23 2013

DOYLE WHEELER; CARRI WHEELER,
husband and wife, individually and on
behalf of similarly situated Washington
residents,

Plaintiffs - Appellees,

v.

NOTEWORLD LLC, DBA NoteWorld
Servicing Center; NATIONWIDE
SUPPORT SERVICES INC., a California
corporation; JOHN DOES, A-K; JANE
DOES, A-K,

Defendants,

and

FREEDOM DEBT CENTER, a California
corporation,

Defendant - Appellant.

No. 11-35984

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

D.C. No. 2:10-cv-00202-LRS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Argued and Submitted December 3, 2012
Seattle, Washington

Before: SCHROEDER, McKEOWN, and TALLMAN, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Plaintiffs Doyle and Carrie Wheeler brought a consumer debt diversity action against Defendants Noteworld LLC, Freedom Debt Center (“Freedom”), and others, arising from the Wheelers’ engagement of Freedom to provide them with debt settlement services. Freedom appeals the denial of its motion to compel arbitration. We affirm.

The district court concluded, and the parties do not dispute, that three provisions of the arbitration section of the Debt Settlement Agreement were substantively unconscionable: the 30-day limitation period for claims; the loser-pays-all provision; and the provision requiring the Wheelers to arbitrate their Washington claim in Orange County California.

Under Washington law, severance of unconscionable provisions from a section of an agreement is not possible where the unconscionable provisions permeate that section. *McKee v. AT&T Corp.*, 191 P.3d 845, 860 (Wash. 2008). This contract’s arbitration section has only four sentences and three of these contain an unconscionable provision. The section is materially similar to the one in *McKee* where four provisions of a consumer services contract were held to be substantively unconscionable and to permeate the dispute resolution section. The Supreme Court of Washington treated the *McKee* arbitration section differently from the arbitration provisions contained in the employment contracts at issue in

Adler v. Fred Lind Manor, 103 P.3d 773 (Wash. 2004) and *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753 (Wash. 2004). In those cases, severance of the unconscionable provisions was ordered because there were only two, and the rest of the provisions in the lengthy arbitration agreements could stand on their own. Here, as in *McKee*, the remaining provisions cannot. The unconscionable provisions “taint the entire [] section, such that severance would essentially require us to rewrite the [] agreement.” *McKee*, 191 P.3d at 860–61. Regardless of whether the severance issue is one of law to be decided de novo or a discretionary determination, we must affirm the district court in this case. There was no error of law or abuse of discretion.

AFFIRMED.

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APPENDIX 2

[Order re: Motion to Compel Arbitration (E.D. Wash., Oct. 27, 2011)]

RESPONDENT'S SUBMISSION OF ADDITIONAL AUTHORITY

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DOYLE WHEELER and CARRI WHEELER,)	
husband and wife, individually)	NO. CV-10-0202-LRS
and on behalf of similarly)	
situated Washington residents,)	ORDER RE MOTION TO COMPEL
)	ARBITRATION
Plaintiffs,)	
)	
-vs-)	
)	
NOTEWORLD, LLC, d/b/a NOTEWORLD)	
SERVICING CENTER, a Delaware)	
limited liability company;)	
NATIONWIDE SUPPORT SERVICES,)	
INC., a California corporation;)	
FREEDOM DEBT CENTER, a)	
California corporation; and JOHN)	
and JANE DOES A-K,)	
)	
Defendants.)	

BEFORE THE COURT, without oral argument, is Defendant Freedom Debt Center's Motion to Compel Arbitration, ECF No. 47, filed September 13, 2011, and noted without oral argument.

I. BRIEF FACTUAL BACKGROUND

This is a consumer debt case. It arises from Plaintiffs Doyle and Carrie Wheeler's (the Wheelers) engagement of Defendant Freedom Debt Center (Freedom) to provide them with debt settlement services.

1 Freedom's service, generally, consists of negotiating with creditors on
2 behalf of clients for the reduction of unsecured debt and the settlement
3 of enrolled accounts. In their complaint, the Wheelers assert claims on
4 behalf of themselves, individually, and as representatives of a purported
5 class. To date, no other purported class members have been identified by
6 name.

7
8 On January 12, 2009, the Wheelers entered into a written contract
9 with Freedom for the provision of debt settlement services. The contract,
10 signed by both Doyle and Carrie Wheeler, contains an arbitration
11 provision, which states:

12 11. Arbitration. All disputes or claims between
13 the parties related to this agreement shall be
14 submitted to binding arbitration in accordance with
15 the rules of American Arbitration Association within
16 30 days from the dispute date or claim. Any
17 arbitration proceedings brought by client shall take
18 place in Orange County California. Judgment upon the
19 decision of the arbitrator may be entered into any
20 court having jurisdiction thereof. The prevailing
21 party in any action or proceeding related to this
22 agreement shall be entitled to recover reasonable
23 legal fees and costs, including attorney's fees
24 which may be incurred.

19 ECF No. 49, Exh. E, Page 6, paragraph 11 of "Debt Settlement Agreement."

20 Plaintiffs brought this action on June 24, 2010 as a class action,
21 claiming that Defendant Freedom was a "debt adjuster" within the meaning
22 of RCW 18.28 et seq., that the fees charges by Freedom violated that
23 statute, and that, by violating RCW 18.28 et seq., Freedom also violated
24 Washington's Consumer Protection Act, RCW 19.86 et seq.

25 **II. DISCUSSION**

26 Defendant Freedom moves to compel arbitration pursuant to the

1 arbitration provision in the Debt Settlement Agreement. Defendant
2 Freedom asserts that the arbitration provision in the "Debt Settlement
3 Agreement" is valid and enforceable. Defendant Freedom further states
4 that although it expects Plaintiffs to argue that the arbitration
5 provision is substantively unconscionable because it requires
6 arbitration proceedings to take place in Orange County California,
7 Freedom is willing to arbitrate Plaintiffs' claims in Washington.
8 Defendants assert the severability clauses in the agreement permit the
9 court to sever the venue and choice of law provisions. Defendants'
10 willingness to forego enforcement of these provisions is understandable
11 given that this court finds it would be substantively unconscionable to
12 require financially-strapped Washington citizens to travel to Orange
13 County California to arbitrate a dispute without the benefit of
14 Washington's Consumer Protection Act.
15

16 Further, Defendant Freedom concedes that the first sentence of the
17 arbitration provision is not a model of clarity, and suggests that the
18 30 day period in the arbitration provision should not apply under the
19 circumstances of this case.¹ Finally, Freedom concedes that the "loser
20 pays all" costs and attorney fee provision is unconscionable under
21

22 ¹Defendants explain that the Wheelers did not provide Freedom with
23 any pre-litigation notice of a claim or dispute. The full nature and
24 extent of Plaintiffs' claims are, at this point, unknown because the
25 Court has yet to certify Plaintiffs as a class. And, after the case was
26 filed, no action of substance took place because of parties' and the
Court's agreement that the matter should be stayed pending a
determination by the Washington Supreme Court on the issues certified by
this Court in *Carlson v. Global Client Solutions*. It has only been
since August 2011 that this case has been back on procedural track.

1 Washington case law and the court can and should sever this provision but
2 otherwise enforce the arbitration provision.

3 Plaintiffs oppose the motion arguing that "[t]he arbitration
4 agreement underlying Defendants' Motion is so plagued with substantively
5 unconscionable provisions that arbitration cannot lawfully be compelled."
6 ECF No. 51, at 2. Plaintiffs interpret the arbitration agreement,
7 drafted by the Defendants, to require any party requesting arbitration
8 to make the request within thirty days of the dispute. Plaintiffs assert
9 that Defendants, by waiting more than a year to request arbitration, have
10 waived their right to enforce the arbitration provision. Additionally,
11 as Defendants anticipated, Plaintiffs take issue with the arbitration
12 provision requiring the Wheelers to arbitrate their claim of
13 approximately \$4,700 in Orange County, California and a mandate that they
14 pay all of Defendants' attorney's fees and costs if they lose. ECF No.
15 3. In other words, Plaintiffs contend it is prohibitively expensive and
16 such provisions should be voided as unconscionable. In response to
17 Defendants' concessions of severing the purported unconscionable
18 provisions, Plaintiffs respond that such "provisions are so pervasive
19 that severing them from the agreement is unwarranted and impractical"
20 rendering the entire [arbitration] agreement unenforceable. *Id.* at 3.

21
22 Defendants, relying on a line of cases favoring arbitration,
23 conclude that under the circumstances of the instant case and complicated
24 procedural history, the strong public policy in favor of arbitration
25 should prevail over Plaintiffs' waiver claim. Defendants also argue that
26

1 certain parts of the arbitration clause discussed above should be
2 severed.

3 **II. ANALYSIS**

4 **FEDERAL ARBITRATION ACT AND WASHINGTON ARBITRATION ACT**

5 The Federal Arbitration Act ("FAA"), and the Washington Uniform
6 Arbitration Act ("WAA") provide that where the parties have entered into
7 a contract that contains an agreement to arbitrate disputes, the
8 agreement will be upheld.
9

10 In particular, the FAA provides that written agreements to arbitrate
11 contained in any contract "evidencing a transaction involving commerce
12 . . . shall be valid, irrevocable, and enforceable, save upon such
13 grounds as exist at law or in equity for the revocation of any contract."
14 9 U.S.C. § 2. The FAA further explicitly states that this Court has
15 authority to enforce such written agreements:

16 A party aggrieved by the alleged failure, neglect,
17 or refusal of another to arbitrate under a written
18 agreement for arbitration may petition any United
19 States district court which, save for such
20 agreement, would have jurisdiction under Title 28,
21 in a civil action or in admiralty of the subject
22 matter of a suit arising out of the controversy
23 between the parties, for an order directing that
24 such arbitration proceed in the manner provided for
25 in such agreement. . . . The court shall hear the
26 parties, and upon being satisfied that the making of
the agreement for arbitration or the failure to
comply therewith is not in issue, the court shall
make an order directing the parties to proceed to
arbitration in accordance with the terms of the
agreement.

9 U.S.C. § 4.

1 Whether an arbitration agreement is enforceable under the FAA is
2 generally determined by reference to common-law principles of general
3 applicability. *Southland Corp. v. Keating*, 465 U.S. 1, 19-20, 104 S. Ct.
4 852 (1984).

5 While the issue of unconscionability of a contract or clause of a
6 contract is a question of law for the court, the decision is one based
7 on the factual circumstances surrounding the transaction in question.
8 *Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 898, 28 P.3d 823 (2001).
9 The burden of proving that a contract or contract clause is
10 unconscionable rests upon the party attacking it. *Id.* Washington
11 recognizes two types of unconscionability. Substantive unconscionability
12 "involves those cases where a clause or term in the contract is alleged
13 to be one-sided or overly harsh" *Id.* quoting *Schroeder v. Fageol*
14 *Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975). Procedural
15 unconscionability is the lack of a meaningful choice, considering all of
16 the circumstances surrounding the transaction including the manner in
17 which the contract was entered, whether each party had a reasonable
18 opportunity to understand the terms of the contract, and whether the
19 important terms were hidden in a maze of fine print. *Id.*

21 The WAA and RCW 7.04A.070(1) states, in relevant part:
22

23 On motion of a person showing an agreement to
24 arbitrate and alleging another person's refusal to
25 arbitrate pursuant to the agreement, the court shall
26 order the parties to arbitrate if the refusing party
does not appear or does not oppose the motion. If
the refusing party opposes the motion, the court
shall proceed summarily to decide the issue. Unless
the court finds that there is no enforceable

1 agreement to arbitrate, it shall order the parties
2 to arbitrate. If the court finds that there is no
3 enforceable agreement, it may not order the parties
to arbitrate.

4 Pursuant to the FAA and WAA, this Court must enforce the provisions
5 of the parties' arbitration agreement if such agreement is found to be
6 valid and enforceable. Viewing the arbitration agreement as a whole, the
7 Court concludes it is not enforceable because of provisions therein which
8 are unconscionable. For example, the agreement states that the
9 "prevailing party in any action or proceeding related to this agreement
10 shall be entitled to recover reasonable legal fees and costs, including
11 attorney's fees which may be incurred." While such clauses are not, by
12 themselves, invalid in many settings, the Washington Unfair Business
13 Practices - Consumer Protection law sets forth a strong policy permitting
14 attorney fees and costs to successful plaintiffs but says nothing about
15 permitting such fees and costs to successful defendants. See RCW
16 19.86.090. Under the arbitration agreement here, the prevailing party
17 is entitled to collect attorneys' fees and costs. While the Wheelers are
18 assured that they will recover their expenses and legal fees if they win
19 decisively, they must assume the risk that if they lose, they will have
20 to pay Freedoms's expenses and legal fees. This risk is a significant
21 deterrent to already financially-strapped consumers contemplating a suit
22 to vindicate their rights under consumer protection laws involving
23 relatively small claims. See *Walters v. A.A.A. Waterproofing, Inc.*, 151
24 Wash.App. 316 (2009) for application of this principle, albeit in an
25 employment context.
26

1 An arbitration agreement is also unconscionable "when the party
2 opposing arbitration reasonably shows in law or equity that prohibitive
3 costs are likely to render the arbitral forum inaccessible." *Mendez v.*
4 *Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 465 (2002). The subject
5 agreement provides that the Wheelers must arbitrate their Washington
6 legal claim of approximately \$4,700.00 in Orange County, California.
7 This travel would render the arbitral forum inaccessible. Moreover,
8 while Freedom is willing to waive that provision, it is not required to
9 do so by the terms of the agreement and Wheeler is not required to accept
10 this modification.
11

12 The Court finds that the unconscionable terms within the
13 "Arbitration" section of the agreement (requiring loser to pay all,
14 requiring arbitration in Orange County, California, and the 30-day
15 limitations period) can not be severed because they permeate the entire
16 arbitration agreement. When unconscionable provisions so permeate an
17 agreement, courts can strike the entire section or contract. See *McKee*
18 *v. AT&T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008). Therefore, the Court
19 denies Defendants' motion to compel arbitration.
20

21 **III. CONCLUSION**

22 The Court has reviewed the record, the pending motion, and is fully
23 informed. For the foregoing reasons, the parties are not compelled to
24 arbitrate pursuant to the agreement.

25 **IT IS ORDERED:**

26 1. Defendants' Motion to Compel Arbitration, **ECF No. 47**, filed

1 September 13, 2011, is **DENIED**.

2 The District Court Executive is directed to file this Order and
3 provide copies to counsel.

4 **DATED** this 27th day of October, 2011.

5
6 *s/Lonny R. Suko*

7 _____
8 LONNY R. SUKO
9 UNITED STATES DISTRICT JUDGE
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Subject: Gandee v. LDL Freedom Enterprises - No. 87674-6

Attached for filing please find *Respondent's Submission of Additional Authority*, along with Appendix 1 and Appendix 2 thereto.

Case Name: *Gandee v. LDL Freedom Enterprises, Inc., et al.*

Case Number: 87674-6

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