SUPREME COURT No. _____

COA No. 862553-I

IN THE SUPREME COURT OF WASHINGTON

FATEN ANWAR
Petitioner/ Appellant/ Plaintiff

v.

PAYPAL INC.
Respondent/ Defendant

APPELLANT'S PETITION FOR REVIEW

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Petitioner

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A. IDENTITY OF PETITIONER

Petitioner, Faten Anwar, henceforth referred to as Anwar was a customer of PayPal Inc.; Anwar filed a Consumer Protection Act (CPA) Complaint against PayPal for deceptive business practices for violating RCW 19.86 *and per se* violating it through violating RCW 19.190, with the Superior Court of Washington for Snohomish County; Anwar is the Plaintiff in the Superior Court and the Appellant in the Court of Appeals, Division One.

B. COURT OF APPEALS DECISION

Anwar filed a timely Motion for Reconsideration with the Court of Appeals on October 10, 2024 which was denied on October 29, 2024; the order denying the Motion to Reconsider is attached as Appendix 1; pursuant to RAP 13.4, Anwar timely filed this Petition for Review with the Court of Appeals on November 26, 2024; the Petition seeks review of the Court of Appeals' opinion entitled *Faten Anwar v. PAYPAL INC. and numbered* 862553-I (September 23, 2024), attached to this

petition as Appendix 2 and henceforth referenced as the (*Opinion*).

C. ISSUES PRESENTED FOR REVIEW

Anwar respectfully asks this Court to grant review to address the following issues:

1. *Does enforcing arbitration agreements such as PayPal's that use the language* "*any claim or dispute at law or equity that has arisen or may arise between us*" *that clearly deviates from the statutory language of 9* U.S.C. § 2 which makes them fall beyond its scope *and should render them unenforceable under the Federal Arbitration Act (FAA) constitute an issue of substantial public interest that should be determined by the Supreme Court? The Court of Appeals' determination that PayPal's arbitration agreement falls within the scope of the FAA* in the final paragraph of Page 9 through the top of Page 10 of the *Opinion patently ignored the plain very clear language of 9 U.S.C. §2*.

2. Does the Court of Appeals *Opinion conflict with* this Court's decision, in *Satomi Owners Ass'n v. Satomi, LLC*, as to whether the FAA applies to a transaction? Anwar's Cause of Action in the instant case entails PayPal's theft, its *fabrication of an authorization and a non-existent tracking number and its sending five emails* to cover that theft up; these activities *do not* constitute and *are not tethered to any transaction between PayPal and Anwar and they do not bear on interstate commerce.*

3. Does the Court of Appeals' *declination to impose sanctions* on PayPal and its counsels under CR 11, which is made applicable to appeals by RAP 18.7 *conflict with* its decision to impose sanctions for making false statements to the Court in *Layne v. Hyde*?

4. Does the Court of Appeals Opinion *depart from and conflict with the Principles of Contract Interpretation espoused by this Court and exemplified in McKee* by failing to consider the impact that provisions located outside the arbitration

agreement have on the parties' arbitration obligations *in its determination of unconscionability?*

5. Does the Court of Appeals Opinion *conflict with this Court's precedents in McKee and Dix* by failing to determine that *PayPal's arbitration agreement's Delaware choice of law, like New York in McKee and Virginia in Dix, contravenes Washington's strong public policy of protecting consumers and is unenforceable*?

6. Does the Court of Appeals Opinion *conflict with* this Court's precedents by failing to determine that *PayPal's arbitration agreement is substantively unconscionable and unenforceable*: (a) on the grounds of preempting the Washington Consumer Protection Act and not allowing vindication of rights under it; *such failure conflicts with this Court's McKee and Scott precedents*; (b) and for being unconscionably one-sided; *such failure conflicts with this Court's Zuver precedent?*

D. STATEMENT OF THE CASE

Anwar filed a CPA Complaint against PayPal for deceptive business practices that *violate* RCW 19.86 and *per se violate* it through violating RCW 19.190, with the Washington Superior court for Snohomish County. CP 326-331; 315-325. Anwar's Complaint seeks relief under RCW 19.86 and RCW 19.190:

> "In this civil action, Plaintiff is seeking (i) Award of damages in the amount of $2500 under RCW 19.190.40 (1); (ii) Award of treble damages in the amount of $29.76 ($9.92 x3) under RCW 19.86.90; (iii) Award of the costs incurred by Plaintiff in this lawsuit."

CP 326-327.

Anwar's Cause of Action as outlined in Appellant Brief Pages 5 through 6 entails: *PayPal's fabrication of an authorization to take money out of Anwar's bank account* without her knowledge or permission; CP 209-212; *its fabrication of a non-existent tracking number to cover it up*; CP 206, 208; *PayPal's email to Anwar acknowledging her claim contained a transaction number that is different from that in the*

authorization email; CP 200, 210, 212; whereas the fabricated March 12, 2021 authorization that the claim of unauthorized charge was filed about had **ID #8YG14116GJ882690R**, the *acknowledgment of the claim bore a different transaction* **ID # 74J688102N466903R;** PayPal *did not* send Anwar, *nor* has it provided the court with, *any* authorization email that corresponds to the March 12, 2021 charge with a transaction **ID # 74J688102N466903R**; *PayPal created two claim IDs*, **claim ID (PP-I-14164545)** *and* **claim ID (PP-D-1064276 23)**, for the same claim. The email, denying **claim ID (PP-D-106427623)**, *postdated* case closure on PayPal's website; CP 216, 214; and in the process of fabricating an authorization and a non-existent tracking number *to cover the theft up*, PayPal sent Anwar five fraudulent emails: (1) the March 12, 2021 fabricated authorization email; (2) a fraudulent email acknowledging a claim with a transaction number different from the one the claim was filed about; (3) a fraudulent email denying said claim; (4) an email fabricating a nonexistent tracking number;

and (5) an email, postdating case closure, denying a claim with an ID number different from the ID number of the acknowledged claim. CP 21-22. PayPal violated the Washington Consumer Protection Act; CP 230-231; and *per se* violated it through its violations of RCW 19.190. CP 231-233. *PayPal's theft and its use of a fabricated authorization, a non-existent tracking number and multiple emails to coverup said theft are not tethered to any transaction between Anwar and PayPal.*

In response to PayPal's Answer(s) that sought to dismiss Anwar's case with prejudice, Anwar filed her Motion for Summary Judgment. CP 218. In an order dated *August 9, 2023,* the trial court denied the motion for summary judgment and transferred Anwar's Complaint to arbitration *despite* her opposition *and without* addressing matters of arbitrability; CP 6-7; immediately following said order, Anwar sought appellate review on August 14, 2023 then amended her notice on September 6, 2023 when the trial court entered a second order

on August 28, 2024 staying proceedings and dismissing the case if arbitration is not initiated within 30 days. CP 1-5; 341-342; 332-340. The Court of Appeals November 9, 2023 *Ruling*, attached to this Petition as Appendix 3 and henceforth referenced as *the Ruling*, *cited its reason for denying discretionary review as being that the arbitration agreement delegated matters of arbitrability to the arbitrator. Ruling at Footnote 5 of page 7; Ruling at 9.* The Ruling *erroneously* states that there exists a clear and unmistakable agreement to arbitrate arbitrability even though none exists in the language of the arbitration agreement. *Ruling at 7, Footnote 5*; the Ruling further argues that Anwar *might be able to convince the arbitrator of the unconscionability of the arbitration agreement* but that argument *completely misses the point* that there is ***no*** clear and unmistakable agreement between the parties to arbitrate arbitrability; *Ruling, at 9*; said *Ruling* became final on July 3, 2024; the Certificate of Finality is attached to this Petition as Appendix 4. Subsequent to the trial court's dismissal

of the case *without* addressing matters of arbitrability on January 4, 2024, Anwar filed a notice of appeal on February 2, 2024. CP 353; CP 343-352. Anwar argued in the Appellant Brief that (1) she has not waived her constitutional right to have a judicial forum address matters of arbitrability and that there is ***no*** clear and umnistakable agreement between the parties to arbitrate arbitrability; Appellant Brief at 16-24; (2) that Orders enforcing arbitration are *appealable* under 9 U.S.C. §16 (a)(3); Appellant Brief at 64-66; and (3) that the trial court order(s): (a) transferring the case to arbitration on August 9, 2023; CP 6-7; (b) then, *while Anwar was seeking an interlocutory appeal*, staying judicial proceedings on August 28, 2023; CP 341-342; and (c) *without* addressing matters of arbitrability *absent* an agreement to arbitrate arbitrability *contravene* 9 U.S.C. §§ 4 & 3. Appellant Brief at 25-32. In the instant case, the trial court compelled arbitration in contravention to 9 U.S.C.§ 4; there is no agreement between Anwar and PayPal to arbitrate arbitrability; and when it comes to the substantive claims of

Anwar's Complaint, PayPal's arbitration agreement is *not valid*. The Federal Arbitration Act (FAA) *reserves for trial* questions of the validity of arbitration agreements. *Stone v. Wells Fargo Bank,* at 548 citing (9 U.S.C.§ 4). Even though the Court of Appeals' September 23, 2024 decision terminating review addressed*, for the first time*, the matters of arbitrability raised by Anwar, its Opinion is rife with issues that deserve this Court's review; these issues are presented in section 'C' above and argued in section "E' below.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Per RAP 13.4(b), this Court accepts review of appellate decisions that conflict with decisions of Supreme Court of Washington or prior Court of Appeals decisions as well as if the petition involves an issue of substantial public interest that should be determined by the Supreme Court; Anwar's petition meets all criteria.

E.1. PayPal's arbitration agreement is unenforceable under FAA and Anwar's Cause of Action does not bear on interstate commerce

In the Appellant Brief, Anwar argued (a) that the *language of PayPal's arbitration agreement makes it unenforceable* under the FAA; and (b) *that her Complaint is not covered by the Federal Arbitration* Act. Appellant Brief at 32-39. The language of 9 U.S.C. § 2 is clear when it states: "A written provision in any maritime transaction *or* a contract involving commerce to settle by arbitration a controversy *thereafter arising out of* such contract *or* transaction involving interstate commerce." 9 U.S.C. § 2 (emphasis added); PayPal's arbitration agreement *deviates from the statutory language of the 9 U.S.C. § 2* and its scope falls beyond the boundaries defined in it when it uses the clause "*any claim or dispute at law or equity that has arisen or may arise between us*". CP 173. Thus 9 U.S.C. §§ 3 and 4 do not apply to PayPal's arbitration agreement that falls beyond the scope of 9 U.S.C. § 2. Therefore, *PayPal's*

arbitration agreement is unenforceable under the FAA.

Courts *cannot* compel arbitration and stay judicial proceedings under 9 U.S.C. §§ 4 & 3 of claims that fall outside the boundaries of 9 U.S.C. §2. Appellant Brief at 34. The United States Supreme Court states that courts cannot use 9 U.S.C §§ 4 & 3 to compel arbitration and stay proceedings based on arbitration agreements and transactions that do not fall within the confines of 9 U.S.C § 2:

> "The parties private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum. Nothing in our holding on this score should come as a surprise. We've long stressed the significance of the statute's sequencing. In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201-202, 76 S.Ct. 273, 100 L.Ed. 199 (1956), we recognized that "Sections 1, 2, and 3 [and 4] are integral parts of a whole…. [Sections] 1 and 2 define the field in which Congress was legislating," and §§ 3 and 4 apply only to contracts covered by those provisions."

New Prime Inc. v. Oliveira, 139 S.Ct. 532, 537-538, 202 L.Ed.2d 536 (2019); in the instant case, *the Court of*

Appeals' determination that PayPal's arbitration agreement falls within the scope of the FAA in the final paragraph of Page 9 through the top of Page 10 of the *Opinion patently ignored the plain very clear language of 9 U.S.C. §2*.

Anwar's Cause of Action *does not bear on interstate commerce*; PayPal's theft, its fabrication of an authorization and a non-existent tracking number and its sending five emails to cover that theft up *do not* constitute and *are not tethered to any transaction between it and Anwar;* Appellant Brief at 10-11; these activities *do not bear on interstate commerce and they are not covered by the Federal Arbitration Act (FAA)*. The Court of Appeals *Opinion conflicts with* this Court's decision as to whether the FAA applies to a transaction in *Satomi Owners Ass'n v. Satomi, LLC*; this Court states:

> "[T]he FAA applies to transactions involving an economic activity that, in aggregate represent a general practice subject to federal control that bears on interstate commerce in a substantial way."

Satomi Owners Ass'n v. Satomi, LLC, at 799 (emphasis added) (footnote omitted); the *Court of Appeals, to justify its departure from this Court's standard of whether the FAA applies to a Complaint, surprisingly argues in the top paragraph of Page 9 of the Opinion* that surreptitiously going into someone's account and sending cover-up emails, one of which including a tracking number that does not exist can only happen if the perpetrator had a contract with the victim.

E.2. PayPal and its counsels knowingly made false statements to the Court in violation of CR 11, which is made applicable to appeals by RAP 18.7

PayPal and its counsels knowingly made false statements to the Court in stark contradiction to evidence on file:

(1) The email, denying claim ID (**PP-D-106427623**), postdated case closure on PayPal's website. CP 216, 214. Grace Garcia's declaration *falsely states* that PayPal denied the claim on March 21, 2021; CP 41 ¶19; her false statement, *an obvious lie*, contradicts evidence, on file with the Court, showing that the

case was already closed on March 20, 2021. CP 214. Anwar moved to strike PayPal's *lie*. CP 33, Lines 12-14.

(2) PayPal **fabricated** a tracking number to cover up the fabricated authorization. CP 206. Anwar provided a screenshot proving that said tracking number does not exist. CP 208. The screenshot proving that the tracking number does not exist was taken on **Wednesday, May 26, 2021.** CP 14, Lines 21-24-CP 15, Lines 1-2. **May 26 was a Wednesday in 2021** but NOT in 2022 or 2023, which contradicts PayPal and its counsels' obvious **lie** about it being taken in 2023. CP 187, Lines 1-4. Anwar moved to strike PayPal's *obvious lie*. CP 34, Lines 5-11. *Anwar also asked the Court of Appeals to* sanction PayPal and its counsels under *CR 11 and RAP 18.7* in the Appellant Brief at 60-62.

PayPal's false statements are egregious violations of CR 11, which is made applicable to appeals by RAP 18.7. PayPal and its counsels *made these false statements* and *signed them knowing full well* that they contradict evidence on file with the

Court. These false statements are meant to *deceive the Court.*

The Court of Appeals, in *Layne v. Hyde,* states:

> "CR 11, which is made applicable to appeals by RAP 18.7, provides in part: The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge, information, and belief, formed after reasonable inquiry *it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation*.... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee. (Italics ours.)"

Layne v. Hyde, 54 Wash.App. 125 (1989), at 136 (citations omitted). Anwar asked the Court of Appeals to sanction PayPal and its counsels for these violations. Appellant Brief at 60-62. In *Layne v. Hyde*, the Court of Appeals states:

> "A party or an attorney, or both, may be assessed litigation expenses, including reasonable attorney's fess,

> for CR 11 violation. *See Wilson v. Henkle,* 45 Wn. App. 162, 174, 724 P.2d 1069 (1986)."

Layne v. Hyde, *at 136.* The Court of Appeals' *declination to impose sanctions* on PayPal and its counsels in Footnote 9 of Page 15 of the *Opinion conflicts with* its decision to impose sanctions for making false statements to the Court in *Layne v. Hyde*.

E3. PayPal's arbitration agreement is unenforceable on grounds of unconscionability

PayPal's arbitration agreement is substantively unconscionable; the Supreme Court of Washington has held that Substantive unconscionability *alone* is sufficient to support a finding of unconscionability:

> "Accordingly, we now hold that substantive unconscionability alone can support a finding of unconscionability."

Adler v. Fred Lind Manor, at 346-347.

In the Appellant Brief, Pages 40-55, Anwar's unconscionability argument entailed:

(1) In the Appellant Brief, Pages 42-43, Anwar argued that under the *Supreme Court of Washington, courts apply Washington contract law when enforceability of an arbitration agreement is challenged*:

> "When the validity of an agreement to arbitrate is challenged, courts apply ordinary state contract law."

McKee v. ATT CORP, at 383 (citing *Luna v. Household Fin. Corp. III*, at 1173).

(2) In the Appellant Brief, Pages 52-54, Anwar argued *that in assessing unconscionability, courts consider the effects that provisions located outside the arbitration agreement have on the parties' arbitration obligations*. In *McKee,* the Supreme Court of Washington considered the effect that provisions located outside the arbitration agreement have on the parties' arbitration obligations:

> "Here the agreement to arbitrate is included in a section of the agreement entitled "Dispute Resolution."... That section, and the rest of the agreement, contains several clauses limiting the nature of the relief available in arbitration."

McKee v. ATT CORP, at 396. In the instant case, the arbitration agreement limits customers to arbitration; the provisions that allow *only* PayPal to take legal actions without limitations and *limit only what customers can recoup* to the actual amount of direct damages are located outside the parties' arbitration agreement but have the effect of making it unconscionably one-sided and substantively unconscionable.

In *R & L Ltd. Investments, Inc., v. Cabot Inv. Properties, LLC,* the Plaintiff argued that documents, separate from the arbitration agreement, gave Defendants several remedies (arbitration +), whereas investors only had the sole remedy of arbitration which made the arbitration agreement unconscionably one-sided; the Court *agreed and held that the agreement is substantively unconscionable*:

> "As an alternative basis for finding that the arbitration clauses are unconscionable, Plaintiff argues that the Purchasing Agreement and other closing documents give Defendants several remedies, ….if Defendants have broad-ranging remedies for claims they may have (arbitration plus), while Plaintiff has the sole remedy of arbitration, it is fair to say that the parties lack mutuality

> with respect to arbitration. In such a setting, there is a clear "overall imbalance in the rights imposed by this bargain,"…Accordingly, the lack of mutuality with respect to the arbitration clauses is an alternative basis for holding they are substantively unconscionable."

Id., at 1117-1118 (emphasis added)(citations omitted).

(3) In the Appellant Brief, Pages 49-52, Anwar argued the PayPal's arbitration agreement's *Delaware choice of law* is *unenforceable*; PayPal's arbitration agreement *and its Delaware choice of law do not allow vindication of rights* under the Washington Consumer Protection Act *and contravene this State's strong Consumer protection policy*. To determine the controlling substantive law, courts must apply forum state's choice of law rules:

> "Federal court sitting in diversity must apply the forum state's choice-of-law rules to determine the controlling substantive law. *Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1082-83 (9th Cir. 2008)(remanding for district court to apply California choice-of-law analysis despite agreement's provision for South Dakota law to govern). Thus the Court must apply Arizona's choice-of-law rules to determine the controlling substantive law for whether the arbitration clauses at issue are unconscionable and therefore unenforceable."

R & L Ltd. Investments, Inc., v. Cabot Inv. Properties, LLC, at 1113. Per the Supreme Court of Washington, *forum selection clauses contravening Washington public policy* are invalid and unenforceable:

> "In *Dix,* we explained that the forum selection clauses contravening the " 'strong public policy of the forum in which suit is brought' "may be invalid and we held that a forum selection clause designating Virginia as the forum was unenforceable against Washington citizens asserting small-dollar Consumer Protection Act claims. *Dix*, 160 Wn.2d at 836 (quoting *Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 514 (1972))."

McKee v. ATT CORP, at 385-386. PayPal's arbitration agreement has Delaware's as its choice of law; CP 180; *Delaware's law allows waiver of class-based relief which conflicts with Washington fundamental public policy of protecting consumers*; in addressing unconscionability and choice of law, the Supreme Court of Washington states:

> " New York law, which allows waiver of class-based relief, conflicts with our state's fundamental public policy to protect consumer through the availability of class action...We have held that some class action prohibitions may be conscionable. But application of New York law would permit waiver of any and all class

> action claims and we have declared a strong Washington State public policy in support of the use of class action claims to pursue actions for small-dollar damage claims under the Washington State Consumer Protection Act…Washington's interest in protecting large classes of its consumers materially outweighs New York's limited interest in this matter. Thus, the New York choice of law provision in ATT's Consumer Services Agreement is unenforceable and Washington law will be applied."

McKee v. ATT CORP., at 385-386 (emphasis added) (citations omitted). Therefore, *PayPal's arbitration agreement's Delaware choice of law is unenforceable*. The Supreme Court of Washington addressed three conditions in deciding the choice of law in *McKee v. ATT CORP*, at 384-386; similar to *McKee*, the three conditions, for deciding to apply Washington law, are met in the instant case; (1) Washington has more significant contacts with the instant case; (2) Delaware law conflicts with Washington public policy; and (3) Washington's interest in this case outweighs whatever limited interest Delaware might have in it.

(4) PayPal's arbitration agreement *is substantively unconscionable: it is unconscionably one sided and; and does*

not allow vindication of statutory rights under the Washington CPA as well as serves to exculpate PayPal's wrongdoings.

PayPal's arbitration agreement is unconscionably one-sided: (a) In the section entitled "Actions We May Take if You Engage in Restricted Activities", PayPal gives itself the *unrestricted right to take legal action, with no limitations whatsoever on what it can recover,* against its customers. CP 159. *On the other hand*, the arbitration agreement limits customers' remedies to arbitration; CP 173; thus PayPal has arbitration + unrestricted access to all judicial forums available to it whereas customers are limited to arbitration. PayPal gives itself the right to take legal actions against its customers when they break the law. CP 159. Anwar is suing because *PayPal broke the law* by violating RCW 19.230.340 (1) & (2), RCW 19.86 and RCW 19.190. CP 326-327; (b) PayPal *limits what customers can recover* in the section entitled " Limitation of Liability" where it states:

> "Our liability to you or any third parties in any circumstance is limited to the actual amount of direct damages."

CP 172. *On other hand*, *no limitations exist, anywhere in the agreement, as to what PayPal can recover from customers through judicial or arbitral forums*. Under Washington law, provisions providing for such *one-sided remedies* are *substantively unconscionable* and *cannot* be enforced. *Zuver,* 153 Wn.2d at 318-319.

Limiting what customers can recoup to 'direct damages' and the use of the phrase 'unless and to the extent prohibited by law' mean that laws like RCW 19.86.090, that **merely allow** the award of punitive damages and legal costs **cannot** overcome PayPal's limitation. CP 172; Appellant Brief at 43-48. The Supreme Court of Washington states:

> "We hold the limit on attorney fees is also substantively unconscionable."

McKee v. ATT CORP, at 400. In *McKee*, ATT's agreement's allowance of punitive damages if expressly authorized by statute is the reason why the Supreme Court of Washington did not find its punitive damages provision to be unconscionable.

McKee v. AT&T CORP, at 401. In contrast to ATT's agreement, PayPal's, by limiting its liability to direct damages, does not allow punitive damages at all. PayPal's arbitration agreement's not allowing its customers to recoup punitive damages and legal costs that the Washington CPA allows for renders it substantively unconscionable; the Supreme Court of Washington states:

> *"* The ATT Consumer Service Agreement before us is a contract of adhesion. ATT's Consumer Services Agreement is substantively unconscionable and therefore unenforceable to the extent that it purports to waive the right to class action, require confidentiality, shorten the Washington Consumer Protection Act statute of limitations, and limit availability of attorney fees."

McKee v. AT&T CORP, at 404. PayPal's arbitration agreement should be invalidated. Appellant Brief at 54-55. In addition to being *unconscionably one-sided*, PayPal's arbitration agreement's prohibition of: (a) class actions; CP173; and, through its 'Limitation of Liability' section, (b) the award of punitive damages or recovery of legal costs *eviscerates* the Washington CPA. PayPal's arbitration agreement is

substantively unconscionable and should be invalidated *regardless of the fact that its prohibition of class actions* is *mooted by the circumstances of Anwar's Complaint.* The Supreme Court of Washington states:

> "Strong reasons exist for encouraging contracts to be reasonable at the time they are written and allowing after-the-fact waiver to moot unconscionability challenges is the exception, not the rule."

Gandee v. LDL Freedom Enters., Inc., at 608 (footnote omitted). *This principle applies with equal force to whether or not the unconscionable provisions can be deemed cured by mootness due to circumstances of a given case*; as per *Gandee*, the analysis should be the same: Is the provision unconscionable at the time the contract was drafted? The Supreme Court of Washington states:

> "Contracts are generally interpreted as of the time of contracting, making any subsequent offer to waive unconscionable terms irrelevant. *See, e.g., Zuver*, 153 Wash.2d at 310 n.7, 103 P.3d 753."

Gandee v. LDL Freedom Enters. Inc., at 1202.

Washingtonians who have accepted PayPal's arbitration agreement could not have possibly imagined that by accepting it, they would be forgoing their statutory rights under the CPA:

> " By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

Mitsubishi Motors v. Soler Chrysler-Plymouth, at 628. It is impossible to argue that Anwar has agreed to forgo her rights under the Washington CPA by accepting PayPal's arbitration agreement. *PayPal's arbitration agreement does not allow vindication of rights under the Washington Consumer Protection Act and is unenforceable*; the Supreme Court of Washington states of arbitration agreements that in effect nullify the Washington CPA:

> "The FAA does not require enforcement of unconscionable contract provisions. We adhere to our decision in *Scott* and hold that the FAA does not preempt application of Washington Consumer Protection law."

McKee v. ATT CORP, at 395-396. In the instant case, PayPal's arbitration agreement serves to exculpate its wrongdoings; this Court states:

> "We also found the agreement substantively unconscionable because it effectively, if not explicitly, exculpated Cingular for potentially widespread misconduct."

McKee v. ATT CORP, at 397 (citing *Scott* at 855).

In the instant case, the Court of Appeals made determinations that are *in conflict* with this Court's precedents:

(1) By failing to consider the impact that provisions located outside the arbitration agreement have on the parties' arbitration obligations in its determination of unconscionability; *such failure conflicts* with *the Principles of Contract Interpretation espoused by this Court and exemplified in McKee.*

(2) By failing to determine that *PayPal's arbitration agreement's Delaware choice of law contravenes Washington's strong public policy of protecting*

consumers and is unenforceable; a failure that Conflicts with this Courts' precedents in McKee and Dix.

(3) By failing to determine that *PayPal's arbitration agreement is substantively unconscionable and unenforceable*: (a) on the grounds of preempting the Washington Consumer Protection Act and not allowing vindication of rights under it; *such failure conflicts with this Court's McKee and Scott precedents*; (b) and for being unconscionably one-sided; *such failure conflicts with this Court's Zuver precedent.*

Protecting consumers from deceptive business practices is a matter of great public interest. Under the Supreme Court of Washington, arbitration agreements that do not allow vindication of rights under the Washington CPA are unenforceable; *both* PayPal's arbitration agreement *and* its Delaware choice of law contravene Washington's strong public policy of protecting consumers and *are unenforceable.* The *use of arbitration agreements as a tool to strip consumers of their*

statutory rights under the Washington CPA defeats the legislature's intent of protecting consumers and is an issue of paramount importance to all Washingtonians; the Court of Appeals Opinion clearly conflicts with the legislature's intent and prior case law and this Court should grant review.

F. CONCLUSION

For all the reasons stated above, this Court should grant review, and following that review, reverse the Court of Appeals' decision, award Anwar the cost of the appeal and remand the case to the trial court for further proceedings consistent with this Court's decision.

*
**

CERTIFICATE OF COMPLIANCE

I, Faten Anwar, certify that this document contains 4,923 words, excluding the parts of the document exempted from the word count by RAP 18.17 (b).

*
**

Dated this 26th day of November 2024.

Respectfully submitted and signed by

Faten Anwar
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APPENDIX 1

FILED
10/29/2024
Court of Appeals
Division I
State of Washington

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

FATEN ANWAR,

Appellant,

v.

PAYPAL, INC.,

Respondent.

No. 86255-3-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Faten Anwar, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Birk, J.

Judge

APPENDIX 2

FILED
9/23/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FATEN ANWAR,

Appellant,

v.

PAYPAL, INC.,

Respondent.

No. 86255-3-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — This appeal arises out of an arbitration agreement signed by Faten Anwar when she created an account with PayPal Inc. After Anwar filed a lawsuit against PayPal, the trial court compelled the parties to submit to arbitration and directed Anwar to initiate arbitration within 30 days or her complaint would be subject to dismissal. When Anwar failed to initiate arbitration within the allotted time, the trial court dismissed her complaint. Because Anwar fails to demonstrate that the arbitration agreement was not enforceable or that the trial court committed any error, we affirm the dismissal of her claims.

I

Anwar opened an account with PayPal in 2016. In order to create the account, she accepted the terms of PayPal's user agreement. The user agreement applicable in 2016 contained an "Agreement to Arbitrate" (hereinafter the Agreement), which read as follows:

> You and PayPal each agree that any and all disputes or claims that have arisen or may arise between you and PayPal, including without

> limitation federal and state statutory claims, common law claims, and those based in contract, tort, fraud, misrepresentation or any other legal theory, shall be resolved exclusively through final and binding arbitration, rather than in court, except that you may assert claims in small claims court, if your claims qualify and so long as the matter remains in such court and advances only on an individual (non-class, non-representative) basis. This Agreement to Arbitrate is intended to be broadly interpreted. The Federal Arbitration Act[1] governs the interpretation and enforcement of this Agreement to Arbitrate.[2]

(Boldface omitted.) The agreement notified new account holders that they could opt out of the Agreement if they mailed a written opt-out notice to PayPal. Anwar did not notify PayPal that she wanted to opt out of the agreement.

On March 12, 2021, a transaction was made using Anwar's PayPal account to purchase floral adhesive tape for $9.92 via eBay.[3] On March 18, 2021, Anwar reported the transaction to PayPal as unauthorized during a login session using the same login credentials, Internet protocol address, and visitor identification as used for the payment authorization for the purchase. PayPal received confirmation from eBay of the purchase and delivery of a package to Anwar's address before she reported the transaction as unauthorized. After an investigation, PayPal concluded the transaction was not fraudulent and declined to refund $9.92 to Anwar's account.

Anwar then filed a complaint against PayPal in superior court asserting claims for violations of Washington's Consumer Protection Act (CPA), ch. 19.86 RCW, and the commercial electronic mail act (CEMA), ch. 19.190 RCW. In her

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[1] 9 U.S.C. §§ 1-16.

[2] The current version of the User Agreement also contains an Agreement to Arbitrate; however, the record cuts off a significant portion of the text. The parties do not appear to dispute that the two agreements are substantially similar.

[3] "eBay" is an Internet site on which individuals can post items for sale or purchase items, either through an online auction or at fixed, "buy-it-now," prices.

complaint, Anwar alleged that PayPal "process[ed] an unauthorized charge to my account in the amount of $9.92," "email[ed] me a fraudulent notice of authorization," and "email[ed] me a fraudulent email about a fraudulent shipment with a fraudulent tracking number." Anwar sought damages under the CPA in the amount of $29.76, the $9.92 charge trebled, and statutory damages under CEMA in the amount of $2,500.00, $500.00 for each for each of the five allegedly "fraudulent" e-mails she received from PayPal. Anwar additionally sought litigation costs. PayPal denied Anwar's claims and asserted that the claims were subject to binding arbitration.

Anwar filed a summary judgment motion seeking a judgment on her claims as a matter of law and opposing arbitration. PayPal opposed her motion and asked the court to compel arbitration pursuant to the Agreement. PayPal provided a declaration of its employee Grace Garcia, whose job included accessing and analyzing PayPal user account records to confirm information regarding user account activities. As to Anwar's claim based on PayPal's use of different transaction numbers, Garcia explained that PayPal assigned three numbers to identify the different actions associated with the $9.92 charge: one to the authorization for a transaction; one to the completed transaction; and one to the bank transfer that funded payment for the transaction. Anwar filed a reply in support of her summary judgment motion and reiterated her opposition to arbitration, arguing her claims were not covered by the Agreement, the Agreement was unconscionable, and PayPal waived its right to arbitration.

On August 9, 2023, the trial court entered an order denying Anwar's summary judgment motion and compelling arbitration. On August 29, 2023, the court entered an order staying the case pending arbitration. In this order, the court directed Anwar to initiate arbitration within 30 days, warning her that if she failed to do so, her complaint would be dismissed.

Anwar sought discretionary review of the trial court's orders denying her summary judgment motion, compelling arbitration, and staying the case pending arbitration. This court denied discretionary review after concluding that Anwar had not demonstrated obvious or probable error by the trial court. Anwar then sought discretionary review in the Supreme Court, which it denied. Ruling Den. Rev, Anwar v. Paypal, Inc., No. 102838-5, at 5 (Wash. April 29, 2024).

On December 20, 2023, PayPal moved to dismiss Anwar's complaint, as more than 30 days had passed since the trial court issued its order staying the case and ordering arbitration. The trial court granted the motion and dismissed the action.

Anwar appeals.

II[4]

We review a decision compelling arbitration de novo. Wiese v. Cach, LLC, 189 Wn. App. 466, 473, 358 P.3d 1213 (2015). Our review is limited to determining

[4] Although the user agreement in effect at the time Anwar filed her complaint contains a choice of law provision stating that the laws of the State of Delaware govern the agreement, PayPal has briefed this matter under a presumption that Washington law applies. Absent sufficient proof of foreign law, courts should apply forum law. B.C. Ministry of Health v. Homewood, 93 Wn. App. 702, 709, 970 P.2d 381 (1999). We therefore apply Washington law.

whether Anwar's claims are arbitrable, without weighing the potential merits of the underlying claims. See Hanford Guards Union of Am., Loc. 21 v. Gen. Elec. Co., 57 Wn.2d 491, 494, 358 P.2d 307 (1961). Both state and federal law require the court to engage in every presumption in favor of arbitrability. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004). "The party opposing arbitration bears the burden of showing that the agreement is not enforceable." Id. (citing Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); Stein v. Geonerco, Inc., 105 Wn. App. 41, 48, 17 P.3d 1266 (2001)).

A

Anwar first asserts that the trial court erred by compelling arbitration because the Agreement did not allow for "arbitration of arbitrability." Her argument misconstrues the procedural history in this matter.

In Anwar's motion for summary judgment, Anwar argued that her claims were not subject to arbitration because "the fraudulent activities that PayPal engaged in don't constitute a transaction" and that PayPal had waived its right to arbitrate by filing an amended answer to her complaint. In response, PayPal requested the court compel arbitration because the Agreement covered all disputes with PayPal, not just those pertaining to transactions. Anwar reasserted her original arguments against the Agreement on reply, and also argued that the Agreement was unconscionable.

Nothing in the trial court's order indicates that it was deferring the question of arbitrability to the arbitrator. To the contrary, in denying Anwar's motion for summary judgment and compelling arbitration, the trial court determined that the matter was arbitrable. Anwar's argument is without merit.

B

Anwar next asserts that the trial court erred by compelling arbitration because her claims were not covered by the Agreement. Anwar contends that because her "cause of action does not constitute a transaction" and does not "bear on interstate commerce," she cannot be compelled to arbitrate under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16.[5]

The Agreement states that the parties agree to arbitration for "*any and all disputes or claims* that have arisen or may arise between you and PayPal, including without limitation federal and state statutory claims, common law claims, and those based in contract, tort, fraud, misrepresentation or any other legal theory." (Emphasis added.) The claims asserted by Anwar fall within the scope of the Agreement.

[5] Anwar also contends that PayPal's arbitration agreement is too broad to be enforceable. The only authority Anwar cites in support of this argument is Hearn v. Comcast Cable Communications, LLC, 415 F.Supp.3d 1155 (N.D. Ga. 2019). This case was reversed by the Eleventh Circuit. Hearn v. Comcast Cable Commc'ns, LLC, 992 F.3d 1209 (11th Cir. 2021). Because Anwar fails to cite any valid authority, her argument is unsupported and fails to justify relief.

Anwar's allegation that PayPal acted fraudulently does not suffice to bring her claim outside the ambit of the FAA and therefore outside the ambit of the Agreement. First, the Agreement specifies that it pertains to claims of fraud. Second, the FAA contains no exceptions for allegations of fraud. Section two of the FAA provides that a

> written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). "Under the plain language of Section 2 of the FAA, the relevant question is not whether *the claim* arises from a transaction involving commerce, but rather whether *the contract* containing the arbitration clause 'evidenc[es] a transaction involving commerce.' " Gilbert v. Indeed, Inc., 513 F. Supp. 3d 374, 400 (S.D.N.Y. 2021) (alteration in original) (quoting 9 U.S.C. § 2). Anwar's dispute under PayPal's user agreement evidences a transaction involving commerce.

Anwar nevertheless asserts that her claims do not relate to the user agreement, citing two cases from the Eleventh Circuit Court of Appeals. The first of these, Hemispherx Biopharma, Inc. v. Johannesburg Consol. Investments, 553 F.3d 1351, 1367 (11th Cir. 2008), concerned an arbitration clause contained in a licensing agreement for Hemispherx's data " 'in the field of double-stranded ribose nucleic acids.' " Hemispherx's claim was for fraudulent financial disclosures made by the defendants during the course of an attempted hostile takeover of the company. Id. The court held that because Hemispherx's claim had nothing

whatsoever to do with its licensing agreement, the arbitration clause did not apply. Id. at 1367-68.

The other case cited by Anwar, Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1208, 1211-12 (11th Cir. 2011), concerned the Jones Act, 6 U.S.C. § 30104, and common law tort claims brought by an employee of a cruise line after she was raped onboard and forbidden from disembarking to receive medical treatment. The court held that the arbitration agreement contained in the plaintiff's employment contract did not apply to her common law tort claims, as they did not arise out of the duties of her employment.[6] Id. at 1219.

In both Hemispherx and Doe, the court applied the simple, clear test it announced in an earlier decision to determine whether a claim relates to the contract containing the arbitration clause:

> [I]f the defendant "could have been" engaged in the allegedly tortious actions even if it "had no contractual relationship with" the plaintiff, then the dispute is not "an immediate, foreseeable result of the performance of the contractual duties" and thus not within the scope of an arbitration clause within that contract.

Hemispherx, 553 F.3d at 1367 (quoting Telecom Italia, SpA v. Wholesale Telecom Corp., 248 F.3d 1109, 1116 (11th Cir.2001)); see also Doe, 657 F.3d at 1219-20. Assuming this test were to apply in Washington, applying the test reveals that, contrary to her argument, Anwar's claims *are* related to PayPal's user agreement. In her complaint, Anwar alleges that PayPal "fraudulently charg[ed]" her for a "fraudulent transaction that [Anwar] didn't authorize" and "process[ed] a fraudulent

[6] The plaintiff's Jones Act, maritime, and wage claims fell under the scope of the arbitration agreement, as those claims were dependent on her status as an employee of the cruise line. Doe, 657 F.3d at 1221.

charge to [Anwar's] bank account." These claims could not have accrued if Anwar had not created a PayPal account, for which she was required to sign PayPal's user agreement. Thus, even Anwar's authority demonstrates that her complaint pertains to the user agreement containing the arbitration clause.

Second, Anwar's claims against PayPal implicate interstate commerce such that the FAA applies to disputes under its user agreement. In support of her argument to the contrary, Anwar cites Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 798, 225 P.3d 213 (2009). The court in Satomi considered whether claims asserted under the Washington Condominium Act, chapter 64.34 RCW, could be subject to arbitration under the FAA. Satomi, 167 Wn.2d at 797. Although all of the parties involved were situated in Washington, the court held that claims between them were still subject to arbitration under the FAA. Id. at 802. Summarizing precedent from the U.S. Supreme Court, the court stated that "the FAA applies to transactions involving an economic activity that, in the aggregate, represent a general practice subject to federal control that bears on interstate commerce in a substantial way." Satomi, 167 Wn.2d at 799. The court held that the transactions between the condominium owners and the condominium associations bore on interstate commerce because the components used to build the condominiums were sourced from out-of-state, some of the condominiums were purchased by out-of-state residents, and some of the owners financed their purchases through out-of-state financial companies. Id. at 802-03.

Satomi does not support Anwar's argument. As Anwar acknowledged in her complaint, PayPal is headquartered in California, yet does enough business in

Washington to be subject to regulation by the Washington Department of Financial Institutions. PayPal's practices as outlined in its user agreement bear on interstate commerce in a substantial way. Thus, PayPal's Agreement falls within the ambit of the FAA.

C

Anwar next asserts that the trial court erred by compelling arbitration because the Agreement was unconscionable. An arbitration agreement is considered void if it is either substantively or procedurally unconscionable. Gandee v. LDL Freedom Enters., Inc., 176 Wn.2d 598, 603, 293 P.3d 1197 (2013) (citing Adler v. Fred Lind Manor, 153 Wn.2d 331, 347, 103 P.3d 773 (2004)). An agreement is substantively unconscionable when it is " 'one-sided or overly harsh,' " " '[s]hocking to the conscience,' " " 'monstrously harsh,' " or " 'exceedingly calloused.' " Id. (alteration in original) (internal quotation marks omitted) (quoting Adler, 153 Wn.2d at 344-45).

Anwar contends that the Agreement is substantively unconscionable because (1) it includes a waiver of the right to bring a class action, (2) it gives PayPal the "unrestricted right to take legal action, with no limitations whatsoever on what it can recover, against its customers," (3) it limits PayPal's liability to direct damages, and (4) it forecloses an award of costs. (Emphasis omitted.)

Anwar's argument that the Agreement is unconscionable because it includes a class action waiver was not asserted in her trial court pleadings. We decline to consider this argument further. See RAP 2.5(a); State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) ("Arguments not raised in the trial court

generally will not be considered on appeal." (citing Van Vonno v. Hertz Corp., 120 Wn.2d 416, 427, 841 P.2d 1244 (1992)).

Anwar's remaining arguments are based on a misreading of the terms of the Agreement. The Agreement states that "[y]ou and PayPal *each agree* that any and all disputes or claims that have arisen or may arise between you and PayPal . . . shall be resolved exclusively through final and binding arbitration." (Boldface omitted and emphasis added.) The Agreement thus does not give PayPal the "unrestricted right to take legal action" against its users, as the plain language clearly binds both parties to its terms.

Rather than precluding an award of costs, the Agreement explicitly contemplates that PayPal will pay the cost of arbitration. As the Agreement states, "If the value of the relief sought is $10,000 or less, at your request, PayPal will pay all filing, administration, and arbitrator fees associated with the arbitration."[7] This applies even if the user's claims are not successful; only if the claims are deemed frivolous would the user be responsible for costs.

Additionally, the limitation of liability is not part of the Agreement. Instead, this limitation is contained in a separate part of PayPal's user agreement under the header "General Provisions." Challenges to the terms of a contract other than the arbitration clause are matters for the arbitrator to decide. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)

[7] For claims valued at over $10,000, the agreement states that "PayPal will pay as much of the filing, administration, and arbitrator fees as the arbitrator(s) deem necessary to prevent the cost of accessing the arbitration from being prohibitive," if the user can demonstrate that the costs of arbitration are prohibitive when compared to court costs.

("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").

Finally, we note that the Agreement contains an opt-out provision that Anwar could have used had she not wanted to agree to arbitrate her claims against PayPal. She chose not to do so. Anwar does not satisfy her burden to show that the Agreement is substantively unconscionable. The trial court did not err by compelling arbitration.

D

Anwar finally asserts that PayPal waived its right to arbitration. Anwar contends that PayPal's inclusion of a request for dismissal in its answer and amended answer was an affirmative act that waived its right to enforce the arbitration provision.

The right to arbitrate may be waived either explicitly or implicitly. Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc., 28 Wn. App. 59, 62, 621 P.2d 791 (1980). "[W]aiver cannot be found absent conduct inconsistent with any other intention but to forego a known right." Id.; see also Townsend v. Quadrant Corp., 173 Wn.2d 451, 462, 268 P.3d 917 (2012). Any doubt about whether the right has been waived should be decided in favor of arbitration. Schuster v. Prestige Senior Mgmt., LLC, 193 Wn. App. 616, 632, 376 P.3d 412 (2016).

In Lake Washington School District, this court held that the defendant's assertion of a counterclaim and its limited use of discovery were not sufficient to

constitute waiver of the right to seek arbitration.[8] 28 Wn. App. at 63-64. Here, PayPal engaged in even less litigation conduct, as the only actions it engaged in were to amend its answer and to respond to the summary judgment motion and motions for default filed by Anwar. PayPal consistently asserted that Anwar's claims were subject to the Agreement. Nothing in PayPal's conduct evidences an intent to waive its right to arbitrate. Accordingly, the trial court did not err by compelling arbitration.

III

Anwar additionally argues that the trial court erred by dismissing her complaint while she was pursuing discretionary review of the orders compelling arbitration and staying proceedings. Anwar contends that the case was not subject to dismissal because discretionary review should have been granted. Both this court and the Supreme Court have already determined that discretionary review was not warranted. We decline to revisit that determination.

A trial court retains full authority over a case unless and until this court accepts review. RAP 7.1. The trial court's order staying the matter for arbitration clearly stated that Anwar "shall initiate the [American Arbitration Association (AAA)] arbitration proceeding within 30 days of the date of this Order," and that "if [Anwar] fails to initiate AAA arbitration within 30 days, this matter *shall be dismissed*." (Emphasis added.) Due to her failure to initiate arbitration, the trial court dismissed

[8] The federal cases Anwar relies on all concern litigants who filed dispositive motions before asserting that the matter was subject to arbitration. Because PayPal did not file any dispositive motions, those cases have no application here.

Anwar's complaint on January 4, 2024, well after the 30 day deadline it previously imposed. The trial court did not err by doing so.

IV

PayPal requests an award of attorney fees pursuant to RAP 18.9, asserting that Anwar's appeal is frivolous. "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal." Advocs. for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010). "[A]ll doubts as to whether the appeal is frivolous should be resolved in favor of the appellant." Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

While it is true that Anwar presented substantially the same arguments in support of her earlier notice for discretionary review, and this court and the Supreme Court rejected those arguments in declining discretionary review, those decisions were made in the context of the standards for discretionary review under RAP 2.3(b). See RAP 2.3(b)(1)-(2) (generally requiring party seeking discretionary review to show "obvious" or "probable" error having effects on the proceedings); Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) ("Interlocutory review is disfavored."). In this appeal from the subsequent dismissal of Anwar's action, we reach her contentions on the merits for the first time. In light of this, and because we give Anwar the benefit of the doubt before deeming her appeal frivolous, we decline to award reasonable attorney fees to

PayPal at this time. However, as prevailing party, PayPal shall recover its costs pursuant to RAP 14.2.[9]

Affirmed.

Birk, J.

WE CONCUR:

Chung, J.

Smith, C.J.

[9] Anwar's request for costs and for sanctions against PayPal is denied.

APPENDIX 3

FILED
11/9/2023
Court of Appeals
Division I
State of Washington

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

FATEN ANWAR,

Petitioner,

v.

PAYPAL, INC,

Respondent.

No. 85717-7-I

COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW

This case arises from plaintiff (petitioner here) Faten Anwar's $9.92 purchase of floral tape from an eBay seller. Anwar claimed the transaction was fraudulent and sought her money back. When defendant (respondent) PayPal declined to refund the transaction by concluding that Anwar had authorized the purchase, Anwar sued PayPal for damages. Anwar, pro se, now seeks discretionary review of the trial court's orders denying her summary judgment motion, compelling arbitration, and staying the case pending arbitration. Anwar argues her claims are outside the scope of the parties' arbitration agreement. She also argues the arbitration agreement is unconscionable. As explained below, Anwar fails to show an obvious error that would render further proceedings useless or a probable error that substantially alters the status quo or substantially limits her freedom to act under RAP 2.3(b). Discretionary review is denied.

FACTS

Anwar opened an account with PayPal in 2016. In order to open a PayPal account, potential PayPal users are required to accept PayPal's "User Agreement" after reviewing the terms through a scroll box or a hyperlink. The User Agreement was also available on PayPal's website. Anwar accepted the terms of the User Agreement and

was thus permitted to open a PayPal account. The User Agreement contained an "Agreement to Arbitrate," which provided:

> You and PayPal each agree that all disputes or claims that have arisen or may arise between you and PayPal . . . shall be resolved exclusively through final and binding arbitration or in small claims court.
>
> ***
>
> This Agreement to Arbitrate is intended to be broadly interpreted. The Federal Arbitration Act governs the interpretation and enforcement of this Agreement to Arbitrate.

Appendix to Motion for Discretionary Review (App.) 230.[1]

The "Agreement to Arbitrate" contained an "Opt-Out Procedure" provision allowing any user to opt out of the agreement by mailing notice to PayPal within 30 days of accepting the User Agreement. Anwar did not opt out of the Agreement to Arbitrate.

On March 14, 2021, Anwar's PayPal account made a transaction to purchase a floral adhesive tape for $9.92 from a third-party eBay seller. On March 18, 2021, Anwar reported the transaction to PayPal as unauthorized during a login session using the same login credentials, IP (Internet Protocol) address, and Visitor ID on her account used for the payment authorization for the purchase. PayPal received confirmation from eBay of the purchase and delivery of a package to Anwar's address before she reported the transaction as unauthorized. After an investigation, PayPal concluded the transaction was not fraudulent and declined to refund $9.92 to Anwar's account.

Anwar then filed a complaint against PayPal in Snohomish County Superior Court asserting claims for violations of Washington's consumer protection act, chapter 19.86 RCW, and commercial electronic mail act, chapter 19.190 RCW. She alleged

[1] The appendix provided by Anwar does not show the whole image of the arbitration agreement. The image contained in her motion for discretionary review is difficult to read. This ruling thus relies on the language provided by PayPal (Answer to Motion for Discretionary Review at 8), as the language appears not in dispute.

that PayPal fraudulently charged her $9.92 for a fraudulent transaction she did not authorize and refused to refund the amount. She alleged that PayPal sent her a fraudulent email acknowledging a claim with a transaction ID that was different from the transaction ID of the unauthorized $9.92 charge. She sought an award of damages in the total amount of $2,529.76 plus litigation costs. PayPal denied Anwar's claims.

Anwar filed a summary judgment motion for a judgment on her claims as a matter of law in the amount of $2529.76 plus litigation costs. PayPal opposed her motion and asked the court to compel arbitration pursuant to the User Agreement.[2] PayPal provided a declaration of its employee Grace Garcia whose job included accessing and analyzing PayPal user account records to confirm information regarding user account activities. Garcia confirmed Anwar's account activities as described above. As to Anwar's claim based on PayPal's use of different transaction numbers, Garcia explained that PayPal assigned three case numbers associated with the $9.92 transaction: one assigned to the authorization for a charge; one to the completion of the charge; and one to the bank transfer that funded the payment. App. 96 ¶ 15. Anwar filed a reply in support of her summary judgment motion and opposed arbitration.

On August 9, 2023, the trial court entered an order denying Anwar's summary judgment motion and compelling arbitration. On August 28, 2023, the court entered an order staying the case pending arbitration. The court ordered Anwar to initiate arbitration within 30 days, stating that if she failed to do so, the case would be dismissed. Anwar filed a notice for discretionary review of these orders to this Court.

[2] PayPal alternatively offered to pay Anwar $9.92 to resolve the litigation although it continued to dispute her claims.

DECISION

Anwar seeks discretionary review of the trial court's orders denying her summary judgment motion, compelling arbitration, and staying the case pending arbitration. "Interlocutory review is disfavored." Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010); Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). "Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business." Minehart, 156 Wn. App. at 462 (quoting Maybury, 53 Wn.2d at 721). This Court may accept discretionary review only on the four narrow grounds set forth in RAP 2.3(b). Anwar seeks review under (b)(1) and (2), which set forth the following criteria:

> [D]iscretionary review may be accepted only in the following circumstances:
>
> (1) The superior court has committed an obvious error which would render further proceedings useless [or]
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]

RAP 2.3(b)(1), (2) (emphasis added). She meets neither criterion because she fails to show an obvious or probable error in the trial court's challenged decisions.[3]

Anwar argues the trial court erred in compelling arbitration because her claims are outside the scope of the Agreement to Arbitrate. The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16,[4] makes arbitration agreements "valid, irrevocable, and enforceable,

[3] PayPal argues Anwar also fails to meet the effect prong of (b)(2). Because I conclude Anwar fails to show a probable error, I need not address the effect prong.

[4] Anwar suggests the FAA does not apply to the Agreement to Agree by stating that the $9.92 transaction did not involve interstate commerce. Motion for Discretionary

save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[B]oth state and federal law strongly favor arbitration and require all presumptions to be made in favor of arbitration." Gandee v. LDL Freedom Enterprises, Inc., 176 Wn.2d 598, 602, 293 P.3d 1197 (2013). Any doubt about the scope of an arbitration clause should be resolved in favor of arbitration. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed.2d 414 (2003). Here, the Agreement to Arbitrate provided:

> You and Pay Pal each agree that any and all disputes or claims that have arisen or may arise between you and PayPal, including without limitation federal and state statutory claims, common law claims, and those based in contract, tort, fraud, misrepresentation or any other legal theory, shall be resolved exclusively through final and binding arbitration or in small claims court.
>
> ***
>
> This Agreement to Arbitrate is intended to be broadly interpreted.

App. 230 (emphasis added).

Despite the broad language "any and all disputes or claims that have arisen or may arise between [Anwar] and PayPal," Anwar argues the arbitration agreement applies "ONLY to **transactions in which the customer is a buyer or a seller**." Motion for Discretionary Review at 10. But the agreement does not say so. Anwar points out the following language outside the Agreement to Arbitrate itself:

> If a dispute arises between you and PayPal, acting as either a buyer or a seller, our goal is to learn about and address your concerns.

Review at 11-12. The FAA applies to arbitration agreements within the full reach of the Commerce Clause and "encompasses a wider range of transactions than those actually 'in commerce' – that is, 'within the flow of interstate commerce.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L. Ed.2d 46 (2003) (citation omitted). Anwar's passing argument buried in her argument regarding the scope of the Agreement to Arbitrate is insufficient to present an obvious or probable error, particularly when she does not address the language in the agreement that "[t]he [FAA] governs the interpretation and enforcement of this Agreement to Arbitrate." App. 230.

App. 229 (emphasis added). This language does not appear to modify the scope of the Agreement to Arbitrate. Nor does it say the agreement applies *only* to transactions in which the customer is a buyer or a seller.

Anwar argues: "You **cannot** call robbery a transaction between victim and the thief and **neither can you** call the fabricated charge and fraudulent emails a transaction between the parties." Motion for Discretionary Review at 9-10 (emphasis in original). She appears to argue that her allegations of fraud in the transaction remove the parties' dispute regarding the transaction from the scope of the Agreement to Arbitrate. But the Agreement to Arbitrate applies to "*any and all* disputes or claims that have arisen or may arise between [Anwar] and PayPal." App. 230 (emphasis added). The language encompasses Anwar's claims concerning the $9.92 transaction.

Citing a federal district court case in Georgia, which has been reversed by the Eleven Circuit Court of Appeals, Anwar argues the language "any and all disputes or claims that have arisen or may arise" between the parties violates the FAA's intent to arbitrate only those claims arising under or related to the contract. Motion for Discretionary Review at 12-13; Hearn v. Comcast Cable Commun'ns, LLC, 415 F. Supp.3d 1155 (N.D. Ga. 2019), rev'd, 992 F.3d 1209 (11th Cir. 2021). Anwar does not mention that the district court had been reversed. In reversing the district court decision, the Eleventh Circuit noted:

> There [] is nothing unusual about an arbitration clause . . . that requires arbitration of all disputes between the parties to the agreement. [And] [w]e have enforced such a clause before because it evidenced a clear intent to cover more than just those matters set forth in the contract.

Hearn, 992 F.3d at 1213 (quoting Bd. of Trs. of Delray Beach Police & Firefighters Ret.

Sys. v. Citigroup Glob. Mkts. Inc., 622 F.3d 1335, 1343 (11th Cir. 2010)). Although the language "any and all disputes or claims that have arisen or may arise" between the parties is broad, Anwar's dispute with PayPal relates to the use of her PayPal account and arguably arises under or relates to the User Agreement. Courts have declined to invalidate overbroad arbitration clauses when the disputes at issue arose from or related to the underlying contracts. See Ostreicher v. TransUnion, LLC, 2020 WL 3414633, at *8, 9 (S.D.N.Y. June 22, 2020). Anwar's arguments regarding the scope of the Agreement to Agree fail to show an obvious or probable error.[5]

Anwar argues the Agreement to Arbitrate is substantively unconscionable because it is one-sided. "Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh." Adler v. Fred Lind Manor, 153 Wn.2d 331, 344, 103 P.3d 773 (2004) (quoting Schroeder v. Fageol Motors, Inc., 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). "Shocking to the conscience," "monstrously harsh," and "exceedingly calloused" are terms sometimes used to define substantive unconscionability. Adler, 153 Wn.2d at 344-45 (citing Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)).

Anwar argues the Agreement to Arbitrate is unconscionably one-sided because it (1) "forces customers to arbitrate their claims while allowing PayPal to sue customers" and (2) "curbs customers' rights to recoup damage and legal costs that are otherwise available under Washington laws but no such limitation exists for PayPal." Motion for Discretionary Review at 16-17. The Agreement to Arbitrate itself applies to both Anwar

[5] Anwar also argues there is no "clear and unmistakable" agreement to arbitrate her claims. Motion for Discretionary Review at 14. In light of the language of the Agreement to Agree, her argument fails to show an obvious or probable error.

and PayPal. App. 230 ("*You and PayPal each agree* that any and all disputes or claims that have arisen or may arise between you and PayPal . . . shall be resolved exclusively through final and binding arbitration or in small claims court."). But there are provisions outside of the Agreement to Arbitrate that addressed actions PayPal could take if a user engaged in certain "restricted activities." App. 215. The provision allowed PayPal to take certain actions, including terminating the agreement and taking a legal action against the user if the user engaged in restricted activities such as selling counterfeit goods or violating the law. Another provision entitled "Limitation of Liability" limits PayPal's liability to the user and any third parties to "the actual amount of direct damages" and disallows other damages including incidental or consequential damages "*unless and to the extent prohibited by law*." App. 228 (emphasis added). Anwar argues the Agreement to Arbitrate does not allow recovery of costs.

PayPal argues it's retaining the ability to take certain actions against individuals abusing its system in the User Agreement does not render the Agreement to Arbitrate itself unconscionable. PayPal points out that Anwar could have opted out of the agreement but did not. PayPal argues contract limitations on liability are regularly enforced. PayPal argues that contrary to Anwar's claim, the Agreement to Arbitrate requires PayPal to pay all arbitration fees associated with the arbitration at the user's request if the value of the relief sought is $10,000 or less (like Anwar's requested relief here). App. 232 ("If the value of the relief sought is $10,000 or less, at your request, PayPal will pay all AAA or arbitrators fees associated with the arbitration."). PayPal argues if any of the provisions are unconscionable, the proper remedy would be to server the offending clauses. See Adler, 153 Wn.2d at 358 ("we can sever the

unconscionable attorney fees and limitations provisions, without disturbing the primary intent of the parties to arbitrate their disputes"). PayPal argues because the provisions providing PayPal the ability to take an action against the user for engaging in restrictive activities and limiting liability are located outside the Agreement to Arbitrate, the provisions could be severed.

In light of the opportunity provided for Anwar to opt out of the Agreement to Arbitrate, the provision requiring PayPal to pay arbitration fees and costs when the relief sought is $10,000 or less (as is the case here), and the court's or arbitrator's option to sever any offending clause, Anwar fails to show an obvious or probable error that warrants discretionary review in the trial court's decision to compel arbitration. To the extent she seeks special or consequential damages, she may persuade the arbitrator that the limitation on damage clause is unconscionable and should not be enforced.[6]

Anwar argues the trial court erred in denying her summary judgment motion. She argues PayPal's email in response to her report was "fraudulent on its face" and did not specify the dollar amount of or the reason for the authorization. Because the trial court concluded that her claims are subject to arbitration, the court did not commit an obvious or probable error in denying Anwar's summary judgment motion.

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[6] Unless a party challenges "the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 163 L.Ed.2d 1038 (2006). "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." Buckeye, 546 U.S. at 445. "[R]egardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." Id. at 449; see also Biochron, Inc. v. Blue Roots, LLC, 26 Wn. App.2d 527, 538, 529 P.3d 464 (2023) ("Where the party opposing arbitration does not bring a discrete challenge to the arbitration provision, but instead challenges the agreement as a whole, that challenge is for the arbitrator to decide.").

Anwar argues the trial court erred in requiring her to initiate arbitration within 30 days, stating that her failure to do so would result in the dismissal of the case. The trial court did so three weeks after compelling arbitration. Under the FAA, when a court compels arbitration, it "shall upon application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. "Trial courts have discretion to manage their docket[.]" State v. Castillo-Lopez, 192 Wn. App. 741, 748, 370 P.3d 589 (2016). Anwar shows no obvious or probable abuse of discretion in the trial court's decision to stay its proceedings pending arbitration and requiring her to initiate arbitration within 30 days with a threat of dismissal if she failed to do so.

Anwar fails to satisfy the criteria for discretionary review under RAP 2.3(b). Accordingly, discretionary review is denied.

PayPal requests an award of attorney fees as sanctions against Anwar for filing a frivolous motion for discretionary review under RAP 18.9(a). PayPal also requests an award of costs as the prevailing party under RAP 14.2. I conclude sanctions are not warranted under RAP 18.9(a). Because review is denied, there is no substantially prevailing party "on review" for a cost award under RAP 14.2. Accordingly, PayPal's request for attorney fees and costs are denied.

Masako Hayashi, Commissioner

APPENDIX 4

FILED
7/3/2024
Court of Appeals
Division I
State of Washington

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

FATEN ANWAR, Petitioner, v. PAYPAL, INC., Respondent.	No. 857177 CERTIFICATE OF FINALITY Snohomish County Superior Court No. 23-2-01248-6

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Snohomish County.

This is to certify that the ruling of the Court of Appeals of the State of Washington, Division I, filed on November 9, 2023, became final on July 3, 2024. An order denying a motion to modify was entered in the Court of Appeals on January 31, 2024. A ruling denying motion for discretionary review was entered in the Supreme Court on April 29, 2024.

c: Faten Anwar
Dominique Renee Scalia
Daniel J Bugbee

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle.

Lea Ennis
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

CERTIFICATE OF SERVICE

I, Faten Anwar, certify that I caused this Petition for Review to be served on the attorney(s) on record for Respondent, PayPal Inc. by electronic service at the time of its filing.

Dated this 26th day of Novemeber 2024.

Submitted and signed by

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FATEN ANWAR - FILING PRO SE

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