UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TERI WOODS, on behalf of herself and all other similarly situated persons,

Plaintiff,

v.

JK HARRIS FINANCIAL RECOVERY SYSTEMS, LLC,

Defendant.

CASE NO. C04-1836C

ORDER

This matter has come before the Court on Defendant's Motion to Compel Arbitration and Stay Proceedings (Dkt. No. 7), and the accompanying Motion for Leave to File an Overlength Brief (Dkt. No. 12). The Court has considered the papers submitted by the parties and determined that oral argument is not necessary. The Court hereby finds and rules as follows.

As a preliminary matter the Court notes that Plaintiff did not oppose Defendant's Motion for Leave to File an Overlength Brief. The Court construes this as an admission that the motion has merit, *see* Local Rule CR 7(b)(2) (W.D. Wash.), and therefore GRANTS Defendant's Motion. The Court will consider Defendant's twelve-page reply to Plaintiff's Opposition. The Court thus turns to Defendant's Motion to Compel Arbitration.

Defendant JK Harris Financial Recovery Systems, LLC provides services to help consumers eliminate their debts and rebuild their credit. (Goddard Decl., Ex. 1.) In September, 2003, Plaintiff Teri Woods entered into a Client Service Agreement with Defendant for assistance in dealing with a default judgment entered against her. The Agreement contains a mandatory provision for mutually binding arbitration.[1] Plaintiff filed suit alleging violations of Washington's Consumer Protection Act, and asserting several statutory claims. Defendant now moves the Court to compel arbitration and to stay proceedings in this Court on the grounds that Plaintiff is bound to arbitrate her claims by the express terms of the contractual agreement, by the Federal Arbitration Act, and by the Washington Arbitration Act.

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[1] The Client Service Agreement provides in relevant part:

> You agree that any claim, dispute or controversy between us or claim by either of us against the other or the employees, agents or assigns of the other and any claim arising from or relating to this agreement or the relationships which result from this agreement, no matter against whom made, including the applicability of this arbitration clause and the validity of the entire agreement, shall be resolved by neutral binding arbitration by the National Arbitration Forum, under the Code of Procedure in effect at the time the claim is filed. Any arbitration hearing at which you appear will take place at a location near your residence. Rules and forms of the National Arbitration Forum may be obtained and all claims shall be filed at any National Arbitration Office, [...].
>
> All disputes subject to arbitration under this Agreement shall be arbitrated individually, and shall not be subject to being joined or combined with claims of any other person or class of persons. NOTWITHSTANDING ANYTHING TO THE CONTRARY SET FORTH HEREIN, THE PARTIES HERETO SPECIFICALLY AND EXPRESSLY WAIVE ANY RIGHT TO PROCEED AS PART OF A CLASS, OR SERVE AS A CLASS REPRESENTATIVE IN AN ARBITRATION UNDERTAKEN PURSUANT TO THIS AGREEMENT OR IN ANY COURT PROCEEDING.
>
> This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon the award may be entered in any court having jurisdiction.
>
> THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE THROUGH A COURT AND TO HAVE A JUDGE OR JURY DECIDE THEIR CASE, BUT THEY CHOOSE TO HAVE ANY DISPUTES DECIDED THROUGH ARBITRATION.

(Goddard Decl., Ex. 2.)

It is for the court to decide in the first instance whether a dispute is to be resolved through arbitration. *AT&T Tech., Inc., v. Communication Workers of Am.*, 475 U.S. 643, 651 (1986). Yet under the Federal Arbitration Act, the court's role is limited to determining (1) whether a valid agreement to arbitrate exists, and if it does, (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); 9 U.S.C. § 4 (providing a court may order arbitration only "upon being satisfied that the making of the agreement for arbitration...is not in issue"). Similar limitations are imposed by Washington state law. *See, e.g., Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 599-600 (Wash. Ct. App. 2002); Wash. Rev. Code § 7.04.010 (stating "[s]uch agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement").

It is undisputed that Plaintiff signed a contract with Defendant and thereby agreed to arbitrate all claims, disputes or controversies arising from or relating to the agreement. (*See* Goddard Decl., Ex. 2.) The issue before this Court, however, is whether that agreement is valid. Where a party challenges the enforceability of an arbitration clause, the court must consider whether the arbitration agreement accords with state law principles of contract formation. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002). Under Washington law, whether a contract is unconscionable is a question of law. *Nelson v. McGoldrick*, 896 P.2d 1258, 1262 (Wash. 1995). A contract may be procedurally unconscionable due to "impropriety during the process of forming a contract," and/or substantively unconscionable "where a clause or term in the contract is alleged to be one-sided or overly harsh." *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1174 (W.D. Wash. 2002) (citing *McGoldrick*, 896 P.2d at 1262) (internal citations omitted). The presence of either type of unconscionability renders a contract unenforceable. *Luna*, 236 F. Supp. 2d at 1174. The party attacking the contract bears the burden of proving that the contract is unconscionable. *Id.* Since Plaintiff argues that the arbitration clause is both procedurally and substantively unconscionable the Court will consider each type in turn.

1. Procedural Unconscionability

Procedural unconscionability may arise when a party lacks a meaningful choice. *Luna*, 236 F. Supp. 2d at 1174 (internal citation omitted). Determination of whether a contract is procedurally unconscionable includes an inquiry into "the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print." *Id.* In the case at bar, Plaintiff does not employ the traditional arguments associated with lack of meaningful choice. Rather, Plaintiff's procedural unconscionability argument depends upon a finding that Defendant's advisors, who are not licensed attorneys, were nonetheless practicing law in Washington. Specifically Plaintiff asserts that it was improper for Defendant to make its Client Service Agreement with Plaintiff where she did not have independent legal counsel since the Agreement limits Defendant's malpractice liability.

The Court is not prepared, based on the limited facts currently before it, to determine whether Defendant was indeed engaged in the unauthorized practice of law. Accordingly, this precludes the Court from finding that the arbitration clause is procedurally unconscionable.

2. Substantive Unconscionability

An agreement may be substantively unconscionable where a clause or term in the contract is "one-sided or overly harsh." *McGoldrick*, 896 P.2d at 1262. Substantive unconscionability may also occur when the terms are "shocking to the conscience, monstrously harsh and exceedingly calloused." *Id.* (quoting *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 556 P.2d 552, 555 (1976)) (internal quotations omitted). Plaintiff argues that the arbitration clause is one-sided and overly harsh because it forces a losing Plaintiff to bear the potentially great costs of arbitration and Defendant's attorney fees, prevents an aggrieved client from joining a class action, severely limits the damages which a wronged client can recover for legal malpractice or other serious harm, and lacks mutuality. The Court agrees.

The Client Service Agreement's abrogation of the clients' rights to litigate any disputes in court

or have a jury trial is not in and of itself one-sided. However, by limiting Defendant's liability for all damages to the contract fee, and by precluding recovery of any "special," "direct," "punitive," and "consequential" damages, the arbitration clause contrasts markedly from the relief available to a plaintiff in a civil suit for claims arising in contract, tort, warranty or otherwise. Moreover, the cost of arbitration effectively restricts access to justice for those, such as Plaintiff, so troubled by debt that they are often unable to cover monthly expenses despite working multiple jobs. Although there may be little difference between the state district court filing fee and NAF filing fee, the end of cost of arbitration is likely to be much higher. *See, e.g.*, *Luna*, 236 F. Supp. 2d at 1181-82. Despite the fact that some clients may qualify as "indigent" and have their filing fees waived, those who do not may still be unable to bear the financial burden of arbitration - particularly when those clients would be forced to pay Defendant's attorneys' fees if they do not prevail in their claims. Finally, the Client Service Agreement also prohibits clients from being a class representative or class member either in court or in arbitration. Given the economic challenges faced by the types of clients Defendant solicits, it may be that a class action is the only means available to seek relief for harm allegedly caused by Defendant. Defendant's reliance on *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), for the proposition that the issue of class arbitration is better decided by an arbitrator, is inapplicable for the sole reason that the arbitration clause at issue in that case was silent as to whether it precluded class arbitration. The arbitration clause in the case at bar clearly states that the client is barred from joining a class either in court and in arbitration. As such, the class action restriction is relevant to the Court's consideration of this issue. In light of these inequities, the Court finds that the arbitration clause is overly harsh and exceedingly calloused, and thus substantively unconscionable. Because the unlawful provisions taint the entire agreement, *see Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994), the Court finds it is not possible to sever the offending portions of the arbitration clause. The arbitration clause contained in the Client Service Agreement is simply unenforceable.

3. Federal and State Laws as Bar to Waiver of Credit Consumers' Rights

Plaintiff further argues that the arbitration clause is "void" under the anti-waiver provisions of federal and state laws protecting credit consumers' rights. Having found that this matter is not appropriate for arbitration, the issue of most immediate concern to the parties, the Court is not prepared based on the current record to rule on whether Defendant, as a matter of law, is a "credit repair organization" within the meaning of the Credit Repair Organizations Act, 15 U.S.C. § 1679a, or a "credit service organization" under the Washington Credit Services Organization Act, Wash. Rev. Code § 19.134.010.

In sum, for the aforementioned reasons, Defendant's Motion to Compel Arbitration is hereby DENIED.

SO ORDERED this 24th day of January, 2005.

/s/ John C. Coughenour
UNITED STATES DISTRICT JUDGE