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SUPREME COURT NO. 95608-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE KROGER CO., an Ohio corporation; FRED MEYER STORES, INC., doing business as QUALITY FOOD CENTERS, INC. (aka QFC)

Appellant,

v.

SUE JIN YI, an individual; and RONALD COX, an individual on behalf of themselves and others similarly situated,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

A Court of Appeals panel unanimously affirmed the trial court's denial of QFC's motion to compel arbitration because Respondent's wage claims are statutory in nature and the applicable CBA does not contain a clear and unmistakable waiver of Respondent's right to pursue those claims in court. QFC seeks review of that decision on the theory that Respondent's Wage Recovery Act seeks more than double Respondent's minimum wage and overtime damages, despite Respondent's repeated (and binding) representations to the contrary. No matter how strongly QFC might wish Respondent were seeking more, Respondent simply is not. Because even QFC concedes that Respondent's claims for minimum wage, overtime and double those damages are statutory in nature and not subject to arbitration, and because Respondent seeks nothing more, the Court should deny QFC's Petition for Supreme Court Review ("Pet.").

STATEMENT OF THE CASE

A. Respondent's Statutory Claims Based on Rounding

This is a wage and hour class action in which Respondent alleges he and other employees of QFC grocery stores were underpaid because QFC's uniform policy of paying all hourly employees in 15-minute increments unfairly favored QFC. Clerk's Papers ("CP") 1-13; 498-510.

Under QFC's rounding policy, Respondent and other employees were not paid for each minute actually worked, even though QFC's time-keeping system tracked the actual hours. CP 4-6; 501-503. Instead, all QFC time clocks rounded to the nearest 15-minute interval. CP 4; 501.

For example, where an employee clocked in at 11:53 for a shift scheduled to begin at 12:00, the time keeping system reported the employee's start time as 12:00 and paid the employee accordingly – denying the employee pay for the first seven minutes the employee was clocked in and working. *Id*. Where that same employee clocks out at 6:07, the time keeping system reported the employee's end time as 6:00 – denying the employee pay (again) for the last seven minutes she was on the clock and working. *Id*.

While rounding policies like QFC's are theoretically permitted under Washington law, they only pass legal muster in certain limited situations, according to guidance issued by Washington's Department of Labor and Industries:

> A system where it is always rounded down is not appropriate. The rounding practice must work both ways so that sometimes it is rounded up and sometimes it is rounded down. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes, this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the

> employees properly for all the time they have actually worked.

L&I, Administrative Policy No. Es.D.1, "Record Keeping and Access to Payroll Records," revised 5/7/2004 ("Es.D.1") (emphasis supplied). In short, employers can round time, but the rounding must in fact "even out" so that employees are not undercompensated by the practice. Where the practice does not even out, and employees are systemically shorted pay for hours worked due to even facially neutral rounding, Respondents may recover that pay. *See, e.g.*, *Alonzo v. Maximus*, 832 F. Supp. 2d 1122, 1126 (C.D. Cal. 2011).

QFC has never disputed that until fiscal year 2016 (approximately two years after Respondent filed this suit), it employed the rounding system described above, and that it did not pay employees for each and every minute they were clocked in. CP 250; 264. The gravamen of this dispute is therefore that the rounding did not "even out" and employees were consequently denied pay for all compensable hours. CP 6; 503. Respondent's claims have robust evidentiary support. Between July 2011 and December 2014, approximately 70 percent of employees in the 13,000-member class lost over 100,000 hours under the policy. CP 1302-1306.

The operative complaint brings four statutory wage claims:

- Claim I – failure to pay wages owed in violation of RCW 49.46.020, RCW 49.46.090, RCW 49.52.050 (the Washington Minimum Wage Act, or "MWA");
- Claim II – willful withholding of wages in violation of RCW 49.52.050 and RCW 49.52.070 (the Washington Wage Recovery Act, or "WRA");
- Claim III – failure to pay wages owed in violation of ORS 652.120; and
- Claim IV – failure to pay wages in violation of ORS 653.055.

CP 498-510. Although the complaint is 13 pages long and contains over 60 separately enumerated paragraphs, it makes no mention of any contracts, collective bargaining agreements, or contractual pay rates. CP 1-13; 498-510.

The complaint brings purely statutory claims, and Respondent seeks purely statutory damages. *Id.* Specifically, Respondent seeks damages under the Washington and Oregon MWA, as well as double those damages for QFC's willful failure to pay wages under Washington's WRA. CP 507-509. Respondent does not seek – and has never sought – damages calculated using any premium rates or shift premiums provided for in any collective bargaining agreements. App at 7.

B. Procedural History

Respondent filed the original complaint in this action on July 21, 2014. CP 1-13. On February 20, 2015, QFC moved for summary

judgment. CP 255-284. The 2015 Motion argued, *inter alia*, that Respondent's WRA claim was preempted under Section 301 of the federal Labor Management Relations Act ("LMRA") because the claim required interpretation of terms in the CBA ("2015 Preemption Motion"). CP 273-282. The trial court rejected that argument, and QFC did not then appeal it. CP 496; App. at 11.

On September 2, 2016 QFC moved to compel arbitration of Respondent's WRA claim ("2016 Motion"). CP 538-728. That motion sought dismissal of any claims for "premium wages" under the CBA. CP 547; App. 5-6. It did not seek dismissal of any claims for "minimum wage, statutory overtime, attorneys' fees, or liquidated damages." CP 542. In November 2016, the trial court denied the 2016 Motion. CP 780-781. QFC appealed that order.

Its brief below argued specifically and repeatedly that Respondent's RCW 49.52.070 WRA claim was really a disguised contract claim because Respondent sought premium pay rates provided only by the CBA (specifically daily and sixth-day overtime and premiums for inadequate rest between shifts), and that QFC could only be liable for those CBA pay rates if it breached the CBA. App. 5-6; Appellant's Brief ("AB") at 3, 9-10, 19, 20, 23-26, 28-32, 34-35, & 37.

This argument was fatally flawed from the beginning because Respondent has never sought those pay rates. CP 349-350; 429-430. Respondent even offered to stipulate that he did not seek the CBA premium pay rates QFC claimed he was seeking. CP 1412-1424. QFC rejected this offer and proceeded with its (ultimately unsuccessful) appeal anyway.

ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court should deny review because (1) QFC's arguments are all premised on the notion that Respondent's claims are contractual, and because Respondent's claims are plainly statutory, those arguments fail; (2) QFC's arguments all fail for additional, independent reasons; and (3) the case does not present issues of "substantial public interest."

A. The Court Should Deny Review Because the Panel Correctly Found Respondent's Claims Were Statutory

As QFC concedes, the central issue before the Court of Appeals was whether Respondent's WRA claims were statutory or contractual. App. at 4 ("the core issue . . . is whether these claims are statutory or contractual"); Pet. at 10 ("the panel correctly identified the 'core issue' for its decision"). QFC's current Petition makes five arguments for review. Pet. at 10, 12, 15, 16, 17. Each of those arguments rests on the fundamentally flawed premise that Respondent's claims are contractual in

nature. Because the Panel correctly determined that Respondent's claims are statutory, QFC's arguments all fail and the Court should deny the Petition.

QFC argues that Respondent's WRA claim is contractual, and therefore subject to the CBA's arbitration clause, because Respondent seeks daily overtime and various shift premiums that are only provided for by the CBA.[1] App. at 6; Pet. at 8; AB at 3, 9-10, 19, 20, 23-26, 28-32, 34-35, & 37. Respondent does not, and has never sought, those pay rates as damages. Respondent offered to stipulate that his WRA damages would not be calculated using any of the CBA rates QFC identified. App. at 6; CP 1412-1424. Respondent's brief below represented repeatedly that Respondent did not seek, and had never sought, CBA premium pay, and the Panel relied in part on this representation in affirming the trial court. App. at 7.[2]

As below, QFC's Petition here offers no actual evidence (or sensible argument) to support a contrary finding. The only "evidence" QFC cites to support its theory that Respondent is actually seeking more

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[1] As QFC concedes, its appeal does not affect Respondent's claims for minimum wage or statutory overtime, or Respondent's claims for double those damages pursuant to the WRA. QFC appeals only the issue of whether Respondent can recover premium pay under the CBA.
[2] QFC's suggestion that Respondent has "recanted" a prior claim to premium pay damages is simply inaccurate.

than minimum wage, weekly overtime, and double those damages, is a series of inferences it draws from an isolated interrogatory response and a stray comment from counsel before the trial court. Pet. 8.

The Panel was right to dismiss those inferences in assessing whether Respondent seeks CBA premium pay. App 7. The Panel had no reason to credit QFC's inferences because Respondent has made it clear that he <u>does not seek any premium pay</u> on his WRA claim. QFC gives the Court here no reason to depart from the Panel's finding.

As if Respondent's proposed stipulation were not enough to forever resolve the issue of what pay rates he seeks, his repeated representations before the Court of Appeals that his WRA claim seeks only double his minimum wage and overtime damages is a binding judicial admission that cannot be controverted now. *Mukilteo Retirement Apartments, LLC v. Mukilteo Investors L.P.*, 176 Wn. App. 244, 255-56 n.8, 310 P.3d 814 (2013) ("facts judicially admitted are facts established not only beyond the need of evidence to prove them, *but beyond the power of evidence to controvert them.*") (internal citations and quotations omitted).

Because QFC can point to no actual evidence that Respondent seeks CBA pay, its petition devolves into circularity. QFC repeatedly states that *because* Respondent's claims are contractual, the Panel erred.

But QFC does nothing to explain *how* the Panel erred in finding the claims to be statutory. That is because QFC simply cannot. No matter how much QFC might wish Respondent sought more on his WRA claim than double his minimum wage and overtime damages, Respondent simply is not. QFC's petition should be denied for that reason alone.

B. QFC's Arguments Fail for Other Reasons

1. QFC Misstates the Legal Standard For Motions to Compel Arbitration Where CBAs are Involved

QFC argues that the Panel erred because "CBA claims should be arbitrated unless there is a non-negotiable right or statutory claim imposing standards outside the CBA." Pet. at 10. QFC's argument fails because it (a) misstates the applicable legal standard; and (b) Respondent's statutory wage claims do confer non-negotiable state rights.

First, QFC completely misstates the law governing arbitration clauses in CBAs. Courts construe arbitration clauses in collective bargaining agreements extremely narrowly. A court will only compel arbitration of statutory claims if the CBA contains an "explicit waiver" and it is "clear and unmistakable" that the parties intended to arbitrate the particular claim. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998); *accord Brundridge v. Fluor Federal Servs., Inc.*, 109 Wn. App. 347, 355-56, 35 P.3d 389 (2001).

The Panel correctly applied this principle to Respondent's claims. App. at 8-10. It first determined that Respondent's claims were statutory, then did a detailed analysis of the CBA's text and found it was not "unmistakably clear" that the CBA waived the right to bring statutory wage claims. *Id.*

QFC, on the other hand, claims that the touchstone inquiry in deciding a motion to compel arbitration is whether the claim involves a "non-negotiable right." Pet. at 11-12. Whether a claim involves a non-negotiable state right is standard for determining whether a claim is preempted by the Labor Relations Management Act – not whether it is subject to CBA arbitration. Indeed, each case QFC cites for this argument considered whether a claim was preempted by the LMRA, *not* whether the court should grant a motion to compel arbitration.[3]

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[3] *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 358, 35 P.3d 389 (2001) (cited by QFC at Pet. 11 and stating "the pipe-fitter's claim . . . is not preempted by federal law" because it involved a non-negotiable right and also refusing to compel arbitration under the FAA because CBA did not clearly and unmistakably waive claims); *See, e.g., Hilse v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004) (LMRA does "not preempt nonnegotiable or independent negotiable claims" like MWA claims); *Ervin v. Columbia Distributing*, 84 Wn. App. 882, 930 P.2d 947 (1997) ("The policies of the National Labor Relations Act do not preempt Mr. Ervin's Minimum Wage Act claim"); *Hill v Garda*, 198 Wn. App. 326, 394 P.3d 390 (2017) ("the plaintiff's state right to meal periods is both independent and non-negotiable, and there is no section 301 preemption").

QFC lost its 2015 Preemption Motion. Its attempted 2016 appeal of that decision failed for procedural reasons. App. 10-13. QFC's current Petition does not dispute the Panel's conclusions regarding those procedural defects, and QFC cannot revive its substantive LMRA arguments now under the guise of this Petition for review regarding the 2016 motion to compel arbitration. As QFC argued below, and as the Panel concluded, whether a claim is preempted by the LMRA is a different substantive inquiry from whether a court should compel arbitration under the FAA. App. at 14 (noting that the 2015 preemption motion and the 2016 arbitration motion "sought different relief and required the court consider different bodies of law").

2. QFC's LMRA Argument Also Fails

Even if QFC could revive its LMRA arguments, those arguments would fail. "Preemption is the exception, not the rule in Washington" and "there is a strong presumption against finding preemption." *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108, 114. As discussed, Respondent brings only statutory claims for minimum wage and overtime, and double those damages under the WRA. App. at 6. Washington courts have long held those claims confer substantive, non-negotiable rights independent of any CBA and are therefore not preempted. Fn. 3 *infra*.

Thus, even if QFC could renew its substantive LMRA arguments here, those arguments would fail.

3. Washington Law Amply Defines "Compensable Time" for Purposes of Respondent's Claims

QFC next argues that review is required because "neither the legislature nor L&I has established wage rates or state standards for compensable time under the WRA." Pet. at 12. As discussed, this argument fails because it presumes Respondent's WRA claim seeks something more than double his statutory minimum wage and overtime damages, and state law clearly addresses compensability and pay rate for minimum wage and overtime claims.

QFC concedes that the WRA allows recovery of double damages and attorneys' fees for willful failure to pay wages owed under statute, ordinance or contract. Pet. at 13. QFC further acknowledges that Respondent brings claims for minimum wage and overtime violations, and that Respondent can double his statutory damages under the WRA. Pet. 13. That is all Respondent seeks on his WRA claim – double damages for wages owed under the minimum wage and overtime statutes. Washington law robustly defines when such wages are owed. WAC 296-126-002(8) (defining "hours worked" for MWA claims"); *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 47-50, 169 P.3d 473 (2007) (applying WAC

296-126-002(8) to determine whether drive time was compensable for minimum wage and overtime purposes). So, too, does Washington law define how much Respondent may recover on those claims. RCW 49.46.020 (setting minimum wage); WAC 296-128-550 (defining overtime pay rate for hours worked in excess of 40 per week).

Because Respondent seeks nothing more than double his unpaid statutory wage damages on his WRA, it is irrelevant whether L&I has issued any guidance or regulations to interpret the amount of "contract" wages an employee might be entitled to under the WRA, as alleged by QFC. Pet. 13-15. It is similarly irrelevant whether the WRA permits an employee to recover CBA guaranteed premium pay.

4. The Panel Applied the Correct Body of Law in Finding Respondent's Claims were Not Arbitrable

QFC argues that the Panel should have ignored *Brundridge v. Fluor,* 109 Wn. App. 347, 35 P.3d 389 (2001), which holds that the FAA applies to an arbitration clauses in a CBA, and should have applied undefined "federal labor law" rather than the FAA. Pet. 15. According to QFC, "federal labor law," and not the FAA, governs because *Brundridge* was decided shortly after *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). This argument simply makes no sense.

The Panel cited *Brunridge* for the uncontroversial proposition that a court will only compel arbitration of statutory claims if the CBA contains an "explicit waiver" and it is "clear and unmistakable" that the parties intended to arbitrate the particular claim. App. at 8. This has been the law with respect to all CBA arbitration clauses since at least 1998. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (so holding). Both *Brundridge* and *Circuit City* and the legal principles for which they stand remain good law. That *Brundridge* was decided shortly after *Circuit City* is no reason to ignore its holding. The Panel correctly applied controlling law.

5. ***Kobold* Is Irrelevant**

QFC claims that the panel erred when it ignored *Kobold v. Good Samaritan Reg. Med. Ctr.*, 832 F.3d 1024 (9th Cir. 2016), which QFC describes as "analogous Ninth Circuit authority" directly applicable to the Oregon WRA. Pet. 16. *Kobold* is not germane. It dealt with three consolidated cases and analyzed whether the LMRA preempted the plaintiffs' various claims. *Kobold*, 832 F.3d at 1031. The case did not involve any motions to compel arbitration, or whether a CBA contained a clear and unmistakable waiver of a right to a judicial forum. Because QFC does not seek review of the Panel's ruling on its 2015 preemption motion, *Kobold* is not relevant.

The specifics of *Kobold* do not help QFC anyway. There, the court determined that the plaintiff's Oregon WRA claim was preempted because it would require extensive analysis of the terms of the CBA. The plaintiff referred to in the passage quoted by QFC (at Pet. 16) had sued in state court to recover premium pay rates, which the CBA provided to nurses "for all hours worked above their regularly scheduled full-time equivalent shifts 'except when there is a change of schedule agreed upon by the Medical Center and nurse.'" *Kobold*, 832 F.3d at 1036. The court logically concluded that such a claim was preempted by the LMRA because it would require extensive analysis of the terms of the CBA, including whether particular shifts were "extra shifts" and whether there had been an agreed change of schedule. *Id*.

Thus, in *Kobold*, whether Plaintiff was owed money depended entirely on whether the employer violated the CBA. Here, whether the Respondent is owed money on his WRA claim depends on whether QFC violated the MWA by failing to pay Respondent the minimum wage or overtime for all compensable hours worked. Washington statutory and common law defines whether the time rounded away was compensable, and if so, at what rate QFC must compensate it. The Panel was right to ignore *Kobold*.

6. The Panel's Ruling Does Not Affect the Rights of Union Members Who Benefitted From Rounding

Finally, QFC argues that the Panel's ruling somehow places the rights of the few employees who benefited from rounding "at risk of setoff without allowing the union to participate or represent all QFC's hourly employees." Pet. 17. This argument fails at the outset because QFC's set-off claim is legal vaporware. Respondent filed this case in 2014, yet QFC has never actually brought any set-off claim against the few union members who benefitted from rounding.

If QFC were to actually bring this theoretical claim, it would face serious substantive hurdles. QFC cites no case to support its novel theory that its knowing use of a flawed rounding policy gives rise to claims against the few employees who benefited from that policy. So, too, would it face serious procedural hurdles. If QFC has any claim, it is a compulsory counterclaim that is almost certainly now barred by QFC's failure to bring it. CR 13(a) ("[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"). This alleged "set-off" is all bark and no bite.

But even if QFC could assert this hypothetical claim, the union could seek to participate under CR 24, which governs intervention rights. If the trial court allows CR 24 intervention, QFC's concerns are unfounded. If the trial court finds the union has no right to intervene, QFC's concerns are still unfounded because the union had no rights for the Panel to deprive it of anyway. In sum, *that* the union has a right to seek intervention refutes QFC's argument.

C. QFC Fails to Address—Much Less Meet—RAP 13.4's Criteria For Review

The Court should deny QFC's Petition for one final reason—QFC fails to address how this case meets RAP 13.4's high standard for review. "The Supreme Court, in passing upon a petition for review, is not operating as a court of error, but rather is functioning as the highest policy-making judicial body of the state"; thus, "RAP 13.4(b) does not allow review simply to correct isolated instances of injustice." WASHINGTON APPELLATE PRACTICE DESKBOOK § 27.11, at 27-10 (WSBA 3rd Ed. & 2011 Suppl.).

Here, QFC mentions in passing that review is appropriate pursuant to RAP 13.4(b)(4), which applies only where the petition involves "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4); Pet. 4. Generally, review is appropriate

under RAP 13.4(b)(4) where the legal issues have significant effect beyond the litigation. *See, e.g., In Re Arnold*, 189 Wn.2d 1023, 1092, 408 P.3d 1091 (2017) ("the likely incorrect holdings . . . affect public safety by removing an entire class of sex offenders from the registration requirements"). QFC utterly fails to explain how this case meets that standard. That is because it cannot.

The legal issue presented here is narrow and niche: whether this employee's wage claim must be arbitrated under the particular language of this CBA. Arbitrability questions are inherently case-specific; they necessarily turn on the specific allegations and the specific wording of the particular agreement. *See, e.g., Kamaya v. American Property Consultants*, *Ltd.*, 91 Wn. App. 703, 721 959 P.2d 1140 (2002) (when "party moves to compel arbitration of a *particular dispute* and the court determines that the parties agreed to arbitrate *that* dispute" court should order arbitration) (emphasis supplied).

Here, the Panel's decision was grounded in the particular facts of this case. Applying long-settled arbitration law, it analyzed whether Respondent's particular claims were contractual or statutory, closely reviewed the specific language of this particular CBA, and affirmed the trial court. In other words, the decision turned on issues unique to this case and its import is therefore confined to those particular issues.

The Court should reject QFC's passing attempt to paint the opinion as something more. QFC is simply wrong when it says the Panel's opinion is one of "first impression" and that it would allow a Plaintiff to skirt arbitration obligations by disguising a claim for breach of a CBA claim as a statutory claim. Pet. 1, 2 & 19. The Panel simply held that because Respondent's claims for minimum wage, overtime and double those damages were statutory, and because the CBA did not contain a clear and unmistakable waiver of the right to bring those claims in court, QFC's motion was properly denied. App. at 1-2. The Panel broke no new legal ground, and there is no "substantial public interest" at play here.

CONCLUSION

For the reasons stated above, the Court should deny review.

RESPECTFULLY SUBMITTED this 6th day of April, 2018.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the 6th day of April, 2018, a true and correct copy of the foregoing was electronically filed via the Court's electronic filing system, which provided notice of said filing to the following:

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Dated this 6th day of April, 2018 at Seattle, Washington.

By: *s/ Angela Tracy*
Angela Tracy, Legal Assistant

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