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No. 66137-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GARDA CL NORTHWEST, INC.

Petitioner/Cross-Respondent,

v.

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER,
on their own behalves and on behalf of all persons
similarly situated,

Respondents/Cross-Petitioners.

OPENING BRIEF OF PETITIONER/CROSS-RESPONDENT

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I. INTRODUCTION

Respondents/Cross-Petitioners Lawrence Hill, Adam Wise, and Robert Miller (collectively "Plaintiffs") are former employees of Petitioner/Cross-Respondent Garda CL Northwest, Inc. ("Garda" or "the Company"), an armored car company with seven branches in the state of Washington.

Plaintiffs filed this lawsuit alleging that Garda denied them and similarly-situated employees meal and rest breaks, altered their time records, and failed to pay them for "off-clock" work in violation of Washington state law. CP 3-8. The parties, however, were subject to a collective bargaining agreement that provided for mandatory arbitration of statutory claims. CP 136-157, 200-243. Consequently, Garda moved the Superior Court to compel Plaintiffs to arbitrate their individual claims.[1] CP 15-40.

The Court granted Garda's Motion to Compel, but directed the parties to arbitrate the dispute as a class. CP 767-768. Plaintiffs appealed the Court's decision to compel arbitration, CP 913-917, and Garda appealed the Court's decision to compel arbitration as a class, CP 769-

[1]Garda moved in the alternative for summary judgment pursuant to Washington Civil Rule 56. CP 15-40. The Court did not address Garda's alternative motion in light of its disposition of the Motion to Compel. CP 767-768.

773. This brief is in support of Garda's appeal of the Court's decision to compel arbitration as a class.[2]

II. ASSIGNMENT OF ERROR

The Superior Court erred in ordering *class* arbitration where the question of what kind of arbitration the parties agreed to is one of contract interpretation for an arbitrator, not a court, to determine.

III. STATEMENT OF THE CASE

Plaintiffs all worked as driver/messenger guards at various Garda branches in Washington.[3] CP 4, ¶ 8. The job responsibilities of the driver/messenger guard position are equally divided between driving the armored truck along a designated route (driver duties) and carrying currency to and from the vehicle and interacting with customers (messenger duties). CP 71. Miller worked at the Mt. Vernon branch from 2000 until 2006. CP 65, 69. Miller then transferred to the Seattle branch, where he worked until 2007. CP 65, 69-70. Wise worked at the Seattle branch from 2007 to 2009. CP 77. Hill worked at the Seattle branch from 2002 to 2008. CP 53-54.

Garda's Washington driver/messenger guards are and were at all times relevant to this lawsuit represented by employee association unions

[2]Garda reserves its arguments on the issues raised by Plaintiffs' appeal for its responsive brief.

[3]Garda's Washington branches are in Seattle, Mt. Vernon, Tacoma, Yakima, Wenatchee, Spokane, and Pasco. CP 66, 133.

specific to each branch. CP 133. At the Mt. Vernon branch, Miller and the other driver/messenger guards at that branch were represented by the Armored Transport Northwest Mt. Vernon Employees Association. CP 64-65, 136-157. When Miller transferred to the Seattle branch, he, along with Wise, Hill, and the other driver/messenger guards at that branch, was represented by the Armored Transport Northwest Seattle Employees Association. CP 55, 69, 78, 200-222. In September 2008, a new union, the Seattle Drivers Association, began representing the Seattle driver/messenger guards. CP 82, 223-243.

Each union negotiated a collective bargaining agreement ("CBA") with Garda governing the terms and conditions of the driver/messenger guards' employment at their respective branches. CP 65-66. The employees all participated in the negotiation process and reviewed the agreements before ratifying them. CP 65-66, 82.

For purposes of this lawsuit, the relevant provisions in the CBA's are those articles addressing the grievance and arbitration process and meal and rest breaks.[4] The 2004-2008 Mt. Vernon CBA, the 2004-2008 Seattle CBA, and the 2008-Present Seattle CBA are identical with respect

[4]Based on their respective tenures with Garda, the 2004-2008 Mt. Vernon CBA and the 2004-2008 Seattle CBA apply to Miller's claims; the 2004-2008 Seattle CBA applies to Hill's claims; and the 2004-2008 Seattle CBA and the 2008-Present Seattle CBA apply to Wise's claims.

to the relevant grievance/arbitration provisions. CP 142-143, 206-207, 229-230.

Under each CBA, a grievance is defined, in pertinent part, as including "any claim under any . . . state . . . law, statute or regulation . . . or any other claim related to the employment relationship." CP 142-143, 206-207, 229-230. The article then sets forth the procedure by which employees are to submit grievances to the Company, and ultimately an arbitrator, for resolution. CP 142-143, 206-207, 229-230. Specifically, the CBA's provide that a grievance "shall be presented in writing to the Company . . . within fourteen (14) calendar days from the occurrence or knowledge of the occurrence giving rise" to it. CP 142-143, 206-207, 229-230. If the Company's response to the grievance "is deemed inadequate by the Union, then the Union shall have fourteen (14) calendar days to request arbitration." CP 142-143, 206-207, 229-230. Finally, the CBA's provide, "The decision of the arbitrator shall be final and binding upon the grievant and all parties to this Agreement." CP 142-143, 206-207, 229-230.

Plaintiffs understood that the CBA's provided a procedure for the equitable resolution of grievances. CP 56, 66, 78. They further agreed that they could grieve claims arising under state law, including the state wage claims at issue in this case. CP 59, 66-67, 79. Additionally,

Plaintiffs agreed that they were supposed to present their specific grievances to the Company within fourteen days of each event at issue. CP 56, 67, 79. Plaintiffs failed to pursue the grievance/arbitration process with respect to the claims that are the subject of this lawsuit and do not contend otherwise. CP 67, 79.

IV. ARGUMENT

The Superior Court appropriately and correctly ordered the parties to arbitrate Plaintiffs' claims in this case. However, the Superior Court erred in directing that the claims be arbitrated as a class. It is well-established that an arbitrator, not a court, should decide such questions of procedural arbitrability. Consequently, the case should be remanded with instructions to the Superior Court to order the parties to arbitrate the dispute without specifying that the arbitration proceed on a class-wide basis.

A. WHETHER AN ARBITRATION AGREEMENT PERMITS CLASS ARBITRATION IS A PROCEDURAL QUESTION FOR AN ARBITRATOR TO DECIDE.

Under well-established and consistently followed United States Supreme Court precedent, the question of whether an arbitration agreement permits class arbitration must be decided by an arbitrator, not a court.

1. United States Supreme Court Authority

The United States Supreme Court held in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002), that questions of arbitration procedure are strictly for arbitrators to decide, and only certain "gateway" arbitrability questions are reserved for the courts. The *Howsam* Court identified the following two examples of "gateway" arbitrability questions to be decided by the courts: (1) whether the parties have a valid arbitration agreement at all, and (2) whether an arbitration clause in a concededly binding contract applies to a certain type of controversy. *Id.* at 84. Emphasizing the liberal federal policy favoring arbitration, the *Howsam* Court observed, in contrast, that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not for* the judge, but for an arbitrator, to decide." *Id.* (internal quotations omitted).

One year after deciding *Howsam*, the Supreme Court ruled in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003) (plurality opinion), that whether an arbitration agreement permits class arbitration is a "procedural" question rather than a "gateway" question under *Howsam*. The plaintiffs in *Bazzle* sought to have their respective lawsuits based on alleged violations of consumer loan agreements with the defendant certified as class actions in South

Carolina state court.[5] *Id.* at 448-449. In one of the cases, the trial court certified a class, but then granted the defendant's motion to compel arbitration based on the arbitration provision in the agreement. *Id.* at 449. The other case was later submitted to the same arbitrator under an identical arbitration provision. *Id.*

The arbitrator proceeded with both arbitrations on a class basis. *Bazzle*, 539 U.S. at 449. The arbitrator ruled against the defendant on the merits of the cases, and the defendant appealed the awards to the South Carolina Supreme Court on the basis that class-based arbitration was not provided for in the agreements. *Id.* The South Carolina Supreme Court affirmed the arbitrator's awards. *Id.* at 450.

The United States Supreme Court vacated the South Carolina Supreme Court's decision, finding that the question of whether a contract forbids class arbitration does not fall into the "narrow exception" for "gateway matters" espoused in *Howsam*. *Bazzle*, 539 U.S. at 452. The Court opined:

> It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. . . . [T]he question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. . . . Rather the relevant question here is what *kind of arbitration proceeding* the

[5]*Bazzle* involved two separate lawsuits against the same defendant based on alleged violations of loan agreements containing materially identical arbitration provisions. *Bazzle*, 539 U.S. at 448. The lawsuits were consolidated on appeal. *Id.* at 450.

> parties agreed to. That question does not concern a state statute or judicial procedures . . . . It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.

Id. at 452-453. Accordingly, the Court remanded the cases for the arbitrator to decide whether to allow class arbitrations. *Id.* at 454.

Although *Bazzle* was decided by a plurality of the Court, it represents controlling Supreme Court precedent. In his concurring opinion, Justice Stevens, citing *Howsam*, acknowledged that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court." *Bazzle*, 539 U.S. at 455. Justice Stevens elected not to join the plurality, however, only "[b]ecause the decision to conduct a class-action arbitration was correct as a matter of law, and because petitioner . . . merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker . . . ." *Id.* Justice Stevens nevertheless observed, "[The plurality's] opinion expresses a view of the case close to my own . . . ." *Id.*

The Supreme Court recognized in *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the

judgments on the narrowest grounds." Courts have applied the *Marks* doctrine to *Bazzle* and found that Justice Stevens' concurrence renders the plurality's opinion controlling on the issue of whether a court or an arbitrator should decide if the parties agreed to class arbitration. *See, e.g.*, *Certain v. Westchester*, 489 F.3d 580, 586 n.2 (3rd Cir. 2007) ("Justice Stevens . . . noted that the '[plurality] opinion expresses a view of the case close to my own,' and stated his agreement with the plurality['s] [reliance on *Howsam*]. Based on this language, therefore, we conclude that a 'common denominator . . . implicitly' runs through the reasoning of the 'five Justices who support the judgment' in the *Green Tree* decision.") (citations omitted); *Pedcor Management v. Nations Personnel of Texas*, 343 F.3d 355, 358-359 (5th Cir. 2003) ("Justice Stevens did express his agreement . . . with the principle laid down by the plurality that arbitrators should be the first ones to interpret the parties' agreement. As a result, the plurality's governing rationale in conjunction with Justice Stevens's support of that rationale substantially guides our consideration of this dispute."); *Johnson v. Gruma*, 123 Fed. App'x 786, 788 (9th Cir. 2005) ("[The plaintiff] contends that *Bazzle* is not binding, but we disagree. Justice Stevens' concurrence made the plurality a controlling judgment

that this court, and the district court, are bound to follow.") (unpublished opinion).[6]

That the plurality opinion in *Bazzle* is binding is further confirmed by the Supreme Court's decision to grant *certiorari* in *Hughes Electronics Corp. v. Garcia*, 540 U.S. 801, 124 S. Ct. 102, 157 L. Ed. 2d 12 (2003). In that case, the Supreme Court vacated the California Court of Appeals' holding that the court, not the arbitrator, should determine whether the parties agreed to class arbitration. *Id.* The Supreme Court remanded the case "for further consideration in light of [*Bazzle*]."[7] *Id.*

In light of *Howsam* and *Bazzle*, the courts' role in analyzing arbitration agreements is clear. The "gateway" questions of whether a valid arbitration agreement exists and, if so, whether it applies in the context of the dispute at bar must be resolved by the court. If those issues are resolved in favor of arbitration, "procedural" questions which arise thereafter – including what kind of arbitration the parties agreed to submit to – are matters of contract interpretation to be resolved by the arbitrator.

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[6]Pursuant to Rule 14.1 of the Washington General Rules, copies of unpublished opinions cited in this brief are included in Appendix A.

[7]On remand, the California Court of Appeals reversed itself and directed that the "class" issue be decided by the arbitrator, stating, "[*Bazzle*] quite plainly mandates a decision made in the first instance by the arbitrator, not a decision made by the trial court and imposed on the arbitrator." *Garcia v. DirectTV, Inc.*, 115 Cal. App. 4th 297, 302-303, 9 Cal. Rptr. 3d 190 (2004).

2. Washington Appellate Courts

Washington appellate courts have repeatedly recognized and applied *Howsam*'s distinction between "procedural" and "gateway" questions of arbitrability. *See, e.g.*, *Broom v. Morgan Stanley DW*, 169 Wn.2d 231, 242, 236 P.3d 182 (2010) (finding the task of interpreting the National Association of Securities Dealers Code of Arbitration Procedure was for arbitrator, not court, under *Howsam*); *Owner Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 809, 225 P.3d 213 (2009) (finding the question of whether an arbitration agreement binds a non-signator is a "gateway dispute" under *Howsam*); *Woodall v. Avalon Care Ctr.*, 155 Wn. App. 919, 923, 231 P.3d 1252 (Ct. App. 2010) ("Whether a person is bound by an agreement to arbitrate is a legal question that is to be determined by the courts.").

The Washington Supreme Court has not had occasion to apply *Bazzle*; however, it has cited *Bazzle* for the general proposition that "[c]lass actions are often arbitrated." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 395, 191 P.3d 845 (2008).

As the above-cited case law illustrates, Washington appellate courts consistently apply *Howsam* and have firmly suggested that *Bazzle* dictates that an arbitrator, not a court, should decide whether an arbitration agreement permits class arbitration.

3. Federal Appellate Courts

Federal appellate courts throughout the country have routinely and uniformly applied *Bazzle* to require arbitrators to determine, in the first instance, whether class arbitration is permissible under a contract. For example, the Ninth Circuit Court of Appeals in *Johnson v. Gruma*, 614 F.3d 1062, 1065 (9th Cir. 2010), vacated the district court's determination that an arbitration agreement prohibited class-wide arbitration. The Court explained, "The district court prohibited arbitration of class-wide claims and dismissed the complaint with prejudice. We vacated and remanded to the district court in light of the Supreme Court's decision in [*Bazzle*]." *Id.* *See also Veliz v. Cintas Corp.*, 273 Fed. App'x 608, 609 (9th Cir. 2008) (applying *Bazzle* and holding that "[o]n remand, the arbitrator is not bound to follow the district court's view whether the plaintiffs have the ability to proceed on a class or collective basis. Rather, he is free to exercise the full extent of his authority under the arbitration agreements.") (unpublished opinion).

The First, Second, Third, and Fifth Circuit Courts of Appeals have also applied *Bazzle* in the class arbitration context.[8] *See Skirchak v.*

[8]The other circuit courts of appeals have not had occasion to apply *Bazzle* in the class arbitration context; however, the Fourth, Eighth, and Eleventh Circuit Courts of Appeals have cited and/or applied *Bazzle* in other contexts. *See, e.g.*, *Dockser v. Schwartzberg*, 433 F.3d 421, 426 (4th Cir. 2006) (issue of how many arbitrators should decide dispute is "procedural" question for arbitrator, not court); *Pro Tech Indus. v. URS Corp.*, 377 F.3d

Dynamics Research Corp., 508 F.3d 49, 56 (1st Cir. 2007) ("[T]he Supreme Court's decision in [*Bazzle*] made clear that when claims are submitted to arbitration, the question of whether class arbitration is forbidden is not a question of arbitrability, but initially a question of contract interpretation and should be decided in the first instance by an arbitrator."); *Vaughn v. Leeds, Morelli & Brown, P.C.*, 315 Fed. App'x 327, 329 (2nd Cir. 2009) (applying *Bazzle* and holding that "[t]he district court . . . properly compelled arbitration on the question of the arbitrability of class claims . . .") (unpublished opinion); *Certain v. Westchester*, 489 F.3d 580, 587 (3rd Cir. 2007) ("As in *Green Tree*, the question here is 'not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*,' but rather 'what *kind of arbitration proceeding* the parties agreed to."); *Pedcor Management v. Nations Personnel of Texas*, 343 F.3d 355, 359 (5th Cir. 2003) ("The clarity of *Green Tree*'s holding – that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration – leaves us to decide only whether the instant case is sufficiently analogous to *Green Tree* to come within its rule.").

868, 870 (8th Cir. 2004) ("We conclude questions of whether waiver occurred and whether demand was sufficient and timely under the agreement, involve issues of procedural arbitrability, matters presumptively for the arbitrator, not for the judge."); *Anders v. Hometown Mortg. Servs.*, 346 F.3d 1024, 1027 (11th Cir. 2003) (finding question of validity of agreement a "gateway" question).

4. Other Courts

The United States District Court for the District of Washington has also adopted *Bazzle*. *See Carlsen v. Freedom Debt Relief, LLC*, No. CV-09-55-LRS, 2010 U.S. Dist. LEXIS 29056, at *10 (E.D. Wash. Mar. 26, 2010) ("Under *Green Tree* . . . an arbitrator should determine whether [the arbitration] clause allows for class-wide arbitration.") (unpublished opinion); *Scout.com v. Bucknuts*, CASE NO. CO7-1444 RSM, 2007 U.S. Dist. LEXIS 87491, at *21 (W.D. Wash. Nov. 16, 2007) ("Given the applicability of *Green Tree* to the instant case, coupled with the ambiguity inherent in the Agreements between the parties, this Court concludes that it cannot compel respondents to proceed with their arbitration claims individually.") (unpublished opinion).

Other federal and state courts have likewise adopted *Bazzle*. *See, e.g.*, *Blimpie Int'l Inc. v. Blimpie of the Keys*, 371 F. Supp. 2d 469, 474 (S.D.N.Y. 2005) ("[A]s the Supreme Court reasoned in *Green Tree*, whether a particular procedural device is permissible in the absence of any language in the agreement is a question of 'contract interpretation and arbitration procedures,' which '[a]rbitrators are well situated to answer.'") (quoting *Bazzle*); *Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656, 668 (M.D. Tenn. 2004) (finding that under *Bazzle*, "this Court cannot determine whether a prohibition on class arbitration would

effectively vindicate rights because this Court does not have the authority to decide whether the contract permits class arbitrations"); *In re Universal Serv. Fund Tel. Billing Practices Litigation*, 300 F. Supp. 2d 1107, 1126-1127 (D. Kan. 2003) ("[The contract] does not by its terms ban class-wide arbitration. Rather, it is silent on this issue. Under these circumstances, the availability of class-wide arbitration is an issue that must be decided by an arbitrator in the first instance.") (citing *Bazzle*); *Garcia v. DirectTV, Inc.*, 115 Cal. App. 4th 297, 302-303, 9 Cal. Rptr. 3d 190 (2004) ("*Green Tree* quite plainly mandates a decision made in the first instance by the arbitrator, not a decision made by the trial court and imposed on the arbitrator."); *Flynn v. Labor Ready, Inc.*, 775 N.Y.S.2d 357, 359, 6 A.D.2d 492 (2d Dept. 2004) ("The agreements were silent as to whether class-action arbitration was permissible. Accordingly, the questions of whether these claims may be submitted to arbitration as a class action is for the arbitrator to decide.").

B. THE SUPERIOR COURT DISREGARDED *HOWSAM* AND *BAZZLE* AND ERRONEOUSLY ORDERED THE PARTIES TO ARBITRATE THE CLAIMS ON A CLASS-WIDE BASIS.

On July 23, 2010, before ruling on Defendant's Motion to Compel Arbitration or for Partial Summary Judgment, the Superior Court certified this case as a class action. On September 28, 2010, the Court granted Defendant's Motion to the extent it sought to compel arbitration. In its

Order on Defendant's Motion, however, the Court directed the parties to arbitrate the claims as a class, citing its earlier certification. While the Superior Court appropriately and correctly determined that the parties agreed to arbitrate this case, in light of *Howsam* and *Bazzle*, the Court exceeded its authority in directing that the parties arbitrate on a class-wide basis.

1. The Superior Court properly decided the "gateway" issues presented to it.

In ordering this case to arbitration, the Superior Court implicitly held that (1) the parties have a valid arbitration agreement, and (2) the arbitration agreement applies to this dispute. Otherwise, of course, the Court could not have compelled arbitration. *See Satomi*, 167 Wn.2d at 810 ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). Thus, the Court appropriately and correctly decided the two "gateway" issues contemplated by the Supreme Court in *Howsam*. *See Howsam*, 537 U.S. at 84 (holding that "gateway disputes" include "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy").

2. The Superior Court exceeded its authority in directing class arbitration.

As the wealth of case law discussed above dictates, supra pp. 5-15, the Superior Court went too far in deciding the procedural question of what kind of arbitration the parties agreed to. *See Law Enforcement v. Yakima County*, 133 Wn. App. 281, 288, 135 P.3d 558 (Ct. App. 2006) ("Once it is determined, by a court, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.") (internal quotations omitted).[9]

C. THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS THAT THE SUPERIOR COURT ORDER THE PARTIES TO ARBITRATE THE DISPUTE WITHOUT SPECIFYING THAT THE ARBITRATION PROCEED ON A CLASS-WIDE BASIS.

Because the Superior Court correctly determined that the parties agreed to submit this dispute to arbitration, but erred in directing that the parties submit to *class* arbitration, the case should be remanded with instructions to the Superior Court to order the parties to arbitrate the

[9]The Superior Court's Order suggests that its decision to direct a class arbitration was based on the fact that a class had already been certified: "[T]he court, *in light of its prior decision to certify a class*, believes that it has the authority to compel arbitration as a class." CP 768 (emphasis added). That a class has already been certified is of no consequence. Indeed, *Bazzle* itself involved a class that had been certified by the trial court. *See Bazzle*, 539 U.S. at 449 ("On January 5, 1998, the court both (1) certified a class action and (2) entered an order compelling arbitration."). *See also Pedcor*, 343 F.3d at 357 (recognizing that despite the defendant's "written suggestions advising against class certification[,] . . . [i]n preparation for arbitration, the court nevertheless certified a class . . .").

dispute without specifying that the arbitration proceed as a class. *See Bazzle*, 539 U.S. at 454 ("[W]e remand the case so that the arbitrator may decide the question of contract interpretation – thereby enforcing the parties' arbitration agreements according to their terms."); *Gruma*, 614 F.3d at 1065 ("The district court prohibited arbitration of class-wide claims and dismissed the complaint with prejudice. We vacated and remanded to the district court in light of the Supreme Court's decision in [*Bazzle*].").

V. CONCLUSION

The Superior Court exceeded its authority in deciding the "procedural" question of whether the parties agreed to arbitrate the dispute on a class-wide basis. Controlling precedent dictates that the question of what kind of arbitration the parties agreed to should be decided by the arbitrator. Accordingly, Garda requests that the case be remanded with instructions to the Superior Court to order the parties to arbitrate the

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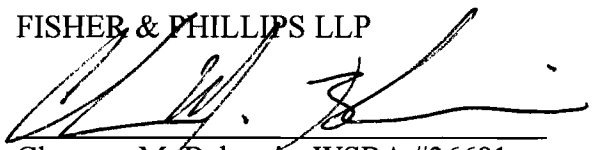
dispute without specifying that the arbitration proceed on a class-wide basis.

DATED this 10th day of March, 2011

Respectfully Submitted,

FISHER & PHILLIPS LLP



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I hereby certify under penalty of perjury of the laws of the State of Washington that on this 10th day of March 2011, I caused a true and correct copy of the:

Opening Brief of Petitioner/Cross-Respondent

to be delivered by mail to the following:

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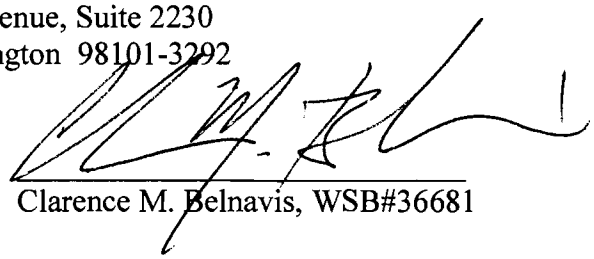


Clarence M. Belnavis, WSB#36681

No. 66137-1-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LAWRENCE HILL, ADAM WISE and ROBERT MILLER, on their own behalves and on behalf of all persons similarly situated, Plaintiffs/Respondents, v. GARDA CL NORTHWEST, INC., f/k/a AT SYSTEMS, INC., a Washington corporation, Defendants/Petitioner.	UNPUBLISHED NON-WASHINGTON AUTHORITIES CITED IN THE OPENING BRIEF OF PETITIONER/CROSS-RESPONDENT

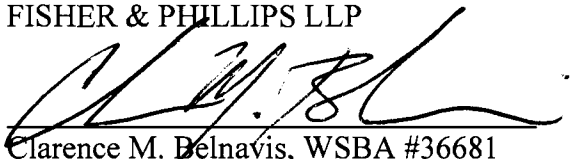
Pursuant to GR 14.1(b) Petitioner/Cross-Respondent Garda CL Northwest, Inc., f/k/a AT Systems, Inc., submits the following unpublished authorities cited in the Opening Brief of Petitioner/Cross-Respondent at the following corresponding pages:

Carlsen v. Freedom Debt Relief, LLC, No. CV-09-55-LRS, 2010 U.S. Dist. LEXIS 29056, at *10 (E.D. Wash. Mar. 26, 2010).....14

Scout.com v. Bucknuts, CASE NO. CO7-1444 RSM, 2007 U.S. Dist. LEXIS 87491, at *21 (W.D. Wash. Nov. 16, 2007) 14

DATED this 10th day of March, 2011.

FISHER & PHILLIPS LLP



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LEXSEE 2010 US DIST. LEXIS 29056

Caution
As of: Mar 09, 2011

CHAD M. CARLSEN and SHASTA CARLSEN, husband and wife, et al., and BARBARA HULSE; each individually and on behalf of a Class of similarly, situated Washington residents, Plaintiffs, v. FREEDOM DEBT RELIEF, LLC, LLC, a Delaware limited liability company, et al., Defendants.

NO. CV-09-55-LRS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

2010 U.S. Dist. LEXIS 29056

March 26, 2010, Decided
March 26, 2010, Filed

COUNSEL: [*1] For Chad M Carlsen, husband, individually and on behalf of a Class of similarily situated Washington families, Shasta L Carlsen, wife, individually and on behalf of a Class of similarily situated Washington families, Plaintiffs: Darrell W Scott, LEAD ATTORNEY, Scott Law Group PS, Spokane, WA; Matthew John Zuchetto, LEAD ATTORNEY, The Scott Law Group, Spokane, WA; Timothy W Durkop, LEAD ATTORNEY, Timothy Durkop Law Office, Spokane Valley, WA.

JUDGES: LONNY R. SUKO, Chief United States District Court Judge.

OPINION BY: LONNY R. SUKO

OPINION

ORDER GRANTING MOTION FOR CLASS CERTIFICATION, *INTER ALIA*

BEFORE THE COURT are the Plaintiffs' Motion For Class Certification (Ct. Rec. 35) and Defendants' Motion To Compel Arbitration And Dismiss (Ct. Rec. 57). These motions were heard with oral argument on March 16, 2010. Darrell W. Scott, Esq., argued for Plaintiffs. Sally Gustafson Garratt, Esq., argued for Defendants. Also before the court is Plaintiffs' Motion To Strike Exhibits Attached To The Declaration Of Sally Gustafson Garratt (Ct. Rec. 74). That motion has been considered without oral argument.

I. BACKGROUND

This is a diversity class action commenced by Plaintiffs against the Defendants [1], alleging Defendants have violated [*2] Washington's Debt Adjusting statute, RCW Chapter 18.28, and/or aided and abetted a violation of the same, and that these violations constitute a violation of Washington's Consumer Protection Act (CPA), RCW Chapter 19.86. Defendant Freedom Debt Relief, LLC, ("FDR") is a company which offers "debt reduction services" to clients and "negotiates settlement terms with a client's creditor." Defendant Freedom Financial Network ("FFN") is the parent company of FDR. As discussed in the court's "Order Denying Motions To Compel Arbitration, *Inter Alia*" in the related case of *Carlsen v. Global Client Solutions,* CV-09-246-LRS (Ct. Rec. 40), Global Client Solutions, LLC (GCS), is in the business of receiving funds for the purpose of distributing those funds among creditors in payment or partial payment of obligations of debtors, including the Plaintiffs. GCS, in partnership with Rocky Mountain Bank and

Trust (RMBT), maintains and manages debt settlement accounts that are part of "debt reduction services" offered by companies such as FDR.

> 1 The federal Class Action Fairness Act (CAFA) expanded federal jurisdiction over putative and certified class actions where the matter in controversy exceeds $ 5,000,000, [*3] determined by aggregating the claims of the individual class members. *28 U.S.C. Section 1332(d)(1), (2), (6)* and *(8)*. Complete diversity of parties is not required. Diversity under the CAFA exists if any member of a class of plaintiffs is a citizen of a State different from any defendant.

Plaintiffs' Second Amended Complaint in the captioned matter alleges that class members, including named Plaintiffs (Carlsens and Hulse) executed a standardized "Debt Reduction Agreement" with FDR which provided for a total fee that exceeded fifteen percent (15%) of the total debt listed on the contract, provided for an initial fee exceeding $ 25, and provided for fees exceeding 15% of the individual payments made by each class member, all in violation of *RCW 18.28.080*.

II. DISCUSSION

A. Arbitration

Defendants seek an order from the court enforcing the arbitration clauses in the agreements between FDR and the Carlsens, and FDR and Hulse. Plaintiffs do not dispute there was an agreement to arbitrate, but contend the agreement is not enforceable. [2]

> 2 In *Carlsen v. Global Client Solutions* CV-09-246-LRS, the court found the Carlsens and Pophams did not agree to arbitrate their dispute with GCS and RMBT, and [*4] therefore did not reach the issue of enforceability.

9 U.S.C. § 2 of the Federal Arbitration Act ("FAA") provides in relevant part that "an agreement in writing to submit to arbitration an existing controversy arising out of . . . a contract, transaction, or refusal [to perform the same], shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract.**" (Emphasis added). Whether an arbitration agreement is enforceable under the FAA is generally determined by reference to common-law principles of general applicability. *Southland Corp. v. Keating, 465 U.S. 1, 19-20, 104 S.Ct. 852, 79 L. Ed. 2d 1 (1984)*.

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

The agreement the Carlsens entered into with FDR contains an arbitration clause which is different from the arbitration clause contained in the agreement between Hulse and FDR. The Hulse agreement constitutes the later version of the agreement.

Paragraph 9 in the Carlsen agreement, entitled "Arbitration of Dispute," states:

> IN THE EVENT OF ANY DISPUTE BETWEEN THE PARTIES ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE PARTIES AGREE TO SUBMIT THAT DISPUTE TO BINDING ARBITRATION UNDER THE AUSPICES OF THE AMERICAN ARBITRATION ASSOCIATION (AAA). VENUE FOR SUCH ARBITRATION WILL BE IN SAN FRANCISCO, CA. BINDING ARBITRATION MEANS THAT BOTH PARTIES GIVE UP THE RIGHT TO TRIAL BY JURY. IT ALSO MEANS THAT BOTH PARTIES GIVE [*6] UP THE RIGHT TO APPEAL FROM THE ARBITRATOR'S RULING EXCEPT FOR A NARROW RANGE OF ISSUES THAT ARE APPEALABLE UNDER CALIFORNIA LAW. IT ALSO MEANS THAT DISCOVERY MAY BE SEVERELY LIMITED BY THE ARBITRATOR.

(Text in Capital Letters).

The Carlsen agreement also contains a Paragraph 8 entitled "Governing Law; Severability:", which states:

> This Agreement is governed by the laws of the State of California, without

> regard to the conflict of law rules of that state. If any provision of this Agreement is held to be unenforceable, the remainder of this Agreement shall remain in full force and effect.

The Hulse agreement contains the identical "Governing Law; Severability" clause at Paragraph 8.

The arbitration clause of the Hulse agreement is found at Paragraph 9 and it states:

> THE EVENT OF ANY CONTROVERSY, CLAIM OR DISPUTE BETWEEN THE PARTIES ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE BREACH, TERMINATION, ENFORCEMENT, INTERPRETATION OR VALIDITY THEREOF, INCLUDING THE TERMINATION OF THE SCOPE OR APPLICABILITY OF THIS AGREEMENT TO ARBITRATE, SHALL BE DETERMINED BY ARBITRATION IN SAN FRANCISCO, CALIFORNIA OR IN THE COUNTY IN WHICH THE CONSUMER RESIDES, IN ACCORDANCE WITH THE LAWS OF STATE OF CALIFORNIA [*7] FOR AGREEMENTS TO BE MADE IN AND TO BE PERFORMED IN CALIFORNIA. THE PARTIES AGREE THE ARBITRATION SHALL BE ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS RULES AND PROCEDURES AND AN ARBITRATOR SHALL BE SELECTED BY THE AAA. . . . THE PARTIES AGREE THAT EITHER PARTY MAY BRING CLAIMS AGAINST THE OTHER ONLY IN HIS/HER OR ITS INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. FURTHER, THE PARTIES AGREE THAT THE ARBITRATOR MAY NOT CONSOLIDATE PROCEEDINGS OF MORE THAN ONE PERSON'S CLAIMS, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF REPRESENTATIVE OR CLASS PROCEEDINGS. THE PARTIES SHALL SHARE THE COST OF ARBITRATION, INCLUDING ATTORNEY'S FEES, EQUALLY. IF THE CONSUMER[']S SHARE OF THE COST IS GREATER THAN $ 1,000 (ONE-THOUSAND DOLLARS), THE COMPANY WILL PAY THE CONSUMER[']S SHARE OF THE COSTS IN EXCESS OF THAT AMOUNT.
>
> . . .

(Text in Capital Letters).

The Plaintiffs contend the arbitration clauses are substantively unconscionable. According to Plaintiffs, the Hulse agreement is substantively unconscionable because it attempts to evade consumer protection laws by depriving consumers of class action procedures, [*8] whereas the Carlsen agreement is substantively unconscionable because it deprives indebted consumers of meaningful opportunity for redress by requiring that claims be pursued in San Francisco under California law.

Defendants say they are willing to arbitrate the claims of each Plaintiff in the county where each Plaintiff resides and to not enforce the "Choice of Law" clause. [3] In other words, Defendants are willing to forego San Francisco as the venue for arbitration and have Washington law apply to the arbitration, including the Debt Adjusting statute and the Consumer Protection Act. Defendants assert the severability clauses in the agreements permit the court to sever the venue and choice of law provisions. Defendants' willingness to forego enforcement of these provisions is understandable given that this court finds it would be substantively unconscionable to require financially-strapped Washington citizens to travel to San Francisco to arbitrate a dispute without the benefit of Washington's Consumer Protection Act.

> 3 Arguably, the Hulse agreement dictates this considering its language that "arbitration [shall be] in San Francisco, California **or in the county in which the consumer** [*9] **resides,** in accordance with the laws of the State of California **for agreements to be made in and performed in California.**" (Emphasis added). Hulse resides in Grant County in the State of Washington and her agreement with FDR was not made in or to be performed in California. One could speculate that the venue and choice of law provisions in the later Hulse agreement, as compared to the earlier Carlsen agreement, were motivated by concerns over the enforceability of the provisions in the earlier Carlsen agreement which leave no doubt that venue for arbitration will be in San Francisco and that California law will apply .

Defendants maintain the class action waiver in the Hulse agreement is not substantively unconscionable and they assert that both the Carlsens and Hulse should proceed to arbitration of their individual claims. The Carlsen agreement, unlike the Hulse agreement, does not contain a class action waiver and is silent on the issue of classwide arbitration. Prior to 2003, the general consensus expressed in federal case law was that classwide arbitration was legally impermissible unless specifically permitted by the pertinent arbitration clause. See *Champ v. Siegel Trading Co. Inc., 55 F.3d 269, 275 (7th Cir. 1995)*(where [*10] the parties are bound by an arbitration agreement and the agreement is silent on class action procedures, a federal court may not order class action treatment). In *Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L. Ed. 2d 414 (2003)*, the U.S. Supreme Court held that because an arbitration clause did not specifically preclude classwide arbitration, the Federal Arbitration Act did not foreclose classwide arbitration, and whether arbitration was permissible was a matter of state-law contract interpretation. Furthermore, the Court held it was for the arbitrator to decide if there should be class certification and therefore, classwide arbitration. *Id. at 453*. Under *Green Tree,* the presumption would be that classwide arbitration is not foreclosed by the arbitration clause in the Carlsen agreement and, assuming the clause is otherwise enforceable, an arbitrator should determine whether the clause allows for classwide arbitration.

The prohibition of classwide arbitration found in the arbitration clause in the Hulse agreement is substantively unconscionable under Washington law. In *Scott v. Cingular Wireless, 160 Wn.2d 843, 161 P.3d 1000 (2007)*, the plaintiffs brought a class action [*11] against the defendant alleging it had overcharged consumers by unlawfully adding roaming charges and hidden charges. The Washington Supreme Court held the class action waiver in the arbitration clause of the standard subscriber contract for cellular telephone service, which waived both class action litigation and class action arbitration, violated Washington state public policy and therefore, was substantively unconscionable. The court concluded the arbitration clause was unenforceable and since the clause itself provided that if any part of the same was found unenforceable, the entire clause was void and there was no basis for compelling arbitration. *Id. at 847*.

The state supreme court explained why the class action waiver was substantively unconscionable:

> Class actions are vital where the damage to any individual consumer is nominal, and that vital piece is exactly what the plaintiffs claim the class action waiver before us seeks to eviscerate.
>
> Thus, we conclude that without class actions, consumers would have far less ability to vindicate the CPA. [Citation omitted]. Again, the CPA contemplates that individual consumers will act as "private attorneys general, harnessing individual [*12] interests in order to promote the public good. [Citation omitted]. **But by mandating that claims be pursued only on an individual basis, the class arbitration waiver undermines the legislature's intent that individual consumers act as private attorneys general by dramatically decreasing the possibility that they will be able to bring meritorious suits.**
>
> Without class action suits the public's ability to perform this function is drastically diminished. We agree with plaintiffs and the Washington attorney general and conclude the class action waiver clause before us is an unconscionable violation of this State's policy to "protect the pubic and foster fair and honest competition," *RCW 19.86.920*, because it drastically forestalls attempts to vindicate consumer rights. To the extent that this clause prevents CPA cases, it is substantively unconscionable.

Id. at 853-54 (emphasis added).

The court found there was an additional consideration in deeming the clause substantively unconscionable:

> Of course, on its face, the class action waiver does not exculpate Cingular from anything; it merely channels dispute resolution into individual arbitration proceedings or small claims court. But, in effect [*13] this exculpates Cingular from legal liability, for any wrong where the cost of pursuit outweighs the potential amount of recovery. . . .
>
> In such cases, the ability, to proceed as a class transforms a merely theoretical possible remedy into a real one. [Citation omitted]. It is often the only meaningful type of redress available for small but widespread injuries. [Citations omitted]. Without it, many consumers may not even realize that they have a claim. [Citations omitted]. The class action provides a mechanism to alert them to this fact. Second,

> again, claims as small as those in this case are impracticable to pursue on an individual basis even in small claims court, and particularly in arbitration. Shifting the cost of arbitration to Cingular does not seem likely to make it worth the time, energy, and stress to pursue such individually small claims. [4]

Id. at 855-56.

> 4 Here, FDR does not agree to bear all of the costs of arbitration. In the Hulse agreement, FDR does agree to cover the consumer's share of costs in excess of $ 1,000. As discussed *infra,* that is insufficient to save the class action waiver from being substantively unconscionable. The Carlsen agreement does not say anything [*14] specific about arbitration costs and the assumption would be that FDR and the client share the arbitration costs equally.

The state supreme court rejected Cingular's argument that the Federal Arbitration Act required the court to enforce the class action waiver. In doing so, it found that Congress only required that arbitration clauses be put on the same footing as other contracts. *Id. at 858.* It observed that:

> Class action waivers have very little to do with arbitration. Clauses that eliminate causes of action, eliminate categories of damages, or otherwise strip away a party's right to vindicate a wrong do not change their character merely because they are found within a clause labeled "Arbitration." At least, based on the briefing before us, we see no reason why the purposes of favoring individual arbitration would not equally favor class-wide arbitration. [Citation omitted].

Id. at 858.

In the subsequent case of *McKee v. AT&T Corp., 164 Wn.2d 372, 191 P.3d 845 (2008)*, the Washington Supreme Court declared unconscionable a choice of law provision in a "Consumer Services Agreement" which designated New York law as controlling. The court found "the choice of New York law in this case is [*15] unconscionable . . . because it conflicts with Washington's fundamental public policy favoring the availability of class-based relief for small consumer claims." *Id. at 386.* The court held that "Washington's strong Consumer Protection Act policy favoring class adjudication of small-dollar claims is a 'fundamental policy' . . . ." *Id.* To no surprise, the court also found substantively unconscionable the provision within the "Dispute Resolution" section of the agreement that prohibited classwide arbitration. *Id. at 397.* It emphasized, however, that class action waiver has nothing to do with a valid agreement to arbitrate because class actions are often arbitrated and promote the prime objective of an agreement to arbitrate which is streamlined proceedings and expeditious results. *Id. at 395.*

In *McKee,* the state supreme court affirmed the trial judge's decision that the unconscionable terms within the "Dispute Resolution" section of the agreement (waiving class actions, requiring confidentiality, shortening the limitations period, and limiting attorney's fees) could not be severed because they "permeate the entire arbitration agreement." *Id. at 402.* AT&T requested the unconscionable provisions [*16] from the "Dispute Resolution" section be stricken and that the balance thereof be enforced, but the court declined to do so, noting that "when unconscionable provisions so permeate an agreement, we strike the entire section or contract." *Id.* The court found that severance of the unconscionable terms which tainted the entire "Dispute Resolution" section would essentially require the court to rewrite the dispute resolution agreement. *Id. at 403.* According to the court:

> Permitting severability as requested by AT&T in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.

Id.

The arbitration clause in the Hulse agreement provides that if the client's 50% share of the costs of arbitration is greater than $ 1,000, FDR will pay the client's share in excess of $ 1,000. That is an insufficient reason for the court to not find the class action waiver unconscionable. Defendants' argument is that this provision makes individual arbitrations [*17] appropriate in lieu of classwide arbitration. The figures cited by Plaintiffs, however, do not bear this out: $ 1,000 exceeds the debt adjuster fees at issue for more than 30% of those Washington consumers who terminated FDR's services, and represents more than 50% of the debt adjuster fees for 70% of that same group; and more than 60% of those

who completed FDR's program would have to incur costs exceeding 30% of the total fees they paid in order to pursue a claim to individually arbitrate their claims. Thus, one cannot conclude that the prospect of having FDR pay the client's share of the arbitration costs in excess of $ 1,000 would provide adequate incentive for the majority of clients to arbitrate their individual small-value claims.

In *Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976 (9th Cir. 2007)*, the defendant argued its arbitration clause did not deter customers from arbitrating individual small-value claims because per the clause, defendant agreed to pay the full cost of arbitration, and plaintiffs who received awards equal to or greater than their demands would receive attorney's fees. The Ninth Circuit rejected this argument and concluded that under California [*18] law, the class action waiver in the arbitration clause was unconscionable. The Ninth Circuit noted the concern of the California courts is that "when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers." *Id. at 986*, citing *Discover Bank v. Superior Court of Los Angeles, 36 Cal. 4th 148, 158-62, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (Cal. 2005)* (emphasis in text). The California courts did not suggest a waiver is unconscionable only when or because a plaintiff in arbitration may experience a net loss, including attorneys' fees and costs. *Id.*

In the case before this court, Plaintiffs make the same point: "aggregation of Washington consumer's claims through class litigation [or arbitration] entirely eliminates barriers to prosecution of consumer's claims because litigation [or arbitration] costs are advanced by class counsel, incurred by consumers only if Class members prove successful, and owing to economies of class litigation, would be a small fraction of those incurred, were the consumers to proceed [*19] individually." The Carlsens and Hulse are obviously not the only Washington clients of FDR and furthermore, while there are perhaps some clients who paid enough in fees to FDR that they would not be economically deterred from pursuing individual arbitration against FDR, this is not the only consideration. Without class litigation or arbitration, companies like FDR have little difficulty with arbitration of individual small-value claims. It is a different matter, however, when such companies are faced with the prospect of aggregate liability through class litigation or arbitration.

The forum selection and choice of law provisions in the arbitration clauses contained in the Carlsen and Hulse agreements, and the class action waiver provision in the arbitration clause in the Hulse agreement, are substantively unconscionable under Washington law. Despite the willingness of the Defendants to forego enforcement of the venue and choice of law provisions, and despite the existence of the severability clauses in the agreements, the court finds the unconscionable provisions so permeate the arbitration clauses and the agreements as a whole that they cannot and should not be severed for the reasoning [*20] provided in *McKee,* and that arbitration (individual or classwide) should not be compelled. The arbitration and governing law clauses in the Carlsen and Hulse agreements are stricken in their entirety.

B. Class Certification

Plaintiffs seek an order certifying this matter as a class action designating a class composed of all Washington residents who have executed a Debt Reduction Agreement with FDR and/or FFN, appointing named Plaintiffs (Carlsens and Hulse) as class representatives, designating Mr. Scott as class counsel, and providing for submission and approval of appropriate and timely notice to class members.

Plaintiffs ask that the class be certified pursuant to *Fed. R. Civ. P. 23(b)(3)* on the basis of a finding "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In addition to making that finding in order to certify a class, the court must also determine that certain prerequisites listed in *Rule 23(a)* have been met: (1) the class is so numerous that joinder of all members is impracticable; [*21] (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Defendants seemingly do not challenge that the first two prerequisites of *Rule 23(a)* are met, those being "numerosity" [5] and "commonality." As discussed below, the questions of law and fact present in the claims of each putative class member are not only "common," but pursuant to *Rule 23(b)(3)*, "predominate" over questions affecting individual members in the putative class and, on balance, a class action is superior to other methods for adjudicating the controversy. And because of this, the "typicality" and "adequacy" prerequisites of *Rule 23(a)* are also satisfied.

5 Defendants do not dispute that they have continuously engaged in business since 2003 and that over 1,000 Washington consumers have contracted with Defendants.

Defendants argue they are not "debt adjusters" as defined in Washington's Debt Adjusting statute, *RCW 18.28.010*, and concede this is a question of law common to the claims of all putative class members. Nevertheless, [*22] Defendants contend class certification is inappropriate because "[e]ach Washington client has had a different experience with the program" and "[a]s a result, the Court will be faced with an endless variety of facts and circumstances for each individual regarding whether his or her situation meets the requirements for sustaining this action."

This action is about the Defendants, pursuant to a standardized debt reduction agreement, allegedly charging each putative class member fees in excess of those specified in *RCW 18.28.080*. It is alleged the fee structure was the same in each individual case. The common question of fact is simply whether the fees charged and collected were in violation of the statute, or not. If they were excessive in violation of *RCW 18.28.080*, a standard remedy is prescribed in *RCW 18.28.090*: "the debt adjuster's contract with the debtor shall be void and the debt adjuster shall return to the debtor the amount of all payments received from the debtor or on the debtor's behalf and not distributed to creditors."

Defendants suggest some putative class members may not have been injured, and that those who claim they were injured, may not be able to show the cause of [*23] their injury was related to Defendants' actions. Being charged a fee in excess of that allowed in *RCW 18.28.080* constitutes "injury" *per se*. *RCW 18.28.080* amounts to a recognition that anything charged and collected above the specified fee limits constitutes injury to Washington consumers. By definition, an individual is injured if he is charged and pays too much in violation of the statute. Per *RCW 18.28.185*, a violation of *RCW 18.28.080* constitutes an unfair and deceptive act or practice in the conduct of trade or commerce under the Consumer Protection Act (RCW Chapter 19.86). A violation of *RCW 18.28.080* is a *per se* violation of the Consumer Protection Act. All of the elements of a CPA violation are satisfied because *RCW 18.28.080* was enacted to protect the public from excessive fees. Indeed, *RCW 18.28.190* makes it a criminal misdemeanor to violate any provision of the Debt Adjusting statute. A violation of *RCW 18.28.080* affects the public interest, injures the party who was charged the excessive fee, and obviously the charging of the excessive fee causes the injury.

Defendants assert that "88 Washington clients have completed the FDR program and every one of them has saved more [*24] money from their reduced debt than they have paid in fees to FDR and benefited significantly from their enrollment in the program." That, however, is not the relevant question. The relevant question is whether those 88 clients were charged and paid fees in excess of the limits specified in *RCW 18.28.080*. If so, they were injured and are entitled to the remedy specified in *RCW 18.28.090*.

It is true that Plaintiffs' Second Amended Complaint alleges some "individual claims" that are unique to the Carlsens. (See Paragraphs 67-89 of Second Amended Complaint). These individual claims are for alleged fraudulent misrepresentations made by Defendants to the Carlsens, and the claims relate to how Defendants performed with regard to certain debts owed by the Carlsens. Plaintiffs propose these individual claims be bifurcated from the class proceeding altogether, deferred for resolution until the class proceeding is completed, referred for resolution on a parallel track involving other proceedings acceptable to the parties, or litigated along side the class claims. The existence of these individual claims does not diminish the fact that common questions of law (are Defendants "debt adjusters" as [*25] defined in RCW 18.28?) and fact (did Defendants collect fees from their clients in excess of the limits specified in *RCW 18.28.080* pursuant to standardized agreements?) "predominate" in this matter so as to justify class certification.

Defendants assert the contracts with their clients have "varied substantially over the years" and that these differences defeat "predominance." Significant, however, is that Defendants do not assert the fee structure of these contracts varied substantially in such a fashion as to eliminate "predominance" of a common question whether fees charged and collected were in violation of *RCW 18.28.080*. There appears to be no dispute that the debt reduction agreements were standardized in regard to fees charged and collected.

It is not enough that common questions "predominate." There must also be a finding that a class action is "superior" to individual lawsuits for resolving the dispute. Defendants contend a class action is not "superior" to other available methods of adjudication because "[f]or those who are displeased with some aspect of the program, they may litigate their claims individually." Defendants assert the Carlsens and Hulse acknowledge as much "by [*26] asking the Court to litigate their individual claims separate and apart from any class litigation." The Carlsens and Hulse have now made clear that they believe their summary judgment motion should be deferred pending resolution of the class certification issue and the court has advised the parties this is how it intends to proceed.

Defendants contend the availability of individualized claim resolution is enhanced by the existence of contractual arbitration, noting that all FDR clients, including the Carlsens and Hulse, signed contracts containing arbitration clauses. The court has found, howev-

er, that these clause are not enforceable because of substantively unconscionable provisions contained therein.

Defendants assert that even if the arbitration clauses are unenforceable, the amount of fees paid by the clients is such that the clients could "easily" bring actions for relief in small claims court ($ 5,000 limit) or (state) district court ($ 50,000 limit). [6] As Plaintiffs point out, there are likely a significant number of FDR clients who are unaware they might have claims related to the fees charged and collected from them. According to Plaintiffs' figures, undisputed by Defendants, [*27] the vast majority of class members have claims valued at $ 3,000 or less as measured by the total fees paid, with 45% having claims involving fees of $ 1,999 or less, and only two having claims involving fees exceeding $ 15,000. There is not a likelihood of large individual recoveries. These are "small-value" (also referred to as "negative value") individual claims.

> 6 Litigation in state court is discussed as an option because if there is no class certification and no federal diversity subject matter jurisdiction under the Class Action Fairness Act (CAFA), it is doubtful there is traditional diversity jurisdiction (complete diversity between Plaintiffs and Defendants and/or no individual claim exceeding $ 75,000 jurisdictional amount), and there certainly is no federal question jurisdiction.

The purposes of a class action are to avoid a multiplicity of actions and to enable persons to assert small claims that would not be litigated individually because the costs would far outweigh any recovery. *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349, 103 S.Ct. 2392, 76 L. Ed. 2d 628 (1983).* Lawyers are not allowed in Washington small claims courts and certainly, an individual does not have to hire an attorney [*28] and can proceed *pro se* in state district court, thereby avoiding payment of attorney fees. Cost, however, is not the only issue here. These are not simple disputes which can be easily presented by *pro se* litigants. Resolution of the disputes involves interpretation of Washington's Debt Adjusting statute (i.e., is FDR a "debt adjuster") for which there is a complete absence of relevant case law and legislative history. In this case, and the related case of *Carlsen v. Global Client Solutions,* CV-09-246-LRS, this court is likely to certify questions of first impression to the state supreme court for resolution. In sum, *pro se* litigants would be at a decided disadvantage in trying to present their cases in state court, and the cost of hiring an attorney would be prohibitive relative to the small value of the claims. Indeed, the likelihood of finding an attorney to take on an individual claim would be diminished because of the small value of the claim and the prospect of a small recovery.

In *Dix v. ICT Group, Inc., 160 Wn.2d 826, 837, 161 P.3d 1016 (2007)*, the Washington Supreme Court found unenforceable a forum selection clause because it precluded class actions for small-value Consumer [*29] Protection Act (CPA) claims and there was no feasible alternative for seeking relief on such claims. According to the court:

> The individual consumer action to enforce *RCW 19.86.020* and vindicate the public interest is . . . a significant aspect of a dual enforcement scheme under the CPA, which provides for individual private actions in addition to enforcement actions brought by the attorney general. **But in some circumstances, the costs and inconvenience of suit may be too great for individual actions, even in small claims court.** We agree, therefore, that class suits are an important tool for carrying out the dual enforcement scheme of the CPA. Individual claims may be so small that it otherwise would be impracticable to bring them; a class action may be the only means that the public interest may be vindicated.

160 Wn.2d at 837 (emphasis added). Per *RCW 18.28.185*, a violation of Washington's Debt Adjusting statute constitutes a *per se* violation of the CPA.

A class action is a "superior" method for resolving individual claims here. None of the individual claims are of significant value and, when viewed objectively, the absence of a class action would likely deter individual actions. *Dix, 160 Wn.2d at 841.*

The [*30] "typicality" requirement of *Rule 23(a)* is that the claims or defenses of the class representatives must be typical of the claims or defenses of the class. In practice, the "commonality" and "typicality" requirements of *Rule 23(a)* tend to merge as both serve as a guideposts for determining whether maintenance of a class action is economical and whether the named plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157, 102 S.Ct. 2364 n. 13, 72 L. Ed. 2d 740 (1982).* The claims of the purported class representatives need not be identical to the claims of other class members, but the class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Id. at 156.* A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives

rise to the claims of other class members, and is based on the same legal theory as their claims. *Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992).*

The Carlsens and Hulse have claims which are identical to the claims [*31] of other class members, those being the claims which allege FDR charged and collected fees in excess of the limits specified in *RCW 18.28.080* pursuant to standardized agreements it had with its clients. As discussed above, the Carlsens are also asserting some unique individual claims for fraud resulting in injury unique to them, but the "typicality" requirement remains satisfied by virtue of the Carlsens (and Hulse) asserting claims identical to other class members alleging FDR charged and collected fees in excess of the limits specified in Washington's Debt Adjusting statute.

Defendants contend the Carlsens and Hulse have not demonstrated they will fairly and adequately represent the class because they "have chosen to proceed individually, seeking summary judgment on liability for themselves prior to a determination on class certification." In doing so, Defendants assert the Carlsens and Hulse have put their own interests on a different footing from those of the putative class. As noted, hearing and resolution of the motion for summary judgment has been deferred pending resolution of the class certification motion.

The test for "adequacy" is whether: 1) the attorney representing the [*32] class is qualified and competent; 2) the class representatives are not disqualified by interests antagonistic to the remainder of the class; and 3) the named plaintiffs must prosecute the action vigorously on behalf of the class. *In re Mego Fin'l Corp. Secur. Litig., 213 F.3d 454, 462 (9th Cir. 2000).* Defendants do not dispute that Mr. Scott is qualified and competent to represent the class. For the reasons already discussed, the Carlsens and Hulse do not have interests which are not antagonistic to the remainder of the class.

Plaintiffs have demonstrated that all of the prerequisites of *Rule 23(a)*-numerosity, commonality, typicality, and adequacy of representation- are met. Furthermore, Plaintiffs have established, pursuant to *Rule 23(b)(3)*, that questions of law and fact common to the class "predominate" over questions affecting the individual members and, on balance, a class action is "superior" to other methods available for adjudicating the controversy.

III. CONCLUSION

Defendants' Motion To Compel Arbitration And Dismiss (Ct. Rec. 57) is **DENIED.** Plaintiffs' Motion For Class Certification (Ct. Rec. 35) is **GRANTED.** Plaintiffs' Motion To Strike Exhibits Attached To The Declaration Of [*33] Sally Gustafson Garratt (Ct. Rec. 74) is **DENIED as moot** with respect to Plaintiffs' Motion For Class Certification, although the court will consider the motion with respect to Plaintiffs' Motion For Summary Judgment at the time that motion is heard.

The *Fed. R. Civ. P. 23(b)(3)* class is composed of all State of Washington residents who have executed a Debt Reduction Agreement with FDR and/or FFN. Named Plaintiffs, Chad M. Carlsen, Shasta L. Carlsen, and Barbara Hulse, are designated as representatives for the class. Darrell W. Scott, Esq., is appointed as class counsel pursuant to *Fed. R. Civ. P. 23(g).* The class claims, issues, or defenses are as identified above. Within ten (10) days from the date of this order, class counsel will serve and file a proposed "Notice" to class members for the court's review and approval. This "Notice" will comply with the requirements of *Fed. R. Civ. P. 23(c)(2)(B).* Defendants will have ten (10) days from service of the proposed "Notice" to serve and file any objections to the same. Class counsel will have five (5) days from service of any objections to serve and file any reply to the same.

After notice is provided to the class members and following the [*34] expiration of the "opt-out" period, class counsel will re-note the Plaintiffs' Motion For Summary Judgment As To Consumer Protection Act Liability And Final Or Preliminary Injunctive Relief (Ct. Rec. 47). Disposition of that motion is **STAYED** pending it being re-noted for hearing. [7]

7 The court will consider whether questions should be certified to the state supreme court, including whether Defendants are "debt adjusters" subject to Washington's Debt Adjusting statute. If the parties agree that is an appropriate course of action and can agree on the questions to be certified, the process can be expedited and it may be possible to consolidate presentation of those questions with the questions anticipated to be presented to the state supreme court in *Carlsen v. Global Client Solutions,* CV-09-246-LRS.

Resolution of the individual claims of the Carlsens is deferred pending completion of the class proceeding.

IT IS SO ORDERED. The District Court Executive is directed to forward copies of this order to counsel of record.

DATED this 26th day of March, 2010.

/S/ Lonny R. Suko

LONNY R. SUKO

Chief United States District Court Judge

LEXSEE 2007 US DIST LEXIS 87491

SCOUT.COM, LLC and SCOUT PUBLISHING, LLC, Petitioners, v. BUCKNUTS, LLC, et al., Respondents.

CASE NO. C07-1444 RSM

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2007 U.S. Dist. LEXIS 87491

November 16, 2007, Decided
November 16, 2007, Filed

COUNSEL: [*1] For Scout.com LLC, a Washington limited liability company, Scout Publishing LLC, a Washington limited liability company, Petitioners: Brian D Buckley, Christopher M Huck, Rogelio Omar Riojas, Stellman Keehnel, LEAD ATTORNEYS, DLA PIPER US LLP (WA), SEATTLE, WA.

For Bucknuts LLC, an Ohio limited liability company, InsideTx Inc, a Texas corporation, Major Upset Productions Inc, a California corporation, Respondents: Brian D Wright, D Jeffrey Ireland, Jeffrey S Sharkey, LEAD ATTORNEYS, FARUKI IRELAND & COX, DAYTON, OH; Jeffrey M Thomas, GORDON TILDEN THOMAS & CORDELL LLP, SEATTLE, WA.

For Trojan Sports Publishing LLC, Respondent: Jeffrey M Thomas, GORDON TILDEN THOMAS & CORDELL LLP, SEATTLE, WA.

JUDGES: RICARDO S. MARTINEZ, UNITED STATES DISTRICT JUDGE.

OPINION BY: RICARDO S. MARTINEZ

OPINION

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on petitioners' Motion to Compel Individual Arbitrations and Stay AAA "Class" Proceedings and respondents' Motion to Dismiss. (Dkt. # 10 and # 15). Petitioners argue that this Court has the authority to make a class arbitration determination based on agreements entered into between the respective parties. Petitioners further argue that [*2] the agreements do not permit class arbitration and therefore request that the Court compel respondents to proceed with their arbitration claims individually. Respondents argue that only the arbitrator has the authority to determine whether the arbitration provisions of the agreements permit class arbitration. Thus, respondents argue that this petition should be dismissed.

For the reasons set forth below, the Court shall GRANT respondents' Motion to Dismiss and STRIKE AS MOOT petitioners' Motion to Compel Individual Arbitrations and Stay AAA "Class" Proceedings. [1]

1 Although this Court rules only on respondents' Motion to Dismiss, the Court agrees with petitioner that petitioners' Motion to Compel presents similar legal issues and analyses. As a result, the Court considered the arguments made by both parties with respect to petitioners' motion, and incorporates those arguments into this Order.

II. DISCUSSION

A. Background Facts and Procedural History

On May 11, 2007, respondents Bucknuts, LLC ("Bucknuts"), InsideTx, Inc. ("InsideTx"), and Major

Upset Productions, Inc. dba The Bootleg ("The Bootleg"), filed a Consolidated Class Action Complaint with the American Arbitration Association ("AAA") [*3] against petitioners Scout.Com, LLC and Scout Publishing, LLC (collectively "Scout"). (Dkt. # 11, Buckley Decl., Exh. A). Respondents are self-described operators of independent websites and publish independent magazines dedicated to high school, college and professional athletics in various parts of the country. *Id.* at PP 1, 3-5. Bucknuts owns and operates a website providing information about The Ohio State University's athletic teams. *Id.* at P 3. InsideTx owns and operates a website providing information about the University of Texas' athletic teams. *Id.* at P 4. The Bootleg owns and operates a website providing information about Stanford University's athletic teams. *Id.* at P 5. Scout is a Washington limited liability corporation that operates the Scout Internet Network and the Scout Magazine Network. *Id.* at PP 7 and 8. The networks collectively provide information about high school, college, and professional sports teams. *Id.*

The gravamen of respondents' AAA complaint is that Scout has failed to properly compensate respondents pursuant to agreements signed between the parties, and has deceived respondents by engaging in unlawful business practices. *Id.* at P 2. Respondents bring their [*4] AAA complaint on "behalf of themselves and on behalf of (a) a class of approximately 300 persons, companies, or other entities that owned or provided content for a website [owned by Scout] . . . ; and (b) a class of approximately 45 persons, companies, or other entities that owned or provided content for a magazine [owned by Scout]. *Id.* at P 14. On August 17, 2007, respondents filed a "clause construction" motion with the AAA arbitrator, seeking a ruling that class arbitration is authorized. (Dkt. # 11, Buckley Decl. P 11). Scout requested the Arbitrator stay his decision and brought a petition in this Court on September 17, 2007. (Dkt. # 1). In its petition, Scout seeks an Order from this Court to stay the AAA "class" proceeding and compel respondents to pursue their arbitration claims individually. *Id.* [2] Scout subsequently sought to enforce its petition by filing a motion to compel on September 27, 2007. (Dkt. # 10). Scout argues in their moving papers that pursuant to agreements signed between the parties, respondents are not permitted to pursue class arbitration. Specifically, Scout indicates that it entered into Network Affiliate Agreements and Magazine Content, License, Publishing [*5] and Marketing Agreements (collectively "Agreements") with respondents that contained specific carve-outs to arbitration. The arbitration provision, which is contained in each of the agreements between the parties, provides:

> Any dispute or claim arising out of or in connection with this Agreement, *except for the provisions of Section 8 or Section 13,* will be finally settled by binding arbitration in Seattle, Washington [or Birmingham, Alabama] in accordance with the then-current Commercial Arbitration Rules of the American Arbitration Association by one arbitrator appointed in accordance with said rules.

(Dkt. # 11, Buckley Decl., Ex. B P 13.10; Ex. C P 13.9; Ex. D P 14.9; Ex. E P 13.9; Ex. F P 14.9; Ex. G P 13.9; Dkt. # 14 at 5) (emphasis added).

2 Scout amended its original petition on October 12, 2007, by adding an additional respondent, Trojan Sports Publishing, LLC ("Trojan Sports"). (Dkt. # 14 at 2).

In some of the Agreements, Section 8 is titled "Representations and Warranties," while in others, Section 8 is titled "Confidentiality." (Dkt. # 11, Buckley Decl., Ex. B P 8; Ex. C; P 8; Ex. D P 8; Ex. E P 8; Ex. F P 8; Ex. G P 8). In addition, Section 13 in some of the Agreements is [*6] titled "Miscellaneous," while in others, Section 13 is titled "Ownership." *Id.* at Ex. B P 13; Ex. C; P 13; Ex. D P 13; Ex. E P 13; Ex. F P 13; Ex. G P 13. [3] Based on these provisions, Scout argues that the parties have expressly carved out from the scope of any arbitration proceeding all disputes concerning the arbitration clauses themselves. Scout further argues that it is undisputable that none of the arbitration clauses in the Agreements provide for class arbitration. Thus, Scout argues that class arbitration is impermissible as a matter of law.

3 It is noteworthy that neither party produced an agreement between Scout and newly added respondent, Trojan Sports. The only reference made to this agreement is contained in petitioner's amended motion to compel. (Dkt. # 14 at 5). This Court is unable to determine what is contained in Section 8 or Section 13 of that particular agreement.

After petitioners filed their motion, respondents filed their response and concurrently filed a motion to dismiss. (Dkt. # 15). In their motion, respondents argue that Scout's petition should be dismissed as a matter of law pursuant to *Fed. R. Civ. P. 12(b)(1)* and *Fed. R. Civ. P. 12(b)(6)* because: (1) Scout [*7] has waived its opportunity to challenge the jurisdiction of the arbitrator; (2) the parties have incorporated the Commercial Arbitration Rules of the AAA by reference, vesting the decision to decide arbitrability with an Arbitrator rather than this

Court; and (3) the requirements of *§ 4* of the Federal Arbitration Act have not been met as Publishers neither refused arbitration nor "aggrieved" Scout in any way. (Dkt. # 15 at 2). **B.**

Standard of Review

A motion to dismiss under *Fed. R. Civ. P. 12(b)(1)* addresses the court's subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (finding that federal courts are courts of limited jurisdiction). They possess only that power authorized by United States Constitution and statute, which is not to be expanded by judicial decree. *Id.* The burden of establishing the subject matter jurisdiction rests upon the party asserting jurisdiction. *Id.* When considering a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(1)*, the Court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).*

Under [*8] *Fed. R. Civ. P. 12(b)(6)*, the Court must dismiss a complaint if a plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Van Buskirk v. Cable News Network Inc., 284 F.3d 977, 980 (9th Cir. 2002)*; *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*; *Love v. United States, 915 F.2d 1242,1245 (9th Cir. 1989).* In deciding a motion to dismiss, courts accept as true all material allegations in the complaint and construes them in the light most favorable to the plaintiff. *See Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir. 2002)*; *Associated Gen. Contractors v. Metro. Water Dist., 159 F.3d 1178, 1181 (9th Cir. 1998).* However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Associated Gen. Contractors, 159 F.3d at 1181.* A court is restricted to consider only the facts alleged in the complaint when reviewing a *12(b)(6)* motion to dismiss, but a court may consider extrinsic evidence by turning such motion into a summary judgment motion pursuant to *Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(b).*

As applied to arbitration, federal district courts are permitted to dismiss claims [*9] that are subject to arbitration pursuant to either *Fed. R. Civ. P. 12(b)(1)* or *Fed. R. Civ. P. 12(b)(6). See, e.g., Inlandboatmens Union of Pacific v. Dutra Group, 279 F.3d 1075, 1078-84 (9th Cir. 2002)* (affirming district court's decision to dismiss pursuant to *Fed. R. Civ. P. 12(b)(1)* where the parties entered into an agreement that subjected their dispute to arbitration); *see also Thinket Ink Info. Res., Inc., v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004)* (holding that the district court did not err in dismissing plaintiffs' claims that were subject to arbitration pursuant to *Fed. R. Civ. P. 12(b)(6)*).

B. Federal Law Governing Arbitrability

The Federal Arbitration Act ("FAA") governs any written provision in a "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." *9 U.S.C. § 2*. The FAA applies to all contracts that involve interstate commerce. *See Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 281, 115 S.Ct. 834, 130 L. Ed. 2d 753 (1995).* In this case, it is undisputed that the parties are from different states and entered into Agreements that were executed and perform across state lines. Therefore [*10] the FAA and its corresponding case law applies.

Furthermore, "[t]he FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referrable to arbitration, and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement." *E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289, 122 S.Ct. 754, 151 L. Ed. 2d 755 (2002)* (*citing 9 U.S.C. §§ 3* and *4*). The Supreme Court has read these provisions to "manifest a 'liberal federal policy favoring arbitration agreements.'" *Id.* (citations omitted). If there exists a doubt about whether an issue or dispute is arbitrable, the doubt should be resolved in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985).* In addition, where courts are faced with multiple ambiguous provisions, courts "should not, on the basis of 'mere speculation' that an arbitrator might interpret [the] ambiguous agreements in a manner that casts enforceability in doubt, take upon [themselves] the authority to decide the antecedent question of how the ambiguity is to be resolved." *PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401, 406-07, 123 S.Ct 1531, 155 L. Ed. 2d 578 (2003)* [*11] (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541, 115 S.Ct. 2322, 132 L. Ed. 2d 462 (1995)).* The existence of multiple agreements between parties may lead to ambiguity and courts are required to resolve such ambiguities in favor of arbitration. *See, e.g., Hartford Acc. and Indem. Co. v. Swiss Reinsurance America Corp., 246 F.3d 219, 227 (2d Cir. 2001)* (finding ambiguity in multiple contracts between the same parties).

However, if the parties have clearly indicated that the dispute is outside the scope of arbitrability, a court is equally compelled to enforce such intent. The "preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered . . . [and to] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L. Ed. 2d 158 (1985)*; *see also*

Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L. Ed. 2d 488 (1989) (finding that the primary purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms"). Arbitration is a "matter of contract and a party cannot be required to submit to arbitration [*12] any dispute which he has not agreed so to submit." *United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L. Ed. 2d 1409 (1960)*; *see also Teamsters Local 315 v. Union Oil Co. of California, 856 F.2d 1307, 1314 (9th Cir. 1988)* (finding that evidence of a purpose to exclude a claim from arbitration rebuts the presumption of arbitrability); *see also Building Materials and Constrs. Teamsters Local No. 216 v. Granite Rock Co., 851 F.2d 1190, 1195 (9th Cir. 1988)* (holding that "[t]he parties . . . decide whether and to what extent their disputes will be subject to binding arbitration"). Therefore "any power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties. [The arbitrator] has no independent source of jurisdiction apart from the consent of the parties." *I.S. Joseph Co., Inc. v. Michigan Sugar Co., 803 F.2d 396, 399 (8th Cir. 1986).*

In the instant case, Scout argues that the parties have expressly carved out from the scope of any arbitration proceeding all disputes concerning the arbitration clauses themselves. Scout points to the language of the arbitration provisions at-issue which, as mentioned above, indicates [*13] that lalny dispute or claim arising out of or in connection with this Agreement, *except for the provisions of Section 8 or Section 13,* will be finally settled by binding arbitration." (Dkt. # 11, Buckley Decl., Ex. B P 13.10; Ex. C P 13.9; Ex. D P 14.9; Ex. E P 13.9; Ex. F P 14.9; Ex. G P 13.9; Dkt. # 14 at 5) (emphasis added). [4] For four of the six arbitration provisions at-issue, Section 8 is titled "Representations and Warranties" and Section 13 is titled "Miscellaneous." The "Miscellaneous" provisions include: Public Announcements; Assignment; Controlling Law; Notice; Binding Effect [and] Authority; Entire Agreement; Severability [and] Waiver; Relationship of Parties; Arbitration; Attorney's Fees; Counterparts; Advice of Legal Counsel; Defined Terms; and Non-disparagement and Confidentiality. In the remaining two arbitration provisions at-issue, Section 8 is titled "Confidentiality" and Section 13 is titled "Ownership." Furthermore, in each of the afore-mentioned Sections, the Agreements are silent on the issue of whether class arbitration is permitted. In fact, both parties acknowledge that the Agreements do not address the issue of class-arbitration. [5]

4 Notably, this Court finds [*14] no merit in respondents' position that the AAA rules trump the language of the at-issue arbitration provisions. The clause "except for the provisions of Section 8 or Section 13" clearly modifies the language of the at-issue provision that provides that all disputes are to be settled in accordance with the AAA rules.

5 Scout states "[t]here is no dispute that the arbitration clauses in the Agreements here are silent on the topic of class arbitration[.]" (Dkt. # 10 at 9). Respondents do not challenge this assertion in any of their pleadings.

As a result, Scout argues that if an arbitration provision is silent on the issue of class arbitration, faithful adherence to the parties' agreement requires that class arbitration be denied. On the other hand, respondents assert that this matter has been settled by the Supreme Court in *Green Tree Fin. Group v. Bazzle, 539 U.S. 444, 123 S.Ct. 2402, 156 L. Ed. 2d 414 (2003).* Respondents characterize *Green Tree* as standing for the proposition that whether a silent arbitration agreement permits class arbitration is a matter for the arbitrator to decide. Therefore the dispositive issue before this Court is whether *Green Tree* applies to the facts of this case.

C. *Green Tree* [*15] and its Progeny

In *Green Tree,* the Supreme Court was faced with an arbitration provision that was silent on the issue of whether class arbitration was permitted. The contract which the parties entered into provided:

> ARBITRATION - All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.*

Green Tree, 539 U.S. at 448 (emphasis in original).

Based on these terms, the Court found that "the dispute about what the arbitration contract in each case means (*i.e.,* whether it forbids the use of class arbitration procedures) is a dispute 'relating to this contract' and the resulting 'relationships.'" *Id. at 451.* The Court determined that the relevant question was "what *kind of arbitration proceeding* the parties agreed to," *id. at 452* (emphasis in original), and held that "the parties seemed to have agreed that an arbitrator . . . would answer the relevant question." *Id. at 451-52.* In its analysis, the Court also reasoned that this question was outside the scope of "gateway matters, such as whether the parties have a valid arbitration [*16] agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," that parties generally expect a court to decide. *Id. at 452* (citing *Howsam v.*

Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S.Ct. 588, 154 L. Ed. 2d 491 (2002)). The Court concluded that "[g]iven these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts to decide." *Id. at 453.*

Post-*Green Tree,* at least two Ninth Circuit cases have implicitly recognized that if an arbitration agreement is silent on the issue of class arbitration, then the issue should be settled by an arbitrator. *See, e.g., Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976, 992 (9th Cir. 2007)* (recognizing that *Green Tree* "concluded that an arbitrator . . . should have determined whether an arbitration agreement that was silent on the issue of class arbitration did in fact authorize class proceedings"); *see also Sanford v. Memberworks, Inc., 483 F.3d 956, 964 (9th Cir. 2007)* (recognizing that *Green Tree* "held that whether a contract permits class [*17] arbitration is an issue for the arbitrator to decide"). Additionally, other federal courts have consistently followed *Green Tree's* mandate. *See Johnson v. Long John Silver's Rests., Inc., 320 F. Supp. 2d 656, 668 (M.D. Tenn. 2004)* (finding that *Green Tree* "specifically states that the arbitrator, not the court, should determine whether class arbitration is permitted by an ambiguous contract"); *In re Universal Serv. Fund Tel. Billing Practices Litigation, 300 F. Supp. 2d 1107, 1126-27 (D.Kan. 2003)* (holding that the contract at-issue "does not by its terms ban class-wide arbitration. Rather, it is silent on this issue. Under theses circumstances, the availability of class-wide arbitration is an issue that must be decided by an arbitrator in the first instance."); *Blimpie Int'l Inc. v. Blimpie of the Keys, 371 F. Supp. 2d 469, 474 (S.D.N.Y. 2005)* ("[W]hether a particular procedural device is permissible in the absence of any language in the agreement is a question of 'contract interpretation and arbitration procedures,' which 'arbitrators are well situated to answer") (citation omitted).

The Court finds that a case out of the Fifth Circuit is significantly relevant here. In *Pedcor Mgmt.* [*18] *Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.,* the court explained that *Green Tree* "made the initial determination that the language of the arbitration agreement *did not clearly forbid* class arbitration." *343 F.3d 355, 359 (5th Cir. 2003)* (emphasis in original). Therefore the court held that *Green Tree* was sufficiently analogous to its case because "*Green Tree* applies, at a minimum, to arbitration agreements under the FAA, and because the arbitration provision in this case also incorporates the FAA, the Court's holding is applicable here." *Id. at 361.*

In the instant case, Scout attempts to distinguish *Green Tree* by arguing that there are carve-outs in its Agreements with respondents. Scout reasons that *Green Tree* applies only to broad sweeping arbitration provisions that do not contain exceptions. However, the Court finds the Agreements in this case are sufficiently analogous to fit within the holding of *Green Tree* for three reasons.

First, the Agreements at-issue do not expressly forbid class arbitration proceedings. The Supreme Court in *Green Tree* made a determination that the language of the arbitration agreement did not clearly forbid class arbitration in reaching its [*19] conclusion that the issue was left for the arbitrator. Likewise, in the instant case, both parties and this Court agree that the Agreements are silent on the issue of class arbitration. The arbitration provisions found in Sections 13.9, 13.10 and 14.9 in the various Agreements between Scout and respondents do not address class arbitration. In addition, the referenced carve-outs found within these provisions also do not address class arbitration. Therefore this silence cuts in favor of the applicability of *Green Tree* to this case.

Second, *Green Tree* applies to agreements that are governed by the FAA, and the Agreements at-issue are governed by the FAA. As Scout correctly points out, the FAA and its rules govern this dispute. *Green Tree* was intended to apply to arbitration provisions that were also governed by the FAA. Thus, this fact also cuts in favor of the applicability of *Green Tree.*

Lastly, and most compelling to this Court, the Agreements are sufficiently ambiguous to justify dismissal of this action. Although Scout asserts that the Agreements expressly carve out from the scope of any arbitration proceeding all disputes concerning the arbitration clauses themselves, the Court cannot [*20] conclude with certainty that this is the case. As mentioned above, for four of the six agreements, what is carved-out from arbitration are disputes around "Representations and Warranties" and "Miscellaneous" provisions in Section 13. For the remaining two agreements, disputes around "Confidentiality" and "Ownership" are excluded from arbitration. Nowhere in any of these provisions that have been carved out is there any clear mention or mandate that suggests disputes concerning the arbitration clauses themselves be excluded from consideration by the arbitrator.

Additionally, the presence of such multiple *inconsistent* arbitration provisions creates an ambiguity as well. Had Scout clearly intended to exclude from arbitration all disputes concerning the arbitration provisions themselves, it would not have placed such prominent language in significantly different places within its Agreements with respondents. The existence of the carve-out provision in Section 14, rather than Section 13, of the Network Affiliate Agreements with InsideTx and The Bootleg presents conflicting intentions, thereby ren-

dering the Agreements ambiguous. Also, no agreement between Scout and newly added respondent [*21] Trojan Sports has been produced, and therefore the Court is unable to determine the scope of the arbitration carve-out in that Agreement. This Court therefore will follow the well-established mandate of the Supreme Court that courts should not "take upon [themselves] the authority to decide the antecedent question of how the ambiguity is to be resolved." *PacifiCare, 538 U.S. at 406-07* (*citing Vimar, 515 U.S. at 541*).

Given the applicability of *Green Tree* to the instant case, coupled with the ambiguity inherent in the Agreements between the parties, this Court concludes that it cannot compel respondents to proceed with their arbitration claims individually. The Court further finds it unnecessary to address the remaining arguments presented by the parties in their respective motions. Accordingly, Scout's petition is dismissed pursuant to *Fed. R. Civ. P. 12(b)(1)*.

III. CONCLUSION

Having reviewed, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Respondents' Motion to Dismiss (Dkt. # 15) is GRANTED. The Court finds that whether respondents are permitted to proceed as a class in the underlying arbitration proceeding is a matter to be resolved by the arbitrator.

(2) Petitioners' [*22] Motion to Compel Individual Arbitrations and Stay AAA "Class" Proceedings (Dkt. # 10) is STRICKEN AS MOOT.

(3) Respondents' Motion For Leave To File Excess Pages (Dkt. # 35) is STRICKEN AS MOOT.

(4) The case is now CLOSED.

(5) The Clerk is directed to forward a copy of this Order to all counsel of record.

DATED this 16th day of November, 2007.

/s/ Richard S. Martinez

RICARDO S. MARTINEZ

UNITED STATES DISTRICT JUDGE