Supreme Court No. _____

COA No. 85709-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NEWMAN DU WORS, LLP

Respondent,

v.

LANDMARK TECHNOLOGY A LLC;
DR. RAYMOND A. MERCADO,

Appellants-Petitioners,

DR. RAYMOND A. MERCADO's PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON STATE SUPREME COURT

Dr. Raymond A. Mercado
219 Billingrath Turn Lane
Cary, NC 27519
phone: 858-401-9732
email: mercado.raymond@gmail.com
Appellant-Petitioner

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I. INTRODUCTION

This case presents important issues regarding enforcement of choice of law provisions in fee disputes with Washington attorneys and protection of client rights that warrant this Court's review. The Court of Appeals failed to enforce a California choice of law provision in an attorney engagement agreement, drafted by Respondent (a Washington law firm) despite this Court's clear mandate in *Erwin v. Cotter Health Ctrs*., 161 Wash.2d 676 (2007) that such provisions must be enforced unless specific exceptions apply. Respondent here drafted an agreement choosing California law to govern fee disputes, and then violated California's Mandatory Fee Arbitration Act (MFAA) once such a dispute arose by failing to notify its client of the right to non-binding arbitration before pursuing binding arbitration. The Court of Appeals permitted this violation by misapprehending both the nature of Petitioner's arguments, Washington law, and California law.

This Court has previously recognized the importance of properly applying California law when parties have agreed to its application. In *Brown v. MHN Gov't Servs., Inc*., 178 Wash. 2d 258 (2013), this Court carefully analyzed California law in determining whether unconscionability challenges to arbitration agreements should be decided by courts rather than arbitrators. Similar careful analysis is

needed here to ensure Washington courts properly enforce California's client protection scheme when attorneys choose California law to govern their fee disputes.

Special considerations support review in this case. Because venue here lies in Washington while California law governs the dispute, Petitioner cannot obtain review in California courts. Yet Washington's ordinary criteria for Supreme Court review—focused on conflicts *within* Washington law—do not directly capture the importance of properly applying another state's law. When parties choose the law of another state to govern their relationship, this Court should ensure Washington courts properly enforce that choice. Otherwise, the combination of Washington venue and out-of-state choice of law could leave parties without meaningful appellate review of whether their chosen law was properly applied. Hence, in determining whether to grant review, this Court should consider whether the Court of Appeals' decision conflicts with California law, as well as Washington law.

Moreover, this case presents issues of substantial public interest regarding protection of client rights in fee disputes with counsel. The Court of Appeals' decision effectively allows attorneys to bypass statutory client protections by failing to provide required notices and then arguing clients forfeited rights they were never informed about. Clear guidance is needed on whether Washington courts will enforce

client protections incorporated through choice of law provisions, particularly given the increasing multi-jurisdictional nature of legal practice.

II. IDENTITY OF THE PETITIONER

Petitioner Dr. Raymond A. Mercado ("Mercado" or "Petitioner") is the Appellant in this action and asks the Court to accept review of the decision designated in Part II.

III. CITATION TO COURT OF APPEALS OF DECISION

Petitioner respectfully asks this Court to accept review of the Court of Appeals' decision in *Newman Du Wors, LLP v. Mercado*, No. 85709-6-I, 2024 WL 4880667 (Wash. Ct. App. Nov. 25, 2024) affirming the Superior Court in part, and terminating review issued on November 25, 2024 ("the Order"). The Order is in the appendix.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' failure to enforce a choice of law provision calling for the application of California law to a fee dispute between a Washington law firm and its non-resident client conflicts with the choice of law principles in *Erwin v. Cotter Health Ctrs*., 161 Wash.2d 676, 694-696 (2007), where the Washington attorney drafted the engagement agreement containing the California choice of law provision, and conceded its violation of California law?

2. Whether depriving clients of their statutory right to non-binding arbitration in a fee dispute with counsel—when counsel

concededly fails to provide clients the requisite statutory notice of their right—is an issue of substantial public interest.

3. Whether the Court of Appeals' decision that Petitioner's arguments as to the unconscionability and ambiguity of the arbitration were forfeited due to Petitioner's failure to raise them in the arbitration conflicts with this Court's holding that a "threshold dispute as to whether an arbitration agreement is unconscionable is ordinarily a decision for the court and not the arbitrator." *Brown v. MHN Gov't Servs., Inc*., 178 Wash. 2d 258, 264 (2013).

V. STATEMENT OF THE CASE

A. Relevant Factual Background

On May 27, 2021, Landmark Technology A LLC ("Landmark") and Respondent Newman Du Wors, LLP ("Newman du Wors" or "Respondent") entered into an Engagement Agreement whereby Respondent agreed to represent Landmark in a suit filed against it in the state of Washington. (CP244-247). The Engagement Agreement set forth the terms of Respondent's representation of Landmark and purported to make Petitioner Mercado the guarantor of any fees billed to Landmark. (*Id*.)

As relevant here, the Section 6 of the Engagement Agreement—entitled "Disputes"—provided that:

> If there is any dispute under this agreement or relating to the attorney–client relationship—including a dispute

> regarding the amount of fees or quality of service—**California law will govern the dispute.** But the exclusive venue for a proceeding to resolve the dispute will be (*i.e.*, the action will take place in) Seattle, Washington.

(CP 36).

Throughout the course of Respondent's representation of Landmark leading up to the parties' dispute, Landmark promptly paid Respondent's invoices. Respondent, however, engaged in significant overbilling, leading to the instant fee dispute.

On or about March 8, 2022, Respondent sent an invoice to Landmark totaling $109,006.00, entailing a single's month's billing and the preparation of a single brief. (CP 18). Notably, the Engagement Agreement referred to a "large 'trial deposit'" of "around $100,000." CP16-71 However, the March invoice for $108,642.00 represented a ***single month's*** billing by Plaintiff in the underlying action, a matter that was far from trial and still at the motion to dismiss stage.

On March 26, 2022, a Saturday—scarcely 18 days after rendering the invoice—Respondent demanded that Landmark make full payment on the $109,006.00 invoice the following Monday.

Thereafter, a dispute between the parties arose. On April 28, 2022, Respondent filed a motion to withdraw from its representation of Landmark in the underlying action, which was granted on October

14, 2022. (CP 18).

On or about November 3, 2022, Respondent filed a notice of intent to commence binding arbitration with WAMS.

On or about November 22, 2022, Landmark requested a 30-day continuance of the proceedings, which was granted.

Subsequently, however, ***neither Landmark nor Mercado participated in the arbitration proceedings***. (CP 10-11 [finding that neither Landmark nor Petitioner Mercado never participated in the arbitration].).

On or about April 4, 2023, a hearing in the arbitration was held before the WAMS arbitrator. (CP 10). On April 7, 2023, the arbitrator issued a decision finding Landmark and Mercado indebted to Respondent in the amount of $135,500, and awarding Respondent costs in the amount of $2,190 ("the Arbitration Award"). (CP 10-11).

B. Relevant Procedural History

On or about July 17, 2023 Respondent filed its Motion for Entry of Judgment ("the Motion") in this action, requesting relief under Washington law, and seeking entry of judgment under RCW 7.04A.220 and RCW 7.04A.250. (CP 1-2).

Notably, Respondent's Motion ***failed*** to attach the underlying Engagement Agreement containing the choice-of-law provision requiring application of California law.

On August 4, 2023, Mercado opposed Respondent's Motion on the grounds that—since California law governed the parties' dispute pursuant to the Engagement Agreement— Respondent's Motion was barred by Respondent's failure to provide notice of Appellant's right to ***non-binding*** arbitration under California's Mandatory Fee Arbitration Act ("MFAA") prior to commencing with ***binding*** arbitration. (CP16-71 [Def's Opp. at 10-12]. Mercado further opposed Respondent's Motion arguing that the arbitration agreement was procedurally and substantively unconscionable, as well as fatally ambiguous and uncertain, and therefore unenforceable. (*Id.* [Def's Opp. at 7-10].). As is uncontested, Mercado, as guarantor under the Engagement Agreement, had standing to assert any defenses available to Landmark. *See Credit Managers Assn. v. Superior Ct*., 51 Cal. App. 3d 352, 357 (1975) ("a guarantor may assert any defense on the guaranty which is available to the debtor on the principal obligation.").

On August 10, 2023, a hearing on Respondent's Motion was held in the trial court, which granted the Motion. In doing so, the trial court provided almost no analysis or reasoning for its decision, stating orally that:

> All right. I will grant the order on judgment, the order and judgment on the arbitration award. The defendants had an opportunity to participate. They had an opportunity to file any motions with the

arbitrator and failed to do so. The plaintiffs are entitled to the order and judgment on the arbitration award, and I will sign the order.

(RP8:20-9:1).

The judgment and order entered August 10, 2023 contained no statement of the trial court's reasoning, did not incorporate its oral ruling by reference, and contained no findings of fact or conclusions of law. Rather, the order simply granted Respondent's Motion and awarded judgment in the amount of $143,394.02 against Landmark and Mercado.

On August 21, 2023, Mercado timely filed a Notice of Appeal to this Court.

On November 25, 2024, the Court of Appeals, Division I, issued an Order affirming the trial court's decision in part, holding that Mercado had not demonstrated that Respondent's violation of California law warranted denial of Respondent's Motion or vacatur of the arbitration award, and that Mercado had forfeited his arguments regarding unconscionability and ambiguity for failure to raise them in the arbitration.[1]

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[1] The Court of Appeals also held that there was an inadequate record to support the trial court's award of attorney's fees to Respondent in connection with Respondent's Motion to Confirm the arbitration award, and remanded for the trial court to make findings of fact and conclusions of law supporting the award.

VI. ARGUMENT

A. Review is Warranted Because the Court of Appeals Failed to Enforce the Parties' Choice of Law Provision Calling for the Application of California Law, in Conflict With *Erwin v. Cotter Health Ctrs*., 161 Wash.2d 676, 694-696 (2007).

The Court of Appeals erred by failing to enforce the parties' express contractual choice of California law to govern their fee dispute—despite Respondent's conceded failure to comply with California law. Under *Erwin*, Washington courts must apply Section 187 of the Restatement (Second) of Conflict of Laws when parties have made an express contractual choice of law. 161 Wash.2d at 694. The Engagement Agreement here explicitly provided that "California law will govern the dispute" for "any dispute under this agreement or relating to the attorney-client relationship—including a dispute regarding the amount of fees." (CP 36).

California law is critical to this dispute, as California's Mandatory Fee Arbitration Act (MFAA) establishes a comprehensive statutory scheme designed to protect clients in fee disputes with their attorneys. The MFAA requires that before attorneys can initiate binding arbitration over fees, they must ***first*** provide their clients written notice of the right to participate in non-binding arbitration under the MFAA. Cal. Bus. & Prof. Code § 6201(a). "[F]ailure to give

such notice shall be a ground for the dismissal of the action"—including Respondent's premature recourse to binding arbitration here—under Section 6201(a).

This notice requirement reflects California's substantive policy determination that clients should have a meaningful opportunity to resolve fee disputes through non-binding arbitration before being subjected to binding arbitration. As California courts have recognized, the MFAA aims "to alleviate the disparity in bargaining power in attorney fee matters" by providing an effective inexpensive remedy to a client which does not necessitate the hiring of a second attorney." *Manatt, Phelps, Rothenberg & Tunney v. Lawrence*, 151 Cal.App.3d 1165, 1175 (1984).

The choice of law provision in the Engagement Agreement—which Respondent itself drafted—explicitly made California law applicable to "any dispute regarding the amount of fees." (CP 36). This necessarily incorporated California's MFAA protections, including the requirement that attorneys provide notice of MFAA rights before commencing binding arbitration. Yet Respondent failed to provide this statutorily-required notice before initiating binding arbitration against Landmark and Mercado. Having chosen California law to govern fee disputes, Respondent cannot now evade the client protections that are integral to California's fee dispute resolution scheme. The Court of Appeals' failure to enforce these protections

effectively allowed Respondent to cherry-pick which aspects of California law it would follow, despite drafting an agreement that made California law applicable to fee disputes in its entirety.

This choice of law provision satisfies all requirements for enforcement under *Erwin*. First, fee dispute procedures are precisely the type of issue "which the parties could have resolved by an explicit provision in their agreement." *Erwin*, 161 Wash.2d at 694 (quoting Restatement § 187(1)). Here, the parties did explicitly address this issue by choosing California law to govern fee disputes. Indeed, Respondent itself drafted the Engagement Agreement and chose California law to govern its relations with clients.

Even if fee dispute procedures were deemed an issue the parties could not have explicitly resolved, Section 187(2) mandates applying California law unless: (a) California lacks a substantial relationship to the parties/transaction or (b) applying California law would contravene a fundamental Washington policy and Washington has a materially greater interest in the dispute. Neither exception applies here.

California has a substantial relationship to this dispute—Respondent itself drafted an agreement choosing California law to govern fee disputes with its clients. By choosing California law, Respondent voluntarily subjected itself to the obligations imposed by

California law, here the MFAA. Moreover, Respondent's attorneys provided many of the services while themselves based in California.

Moreover, applying California's MFAA would not contravene any fundamental Washington policy. Washington has no policy against protecting clients in fee disputes with counsel. Indeed, protecting clients in such disputes advances core policies both states share regarding the attorney-client relationship. Nor can Washington claim a "materially greater interest" when Respondent—a Washington firm—deliberately chose California law in its own Engagement Agreement to govern its fee disputes with clietns.

The Court of Appeals' failure to enforce this choice of law provision effectively nullified protections Respondent's own agreement promised its clients. California's MFAA requires attorneys to provide clients notice of their right to non-binding arbitration before initiating binding arbitration. Cal. Bus. & Prof. Code § 6201(a). Respondent concededly failed to provide this notice, yet sought to enforce a binding arbitration award against its client anyway.

The trial court abused its discretion by refusing to apply Section 6201(a) based solely on Appellant's failure to raise MFAA rights before the arbitrator—rights Respondent never informed Appellant about. The Court of Appeals compounded this error by failing to

correct this abuse of discretion, in direct conflict with *Erwin's* mandate that Washington courts enforce contractual choices of law. This error warrants review because it undermines both parties' freedom of contract and statutory protections for clients in fee disputes with counsel. When attorneys draft agreements choosing California law to govern fee disputes, Washington courts must enforce those choices by applying California's client protection scheme in its entirety. The Court of Appeals' failure to do so conflicts with *Erwin* and merits this Court's review.

B. The Court of Appeals Misapprehended Mercado's Argument Regarding the Trial Court's Failure to Grant Appellant Relief Under Section 6201(a).

The Court of Appeals misapprehended the nature and scope of Mercado's argument that the trial court erred in failing to dismiss Respondent's action to confirm the arbitration award under Section 6201(a). In its Opinion, the Court stated that:

> Mercado does not assert that the trial court abused its discretion when it denied his request to vacate the arbitration award. Rather, Mercado asserts that dismissal of the arbitration proceedings, and subsequent vacation of the arbitration award, was mandatory. Because California law does not mandate dismissal for failure to provide notice under the MFAA, Mercado does not demonstrate error by the trial court.

Order at 4.

However, at no point in his briefing did Mercado insist that dismissal and vacatur under the MFAA were necessarily "mandatory," rather than discretionary. Rather, Mercado argued that the trial court had no basis (and certainly stated no basis in the oral record) for failing to vacate the arbitration award. True, Mercado argued strenuously that dismissal of the action and vacatur of the award were *warranted*, but Mercado's arguments were as relevant to an abuse of discretion by the trial court as to an error under any other standard.

For example, Mercado identified the issue pertaining to his assignment of error as "[w]hether Respondent's conceded failure to provide notice of Appellant's right to non-binding arbitration under California's Mandatory Fee Arbitration Act ('MFAA') ***warranted*** denial of Respondent's Motion for Entry of Judgment on Arbitration Award pursuant to Cal. Bus. & Prof. C. 6201(a)." Appellant's Opening Br. at 9 (emphasis added). Indeed, Mercado principally relied on a case—*Wager v. Mirzayance* (1998) 67 Cal.App.4th 1187, 1189-1191—which specifically recognized that dismissal under Section 6201(a) is "discretionary." Relying on *Wager*, Mercado argued that Respondent's motion to confirm the arbitration award "should have been dismissed for failure to provide the requisite notice to Appellant" under Section 6201(a)—***not*** that it was mandatory. Appellant's Opening Br. at 21.

When Respondent mentioned in passing that "[d]ismissal under [Section 6201(a)] is discretionary, not mandatory, and up to the courts," Respondent was not arguing against Appellant about whether relief under Section 6201(a) is "mandatory" or not. Respondent's Br. at 25. That was not an issue contested by the parties. Rather, Respondent was arguing that Mercado's remedy under Section 6201 "was to seek a dismissal, not vacate an arbitration award after it's been granted." *Id.*

Unsurprisingly, given the actual flow of argument, Mercado did not argue in reply to Respondent that dismissal was "mandatory." Rather, Mercado argued that the trial court was empowered under Section 6201(a) to "dismiss" Respondent's action to confirm the arbitration award (and/or to vacate the arbitration award within the action)—and that the trial court's only stated reason for its holding (i.e., that Mercado failed to raise the argument before the arbitrator) was unsustainable when Mercado's rights under Section 6201(a) were premised on the very notice which Respondent concededly failed to provide. Appellant's Reply Br. at 23 & 21-22.

Thus, Mercado's arguments on appeal did not advance the proposition that Section 6201(a) relief is mandatory, or rely on that proposition. Rather, Mercado argued repeatedly that the trial court's only stated basis for denying Mercado relief was inconsistent with California law and the statutory scheme underlying Section 6201(a).

C. Mercado's Arguments Regarding Application of Section 6201(a) Were Sufficient to Show Error by the Trial Court and An Abuse of Discretion.

No court has ever refused to apply Section 6201(a) on the basis the trial court asserted here, i.e., failure to raise the argument before the arbitrator. There are strong reasons not to do so, given that the entire regime underlying Section 6201(a) requires that attorneys provide ***notice*** to their clients of their right to non-binding arbitration under the MFAA in order to "to alleviate the disparity in bargaining power in attorney fee matters." *Richards, Watson & Gershon v. King* (1995) 39 Cal. App. 4th 1176, 1180. Thus, as *Richards* recognized, a key factor in deciding the appropriateness of relief under Section 6201(a) is the client's actual "knowledge" of her rights under Section 6201(a). "On occasion…a sophisticated client will ***know*** of its right to arbitration whether or not it received notice," in which case the purposes of the MFAA would not be furthered by dismissal. *Id*. But the trial court's rationale was completely inconsistent with this reasoning. In effect, after Respondent failed to apprise Mercado of his rights, the trial court penalized Mercado for not raising what he did not know.

Here, Respondent failed to provide Mercado the requisite notice under Section 6201(a), and there was no evidence ever presented that Mercado somehow already knew of his right to non-binding

arbitration under the MFAA at the time that Respondent prematurely commenced arbitration, or during the arbitration—and indeed, Mercado did ***not*** know.

Under these circumstances, the trial court's rationale in this case—that Mercado failed to raise before the arbitrator the very rights under the MFAA that Mercado did not know he had—makes no sense, as Mercado lacked the knowledge of his rights under Section 6201(a) and Respondent failed to provide him notice. This was error under any standard—abuse of discretion or otherwise—and was precisely the argument Mercado made in this appeal. *See* Mercado's Opening Br. at 19-23; Mercado's Reply Br. at 21-22.

To be sure, courts have also refused to grant relief under Section 6201(a) for other reasons. For example, the court in *Philipson* refused to do so when the former client was already pursuing a cross-complaint against her former lawyers in the same action for which she sought dismissal. *Philipson & Simon v. Gulsvig* (2007) 154 Cal. App. 4th 347, 366. Section 6201(d) also sets forth other potential grounds for waiver, including "commencing an action or filing any pleading" seeking "[j]udicial resolution of a fee dispute" or "affirmative relief against the attorney" for malpractice. But neither ground for waiver applied in this case.

Likewise, *L. Offs. of Dixon R. Howell v. Valley* (2005) 129 Cal. App. 4th 1076, 1098, the court applied six *Sobremonte* factors to

evaluate whether the client waived his right to non-binding arbitration under the MFAA—(1) actions inconsistent with the right to non-binding arbitration under the MFAA, (2) invoking litigation machinery, (3) lengthy delay, (4) filing a counterclaim, (5) important intervening steps taken, and (6) prejudice. Once again, however, *none* of these factors remotely resembles the basis asserted by the trial court in this case, i.e., failure to raise objections before the arbitrator.

Mercado's arguments regarding the sole basis for the trial court's decision in this case—Mercado's failure to assert his rights under Section 6201(a) before the arbitrator—were meritorious under the applicable discretionary standard, and any standard.

Indeed, it is not altogether clear what other argument Mercado could have made. The trial court orally articulated only one, thin rationale for its ruling. That was the only ground applicable to Section 6201(a) which Mercado could challenge on appeal, and Mercado did so.

To the extent the Court of Appeals' Order rests on Mercado failure to couch his argument specifically in terms of an "abuse of discretion," the Court elevates form over substance.

Courts do not require parties to use "the magic words 'abuse of discretion'" when "a fair reading" of their briefs shows "that such an abuse was alleged." *Seager v. James M. Walter Profit Sharing Plan*, No. 1:04CV00035, 2004 WL 2186328, at *3 (M.D.N.C. July 29,

2004); *Wood v. O'Donnell*, 894 S.W.2d 555, 556–57 (Tex. App. 1995) ("While Wood never uses the words 'abuse of discretion' in this point of error, the point of error clearly raises it. Therefore, we will review the trial court's modification order using an abuse of discretion standard."); *McKinney v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 747 S.W.2d 907, 909 (Tex. App. 1988) ("However, we decline to rule that the absence of the words, 'abuse of discretion,' are fatal to McKinney's point of error."); *Mist-On Sys., Inc. v. Nouveau Body & Tan, LLC*, 341 Fed. Appx. 1 (5th Cir. 2009) (failure to note the standard of review for some issues did not waive his appeal of those issues).

This Court "interpret the RAPs liberally to promote justice and facilitate a decision on the merits." RAP 1.2(a)." *State v. Bonisisio*, 92 Wash. App. 783, 796 (1998); RAP 10.3; RAP 1.2. Given that Mercado's arguments have merit (and the trial court's decision lacks a reasoned basis consisted with California law applicable here), the Court should not deny Mercado relief merely because he did not frame his argument in terms of an "abuse of discretion."

Moreover, any deficiency in presenting the argument in terms of abuse of discretion was not a point ever pressed by Respondent, but one raised *sua sponte* by the Court for the first time in its Opinion. Normally, "[i]f the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case,

the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court." *Bonisisio*, 92 Wn.App. at 796 (citing RAP 12.1(b)).

Here, the Court of Appeals did not afford Mercado an opportunity to argue this issue, which neither of the parties raised themselves.

D. Protecting Clients' Right to Non-Binding Arbitration in Fee Disputes is an Issue of Substantial Public Interest

This Court should accept review because protecting clients' statutory rights in fee disputes with counsel is a matter of substantial public interest that warrants this Court's attention. When attorneys draft agreements choosing California law to govern fee disputes, they must honor the client protections that choice entails. The Court of Appeals' decision effectively allows attorneys to circumvent these protections by failing to notify clients of their rights and then arguing the clients forfeited rights they were never informed about.

Fee disputes between attorneys and clients implicate core public interests in protecting clients and maintaining trust in the legal profession. As California courts have recognized, the MFAA's notice requirements exist precisely because of "the disparity in bargaining power in attorney fee matters." *Manatt*, 151 Cal.App.3d 1165 at (1984). This disparity is particularly acute where, as here, attorneys draft choice of law provisions incorporating client protections but then

fail to honor those very protections. Allowing attorneys to bypass statutory notice requirements through such tactics undermines both client protection and freedom of contract.

The implications of the Court of Appeals' ruling extend beyond this case. Respondent has other clients in Washington, a matter of which this Court may take judicial notice. When Washington attorneys select California as their choice of law for fee disputes, clients reasonably expect to receive the protections California law provides—including the right to non-binding arbitration under the MFAA. The Court of Appeals' decision creates uncertainty about whether and how Washington courts will enforce such provisions, potentially leaving clients without important statutory protections their attorneys expressly agreed to provide.

This issue is particularly significant given the increasing multi-jurisdictional nature of legal practice. Law firms frequently represent out-of-state clients and include choice of law provisions in their agreements. Clear guidance from this Court is needed on whether Washington courts will enforce the client protections such provisions incorporate. Otherwise, attorneys may be incentivized to include choice of law provisions promising client protections while knowing those protections need not actually be provided.

E. The Court of Appeals' Order Conflicts With Washington and California Law in Holding That Mercado's

Arguments on Unenforceability and Ambiguity Were "Forfeited" For Failure to Raise Them in Arbitration.

The Court also affirmed the trial court's ruling on the grounds that Mercado failed to raise his unenforceability and ambiguity arguments before the arbitrator, citing *Cummings* and *Moncharsh*. However, Court of Appeals' Order is in direct conflict with this Court's holding in Brown that the "threshold dispute as to whether an arbitration agreement is unconscionable is ordinarily a decision for the court and not the arbitrator." *Brown v. MHN Gov't Servs., Inc*., 178 Wash. 2d 258, 264 (2013) (applying California law pursuant to California choice of law provision). Thus, the Court of Appeals misapprehended and extended these holdings to an inapposite factual scenario where, as here, the Mercado never participated in the arbitration. (CP 10-11 [finding that Mercado never participated in the arbitration].)

Contrary to the Court of Appeals' reading of *Cummings*, the court in *Cummings* held—in a phrase absent from this Court's Order—that a "party who ***knowingly participates*** in the arbitration process without disclosing a ground for declaring it invalid is properly cast into the outer darkness of forfeiture." *Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 329 (emphasis added). Here, by contrast, Mercado did not participate in the arbitration (CP10-11) and cannot run be deemed to have run afoul of the rule in *Cummings.* Mercado

did not engage in gamesmanship—indeed, by Mercado's non-participation in the arbitration against him, Mercado essentially defaulted and an unfavorable result was virtually ensured. This is nothing like the scenario in *Cummings* or *Moncharsh*, in which an active participant lay in wait to challenge the validity of the arbitration in the event of an adverse outcome. Similarly, the court in *Moncharsh* held that a party cannot both "***participate***" and "sit on his rights." *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 6-7 (1992).

Respectfully, neither *Cummings* nor *Moncharsh* apply to the scenario here. Both turned on the party's active participation in the arbitration. Here, it is undisputed that Mercado did not participate in the arbitration. (CP 10-11.) Moreover, under this Court's decision in Brown, questions of unconscionability are for the trial court—not the arbitrator—and thus the Court of Appeals wrongly faulted Mercado for not raising these issues in a forum where it would have been unavailing to raise them.

As for the Court of Appeals' suggestion that Mercado failed to bring these arguments to the attention of the court while the arbitration was proceeding, this, too, is contrary to California law. In *Sauter*, the court specifically held that a party "may decline or refuse to participate in the arbitration proceedings and the real party in interest, Logan, will then be compelled to rely upon the procedures set forth in section 1281.2 of the Code of Civil Procedure to enforce the

right of arbitration." *Sauter v. Superior Ct.* (1969) 2 Cal. App. 3d 25, 29. That is exactly what Mercado did here—decline to participate in the arbitration.

CONCLUSION

For the foregoing reasons, Mercado respectfully requests that this Supreme Court accept review of the issues raised herein.

Dated: December 26, 2024

Respectfully Submitted,

/s/ Raymond A. Mercado
Dr. Raymond A. Mercado
219 Billingrath Turn Lane
Cary, NC 27519
phone: 858-401-9732
email: mercado.raymond@gmail.com
Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17 I certify that the foregoing Petition for Discretionary Review contains 4,944 words, prepared using 14 pt. Times New Roman font. I am relying on the word count of the computer program used to prepare the brief.

Dated: December 26, 2024

/s/ Raymond A. Mercado
Dr. Raymond A. Mercado
219 Billingrath Turn Lane
Cary, NC 27519
phone: 858-401-9732
email: mercado.raymond@gmail.com
Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Petition for Discretionary Review to be filed with the Court of Appeals, Division I, electronic filing portal, which will cause it to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated: December 26, 2024

/s/ Raymond A. Mercado
Dr. Raymond A. Mercado
219 Billingrath Turn Lane
Cary, NC 27519
phone: 858-401-9732
email: mercado.raymond@gmail.com
Petitioner-Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NEWMAN DU WORS, LLP, Respondent, v. DR. RAYMOND A. MERCADO, an individual, Appellant, LANDMARK TECHNOLOGY A, LLC, Defendant.	No. 85709-6-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Dr. Raymond Mercado challenges the trial court's order confirming the arbitration award entered in favor of Newman Du Wors LLP. Mercado fails to demonstrate that confirmation of the arbitration award was improper under either California or Washington law. However, the trial court's award of attorney fees to Newman Du Wors was not supported by an adequate record. Accordingly, we reverse and remand as to the trial court's award of attorney fees, and otherwise affirm.

FACTS

On May 24, 2021, Landmark Technology A LLC entered into a fee agreement to have Newman Du Wors represent it in a case filed against it by the State of Washington. The fee agreement contained a provision that the person signing had

the authority to bind Landmark and also personally guarantee the payment of all fees and costs. Additionally, the fee agreement had a provision governing any dispute between the parties, which reads in pertinent part as follows:

> If there is any dispute under this agreement or relating to the attorney-client relationship—including a dispute regarding the amount of fees or quality of service—California law will govern the dispute. But the exclusive venue for a proceeding to resolve the dispute will be *(i.e.,* the action will take place in) Seattle, Washington. You and the Firm agree to waive a proceeding in court and, instead, we will have any dispute decided by an arbitrator. Either you or the Firm may initiate arbitration before [one of several listed arbitration firms]. You and the Firm will equally split the costs of arbitration.

Mercado signed the agreement on behalf of Landmark and as personal guarantor, and promptly paid the $25,000 retainer.

Mercado paid the first few invoices without question or complaint. However, Mercado ceased paying when he received an invoice for over $100,000. Newman Du Wors moved to withdraw from the case in which it represented Landmark and, after the motion was granted, sent a notice of intent to arbitrate to Washington Arbitration and Mediation Services (WAMS) and Landmark. Mercado moved to continue the arbitration, but otherwise did not participate in the proceedings.

The matter proceeded to arbitration despite Landmark and Mercado's nonparticipation. The arbitrator entered an award in favor of Newman Du Wors of $135,500 for legal services and prejudgment interest, plus $2,190 in costs. Newman Du Wors then filed a motion for entry of judgment on the arbitration award. Mercado objected to the motion, asserting that the arbitration agreement was unenforceable and Newman Du Wors failed to adhere to California law concerning arbitration of fee disputes between attorneys and their former clients. The trial court rejected

Mercado's arguments and entered judgment on the arbitration award. Mercado filed a timely notice of appeal.[1]

Subsequently, Newman Du Wors filed a motion for a supplemental award of attorney fees incurred at the trial court in connection with its motion to confirm the arbitration award. Over an objection by Mercado, the court entered a supplemental judgment awarding Newman Du Wors $15,439.94 in attorney fees and costs.

ANALYSIS

I. Standard of Review

Mercado appeals the trial court's order confirming the arbitration award and entering judgment thereon. Judicial review of a confirmed arbitration award is "exceedingly limited." *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998). Our review does not include examination of the merits of the arbitrator's decision. *ACF Prop. Mgmt., Inc. v. Chaussee*, 69 Wn. App. 913, 919, 850 P.2d 1387 (1993). Rather, our "inquiry into an arbitrator's award is limited to that of the court which confirmed, vacated, modified or corrected that award." *Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992).[2]

II. Notice under California's Mandatory Fee Arbitration Act

Mercado first asserts that the arbitration award should not have been confirmed because Newman Du Wors failed to provide him notice of his right to

[1] Mercado purports to appeal on behalf of both himself and Landmark. In Washington, "corporations appearing in court proceedings must be represented by an attorney." *Lloyd Enters., Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998). Because Mercado is not a licensed attorney, his appeal is valid only as to himself.

[2] California employs a similarly narrow scope of review, and will not review the merits of the arbitrator's decision. *See Paramount Unified Sch. Dist. v. Teachers Assn. of Paramount*, 26 Cal. App. 4th 1371, 1381, 32 Cal. Rptr. 2d 311 (1994).

nonbinding arbitration, as required by California's Mandatory Fee Arbitration Act[3] (MFAA). Newman Du Wors asserts that it should not be subject to the MFAA as it represented Mercado in a lawsuit in Washington, rather than California. Assuming, without deciding, that the MFAA applies, Mercado fails to demonstrate any error.

California's MFAA establishes a system of alternative dispute resolution specifically designed to address "disputes concerning fees, costs, or both, charged for professional services by licensees of the State Bar or by members of the bar of other jurisdictions." Cal. Bus. & Prof. Code, § 6200(a). Under the MFAA, attorneys must notify their former clients of their rights under the MFAA before they commence collection proceedings for legal fees and costs. *Id.* at § 6201(a). Although failure to adhere to this notice requirement can be grounds for dismissal of the collection action, *id.*, dismissal is not mandatory. California courts have repeatedly held that dismissal or vacatur of an arbitration award for failure to provide the correct statutory notice is within the trial court's discretion. *See Law Offices of Dixon R. Howell v. Valley*, 129 Cal. App. 4th 1076, 1088, 29 Cal. Rptr. 3d 499 (2005); *Aheroni v. Maxwell*, 205 Cal. App. 3d 284, 294-295, 252 Cal. Rptr. 369 (1988).

Mercado does not assert that the trial court abused its discretion when it denied his request to vacate the arbitration award. Rather, Mercado asserts that dismissal of the arbitration proceedings, and subsequent vacation of the arbitration award, was mandatory. Because California law does not mandate dismissal for failure to provide notice under the MFAA, Mercado does not demonstrate error by the trial court.

[3] Cal. Bus. & Prof. Code, § 6200 et seq.

III. Unconscionability and Ambiguity

Mercado next asserts that the trial court should not have confirmed the arbitration award because it is both procedurally and substantively unconscionable and fatally ambiguous and, accordingly, the arbitrator did not have jurisdiction over the parties due to the absence of a binding arbitration agreement. Newman Du Wors contends that Mercado forfeited these arguments by failing to raise them in the arbitration. We agree with Newman Du Wors.

Under California law, a party claiming that the arbitration agreement is unenforceable due to illegality must raise that argument either before or during the arbitration or it is forfeited. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 30-31, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992). The court in *Moncharsh* explained as follows:

> The issue would have been waived, however, had Moncharsh failed to raise it *before the arbitrator.* Any other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally decide a dispute between the parties. Moreover, we cannot permit a party to sit on [their] rights, content in the knowledge that should [they] suffer an adverse decision, [they] could then raise the illegality issue in a motion to vacate the arbitrator's award. A contrary rule would condone a level of "procedural gamesmanship" that we have condemned as "undermining the advantages of arbitration." (*Ericksen,* [*Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.*, 35 Cal. 3d 312, 323, 673 P.2d 251, 197 Cal. Rptr. 581 (1983)] (rejecting a rule permitting determination by courts of preliminary issues prior to submission to arbitration); see also *Christensen v. Dewor* [*Devs.*, 33 Cal. 3d 778, 783-784, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983)] (condemning filing of pre-arbitration lawsuit in order to obtain pleadings that would reveal opponent's legal strategy).) Such a waste of arbitral and judicial time and resources should not be permitted.
>
> We thus hold that unless a party is claiming (i) the entire contract is illegal, or (ii) the arbitration agreement itself is illegal, [they] need not raise the illegality question prior to participating in the arbitration process, so long as the issue is raised before the arbitrator.

> Failure to raise the claim before the arbitrator, however, waives the claim for any future judicial review.

Id.

Mercado contends that the holding in *Moncharsh* is limited to parties who actively participate in the arbitration and is therefore inapplicable to him, as he refused to participate. We disagree. Inherent in the court's holding is its reasoning that courts should not condone any "procedural gamesmanship" to negate the results of an arbitration, as doing so would undermine the purpose of arbitration. *Id.* at 30. That reasoning applies with equal force here.

Mercado did not object when Newman Du Wors filed a notice of intent to arbitrate. Rather than submitting an objection, requesting a stay of arbitration, or filing for an injunction, Mercado's only action was to request a continuance of the proceedings. At no point did Mercado indicate that he believed the arbitration agreement was unenforceable or that the arbitrator lacked authority to decide the matter. It was only after Newman Du Wors moved to confirm the arbitration award that Mercado articulated any objection to the arbitration agreement itself. This is precisely the type of "procedural gamesmanship" that *Moncharsh* aimed to prevent.

The California Court of Appeals rejected an argument similar to Mercado's in *Cummings v. Future Nissan*, 128 Cal. App. 4th 321, 27 Cal. Rptr. 3d 10 (2005). There, the appellant asserted that "forfeiture should apply only where a party participates in arbitration willingly" and that because she was forced to participate via court order, she could not have waived the argument that the arbitration agreement was unconscionable and unenforceable. *Id.* at 328. The court rejected this argument, explaining,

> The "bright line" for application of forfeiture does not lie between those who voluntarily invoke the arbitration process and those who are dragged to the table against their will. The forfeiture rule exists to avoid the waste of scarce dispute resolution resources, and to thwart game-playing litigants who would conceal an ace up their sleeves for use in the event of an adverse outcome. The proper criterion for dividing the sheep from the goats is a litigant's *knowledge* of a defense to the jurisdiction of the arbitrator.

Id. (internal citation omitted).[4] The court summarized the rule as "[t]hose who are aware of a basis for finding the arbitration process invalid must raise it at the outset or as soon as they learn of it so that prompt judicial resolution may take place before wasting the time of the adjudicator(s) and the parties." *Id.* at 328-29. Accordingly, the court held that because the appellant failed to raise unconscionability when she initially resisted arbitration on other grounds, she had forfeited the argument, as well as any others that she did not previously raise. *Id.* at 329-30.

Here, Mercado had knowledge of the basis of his claims of unconscionability and ambiguity, as he was in possession of the arbitration agreement and knew of the facts precipitating the signing of the agreement. Yet, Mercado did not bring these facts or argument to the attention of the arbitrator or the court and instead allowed the arbitrator and Newman Du Wors to expend resources adjudicating the law firm's claims. California law does not permit a party to hide the ball in this manner. Therefore, Mercado's claims that the arbitration agreement is unenforceable have been forfeited.

[4] The court noted that there may be an exception to this rule where the party faces possible criminal sanctions for failing to participate in arbitration. *Cummings*, 128 Cal. App. 4th at 329 n.8. This exception does not apply here.

IV. Failure to Attach Arbitration Agreement

Mercado asserts that the trial court erred when it confirmed the arbitration award because Newman Du Wors failed to attach a copy of the arbitration agreement to the motion to confirm the award. Mercado contends that Newman Du Wors' failure to adhere to California Code of Civil Procedure section 1285.4(a), which requires the arbitration agreement to be attached to the motion to confirm, was fatal to its motion and the award should not have been confirmed. We disagree.

Newman Du Wors asserts that Mercado's argument is without merit, as the procedural rules of Washington, not California, apply to the proceedings and Washington does not require the party moving to confirm an arbitration award to attach a copy of the arbitration agreement. Mercado, on the other hand, claims that confirmation of an arbitration award constitutes substantive, not procedural law, therefore, California law applies. We need not resolve the issue of which state's law applies, as the result is the same in either jurisdiction.

California Code of Civil Procedure section 1285.4 requires a party moving to confirm an arbitration award to set forth the substance of or attach a copy of the agreement to arbitrate, set forth the name(s) of the arbitrator(s), and set forth or attach a copy of the award. The purpose of this law "is to be sure that the trial judge has access to the arbitration agreement, the names of the arbitrators and the award." *Puccinelli v. Nestor*, 145 Cal. App. 2d 48, 49-50, 301 P.2d 921 (1956). Strict compliance with this rule is not required, and so long as all of the relevant information is before the court, its order confirming the award is valid. *Id.*; *Accito v. Matmor Canning Co.*, 128 Cal. App. 2d 631, 634, 276 P.2d 34 (1954). The trial court here

had a copy of the arbitration agreement at the time it entered the order confirming the arbitration award. Mercado has not cited to any authority, nor have we located any, where confirmation of an arbitration award was reversed solely on the basis that the moving party failed to attach a copy of the arbitration agreement to its motion. Thus, Mercado's requested relief is not warranted under California law.

In Washington, "RCW 7.04A.200, .240, and .230 provide narrow grounds for modifying, correcting, or vacating an arbitrator's award." *AURC III, LLC v. Point Ruston Phase II, LLC*, 3 Wn.3d 80, 86, 546 P.3d 385 (2024). Failure to attach a copy of the arbitration agreement is not one of those narrow grounds. Washington law does not require that a party moving to confirm an arbitration award attach a copy of the arbitration agreement. *See* RCW 7.04A.220. Accordingly, Mercado does not state a basis for relief under either California or Washington law.

V. Attorney Fees on Confirmation

Mercado asserts that the trial court erred in awarding $15,439.94 in attorney fees and costs to Newman Du Wors in connection with its motion to confirm the arbitration award. We engage in a two-part review of an award of attorney fees. *In re Vulnerable Adult Pet. of Winter*, 12 Wn. App. 2d 815, 836, 460 P.3d 667 (2020). "First, we review de novo whether a legal basis exists for awarding attorney fees." *Id.* Second, we evaluate the reasonableness of the fee award for an abuse of discretion. *Id.*; *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

"Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought." *Mahler v.*

Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). "Consistent with such an admonition is the need for an adequate record on fee award decisions." *Id.* at 435. To establish such a record, the trial court must enter findings of fact and conclusions of law in support of its award of fees. *Id.* "The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013).

Here, the trial court did not enter any findings of fact or conclusions of law. Rather, the court merely entered judgment on the request for fees and ordered that the amount awarded was reasonable. This order contains no meaningful analysis of the request for fees and does not address any of the arguments Mercado raised in his opposition.

"[A] fee award that is unsupported by an adequate record will be remanded for the entry of proper findings of fact and conclusions of law that explain the basis for the award." *Id.* at 644. Accordingly, we remand to the trial court to enter findings of fact and conclusions of law explaining its award of fees.

VI. Attorney Fees on Appeal

Mercado requests an award of attorney fees pursuant to RAP 18.1 and the terms of the parties' engagement agreement, which states, "If there is a final arbitration award, the non-prevailing party will pay costs and fees for any post-award action." Because we reject the majority of Mercado's arguments on the merits, Mercado is not the prevailing party. As such, he is not entitled to fees on appeal.

Newman Du Wors requests an award of sanctions pursuant to RAP 18.9, asserting that Mercado's appeal is frivolous. A party may recover attorney fees

pursuant to RAP 18.9 if the appellant files a frivolous appeal. "An appeal is frivolous if there are no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal." *In re Marriage of Schnurman*, 178 Wn. App. 634, 644, 316 P.3d 514 (2013). Because the trial court's award of attorney fees was not supported by an adequate record, Mercado's appeal cannot be considered frivolous. We therefore decline to award attorney fees to Newman Du Wors on appeal.

Affirmed in part and remanded for entry of findings of fact and conclusions of law for the fee award.

WE CONCUR:

RAYMOND MERCADO - FILING PRO SE

December 26, 2024 - 4:37 PM

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Address:
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