No. 97429-2
Court of Appeals No. 78356-4-I

IN THE SUPREME COURT OF WASHINGTON

STEVEN BURNETT, individually and on behalf of all others similarly situated,

Respondent,

v.

PAGLIACCI PIZZA, INC.,

Petitioner.

RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW

Toby J. Marshall, WSBA #32726
Erika L. Nusser, WSBA #40854
Blythe H. Chandler, WSBA #43387
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Attorneys for Plaintiff/Respondent

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I. IDENTITY OF RESPONDENT

Steven Burnett worked for Pagliacci Pizza, Inc. as a delivery driver. He filed this action to recover unpaid wages on behalf of himself and a proposed class of pizza delivery drivers. Mr. Burnett respectfully asks this Court to deny Pagliacci's petition for review.

II. INTRODUCTION

Pagliacci moved to compel arbitration of Mr. Burnett's claims. The trial court denied the motion, and the Court of Appeals affirmed. Pagliacci now seeks review on the ground that the lower courts failed to recognize Washington employers can use employee handbooks to "impose mandatory arbitration policies" on their employees. Petition at 4. Pagliacci's arguments ignore a "rule of fundamental importance," which is that "arbitration is a matter of consent, not coercion." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (internal marks and citations omitted); *see also Zuver v. Airtouch Comms. Inc.*, 153 Wn.2d 293, 304, 103 P.3d 753, 760 (2004) (explaining key question is whether employee "lacked meaningful choice" in manner in which agreement to arbitrate was entered). This misapprehension of the law may explain why the company drafted a one-sided arbitration clause and buried it in a 23-page employee handbook that employees were told to read on their own time, but that is not a reason for this Court to review the Court of Appeals' well-reasoned

decision (Opinion).

Pagliacci's petition for discretionary review should be denied. The Court of Appeals applied well-established rules regarding the enforceability of arbitration clauses to the unique facts of this case; Pagliacci has not shown a conflict with any published appellate decision in Washington. And while the issue of when employers can "impose mandatory arbitration policies" on their employees is certainly one of substantial public interest, it is one the Court of Appeals more than adequately addressed in its published opinion finding Pagliacci's arbitration agreement unconscionable and unenforceable.

Pagliacci has also waived many of the arguments made in its petition for review by failing to raise them until a motion for reconsideration in the trial court or a reply brief on appeal.

Steven Burnett filed this case in 2017 to recover unpaid wages for himself and his fellow pizza delivery drivers. After two years, the case has not moved past the pleading stage because of preliminary litigation over arbitration. This Court should deny the petition for review so the parties can finally address the merits of Mr. Burnett's claims. If the Court grants the petition for review, however, it should reformulate the issues raised by Pagliacci and accept review of one additional issue.

III. ISSUES PRESENTED FOR REVIEW

If the Court accepts review, the issues for review raised by Pagliacci should be restated as follows:

1. Was the Court of Appeals correct in holding that the manner in which Pagliacci presented its Mandatory Arbitration Policy to employees was procedurally unconscionable?

2. Was the Court of Appeals correct in holding that Pagliacci's Mandatory Arbitration Policy is substantively unconscionable?

And if the Court accepts review, Mr. Burnett respectfully asks that the Court also accept review of the following issue:

3. Did the Court of Appeals err in holding that Pagliacci's Mandatory Arbitration Policy is not unfairly one-sided because it requires arbitration of only the employee's potential claims against Pagliacci?

IV. STATEMENT OF THE CASE

The issue raised by Pagliacci's petition for review is whether Pagliacci can force the company's pizza delivery drivers to arbitrate wage-and-hour claims. Every judge to consider the question has answered it "no." The Court of Appeals summarized the reasons why: "the circumstances surrounding the formation of the parties' agreement were procedurally unconscionable" and the agreement is substantively unconscionable because it limits "employee's access to substantive

remedies" and discourages them "from pursuing valid claims." Opinion at 1–2. Pagliacci's petition for review fails to show that either conclusion conflicts with a prior published decision of this Court or the Court of Appeals.

Pagliacci hired Mr. Burnett as a pizza delivery driver. At his orientation, Mr. Burnett signed Pagliacci's one-page Employee Relationship Agreement. The Agreement "does not mention arbitration." Opinion at 2. Mr. Burnett was also given a copy of Pagliacci's Little Book of Answers, an employee handbook, which Pagliacci directed him to read at home.[1] Opinion at 2. Pagliacci's employee handbook contains Pagliacci's "F.A.I.R. Policy" and a Mandatory Arbitration Policy, both of which are set forth in full in the Opinion. *Id.* at 3.

The F.A.I.R. Policy provides that an employee "may not commence an arbitration" unless the employee has "submitted the claim for resolution in conformity with the F.A.I.R. Policy and fully complied with the steps and procedures in the F.A.I.R. Policy." *Id.* It further provides: "If you do not comply with a step, rule, or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in any court or other forum, including arbitration." *Id.* The

[1] The Court of Appeals' Opinion refers to the Employee Relationship Agreement as the "ERA" and the Little Book of Answers as the "Little Book."

Mandatory Arbitration Policy requires arbitration of an employee's claims for "illegal harassment or discrimination," unpaid wages, or wrongful termination. *Id.* Pagliacci's Mandatory Arbitration Policy does not authorize or require arbitration of any claim that Pagliacci may have against an employee. *Id.*

Many of the arguments in Pagliacci's petition for review should be deemed waived. First, in its motion to compel arbitration in the trial court, Pagliacci failed to raise the argument that an enforceable arbitration agreement was formed when the company provided the handbook to Mr. Burnett. Pagliacci first cited *Gagliardi v. Denny's Restaurants* for this proposition in its motion for reconsideration in the trial court. *See* Appendix A (trial court briefs). Second, Pagliacci made no argument regarding unconscionability in its opening brief to the Court of Appeals. *See* Appendix B (Opening Brief on Appeal). And third, Pagliacci's current argument that *Gagliardi* precludes a finding of procedural unconscionability appeared for the first time in its reply brief on appeal. *See* Appendix B (Reply Brief on Appeal).

V. ARGUMENTS FOR DENYING REVIEW

A. Pagliacci waived unconscionability arguments based on its contract-by-handbook theory.

In the trial court, Pagliacci first cited the *Gagliardi* case, which was

decided in 1991, in its request for reconsideration. A motion for reconsideration is not an opportunity to present new theories that could have been raised before entry of an adverse ruling. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (finding legal theories raised for first time in motion for reconsideration are waived on appeal)); *see also JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (same). Even in the Court of Appeals, Pagliacci first made the argument it now presses, that *Gagliardi* precludes a finding of procedural unconscionability, in its reply.

Pagliacci's central arguments in the petition for review should be deemed waived. *See Coweiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."). Even if the petition raises debatable issues—and it doesn't—the petition should be denied because Pagliacci's repeated failure to make arguments in a timely manner renders the case a poor vehicle for this Court's review.

B. The decision of the Court of Appeals does not conflict with any other Washington appellate decision regarding employee handbooks.

This Court has not held that "employers can use employee handbooks to create binding contracts." Petition at 10. This Court has held that in some circumstances "employee handbooks give rise to contractual

obligations *on the part of the employer*." *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 432–33, 815 P.2d 1632 (1991) (discussing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984)) (emphasis added). Pagliacci characterizes the issue in *Gagliardi* as whether the employee was bound by the provisions in two handbooks, but that is incorrect. In *Gagliardi*, the issue was whether the *employer* breached its contractual obligations to the employee when it terminated her employment. 117 Wn.2d at 431, 815 P.2d 1362. The Court found the employer was bound by promises it made in its handbooks regarding progressive discipline but could unilaterally modify those terms in subsequent handbooks. *Id.* at 436, 815 P.2d 1362. The employer in *Gagliardi* was not trying to bind the *employee* to any obligation; it was defending a breach of contract action by saying that it met its own obligations under the contract.

Because the Court of Appeals found that Pagliacci's Mandatory Arbitration Policy was incorporated by reference, it did not have to address Pagliacci's arbitration agreement-by-handbook arguments in the context of contract formation. Opinion at 7 n.6. Instead, it addressed and rejected the arbitration agreement-by-handbook argument in the context of procedural unconscionability. Opinion at 13–18. That decision has no impact on whether employees may enforce promises *made by employers*

in handbooks, the issue addressed by the cases on which Pagliacci relies. *See* Opinion at 17 (*Gagliardi* and *Grovier* are about "whether an employer was bound by the promises it made to its employee" and aren't relevant where "Pagliacci seeks to bind its employee.").

To the extent there was any question about whether an employer can "impose" arbitration on its employees by putting an arbitration clause in a handbook the employee never signed, the Court of Appeals answered it in the negative: "Pagliacci cites no Washington authority holding that an employer can foist an arbitration agreement on an employee simply by including an arbitration clause in an employee handbook that is provided to the employee." Opinion at 15. There is no such authority because "[a]s an important policy of contract, one who has not agreed to arbitrate generally cannot be required to do so." *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 934–35, 231 P.3d 1252 (2010). Pagliacci put its arbitration policy in a handbook that employees were told to read "on your own initiative," instead of in the Employee Relationship Agreement employees signed. Opinion at 19. As a result, employees "lacked meaningful choice," regarding the Mandatory Arbitration Policy, making it procedurally unconscionable. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 348–49, 103 P.3d 773 (2004) ("the key inquiry for finding procedural unconscionability is whether [the employee] lacked

meaningful choice").

The Court of Appeals clearly distinguished on its facts *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001). Opinion at 12. In *Tjart*, the employee signed the document that contained the arbitration clause. *Id.* (citing *Tjart*, 107 Wn. App. at 891–92, 28 P.3d 823). In contrast, Mr. Burnett signed Pagliacci's Employee Relationship Agreement, which does not even use the word arbitration. As the Court of Appeals explained, this case is more like *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010). Opinion at 9–12. Pagliacci's petition for review fails to meaningfully engage with the Court of Appeals' discussion of *Tjart* and simply ignores *Mattingly*. There is no conflict between the Court of Appeals' analysis here and *Tjart*.

Finally, Pagliacci baldly asserts that other employers in this state have imposed mandatory arbitration on their employees via handbook as Pagliacci tried to do here. If any other employers have done so, the Court of Appeals has told them those arbitration clauses are procedurally unconscionable. There is no need for further clarification from this Court.

C. The Court of Appeals correctly applied this Court's precedent to find the Mandatory Arbitration Policy substantively unconscionable.

An arbitration clause is substantively unconscionable "where it is overly or monstrously harsh, is one-sided, shocks the conscience, or is

exceedingly calloused." *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 55, 308 P.3d 635 (2013) (affirming refusal to enforce arbitration provision in employment contract in case involving wage and hour violations); *see also Zuver v. Airtouch Comms., Inc.*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004) ("Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.").

The Court of Appeals applied this Court's well-established standards governing whether an arbitration clause in an employment contract is substantively unconscionable. Opinion at 20–27. Pagliacci suggests that unless the one-sidedness in an arbitration clause arises from a term exactly like terms this Court has already ruled unconscionable, the clause must be enforced. *See* Petition at 16–17 (arguing unconscionability analysis is limited to the "type of provision this Court has found to be substantively unconscionable"). This Court has never so held. And Pagliacci's Mandatory Arbitration Policy *is* unfairly one-sided like clauses this Court has ruled unconscionable.

Pagliacci's "F.A.I.R. Policy, which is a prerequisite to arbitration, contains a limitations provision that is overly harsh." Opinion at 21. The Court of Appeals explained that under *Zuver*, "nonmutual provisions in an arbitration agreement are substantively unconscionable when . . . they have the effect of limiting an employee's ability to access substantive

remedies or discouraging an employee from pursuing valid claims." Opinion at 22.

Pagliacci does not argue that the Court of Appeals applied the wrong standards. Instead, Pagliacci argues that the Court of Appeals misread the terms of the Mandatory Arbitration Policy and F.A.I.R. Policy. Pagliacci quarrels with the conclusion that the F.A.I.R. Policy effectively shortens the statute of limitations for former employees because they cannot comply with the F.A.I.R Policy requirement of first reporting a dispute to the employee's supervisor. *See* Opinion at 23.

According to Pagliacci, the "only reasonable" interpretation of the F.A.I.R. Policy is that it is intended to apply to current employees. Petition at 18.[2] But that reading is foreclosed by the plain language of the Mandatory Arbitration Policy. The Mandatory Arbitration Policy provides: "If you believe . . . that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration." Petition at 9; Opinion at 3. The plain language of the handbook requires employees with claims for wrongful termination—who are never current employees—to

[2] Pagliacci made this argument to the Court of Appeals for the first time in reply.

follow the F.A.I.R. policy before they can bring their claims in any other forum.

The Court of Appeals' reading of Pagliacci's agreements is entirely correct. It is Pagliacci that ignores two fundamental rules of contract interpretation: (1) words in contracts are given their plain meaning; and (2) written contracts are construed against their drafters. *See McKasson v. Johnson*, 178 Wn. App. 422, 429, 315 P.3d 1138 (2013). Pagliacci's attempt to rewrite the provisions to save them from unconscionability was properly rejected by the Court of Appeals. *See* Opinion at 23 (rejecting Pagliacci's "liberal interpretation" of language company drafted). This Court has held that parties "should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver." *Gandee*, 176 Wn.2d at 608, 239 P.3d 1197. Nor should employers be able to load their arbitration agreements full of terms intended to discourage employees from bringing claims and then, when challenged in court, offer a liberal interpretation that is contradicted by the plain language the employer drafted.

The language of the F.A.I.R. Policy is mandatory, not permissive. *See* Opinion at 3. There is no exception for former employees or for employees who would be required to report claims against a supervisor to that very same supervisor in order to comply with the "F.A.I.R." policy.

See Opinion at 23, 26. The policy provides that an employee "may not commence an arbitration" or "commence a lawsuit" on a claim unless the employee has submitted the claim in conformity with the F.A.I.R. Policy and "fully complied with the steps and procedures in the F.A.I.R. Policy." Opinion at 3. "If you do not comply with a step, rule or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in any court or other forum, including arbitration." *Id.* The Court of Appeals was also correct in holding that the F.A.I.R. Policy requirement effectively shortens the statute of limitations for all employee claims by "whatever time it takes to complete the procedures set out in the F.A.I.R. Policy." Opinion at 24–26. The Court of Appeals found Pagliacci's limitation on actions unfairly one-sided based on its plain language, not any hypothetical facts. *See* Petition at 17.

Finally, the Court of Appeals was correct that Pagliacci itself at one time believed that the F.A.I.R. requirements applied to former employees. Opinion at 23 n.10. Pagliacci makes the misleading assertion that it has "never argued" that Mr. Burnett waived his right to arbitration because he did not use the F.A.I.R. process. Petition at 10 (emphasis in original). Pagliacci's opening brief in the trial court presented the following as relevant facts: "In violation of the Mandatory Arbitration Policy and signed Employee Relationship Agreement, Plaintiff filed the

instant lawsuit on October 3, 2017. Plaintiff also never requested resolution via Pagliacci's internal F.A.I.R. Policy." Appendix A (Motion to Compel at 3). Whether or not it was an "argument," Pagliacci said that Mr. Burnett acted "in violation" of his agreements with Pagliacci by filing a lawsuit and not requesting resolution of his wage claims via the F.A.I.R. Policy. Mr. Burnett argued to the trial court that "Pagliacci does appear to be preserving the argument that Mr. Burnett failed to comply with FAIR . . . So maybe their intent is to go to arbitration and say this arbitration should be dismissed for failure to comply with a contractual term." Appendix C (CP at 273:2–9). Pagliacci responded with silence. *Id.* (CP 275:11–279:4).

In short, Pagliacci itself once read its agreements to require that both current and former employees comply with the F.A.I.R. Policy before they may commence arbitration. Pagliacci makes no response to the Court of Appeals' conclusion that such a limitation on actions is unfairly one-sided because it discourages employees from pursuing valid claims.

D. The Court of Appeals' analysis of severance does not conflict with this Court's decisions.

The Court of Appeals held that Pagliacci's arbitration clause could not be saved by severance for three reasons: procedural unconscionability cannot be cured by severance; unfairness pervades Pagliacci's Mandatory

Arbitration Policy; and the Policy contains no severance provision. Opinion at 27–28. In arguing the Court of Appeals' Opinion conflicts with this Court's decisions on severance, Pagliacci assumes both that there is no procedural unconscionability and that the F.A.I.R. Policy is the only grounds for finding substantive unconscionability. Neither assumption is correct as discussed above and in the following section. Procedural unconscionability cannot be cured by severance. The substantive unconscionability here cannot be cured because unfairness pervades the arbitration clause and, as discussed in the next section, both sentences of the Mandatory Arbitration Policy are unfairly one-sided.

E. Whether an employer may enforce an agreement to arbitrate only the employee's claims is an issue of substantial public interest on which the Court of Appeals misread *Zuver*.

If this Court accepts review of Pagliacci's petition, it should also address Mr. Burnett's argument that the Mandatory Arbitration Policy is unconscionable because it requires arbitration of only the employee's claims. The Mandatory Arbitration Policy expressly provides that "you" must comply with the company's mandatory arbitration policy:

> If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not

> successful in resolving the dispute, you then submit the dispute to binding arbitration.

Opinion at 3 (emphases added). Pagliacci is not required to arbitrate any claim it may have against an employee—a point Pagliacci has never disputed.

Arbitration provisions that require an employee to arbitrate her claims but do not require the same of her employer are unfairly one-sided and unconscionable. *See Zuver*, 153 Wn.2d at 316–17 & n.16, 103 P.3d 753 (explaining that unilateral arbitration agreements imposed on employee by employer reflect very mistrust of arbitration that FAA is supposed to remedy (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 120–21, 6 P.3d 669 (2000)). The Court's citation with approval to *Armendariz* reflects agreement with the California Supreme Court's holding that a clause requiring arbitration of only an employee's claims against the employer and not the other way around is unfairly one-sided.

The Court of Appeals pointed to language in *Zuver* indicating that lack of mutuality of obligations alone is not enough to render an arbitration clause unconscionable. Opinion at 22. But unlike Pagliacci's arbitration clause, the clause at issue in *Zuver* required arbitration of "any controversy or dispute" between the employee and employer. 153 Wn.2d at 298, 109 P.3d 753. The one-sided limitation related only to remedies.

Mr. Burnett is not arguing that the parties' commitments under an arbitration clause must be the same—but a clause that requires only the weaker party to arbitrate his claims while permitting the stronger party to take any claim it may have to court is unfairly one-sided and unconscionable. *See Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 724, 13 Cal. Rptr. 3d 88 (2004) (holding arbitration clause in an employment contract "may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party").

If the Court accepts Pagliacci's petition for review, it should consider this additional ground for affirmance of the trial court's denial of Pagliacci's motion to compel arbitration.

VI. CONCLUSION

For the foregoing reasons, Mr. Burnett respectfully requests that the Court deny Pagliacci's petition for review. The petition reveals no conflict between the Court of Appeals' decision and any binding precedent. If the Court accepts review, it should also review the issue of whether a provision requiring arbitration of only an employee's potential claims against an employer is substantively unconscionable.

RESPECTFULLY SUBMITTED AND DATED this 12th day of August, 2019.

TERRELL MARSHALL LAW GROUP PLLC

By: _____

Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Erika L. Nusser, WSBA #40854
Email: enusser@terrellmarshall.com
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Attorneys for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I certify that on August 12, 2019, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Michael W. Droke, WSBA #25972
Email: droke.michael@dorsey.com
Jasmine Hui, WSBA #49964
Email: hui.jasmine@dorsey.com
Todd S. Fairchild, WSBA #17654
Email: fairchild.todd@dorsey.com
Email: jaswal.stefanie@dorsey.com
Email: price.molly@dorsey.com
DORSEY & WHITNEY LLP
Columbia Center
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

☐ U.S. Mail, postage prepaid
☐ Hand Delivered via Messenger Service
☐ Overnight Courier
☐ Facsimile
☒ Electronic Service

Attorney for Appellant/Defendant

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of August, 2019.

TERRELL MARSHALL LAW GROUP PLLC

By: _____
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Appellant/Plaintiff

Appendix A

THE HONORABLE CATHERINE SHAFFER
Department 11

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STEVEN BURNETT, PLAINTIFF, vs. PAGLIACCI PIZZA, INC., DEFENDANT.	NO. 17-2-25978-1 SEA DEFENDANT'S MOTION TO COMPEL ARBITRATION Hearing Date: March 9, 2018 Hearing Time: 9:00 AM Before: THE HONORABLE CATHERINE SHAFFER ORAL ARGUMENT REQUESTED

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

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DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

I. INTRODUCTION

Plaintiff Steven Burnett ("Burnett") filed the present action in violation of the parties' agreement to arbitrate. Under the parties' Employee Relationship Agreement, Plaintiff Burnett is obligated to submit any wage disputes to binding arbitration before a neutral arbitrator. All of Plaintiff's claims against Pagliacci must therefore be resolved through arbitration.

II. EVIDENCE RELIED UPON

This Motion to Compel Arbitration relies upon the Declaration of Sasha Mitronovas, Plaintiff Burnett's signed Employee Relationship Agreement, Pagliacci's Little Book of Answers and case law relating to the enforceability of arbitration agreements.

III. STATEMENT OF FACTS

Defendant Pagliacci Pizza, Inc. ("Pagliacci") is a locally-owned pizzeria chain in Washington that sells and delivers pizza. Plaintiff Steven Burnett began his employment on or around October 16, 2015 as a pizza delivery driver for Pagliacci's "Valley Street" store, located at 719 Aurora Avenue North, Seattle, WA, 98109. *See* Declaration of Sasha Mitronovas, ¶ 7. He was fired on June 22, 2017 for a failure to follow Pagliacci rules. Mitronovas Declaration, ¶ 8.

Upon hire, Mr. Burnett was required to attend new employee orientation and sign various documents upon beginning employment. *See* Mitronovas Decl., ¶ 6. Included in the documents were the Employee Relationship Agreement and the "Little Book of Answers" which is incorporated by reference into the Employee Relationship Agreement. Mr. Burnett signed the Employee Relationship Agreement, and thereby agreed to comply with the Little Book of Answers. The Little Book of Answers contains a Mandatory Arbitration Policy on page 18, under the section entitled "Mutual Fairness." *See* Mitronovas Decl., ¶ 5. Mr. Burnett signed his Employee Relationship Agreement on October 16, 2015. *See* Mitronovas Decl., Ex. A.

The Mandatory Arbitration Policy requires a two-step dispute resolution policy. The first step requires employees who believe that they "have not been paid for all hours worked or at less

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

than the rate of pay required by law," to submit the dispute to resolution in accordance with Pagliacci's F.A.I.R. Policy, or the Fair and Amicable Internal Resolution Policy. *See* Mitronovas Decl., Ex. B, p. 18. The F.A.I.R. Policy requires employees to attempt a good faith resolution internally before arbitration. If a resolution cannot be made, the second step requires an employee to submit the dispute to "binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act." *See id.*

In violation of the Mandatory Arbitration Policy and signed Employee Relationship Agreement, Plaintiff filed the instant lawsuit on October 3, 2017. Plaintiff also never requested resolution via Pagliacci's internal F.A.I.R. Policy. Plaintiff filed an Amended Complaint on October 20, 2017. The Amended Complaint alleges seven causes of action, all of which deal with wages owed. Amended Complaint, ¶¶ 6.1 – 12.8. Wage claims are specifically identified as issues to be resolved by mandatory arbitration pursuant to Pagliacci's Mandatory Arbitration Policy. Plaintiff therefore agreed to resolve any and all of his wage disputes through binding arbitration. Defendant's Motion should be granted.

IV. ARGUMENT

A. Washington Law Strongly Favors Arbitration Agreements.

The Court must compel arbitration and dismiss the case because the parties have a contractual agreement to arbitrate wage disputes brought by Mr. Burnett. With limited exceptions inapplicable here, the Washington Supreme Court has held that the Federal Arbitration Act (FAA) applies to all employment contracts like the one signed by Steven Burnett. *See Zuver, v. Airtouch Comm'ns*, 153 Wash. 2d 293, 301 (2004). The FAA states that an arbitration agreement is "'valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* (citing 9 U.S.C. § 2). In accordance with the Supremacy Clause, U.S. Const. art. VI, cl.2, Washington and other states must comply with the policy of the FAA and presume arbitrability. *Mayne v. Monaco Enters., Inc.*, 191 Wash. App. 113, 118, 361 P.3d 264, 267 (2015).

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

As recently as last year, a Washington appellate court reaffirmed the Washington courts' strong presumption in favor of arbitrability. *Marcus & Millichap Real Estate Inv. Servs. of Seattle*, 192 Wn. App. 465, 474, 369 P.3d 503, (2016) (citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. Of Peninsula*, 130 Wn.2d 401, 414, 924 P.2d 13 (1996)); *see also Zuver*, 153 Wash. 2d at 301. "Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Zuver* at 301.

The party opposing arbitration has the burden to show that the agreement is not enforceable. It can do this by showing the agreement was invalid, or procedurally or substantively unconscionable. *Id.* at 302; *Hill v. Garda CL Nw. Inc.*, 179 Wash. 2d 47, 53 (2013).

B. The Parties Agreed to Dispute Plaintiff's Claims Through Binding Arbitration.

Steven Burnett agreed that the exclusive jurisdiction to any wage claims would be binding arbitration. Plaintiff Burnett signed the Employee Relationship Agreement as a condition of employment. *See* Mitronovas Decl., Ex. A. The Employee Relationship Agreement specifically incorporates by reference the Mandatory Arbitration Policy contained in Pagliacci's Little Book of Answers. On this basis alone, Plaintiff agreed to arbitrate his claims. Mr. Burnett might attempt to avoid the compelling effect of the incorporation by reference, but such an argument must fail. Washington courts favor arbitration agreements, and such agreements are presumptively valid and enforceable under Washington law. *Marcus & Millichap,* 192 Wn. App. at 474. Second, courts have found arbitration agreements to exist in much more tenuous contexts. For example, the *Marcus & Millichap* court enforced an arbitration agreement despite the absence of a signed arbitration clause. *See id.* at 474 (compelling arbitration based on an agreement contained in a professional organization's bylaws). Ignorance of the contents of a contract expressed in written form also does not generally affect the liability of the person who signs it. *See Tjart v. Smith Barney, Inc.,* 107 Wn. App. 885, 897, 28 P.3d 823 (2001). Such broad

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

acceptance of arbitration agreements in Washington strongly favors the validity of Plaintiff and Defendant's arbitration agreement.

Moreover, Pagliacci's Mandatory Arbitration Policy states that if a dispute cannot be resolved internally through Pagliacci's F.A.I.R. policy, it must be submitted to "binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act." Mitronovas Decl., Ex. B. The Washington Uniform Arbitration Act contains substantially similar language to the FAA regarding the validity of arbitration agreements, such that agreements are presumed "valid, irrevocable and enforceable save upon grounds as exist in law or in equity..." *See Saleemi v. Doctor's Ass'n.*, 176 Wn.2d 368, 375 (2013) (citing RCW 7.04A.060(1)).

The policy also specifically requires arbitration if the employee believes they have "not been paid for all hours worked or at less than the rate of pay required by law." Mitronovas Decl., Ex. B. All seven causes of action brought by Plaintiff relate to alleged compensation and wages owed to him. Plaintiff's claims therefore fall squarely within the scope of the Mandatory Arbitration Policy. Accordingly, Plaintiff's claims against Pagliacci must be submitted to binding arbitration before a neutral arbitrator.

1. The Employee Relationship Agreement and Mandatory Arbitration Policy are Procedurally Enforceable.

A party objecting to arbitration must prove that it was procedurally unconscionable in order to avoid their agreement. Courts in Washington will determine whether an arbitration agreement is procedurally unconscionable by looking at "the manner in which the contract was entered," whether the employee had a "reasonable opportunity to understand the terms of the contract," and whether the important terms are "hidden in a maze of fine print." *Zuver* at 304.

Here, Plaintiff signed a one page Employee Relationship Agreement, which clearly states in the third paragraph that the employee will "learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to... FAIR Policy." *See* Mitronovas Decl., Ex. A. In the Little Book of Answers, there is a short, plain-language

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

paragraph under "MANDATORY ARBITRATION POLICY" (all caps in original) that informs the employee of the company's mandatory arbitration procedures. Specifically, the Mandatory Arbitration Policy states:

> "If you believe... that you have not been paid for all hours worked or at less than the rate of pay required by law... you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act."

See Mitronovas Decl., Ex. B.

The language of the Employee Relationship Agreement and the Mandatory Arbitration Policy is stated in plain language such that any reasonable layperson could understand it. The text is not hidden or difficult to read in either the Employee Relationship Agreement or the Little Book of Answers. Moreover, all employees, including Plaintiff, are required to go through new employee orientation before commencing employment, where Plaintiff had an open and meaningful opportunity to ask questions or express concerns related to such policy. *See* Mitronovas Decl., ¶ 6. At all times, employees are free and encouraged to ask questions or express concerns about Pagliacci policies.

Further, by signing the Employee Relationship Agreement, Plaintiff expressly agreed to all terms in the Agreement. The last paragraph of the Employee Relationship Agreement states:

> Pagliacci Pizza, Inc. agrees to employ you and you agree to work for it. For good and valuable consideration, the receipt of which is acknowledged, you agree to all the foregoing. This agreement is effective from and after the date of your first shift.

Employees therefore agree to comply with the Mandatory Arbitration Policy. The

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

Employee Relationship Agreement and Mandatory Arbitration Policy are thus procedurally valid.

2. The Employee Relationship Agreement and Mandatory Arbitration Policy are Substantively Valid.

Terms of an agreement are substantively unconscionable when they are "one-sided or overly harsh," "shocking to the conscience," "monstrously harsh," or "exceedingly calloused." *Gandee v. LDL Freedom Enters., Inc.*, 176 Wash. 2d 598, 603 (2013). For example, courts have found an agreement to be substantively unconscionable where the employee is effectively agreeing to a shortened statute of limitations period for specific claims, or where fee-sharing provisions require the loser to pay all costs. *See Hill v. Garda CL Nw., Inc.*, 179 Wash. 2d 47, 56-57 (2013). But even in the event that specific terms of an agreement are found to be substantively unconscionable, courts are still "generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties." *See Zuver* at 320. Courts will sever such unenforceable terms and enforce the remainder of the provision or agreement. *Id.*

Pagliacci's Mandatory Arbitration Policy is substantively fair and valid. It does not require a shortened statute of limitations period, nor does it have any fee shifting or sharing mandates. It simply states if an employee believes they have not been paid for all hours worked or at a rate less than required, that the employee submit the dispute internally through Pagliacci's F.A.I.R. Policy, and then, if unsuccessful, to arbitration. Moreover, the language used to require arbitration for wage disputes is drafted as simply as possible—"if you believe … you have not been paid for all hours worked or at less than the rate of pay required by law… you submit the dispute to resolution…" There is no overly harsh or one-sided term; indeed, the Mandatory Arbitration Policy is provided under the section "Mutual Fairness." Pagliacci drafted the policy in an effort to be as clear as possible to all employees agreeing to it. Finally, the arbitration clause specifically references the Washington Arbitration Act. The reference to the state statute makes the arbitration provision more reasonable and indicative of the parties' intent to arbitrate

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

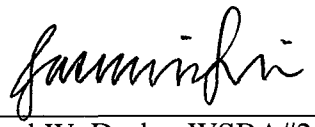
such disputes. The arbitration policy is therefore substantively fair.

V. CONCLUSION

Plaintiff effectively agreed to resolve any and all of his wage disputes through binding arbitration when he signed his Employee Relationship Agreement. The terms of the Mandatory Arbitration Policy and the Employee Relationship Agreement are both procedurally and substantively valid, thereby rendering the agreement to arbitrate valid and enforceable. This Court must compel arbitration for all of Plaintiff's claims against Pagliacci and dismiss Plaintiff's lawsuit in favor of arbitration.

DATED this 1st day of December, 2017.

DORSEY & WHITNEY LLP



Michael W. Droke, WSBA#25972
Droke.michael@dorsey.com
Jasmine Hui, WSBA #49964
hui.jasmine@dorsey.com
Columbia Center
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

CERTIFICATE OF SERVICE

On this 1st day of December, 2017, I caused to be served a true copy of the foregoing on the following:

Toby J. Marshall
tmarshall@terrellmarshall.com
Erika L. Nusser
enusser@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, WA 98103

☒ Via Messenger
☐ Via Facsimile
☐ Via U.S. Mail
☐ Via Overnight Mail

DATED this 1st day of December, 2017.

JASMINE HUI

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

THE HONORABLE CATHERINE SHAFFER
Department 11

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STEVEN BURNETT, individually, and on behalf of all others similarly situated

PLAINTIFF,

vs.

PAGLIACCI PIZZA, INC., a Washington corporation,

DEFENDANT.

NO. 17-2-25978-1 SEA

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION

Hearing Date: March 9, 2018
Hearing Time: 1:30 PM
Before: THE HONORABLE CATHERINE SHAFFER

ORAL ARGUMENT REQUESTED

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

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DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

I. INTRODUCTION

Steven Burnett had full opportunity to understand and agree to arbitration to resolve his disputes when he attended his employee orientation and signed his Employee Relationship Agreement on October 16, 2015. Washington courts favor arbitration, and Pagliacci's agreements are both procedurally and substantively valid. Pagliacci's Motion should be granted.

II. EVIDENCE RELIED UPON

Mitronovas Declarations, exhibits thereto, and pleadings and papers filed.

III. STATEMENT OF FACTS

Mr. Burnett admits attending the new employee orientation at the Valley Street store, where he received Pagliacci's Little Book of Answers. *See generally*, Burnett Decl. Mr. Burnett could ask questions regarding the F.A.I.R. and Mandatory Arbitration Policies during orientation. By signing his Employee Relationship Agreement, he agreed to resolve any of the underlying claims in this lawsuit through binding arbitration.

IV. ARGUMENT

A. Pagliacci's Motion Must Be Granted Because Washington Strongly Favors Arbitration, and Plaintiff Concedes that Washington Law Applies.

There is strong public policy in Washington favoring arbitration. *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87 (2010). Washington is constitutionally required to comply with the Federal Arbitration Act (FAA) and presume arbitrability. *See Mayne v. Monaco Enters., Inc.*, 191 Wash. App. 113, 118 (2015). The Washington Supreme Court holds that the FAA applies to employment contracts like the one signed by Mr. Burnett. *See Zuver v. Airtouch Comm'ns*, 153 Wash. 2d 293, 301 (2004). *Zuver* does not require interstate commerce to enforce an employment-based arbitration agreement as Mr. Burnett argues. Nonetheless, Pagliacci products critical to Mr. Burnett's employment as a delivery driver are shipped from local sources outside Washington, including its pizza boxes, ovens, flour, soft drinks, and other items. Supplemental Declaration of Sasha Mitronovas, ¶ 2. The FAA therefore applies and compels

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

arbitration.

Mr. Burnett's circular argument is also a red herring — by stating that the FAA does not apply, he concedes the Washington Arbitration Act applies. *See* Opposition at footnote 1, citing *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783 (1991). Either way, this agreement must be enforced.

B. Washington Law Compels Enforcement of the Arbitration Agreement Because It is Both Procedurally and Substantively Valid.

Mr. Burnett admits that the Washington Arbitration Act is substantively similar to the FAA. Opp. Brf. at 7. *See also, Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 375 (2013). Both statutes place arbitration agreements on equal footing with other contracts. *See* Opp. Brf. at 7; *see also Mendez v. Palm Harbor Homes, Inc.*, 111 Wash. App. 446, 454 (2002). Washington courts determine an agreement's validity by analyzing whether the contract is procedurally and substantively valid. *See Mayne*, 191 Wash. App. at 118. Pagliacci satisfied both elements.

C. The Arbitration Agreement is Procedurally Valid Because Mr. Burnett Had Meaningful Choice to Understand the Clear, Plain, and Simple Terms of His Agreement.

Pagliacci disputes that this common handbook provision is an adhesion contract. But that alone does not render it procedurally unconscionable. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 348 (2004). Because Mr. Burnett had full opportunity to understand the agreement, which was not in fine print, he was given meaningful choice to understand and accept the agreement.

1. Mr. Burnett Had Full and Reasonable Opportunity to Understand the Terms of the Arbitration Policy.

Mr. Burnett had full opportunity to understand the Mandatory Arbitration Policy. He tries to excuse his failure to take this opportunity by citing *Mattingly v. Palmer Ridge Homes LLC*. *See* Opp. Brf. at 9. The Mattinglys sued over a home buyers' warranty contract which stated the signers had "read a sample copy of the Warranty Booklet..." that ultimately contained the arbitration provisions. *Id.* at 383. Unlike Mr. Burnett who received all documents upon hire, the Mattinglys did not receive the Warranty Booklet until one year after signing the underlying contract. *Id.* at

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

391. There was no record showing the Mattinglys even knew of the booklet's contents. *See Id.* In those circumstances, "there was no evidence that the Mattinglys had reasonable opportunity to understand the terms..." *See Mattingly*, 157 Wn. App. 376, 392 (2010).

Mr. Burnett received the Little Book of Answers and the Employee Relationship Agreement simultaneously at his orientation. *See* Burnett Decl., ¶ 7, 8. His argument that the Employee Relationship Agreement does not address the arbitration policy and directs employees not to read the Little Book directly conflicts with the sentence: "[o]n your own initiative you will learn and comply with the rules and policies in the Little Book of Answers, including those that relate to...FAIR Policy." Mitronovas Decl., Exh. B.

Mr. Burnett's self-serving claims contradict the undisputed presentation in the orientation, which Mr. Burnett admits attending. *See* Burnett Decl., ¶ 3. The orientation's purpose is to address Pagliacci's employment policies, and specifically, the Little Book of Answers. Mitronovas Supp. Decl., ¶ 3. By even flipping through the "Little Book" during the orientation, any reasonable person would notice the F.A.I.R. and Mandatory Arbitration Policies. The booklet takes the average reader just minutes to review. Mr. Burnett could ask questions if desired. He had full, reasonable opportunity to understand the terms of his agreement to arbitrate.

2. The Employee Relationship Agreement and the Mandatory Arbitration Policy Are Clear, Simple, and Presented Upon Hire.

Washington Courts have long held that parties to a contract shall be bound by its terms, and complete ignorance of contract contents does not excuse enforcement against a signer. *See Zuver* at 302; *see also Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 887. Pagliacci's direct, explicit and clear incorporation by reference is procedurally valid. *See Zuver* at 307 (finding no procedural unconscionability where an employee received the agreement with five other attachments, and the agreement was underlined, bolded, and in capital letters).

The signed Employee Relationship Agreement is a single page. Mitronovas Decl., Ex. A. The third paragraph, "Rules and Policies," states: "On your own initiative you will learn and

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

comply with the rules and policies outlined in our Little Book of Answers, including those that relate to…FAIR Policy." Mitronovas Decl., Ex. A. This simple language is read by employees before signing, placing them on clear notice of the Little Book of Answers and F.A.I.R. Policy.

The "Little Book" is exactly that: a little booklet comprising core policies. Unlike dense insurance contracts, the book consists of half-pages on standard paper, each page containing approximately 45-50 lines, including the normal size typeface, large, capitalized headings, and white space. *See* Mitronovas Decl., Exh. B. Courts have found no procedural unconscionability in similar contracts. *See Zuver* at 307.

The first page of the "Little Book" lists its contents. Mitronovas Decl., Ex. B at 3. "MUTUAL FAIRNESS BENEFITS" directed Mr. Burnett to the correct page. There, a white-on-black page reads "MUTUAL FAIRNESS" and provides a short description of the section's contents. Mitronovas Decl., Ex. B at 16. On the counter-page, the F.A.I.R. Policy is distinguished clearly, in bold and in capital letters. On the following page, the Mandatory Arbitration Policy is identically distinguished—in plain sight, bold and capital letters. Mitronovas Decl., Ex. B at 17-18.

The Employee Relationship Agreement, F.A.I.R. and Mandatory Arbitration Policies were clearly presented, not buried in fine print. The arbitration agreement was procedurally valid.

D. The Arbitration Agreement Is Substantively Fair, Mutual, and Understandable.

Pagliacci's simple arbitration agreement is not "one-sided or overly harsh," "shocking to the conscience," "monstrously harsh," or "exceedingly calloused." *See Gandee v. LDL Freedom Enters., Inc.*, 176 Wash. 2d 598, 603 (2013). Plaintiff argues the agreement is one-sided because it references the term "you," or Mr. Burnett, yet the policy does not exempt Pagliacci. Instead, it's under the title, "MUTUAL FAIRNESS" (caps in original). *Gandee*'s serial, dicta recitation including the phrase "one-sided or overly harsh" must also be reviewed in the context of whether it is "shocking to the conscience." The Employee Relationship Agreement states in the right-

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

hand corner: "Pagliacci Pizza, Inc. agrees to employ you and you agree to work for it. For good and valuable consideration, the receipt of which is hereby acknowledged, you agree to all the foregoing." Mitronovas Decl., Ex. A. Mutual agreement is placed directly above the signature line.

The Little Book of Answers is remarkably mutual. Under the section entitled "MUTUAL FAIRNESS," Pagliacci states: "[w]e want respect, dignity and fairness to be a two-way street at Pagliacci Pizza. If this isn't happening for you, we want to know so we can fix it." Mitronovas Decl., Ex. B at 17. The phrase "two-way street" directly contradicts any argument that the Agreement is "one-sided." The language is fair, mutual, and not the kind of monstrously harsh agreement invalidated by courts.

Mr. Burnett unsuccessfully bootstraps the "Limitations on Action" provision to a shortened statute of limitations period absent in the document itself. *See* Opp. Brf. at 12, citing *Hill v. Garda CL Nw., Inc.*, 179 Wash. 2d 47, 55 (2013) (mandatory, specific thirty-day notice of potential claims found substantively unconscionable). Pagliacci's arbitration policy contains no such prerequisite. It is also free of any fee-shifting mandates the *Gandee* court found unconscionable. Pagliacci's policy merely contains a permissive ("may") mechanism and a process for employees to voice concerns.

That Pagliacci may (but did not) update the arbitration section of the Little Book of Answers does not render the policy unenforceable. In *Al-Safin v. Circuit City Stores*, the employer tried to enforce an arbitration agreement it amended four years after the employee already left the company. *Al-Safin,* 394 F.3d 1254, 1256 (9th Cir. 2005). That modification was invalidated, yet the court enforced the original arbitration agreement. *See Al-Safin* at 1257. Here, Pagliacci's is the same agreement Mr. Burnett signed in 2015.

Finally, should the court find any provision of the arbitration policy unconscionable, the court should sever those terms and enforce the remaining terms. *Gandee* 176 Wash. 2d at 607.

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

The first sentence states: "[t]he company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits." Mitronovas Decl., Ex. B at 18.

Mr. Burnett admits that Pagliacci drafted a clear, simple and short policy. *See* Opp. Brf. at 14. The arbitration policy is substantively fair and must be enforced.

V. CONCLUSION

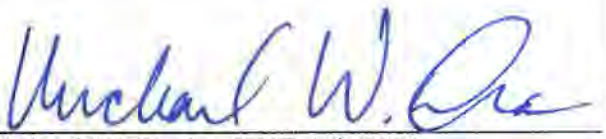
This is a simple motion to enforce a clear, concise and FAIR (as the policy implies) requirement to arbitrate. Mr. Burnett effectively agreed to resolve any and all of his wage disputes through binding arbitration when he signed his Employee Relationship Agreement. Pagliacci's Motion should be granted.

VI. LCR 7(B)(V) VERIFICATION

I certify that this memorandum contains 1,729 words, in compliance with the Local Civil Rules.

DATED this 5th day of March, 2018.

DORSEY & WHITNEY LLP



Michael W. Droke, WSBA#25972
droke.michael@dorsey.com
Jasmine Hui, WSBA #49964
hui.jasmine@dorsey.com
Columbia Center
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

CERTIFICATE OF SERVICE

On this 5th day of March, 2018, I caused to be served a true copy of the foregoing on the following:

Blythe Chandler
bchandler@terrellmarshall.com
Toby J. Marshall
tmarshall@terrellmarshall.com
Erika L. Nusser
enusser@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, WA 98103

☐ Via Messenger
☒ Via ECF Notification
☐ Via Facsimile
☐ Via U.S. Mail
☐ Via Overnight Mail

MICHAEL W. DROKE

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

THE HONORABLE CATHERINE SHAFFER
Department 11

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STEVEN BURNETT,

PLAINTIFF,

vs.

PAGLIACCI PIZZA, INC.,

DEFENDANT.

NO. 17-2-25978-1 SEA

DEFENDANT'S MOTION FOR RECONSIDERATION OF MARCH 9, 2018 ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

I. INTRODUCTION AND RELIEF REQUESTED

Defendant Pagliacci Pizza, Inc. ("Pagliacci") moved to compel arbitration based on the mandatory arbitration clause in Pagliacci's employee handbook, called the "Little Book of Answers" (hereinafter "Handbook"). The Court denied Paglaicci's motion, finding "there is no agreement to arbitrate." Order Denying Defendant's Motion to Compel Arbitration (March 9, 2018) at ¶ 7. Pagliacci respectfully requests that the Court reconsider its ruling in light of the Washington State Supreme Court's holding in *Gaglidari v. Denny's Rests.*, 117 Wn.2d 426, 815 P.2d 1362 (1991) and similar Washington State appellate decisions.

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

The Supreme Court held that all three elements of a binding contract (offer, acceptance and consideration) are met when an employer reasonably notifies an employee of rules and policies contained in an employee handbook, and the employee begins or continues employment with notice of the handbook. *Id.* at 432-34, 815 P.2d at 1366-67. The undisputed evidence shows that Plaintiff Steven Burnett ("Mr. Burnett") was notified of Pagliacci's Handbook when he first agreed to work for Pagliacci, and that Mr. Burnett began and continued his employment with Pagliacci after being notified of the Handbook. A binding agreement to arbitrate was formed under the Supreme Court's ruling in *Gaglidari*.

Given the legal standard set forth in *Gaglidari* and similar appellate cases, there is no evidence or reasonable inference from the evidence to justify the March 9, 2018 Order Denying Defendant's Motion to Compel Arbitration, and that decision is contrary to law. CR 59(7).

This motion is supported by the Declaration of Todd S. Fairchild ("Fairchild Decl.") and Exhibits A through D thereto, and by the Amended Class Action Complaint in this case (Dkt. No. 7).

II. STATEMENT OF FACTS

Mr. Burnett has declared under penalty of perjury that during his initial orientation at Pagliacci, he "was given a copy of the Little Book of Answers and told to read it at home." *See* Burnett Decl. at ¶ 8. It is undisputed that Mr. Burnett began—and continued—to work at Pagliacci after receiving actual notice of the Handbook. *See* Amended Class Action Complaint ¶ 3.1 ("Plaintiff worked as a delivery driver for Pagliacci from approximately October 2015 to July 2017."). The Handbook states on page 1:

> **OBLIGATION**
>
> By working here, you agree to comply with the contents of this book and with the written plans and policies that are referenced in it.

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

Fairchild Decl., Ex. B at 1. These facts alone created a binding agreement under the legal standard set forth in *Gaglidari* (discussed in Section V, *infra*). As shown below, there are good policy reasons why Washington and many other states recognize this procedure for using employee manuals or handbooks to create binding agreements between an employer and its employees.

In addition, and although **not** required under *Gaglidari* or its progeny, the "Employee Relationship Agreement" signed by Mr. Burnett states: "On your own initiative **you will learn and comply with** the rules and policies in our Little Book of Answers …." Fairchild Decl., Ex. A (emphasis added). The Employee Relationship Agreement further states, directly above the signature lines:

> **EMPLOYMENT**
>
> Pagliacci Pizza, Inc. agrees to employ you and you agree to work for it. For good and valuable consideration, the receipt of which is hereby acknowledged, **you agree to all the foregoing.** This agreement is effective from and after the date of your first shift.

Fairchild Decl., Ex. A.

Thus, the Handbook states that it creates a binding "OBLIGATION" to comply with the contents of the Handbook, and the Employee Relationship Agreement states that "by working here" Mr. Burnett "agree[d] to comply" with the rules and policies contained in the Handbook. These statements perfectly track Washington law regarding use of employee handbooks to create binding agreements with employees.

One of the policies that Mr. Burnett agreed to comply with is the Mandatory Arbitration Policy:

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

MANDATORY ARBITRATION POLICY

> **The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits.** If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, **you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.**

Fairchild Decl., Ex. B at 18.

As shown below, it was not necessary for Mr. Burnett's Employee Relationship Agreement to incorporate by reference the terms of the Handbook. Nonetheless, the parties agree that the Employee Relationship Agreement did, in fact, incorporate the Handbook by reference. During the hearing on Pagliacci's motion, counsel for Mr. Burnett made the following judicial admissions in open court:

> THE COURT: Are you conceding that this arbitration clause is part of your client's employment agreement?
>
> MS. CHANDLER: I believe that the -- **it is incorporated by reference into the agreement.**
>
> THE COURT: Why do you think that?
>
> MS. CHANDLER: **I think the case law discussing incorporation by reference suggests that when there is a clear reference to a document that is available to the person signing the contract, incorporation by reference is valid.**
>
> I did consider that issue quite extensively, but I can see that the court is aware of the way in which this contract was presented.
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DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

> MS. CHANDLER: I think it's procedurally unconscionable in the manner in which it presents – or incorporates the Little Book of Answers. **I think the language that is probably sufficient for incorporation by reference is found under "rules and policies" in the employee relationship agreement. It says, "On your own initiative, you will learn and comply with the rules and policies outlined in our Little Book of Answers**, including those that relate to positive attitude, public safety, company funds, tips, and the FAIR policy.
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> So I think the key language there, related to whether or not that provision gives Mr. Burnett or other prospective employees notice that they are purportedly waiving arbitration when they sign this contract, or a fair opportunity to consider the arbitration provision that is found in the separate document, the Little Book of Answers --

Fairchild Decl., Ex. D at 4-5.

III. STATEMENT OF ISSUES

Whether Mr. Burnett agreed to arbitrate disputes concerning his employment when Pagliacci provided Mr. Burnett with a copy of its employee Handbook, and Mr. Burnett began and continued to work at Pagliacci with actual notice of the Handbook? (Answer: Yes.)

IV. EVIDENCE RELIED UPON

This motion is supported by the Declaration of Todd S. Fairchild ("Fairchild Decl."), and Exhibits A through D thereto, and by the Amended Class Action Complaint in this case (Dkt. No. 7).

V. ARGUMENT AND AUTHORITY

A. The Objective Manifestations of the Parties Show that Mr. Burnett Agreed to Comply with the Rules and Policies Set Forth in the Handbook

The issue presented by this motion is a question of fact, not an issue of law. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-23, 826 P.2d 664, 669-70 (1992). The Supreme Court held:

> We note that some courts have concluded that whether a handbook constitutes a contract is a matter of law for the court. However, "[t]he more modern view—and the view in keeping with the modern analysis of other types of contracts—is that the question whether employee handbook provisions are part of the contract is a question of fact. That is, the analysis is the same as that generally used to

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

> determine whether a contract has been formed: Would a reasonable person **looking at the objective manifestations of the parties' intent** find that they had intended this obligation to be part of the contract?"

Id., quoting 1 L. Larson, Unjust Dismissal § 8.02, at 8-5 (1988) (emphasis added).

Although this motion presents an issue of fact, the facts relevant to this motion are **undisputed**. The "objective manifestations of the parties' intent" are: (1) Pagliacci notified Mr. Burnett in the Employee Relationship Agreement that he was required to "learn and comply with the rules and policies outlined in our Little Book of Answers" (Fairchild Decl., Exs. A and B); (2) Pagliacci gave Mr. Burnett a copy of the Handbook, and told him to read it (Fairchild Decl., Ex. C - Burnett Decl. at ¶ 8); (3) the Handbook states on page 1: "OBLIGATION -- By working here, you agree to comply with the contents of this book and with the written plans and policies that are referenced in it" (Fairchild Decl., Ex. B at 1); and (4) Mr. Burnett began and continued to work at Pagliacci after being notified that he was required to comply with the Handbook (Fairchild Decl., Ex. C; Amended Class Action Complaint ¶ 3.1).

B. A Binding Arbitration Agreement Was Formed When Mr. Burnett Received Notice of the Pagliacci Handbook and Continued His Employment with Pagliacci

In 1984, the Washington State Supreme Court held that an employee policy manual can create binding legal obligations. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 229, 685 P.2d 1081, 1087 (1984) ("absent specific contractual agreement to the contrary, we conclude that the employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship.") The Supreme Court revisited the issue seven years later in *Gaglidari, supra*. In that case, the Court held that an employee handbook created a binding agreement where the employee (like Mr. Burnett) received a copy of the handbook on her first day of work, and (like Mr. Burnett) signed a form agreeing to abide by the rules. *Gaglidari*, 117 Wn.2d at 433-34, 815 P.2d at 1366-67. The Court held:

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

> In *Thompson*, we held an employment relationship terminable at will can be modified by statements contained in policy manuals or handbooks. *Thompson*, 102 Wn.2d at 228. The concepts of offer, acceptance and consideration are requisite to a contract analysis of employee handbooks. *Thompson*, 102 Wn.2d at 228. . . . [In this case, the] handbook formed a contract between defendant and plaintiff. Defendant extended plaintiff an offer by giving her the manual and explaining its provisions. Plaintiff accepted the offer by signing the acknowledgment form agreeing to abide by its provisions. The consideration is found in plaintiff actually working for defendant. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983) (**the handbook language constitutes the offer; the offer is communicated by the dissemination of the handbook to the employee; the employee's retention of employment constitutes acceptance; and by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration**).

Gaglidari, 117 Wn.2d at 433-34, 815 P.2d at 1366-67 (citation omitted). *See Parker v. Skagit/Island Head Start*, No. 35481-7-I, 1996 Wash. App. LEXIS 463, *9 (Sept. 30, 1996) ("Parker implies that her situation is like that of the plaintiff in *Gaglidari*, in which an employment contract was created when the employer gave Ronda Gaglidari an employee handbook, *Gaglidari* signed an acknowledgment form, then worked for the defendant.")

This legal standard was applied by the Washington State Court of Appeals in *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 145 P.3d 1253 (2006). The Court held:

> The same rule applies in at-will employment agreements, where an employer may unilaterally change policies and procedures set forth in an employee handbook so long as the employee receives reasonable notice of the change. In such cases, **a new contract is formed when the employer communicates the new terms (offer), the employee works after receiving notice (acceptance), and the employee continues in employment although free to terminate (consideration).**

Cascade Auto Glass, 135 Wn. App. at 768-69, 145 P.3d at 1257, *citing Govier v. N. Sound Bank*, 91 Wn. App. 493, 498, 957 P.2d 811 (1998) and *Gaglidari*, 117 Wn.2d at 433-34. *See Browning v. 24 Hour Fitness, Inc.*, No. 05-5732, 2006 U.S. Dist. LEXIS 3386, *3-5, 2006 WL 151933 (W.D. Wash. Jan. 19, 2006) ("In Washington, as in many jurisdictions, an Employee Handbook

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

can create a contract between the parties."); *Sampson v. Jeld-Wen Inc.*, No. 15-03025, 2015 U.S. Dist. LEXIS 181232, *7-9 (E.D. Wash. Dec. 18, 2015) ("Sufficiently strong language in an employee handbook can constitute offer, and the continuing work of employees after the introduction of the handbook can constitute acceptance.")

In the instant case, Mr. Burnett acknowledges receiving a copy of the Pagliacci employee Handbook and being told to read it. *See* Burnett Decl. at ¶ 8. "Actual notice is reasonable notice." *Govier*, 91 Wn. App. at 502, 957 P.2d at 817, *citing Gaglidari*, 117 Wn.2d at 435 (other citations omitted). Mr. Burnett began—and continued—to work for Pagliacci after receiving actual notice of the Handbook.

Virtually all companies that employ a significant number of employees use employee handbooks to govern the terms of the employment relationship. There are legitimate policy reasons why this procedure is blessed by the courts. As held by the Washington State Court of Appeals: "[I]n the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change. **An employer that could not change its policies without renegotiating with each employee could find itself obligated in a variety of different ways to any number of different employees.** The resulting confusion and uncertainty would not be conducive to harmonious labor-management relations." *Govier*, 91 Wn. App. at 500-01, 957 P.2d at 816 (emphasis added) (citations and internal punctuation omitted).

C. The Obligations of the Handbook Are Incorporated by Reference into the Employee Relationship Agreement

As shown by the cases cited above, an employee does **not** need to sign an agreement or any other document in order to form a binding agreement to comply with the terms of an employee handbook. The agreement is formed when the employee receives reasonable notice of the terms of the Handbook, and then begins or continues working for the employer.

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

But even assuming that a signed document was required, there is no specific language needed to incorporate the terms of a separate writing into an agreement. For example, the words "incorporated by reference" were not used in the following cases, but the courts nevertheless found that the terms of various documents were incorporated into an agreement: *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941, 943-44 (1994) (finding that a policy of title insurance covered an easement described in a separate document mentioned in the property description); *Brown v. Poston*, 44 Wn.2d 717, 719, 269 P.2d 967, 968 (1954) (where a subcontractor contracted to perform plastering work "as per plans and specifications," both of those documents were incorporated by reference into the contract); *Washington Trust Bank v. Circle K Corp.*, 15 Wn. App. 89, 93, 546 P.2d 1249, 1252 (where a memorandum to lease referred to an earlier contract between the parties, the memorandum was held to have incorporated the terms of the earlier contract by reference), *review denied*, 87 Wn.2d 1006 (1976); *Turner v. Wexler*, 14 Wn. App. 143, 148, 538 P.2d 877, 880 (where a real estate contract referred to an earlier real estate contract between parties, the terms of the earlier contract were held to be incorporated by reference), *review denied*, 86 Wn.2d 1004 (1975).

In the instant case, the Employee Relationship Agreement specifically referenced the Pagliacci Handbook, and specifically informed Mr. Burnett that he was required to "learn and comply with the rules and policies" set forth in the Handbook. Fairchild Decl., Ex. A. Although not required by *Paglidari* and its progeny, these words are sufficient under Washington law to incorporate the Handbook by reference.

D. The In-Court Statements by Mr. Burnett's Counsel Constitute Judicial Admissions that the Pagliacci Handbook is Incorporated by Reference into the Employee Relationship Agreement

Mr. Burnett's counsel stated three times in open court that the Little Book of Answers is incorporated by reference into the Employee Relationship Agreement. Fairchild Decl., Ex. D at

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

4-5. Those statements are judicial admissions. RCW 2.44.010; CR 2A; *see* K. Tegland, 5B Wash. Prac., Evidence § 801.54 (6th Ed. 2016). Judicial admissions:

> have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Such admissions are proof possessing the highest possible probative value. Indeed, 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.

Mukilteo Ret. Apartments, LLC v. Mukilteo Investors LP, 176 Wn. App. 244, 256 n.8, 310 P.3d 814, 820 n.8 (2013) (citations and internal punctuation omitted).

VI. CONCLUSION

For the foregoing reasons, Pagliacci respectfully requests that the Court reconsider its March 9, 2018 Order Denying Defendant's Motion to Compel Arbitration, and enter an Order dismissing this action with prejudice in favor of arbitration.

RESPECTFULLY SUBMITTED this 19th day of March, 2018.

I certify that this memorandum contains 2,843 words, in compliance with the Local Civil Rules.

DORSEY & WHITNEY LLP

/s/ Todd S. Fairchild

Todd Fairchild, WSBA #17654
Fairchild.todd@dorsey.com
Michael W. Droke, WSBA #25972
droke.michael@dorsey.com
Jasmine Hui, WSBA #49964
Hui.jasmine@dorsey.com
Columbia Center
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

Attorneys for Defendant
PAGLIACCI PIZZA, INC.

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

CERTIFICATE OF SERVICE

On this 19th day of March, 2018, I caused to be served a true copy of the foregoing on the following:

Toby J. Marshall
Erika L. Nusser
Blythe Chandler
Terrell Marshall Law Group
936 North 34th Street, Suite 300
Seattle, WA 98103

tmarshall@terrellmarshall.com
enusser@terrellmarshall.com
bchandler@terrellmarshall.com

- ☐ Via Messenger
- ☒ Via Electronic Mail
- ☒ Via Electronic Filing
- ☐ Via U.S. Mail
- ☐ Via Overnight Mail

DATED this 19th day of March, 2018.

/s/ Jackie Slavik
Jackie Slavik

DORSEY & WHITNEY LLP
COLUMBIA CENTER
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

Appendix B

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

STEVEN BURNETT,

Respondent,

vs.

PAGLIACCI PIZZA, INC.,

Appellant.

NO.: 78356-4-I

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Pagliacci Pizza, Inc. ("Employer") is a pizzeria chain that employs hundreds of employees at dozens of locations in the greater Seattle area. Appellee Steven Burnett ("Employee") was formerly employed by Employer as a pizza delivery driver. After Employee ceased working for Employer, he filed a putative class action lawsuit in the Superior Court of Washington alleging 'wage and hour' claims under various municipal ordinances and state laws and regulations. CP 1-20. In essence, Employee alleges that Employer failed to provide required compensation, rest breaks and meal breaks to Employee and to other pizza delivery drivers formerly or currently employed by Employer. *Id.*

Employer moved to compel arbitration of Employee's claims based on the Mandatory Arbitration Policy contained in Employer's employee handbook, called the Little Book of Answers (the "Handbook"). CP 71. The Superior Court denied Employer's motion, finding: "The Court finds there is no agreement to arbitrate." CP 227. Employer moved for reconsideration (CP 228-320), which was denied. CP 321-22.

The Superior Court erred in denying the Motion to Compel Arbitration. The Mandatory Arbitration Policy contained in the Handbook created a binding agreement to arbitrate under the Washington State Supreme Court's holding in *Gaglidari v. Denny's Rests.*, 117 Wn.2d 426,

815 P.2d 1362 (1991) and similar Washington State appellate decisions. The Supreme Court has held that all three elements of a binding contract (offer, acceptance and consideration) are present when an employer reasonably notifies an employee of rules and policies contained in an employee handbook, and the employee begins or continues employment with notice of the handbook. *Gaglidari*, 117 Wn.2d at 432-34, 815 P.2d at 1366-67.

The undisputed evidence shows that Employee received a copy of the Handbook when he first came to work for Employer, and Employee began and continued his employment after being notified of the Handbook. The Handbook contains a Mandatory Arbitration Policy for disputes arising out of the employment relationship. A binding agreement to arbitrate was formed under the Supreme Court's ruling in *Gaglidari*. In addition, and although not required by *Gaglidari*, the Handbook was incorporated by reference into a written Employee Relationship Agreement signed by Employee. Thus, Employee expressly agreed to the Mandatory Arbitration Policy contained in the Handbook.

Given the undisputed evidence and the legal standard set forth in *Gaglidari* and similar appellate cases, the Superior Court erred as a matter of law in denying Employer's Motion to Compel Arbitration. This Court

should reverse and remand with instructions to stay the Superior Court action in favor of mandatory arbitration.

II. ASSIGNMENT OF ERROR

The Superior Court erred as a matter of law in denying Employer's Motion to Compel Arbitration. CP 226-27.

A. Issues

1. Did Employee agree to arbitrate disputes arising from his employment where he began and continued his employment with actual notice of the Handbook containing the Mandatory Arbitration Policy? (Answer: Yes.)

2. Did the Superior Court commit reversible error when it found "there is no agreement to arbitrate" and denied Employer's Motion to Compel Arbitration and Motion for Reconsideration? (Answer: Yes.)

3. Should this Court reverse the Superior Court's Order denying Employer's Motion to Compel Arbitration, and remand with instructions to stay the Superior Court lawsuit pending arbitration? (Answer: Yes.)

III. STATEMENT OF THE CASE

A. Employee Began and Continued His Employment After Receiving Actual Notice of the Handbook Containing the Mandatory Arbitration Policy

Employer is a pizzeria chain that employs hundreds of employees at dozens of locations in the greater Seattle area. CP 21. In October of 2015, Employee began working for Employer as a pizza delivery driver. CP 58. Employee has declared under penalty of perjury that during his initial orientation he "was given a copy of the Little Book of Answers and told to read it at home." CP 142 at ¶ 8. It is undisputed that Employer began—and continued—his employment after receiving actual notice of the Handbook. CP 3 at ¶ 3.1 ("Plaintiff worked as a delivery driver for Pagliacci from approximately October 2015 to July 2017.")

The Handbook states on page 1:

OBLIGATION

> By working here, you agree to comply with the contents of this book and with the written plans and policies that are referenced in it.

CP 62.

One of the policies that Employer agreed to comply with is the Mandatory Arbitration Policy set forth in the Handbook:

MANDATORY ARBITRATION POLICY

> **The company has a mandatory arbitration policy with which you must comply for the binding resolution**

> **of disputes without lawsuits.** If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, **you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.**

CP 71 (emphasis added).

These facts alone created a binding agreement to arbitrate employment-related disputes. As shown below, there are good policy reasons why Washington State and many other states recognize this procedure for using employee manuals or handbooks to create binding agreements between an employer and its employees.

B. The Handbook Was Incorporated by Reference into the Employee Relationship Agreement Signed by Employee

In addition, and although not required under Washington State law, Employee signed an "Employee Relationship Agreement" in which he agreed to "learn and comply with the rules and policies outlined in" the Handbook. CP 58. The first paragraph of the Employee Relationship Agreement states:

> **MY COMMITMENT**
>
> At Pagliacci Pizza respect, dignity and fairness are intended to be a two-way street. The following agreements and their written policies help make that happen and in consideration

> of my employment by Pagliacci Pizza, **I agree to comply with them**.

CP 58 (emphasis added). The Employee Relationship Agreement further states:

RULES AND POLICIES

> On your own initiative **you will learn and comply with the rules and policies in our Little Book of Answers** … .

CP 58 (emphasis added). Directly above the signature lines, the Employee Relationship Agreement states:

EMPLOYMENT

> Pagliacci Pizza, Inc. agrees to employ you and you agree to work for it. For good and valuable consideration, the receipt of which is hereby acknowledged, **you agree to all the foregoing.** This agreement is effective from and after the date of your first shift.

CP 58 (emphasis added).

Thus, the Handbook states that it creates a binding "OBLIGATION" to comply with the contents of the Handbook (CP 62), and the Employee Relationship Agreement states that "by working here" Employee "agree[s] to comply" with the rules and policies contained in the Handbook. CP 58. The express, written agreement signed by the Employee goes beyond the requirements of Washington law for creating a binding agreement using an employee handbook.

C. Employee Admits that the Handbook Is Incorporated by Reference into the Employee Relationship Agreement

It was not necessary under Washington law for the Employee Relationship Agreement to incorporate by reference the terms of the Handbook. Nonetheless, the parties agree that the Employee Relationship Agreement did, in fact, incorporate the Handbook by reference. During the hearing on the Motion to Compel Arbitration, counsel for Employee made the following judicial admissions in open court:

> THE COURT: Are you conceding that this arbitration clause is part of your client's employment agreement?
>
> MS. CHANDLER: I believe that the -- **it is incorporated by reference into the agreement.**
>
> THE COURT: Why do you think that?
>
> MS. CHANDLER: **I think the case law discussing incorporation by reference suggests that when there is a clear reference to a document that is available to the person signing the contract, incorporation by reference is valid.** I did consider that issue quite extensively, but I can see that the court is aware of the way in which this contract was presented.
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> THE COURT: I ask you that because the argument in your briefing is that the employment relationship agreement failed to incorporate the Little Book of Answers, and, indeed, I do not see any of language incorporating it, so I'm wondering what you're looking at.
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> MS. CHANDLER: I think it's procedurally unconscionable in the manner in which it presents – or incorporates the Little Book of Answers. **I think the language that is probably sufficient for incorporation by reference is found under "rules and policies" in the employee relationship agreement. It says, "On your own**

> **initiative, you will learn and comply with the rules and policies outlined in our Little Book of Answers**, including those that relate to positive attitude, public safety, company funds, tips, and the FAIR policy. So I think the key language there, related to whether or not that provision gives Mr. Burnett or other prospective employees notice that they are purportedly waiving arbitration when they sign this contract, or a fair opportunity to consider the arbitration provision that is found in the separate document, the Little Book of Answers – –

RP 4-5.

IV. ARGUMENT

A. There is a Strong Presumption in Favor of Arbitrability.

Where there is evidence of an agreement to arbitrate, "Washington courts apply a strong presumption in favor of arbitration." *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 405, 200 P.3d 254 (2009). "Washington courts apply a strong presumption in favor of arbitrability, and doubts should be resolved in favor of coverage. If the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end." *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 474-475, 369 P.3d 503, 507 (2016) (citations and internal punctuation omitted). "Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense

to arbitrability. *Verbeek Props., LLC v. GreenCo Envt'l., Inc.*, 159 Wn. App. 82, 86-87, 246 P.3d 205, 207 (2010) (citing *Heights*, 148 Wn. App. at 407).

"Under Washington law, an express agreement to arbitrate is not required. As a matter of contract, a party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document. *Marcus & Millichap*, 192 Wn. App. at 474, 369 P.3d at 507 (citations and internal punctuation omitted). The party opposing arbitration has the burden of proving that the arbitration agreement is unenforceable. *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 924, 231 P.3d 1252, 1254 (2010) (citations omitted).

B. The Objective Manifestations of the Parties Show that Employee Agreed to Comply with the Rules and Policies Set Forth in the Handbook.

The issue presented by the underlying Motion to Compel Arbitration was a question of fact, not an issue of law. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522-23, 826 P.2d 664, 669-70 (1992). The Washington State Supreme Court held in *Swanson*:

> We note that some courts have concluded that whether a handbook constitutes a contract is a matter of law for the court. However, "[t]he more modern view—and the view in keeping with the modern analysis of other types of contracts—is that **the question whether employee**

> **handbook provisions are part of the contract is a question of fact**. That is, the analysis is the same as that generally used to **looking at the objective manifestations of the parties' intent** find that they had intended this obligation to be part of the contract?"

Id., quoting 1 L. Larson, Unjust Dismissal § 8.02, at 8-5 (1988) (emphasis added).

Although the underlying motion presented a question of fact, the facts relevant to the motion were undisputed. The undisputed "objective manifestations of the parties' intent" are: (1) Employee was given a copy of the Handbook during his orientation as a new employee, and was told to read it at home (CP 142 at ¶ 8); (2) the Employee Relationship Agreement states that Employee was required to "learn and comply with the rules and policies outlined in our Little Book of Answers" (CP 58); (3) the Handbook states on page 1: "OBLIGATION -- By working here, you agree to comply with the contents of this book and with the written plans and policies that are referenced in it" (CP 62); and (4) Employee began and continued his employment after being notified that he was required to comply with the Handbook (CP 142 at ¶ 8; CP 3 at ¶ 3.1).

C. A Binding Arbitration Agreement Was Formed When Employee Received Notice of the Handbook and Continued His Employment with Employer.

In 1984, the Washington State Supreme Court held that an employee policy manual can create binding legal obligations. *Thompson, supra,* 102

Wn.2d at 229, 685 P.2d at 1087 ("absent specific contractual agreement to the contrary, we conclude that the employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship"). The Supreme Court revisited the issue seven years later in *Gaglidari*. The Court held that an employee handbook created a binding agreement where an employee (like Employee in this case) received a copy of the handbook on her first day of work, and (like Employee in this case) signed a form agreeing to abide by the rules. *Gaglidari*, 117 Wn.2d at 433-34, 815 P.2d at 1366-67. The Court held:

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Gaglidari, 117 Wn.2d at 433-34, 815 P.2d at 1366-67 (citation omitted); *see Parker v. Skagit/Island Head Start*, No. 35481-7-I, 1996 Wn. App.

LEXIS 463, *9 (Sept. 30, 1996) ("Parker implies that her situation is like that of the plaintiff in *Gaglidari*, in which an employment contract was created when the employer gave Ronda Gaglidari an employee handbook, Gaglidari signed an acknowledgment form, then worked for the defendant.")

The issue in *Gaglidari* was whether a Denny's Restaurants employee was bound by the provisions of two Denny's Restaurants employee handbooks. The Supreme Court described the issue it was deciding as follows: "Whether the employee handbooks, distributed to plaintiff, for which she signed an acknowledgment agreeing to abide by their rules and policies and which contained termination procedures, created a contract between defendant and plaintiff." *Gaglidari*, 117 Wn.2d at 432, 815 P.2d at 1365. The Supreme Court held that the employee, Ms. Gaglidari, was legally bound by those rules and policies. *Id*. at 435, 815 P.2d at 1367.

The relevant facts in *Gaglidari* are not distinguishable from the facts of this case. Starting in 1980, plaintiff Rhonda Gaglidari was employed as a bartender at a Denny's restaurant. On her first day of work, Ms. Gaglidari received a copy of the Denny's Restaurants employee handbook. Like Employee here, Ms. Gaglidari acknowledged receiving the handbook. *Id*. at 428, 815 P.2d at 1364.

In 1986, Denny's Restaurants gave Ms. Gaglidari an "alcoholic beverage handbook" which she also acknowledged receiving. *Id*. at 429, 815 P.2d at 1364. "This handbook contained [a] provision that that fighting on company premises was grounds for immediate dismissal." *Id*. Ms. Gaglidari continued working for Denny's Restaurants. In 1987, while off duty, Ms. Gaglidari entered the Denny's restaurant and became involved in a fight with a customer. Three days later, Ms. Gaglidari was fired for fighting on company premises. She sued Denny's Restaurants for "breach of [her] employment contract and the tort of outrage." *Id*. at 430, 815 P.2d at 1365. The issue decided by the Supreme Court was whether the two handbooks provided to Ms. Gaglidari created a binding contract. The Court held: "We hold that the 1979 employee handbook did give rise to a contract and that its terms were modified by the alcoholic beverage handbook plaintiff received in 1986." *Id*. at 431, 815 P.2d at 1365.

The Supreme Court held that an employee handbook creates a binding contract where the employee receives reasonable notice of the handbook and continues her employment. *Gaglidari*, 117 Wn.2d at 435, 815 P.2d at 1367. "Plaintiff's receipt of the handbook satisfied the requisites of contract formation." *Id.* "The consideration was plaintiff's continuation of her employment." *Id*. The Supreme Court further held that "[a]n employer may unilaterally amend or revoke policies and procedures established in an

employee handbook" as long as the employee "receive[s] reasonable notice of the change." *Id*. at 434, 815 P.2d at 1367. As shown in *Gaglidari*, it is not relevant whether an employee reads the employee handbook. The employee needs only to receive reasonable notice of the handbook, and thereafter begin or continue working for the employer.

The legal standard described in *Gaglidari* was applied by this Court in *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 145 P.3d 1253 (2006). The Court held:

> The same rule applies in at-will employment agreements, where an employer may unilaterally change policies and procedures set forth in an employee handbook so long as the employee receives reasonable notice of the change. In such cases, **a new contract is formed when the employer communicates the new terms (offer), the employee works after receiving notice (acceptance), and the employee continues in employment although free to terminate (consideration).**

Cascade Auto Glass, 135 Wn. App. at 768-69, 145 P.3d at 1257 (emphasis added), *citing Govier v. N. Sound Bank*, 91 Wn. App. 493, 498, 957 P.2d 811 (1998) and *Gaglidari,* 117 Wn.2d at 433-34. *See Browning v. 24 Hour Fitness, Inc.*, No. 05-5732, 2006 U.S. Dist. LEXIS 3386, *3-5, 2006 WL 151933 (W.D. Wash. Jan. 19, 2006) ("In Washington, as in many jurisdictions, an Employee Handbook can create a contract between the parties."); *Sampson v. Jeld-Wen Inc.*, No. 15-03025, 2015 U.S. Dist. LEXIS 181232, *7-9 (E.D. Wash. Dec. 18, 2015) ("Sufficiently strong language in

an employee handbook can constitute offer, and the continuing work of employees after the introduction of the handbook can constitute acceptance.")

In the instant case, Employee declares under oath that he received a copy of the Handbook during his new employee orientation, and was told to read it. CP 142 at ¶ 8. "Actual notice is reasonable notice." *Govier*, 91 Wn. App. at 502, 957 P.2d at 817, *citing Gaglidari*, 117 Wn.2d at 435 (other citations omitted). Employee began—and continued—to work for Employer after receiving actual notice of the Handbook.

Virtually all Washington State companies that employ a significant number of employees use employee handbooks to govern the terms of the employment relationship. There are legitimate policy reasons why this procedure has been blessed by the courts. As explained by this Court: "[I]n the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change. **An employer that could not change its policies without renegotiating with each employee could find itself obligated in a variety of different ways to any number of different employees.** The resulting confusion and uncertainty would not be conducive to harmonious labor-management relations." *Govier,* 91 Wn. App. at 500-01, 957 P.2d at 816 (emphasis added) (citations and internal punctuation omitted).

D. Bilateral Contract Analysis Does Not Apply to Employee Handbooks.

It is significant to note that Employee's employment was terminable "at will" by either party. CP 58 ("AT WILL EMPLOYMENT – Your employment at Pagliacci Pizza is and will remain 'at will' meaning that you or your employer may terminate your employment at any time and in any manner without prior notice or warning and without cause.") Employee could have terminated his employment at any time if he did not accept the terms of employment that were offered to him through the Handbook. An employee's ability to terminate his employment is one of the reasons why Washington courts have blessed "unilateral" contacts arising from employee handbooks. "[A] new contract is formed when the employer communicates the new terms (offer), the employee works after receiving notice (acceptance), and the employee continues in employment although free to terminate (consideration)." *Cascade Auto Glass,* 135 Wn. App. at 768-69, 145 P.3d at 1257, citing *Govier*, *supra* (parentheses in original).

This Court has explained that "bilateral contract analysis," *i.e.*, the "exchange of reciprocal promises" does not apply to employee handbooks. *Govier*, 91 Wn. App. at 399, 957 P.2d at 815. The facts of *Govier* are as follows. In 1991, plaintiff Deborah Govier was hired by North Sound Bank to work as a loan originator. On her first day of work, Ms. Govier was given

a "personnel handbook" that described the terms of her employment. The handbook stated that after a 90-day probationary period, Ms. Govier would be considered a "permanent employee" and would not be terminated "except for cause." *Id*. at 495-496, 957 P.2d at 813-814.

In 1993, the Bank unilaterally modified its terms of employment for loan originators. The Bank presented each loan originator with a written agreement to sign reflecting the new terms. The new agreement was for a one-year period and eliminated sick leave and holiday and vacation pay. *Id*. at 496-497, 957 P.2d at 814. Ms. Govier refused to sign the agreement, and sued the Bank "for breach of the employment contract embodied in the Bank's personnel handbook." *Id*. at 497, 957 P.2d at 814. The trial court dismissed the action on summary judgment, and this Court affirmed. *Id*. at 494, 957 P.2d at 813.

Ms. Govier argued that "the Bank could not substantially modify the terms of her employment without obtaining her assent or providing separate consideration." *Id*. at 498, 957 P.2d at 814. This Court rejected that argument, holding that "an employer may modify the terms of employment without the employee's assent where the employer established those terms by a 'unilateral' contract." *Id*. at 494, 957 P.2d at 813.

In this case, Employee expressly agreed in writing to comply with the terms of the Handbook. But *Govier* shows that such terms can be

imposed unilaterally where the employment is "at will" and the employee can terminate his employment if he disagrees with the terms offered by the employer. The exception would be if the terms were unconscionable, as Employee argued below, but the Superior Court rejected that argument (CP 227), and there is no cross-appeal.

E. The Obligations of the Handbook Are Incorporated by Reference into the Employee Relationship Agreement

As shown by the cases cited above, an employee does not need to sign an agreement or any other document to form a binding agreement to comply with the terms of an employee handbook. The agreement is formed when the employee receives reasonable notice of the handbook and then begins or continues working for the employer.

But even assuming a signed document were required, there is no specific language needed to incorporate the terms of a separate writing into an agreement. For example, the words "incorporated by reference" were not used in the following cases, but the courts nevertheless found that the terms of various documents were incorporated into an agreement: *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941, 943-44 (1994) (finding that a policy of title insurance covered an easement described in a separate document mentioned in the property description); *Brown v. Poston*, 44 Wn.2d 717, 719, 269 P.2d 967, 968 (1954) (where a subcontractor

contracted to perform plastering work "as per plans and specifications," both of those documents were incorporated by reference into the contract); *Washington Trust Bank v. Circle K Corp.*, 15 Wn. App. 89, 93, 546 P.2d 1249, 1252 (where a memorandum to lease referred to an earlier contract between the parties, the earlier contract was incorporated by reference), *review denied*, 87 Wn.2d 1006 (1976); *Turner v. Wexler*, 14 Wn. App. 143, 148, 538 P.2d 877, 880 (where a real estate contract referred to an earlier contract between parties, the terms of the earlier contract were incorporated by reference), *review denied*, 86 Wn.2d 1004 (1975).

In the instant case, the Employee Relationship Agreement specifically referenced the Handbook, and specifically informed Employee that he was required to "learn and comply with the rules and policies" set forth in the Handbook. CP 58. Although not required by *Gaglidari* and its progeny, these words are sufficient to incorporate the Handbook by reference.

F. Employee Has Judicially Admitted that the Handbook is Incorporated by Reference into the Employee Relationship Agreement

In response to questions from the Superior Court, Employee's counsel stated three times in open court that the Handbook is incorporated by reference into the Employee Relationship Agreement. RP 4-5. Those

statements are judicial admissions. RCW 2.44.010; CR 2A; *see* K. Tegland, 5B Wash. Prac., Evidence § 801.54 (6th Ed. 2016). Judicial admissions:

> have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Such admissions are proof possessing the highest possible probative value. Indeed, 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.

Mukilteo Ret. Apartments, LLC v. Mukilteo Investors LP, 176 Wn. App. 244, 256 n.8, 310 P.3d 814, 820 n.8 (2013) (citations and internal punctuation omitted).

V. CONCLUSION

For the foregoing reasons, Employer respectfully requests that the Court reverse the Order Denying Defendant's Motion to Compel Arbitration (CP 226-27), and remand with instructions to stay the Superior Court action in favor of arbitration.

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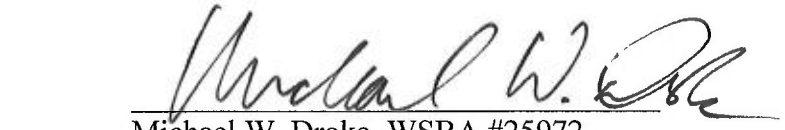
Respectfully submitted this 26th day of July, 2018.

DORSEY & WHITNEY LLP



Michael W. Droke, WSBA #25972
Email: droke.michael@dorsey.com
Todd S. Fairchild, WSBA #17654
Email: fairchild.todd@dorsey.com
Jasmine Hui, WSBA #49964
Email: hui.jasmine@dorsey.com
Columbia Center
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

Attorneys for Appellant Pagliacci Pizza, Inc.

CERTIFICATE OF SERVICE

On this 26th day of July, 2018, I caused to be served a true copy of the foregoing Brief of Appellant on the following:

TERRELL MARSHALL LAW GROUP PLLC
Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Erika L. Nusser, WSBA #40854
Email: enusser@terrellmarshall.com
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

☒ Via Court E-Service Notification
☐ Via Electronic Mail
☐ Via Facsimile
☐ Via U.S. Mail
☐ Via Overnight Mail

DATED this 26th day of July, 2018.

MICHAEL W. DROKE

DORSEY & WHITNEY LLP

July 26, 2018 - 10:15 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78356-4
Appellate Court Case Title:	Steven Burnett, Respondent v. Pagliacci Pizza, Appellant
Superior Court Case Number:	17-2-25978-1

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

STEVEN BURNETT, individually and on behalf of all others similarly situated,

Plaintiff/Respondent,

v.

PAGLIACCI PIZZA, INC.,

Defendant/Appellant.

BRIEF OF RESPONDENT

Toby J. Marshall, WSBA #32726
Erika L. Nusser, WSBA #40854
Blythe H. Chandler, WSBA #43387
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Attorneys for Plaintiff/Respondent

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I. INTRODUCTION

Steven Burnett (the Employee) worked for Pagliacci Pizza Inc. (the Employer) as a pizza delivery driver. The Employee alleges that the Employer failed to pay him and his fellow drivers all wages owed and failed to provide rest and meal breaks as required by law. The issue in this appeal is whether the Employee entered into an enforceable agreement to arbitrate his wage-and-hour claims with the Employer. The trial court correctly ruled that the Employee did not agree to the purported arbitration agreement because it was not incorporated by reference into his written employment agreement with Employer. The trial court also said that if it reached the question of whether the arbitration agreement was enforceable, the court would find the Employer's Mandatory Arbitration Policy both procedurally and substantively unconscionable.

The Employer gives this Court no reason to reverse the trial court. On appeal the Employer relies primarily on its inclusion of the arbitration provision in a handbook to establish the existence of an agreement. This argument was raised for the first time in a motion for reconsideration and is waived. It is also wrong as a matter of law because promises to resolve future disputes in a specific forum are necessarily bilateral and do not become binding based on unilateral contract formation principals.

The trial court's ruling that the Employer's Little Book of Answers, which includes the Employer's Mandatory Arbitration Policy, is not incorporated by reference into the written contract the Employee signed is also correct. As the trial court found, the language of the signed Employee Relationship Agreement does not clearly and unequivocally incorporate the Mandatory Arbitration Policy. In fact, the signed Employee Relationship Agreement contains terms inconsistent with Mandatory Arbitration and "FAIR" policies found in the Little Book of Answers.

The Employer fails to address unconscionability in its opening brief. It also fails to cite either of the Washington Supreme Court's two leading cases on the enforceability of arbitration provisions in employment contracts. Instead, the Employer falsely asserts that the trial court rejected the Employee's unconscionability arguments. Four pages of the transcript of the trial court's oral ruling are devoted to explaining that if the court were to reach unconscionability, the court would find the Employer's Mandatory Arbitration Policy unconscionable. CP 286–289. The Employer's failure to address this alternative ground for affirmance in its opening brief signals the weakness of its arguments on appeal and should be deemed a waiver of its ability to make any arguments regarding unconscionability.

The terms of the Employer's Mandatory Arbitration Policy are unconscionable and unenforceable. Even if this Court finds the Employee agreed to the Mandatory Arbitration Policy, it should affirm the denial of the motion to compel arbitration on unconscionability grounds.

II. ASSIGNMENTS OF ERROR

The issue before this Court is whether the trial court erred in denying the Employer's motion to compel arbitration. This Court should affirm because there is no enforceable agreement to arbitrate between the Employee and the Employer. The Employer's statement of issues improperly attempts to limit this Court's review to the question of whether an agreement exists and to foreclose consideration of whether the purported agreement is enforceable. If the Employer intends to argue that the Employee was required to file a cross-appeal to preserve arguments based on alternative grounds for affirmance, such an argument is meritless. *See Wash. Fed. Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011) (this Court "may affirm on any ground supported by the record").

III. STATEMENT OF THE CASE

A. The Employee Relationship Agreement the Employee signed does not contain an arbitration provision.

During the Employee's orientation, the Employer presented the Employee with multiple forms and told the Employee to sign the forms so

that he could start working. CP 142–143 at ¶¶ 3–7. One of those forms was the Employee Relationship Agreement, which he was told to sign. CP 58 ("Employee Relationship Agreement"); CP 124 at ¶ 7. The Employee was also given a copy of the Little Book of Answers and told to read it at home. CP 142 at ¶ 8.

The Employee Relationship Agreement that the Employee signed does not contain an arbitration clause. CP 58. Indeed, the agreement does not even use the word "arbitration" or any variant of it. *Id*. Rather, the Employee Relationship Agreement contains a section on "INCONSISTENCIES IN HOURS/PAY/BREAKS" that instructs employees to "promptly inform Human Resources" if they have concerns about hours, pay, or breaks. *Id*. It says nothing about arbitration. *Id*.

The Employee Relationship Agreement also contains a section entitled "RULES AND POLICIES," which provides: "On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR policy." CP 58. In other words, the Employee Relationship Agreement directs employees *not* to spend time reading the Little Book of Answers before signing the Employee Relationship Agreement. *Id*.

B. The Mandatory Arbitration Policy is hidden in the Little Book of Answers.

The Employee Relationship Agreement's "RULES AND POLICIES" reference a "FAIR Policy" in the Little Book of Answers. CP 58. The Little Book of Answers is a 23-page handbook that the Employer provides to employees. CP 60–73. The FAIR Policy is on page 17. CP at 70.

The Mandatory Arbitration Policy appears on page 18 of the Little Book of Answers. CP 71. The Mandatory Arbitration Policy is a single paragraph that provides in full:

> The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant the Washington Arbitration Act.

Id.

The "INCONSISTENCIES IN HOURS/PAY/BREAKS" section of the Employee Relationship Agreement that the Employee signed contains terms different from the terms of both the FAIR Policy and the

Mandatory Arbitration Policy. *Compare* CP 58 *with* CP 70–71. The Employee Relationship Agreement also permits the Employer to unilaterally change the terms of the Little Book of Answers, including the FAIR Policy and Mandatory Arbitration Policy, at any time. CP 58.

C. The trial court correctly denied the Employer's motion to compel arbitration and motion for reconsideration.

Shortly after the Employee filed his class action complaint, the Employer moved to compel arbitration. CP 39–47. The Employer's motion argued that the Employee Relationship Agreement the Employee signed incorporates by reference the Little Book of Answers and its Mandatory Arbitration Policy. CP 42. The Employer also argued that the presentation of the Mandatory Arbitration policy was neither procedurally nor substantively unconscionable. CP 44–47. Neither the Employer's motion nor its reply made any argument that the Little Book of Answers is a separate and binding unilateral contract. CP 39–47, 213–220.

After a hearing, the trial court issued a detailed oral ruling from the bench. CP 279–290; *see also* CP 225. The trial court first explained that the court's focus was on the basic question of whether the Employee's employment contract contains an agreement to arbitrate. CP 279 (RP 17:5–8). The court discussed the terms of the Employee Relationship Agreement and found it did not incorporate the Mandatory Arbitration Policy in the Little Book of Answers:

> I don't see anything in this agreement that includes an arbitration provision either on its face or by saying we're incorporating our Little Book of Answers that is an employee handbook, and, by the way, also includes additional terms to this agreement. I mean, it would be easy to say that, but it doesn't say that.

CP 282. The court explained that a "second big problem" with the Employer's argument is that the dispute resolution terms in the Little Book of Answers are "directly contradicted" by the Employee Relationship Agreement. CP 283 (RP 21:16–22). The court concluded that as a reasonable person reading the Employee Relationship Agreement, there is no way to find the Mandatory Arbitration Policy is incorporated by reference. CP 285 (RP 23:12–24).

The trial court then addressed unconscionability because that is where the parties had focused their arguments. CP 286. With respect to procedural unconscionability, the court explained that "the terms in the *Little Book of Answers* were not provided to be read before [the Employee Relationship Agreement] was signed. You can't add additional terms or impose additional terms that are only provided to a party to the contract later." CP 287 (RP 25:10–16).

Next the court addressed substantive unconscionability. The court explained that the Mandatory Arbitration Policy is "very, very one-sided." CP 288 (RP 26:6–10). Adding: "it's one-sided in a way that always

offends courts, which is it only binds one side." CP 288 (RP 26:11–12). The court continued: "it's very unfair and wrong for one party to a contract to require that only the other side has to arbitrate, and that's what this does." CP 288 (RP 26:15–17). The court characterized this as "hugely concerning." CP 288–89 (RP 26:25–27:2). The court also said that the FAIR Policy's limitation on actions, which purports to preclude arbitration unless an employee complies with the informal reporting requirements of FAIR, "looks to me to be substantively unconscionable." CP 289 (RP 27:3–19).

The Employer filed a motion for reconsideration, CP 228–237, in which it argued for the first time that the Employee became bound by the arbitration policy in the Little Book of Answers simply by working for the Employer. The Employee pointed out in response that this was a new argument improperly raised for the first time in a motion for reconsideration and that the motion failed to address unconscionability, the alternative grounds for the court's denial of the motion to compel arbitration. CP 297. The trial court promptly denied the Employer's motion for reconsideration. CP 321–22.

IV. ARGUMENT AND AUTHORITY

This Court reviews the trial court's decision to deny a motion to compel arbitration de novo. *Gandee v. LDL Freedom Enters., Inc.*, 176

Wn.2d 598, 602, 293 P.3d 1197 (2013). This Court "may affirm on any ground supported by the record." *Wash. Fed. Sav. & Loan Ass'n*, 165 Wn. App. at 14, 266 P.3d 905. As the party opposing arbitration, the Employee bears the burden of establishing that the purported agreement to arbitrate is not enforceable. *Zuver v. Airtouch Communc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). The trial court correctly denied the Employer's motion to compel arbitration because the Employee carried his burden.

A. Washington's public policy favoring arbitration does not override black letter law governing contract formation and enforceability.

The Washington Arbitration Act ("WAA") requires the court determine whether there is an agreement to arbitrate, and if so whether it is enforceable. *See Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (Courts "determine the threshold matter of whether an arbitration clause is valid and enforceable."). "If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate." RCW 7.04A.070(2).

"While a strong public policy favoring arbitration is recognized under both federal and Washington law, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Satomi Owners Ass'n v. Satomi, LLC*, 167

Wn.2d 781, 810, 225 P.3d 213 (2009) (internal citations and quotation marks omitted). Arbitration agreements stand on equal footing with other contracts and may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 467, 45 P.3d 594 (2002); *see also Gandee*, 176 Wn.2d at 609–10, 239 P.3d 1197 (denying enforcement of unconscionable arbitration clause).

B. Employers may not unilaterally impose mandatory arbitration provisions on employees via handbooks.

The Employer maintains the Employee is bound by the arbitration provision simply because that provision was included in the Employer's handbook and the Employee worked for the Employer after receiving the handbook. This argument was waived below because it is based on decades-old authority yet appeared for the first time in the Employer's motion for reconsideration. CP 228–237. A motion for reconsideration is not an opportunity to present new theories that could have been raised before entry of an adverse ruling. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (finding new legal theories raised for the first time in a motion for reconsideration are waived on appeal)); *see also JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (same).

Further, a trial court's denial of a motion for reconsideration will not be reversed absent a showing of manifest abuse of discretion. *See Wilcox*, 130 Wn. App. at 241, 122 P.3d 729 (citing *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988)). The trial court's rejection of the Employer's new legal theories raised for the first time on reconsideration was no abuse of discretion—it was entirely correct as a matter of law.

The Employer cites no Washington state-court decision holding that an employer may bind an employee to arbitration simply by putting an arbitration clause in an employee handbook. Instead, Washington courts have said that when *employers* make promises to employees in employee handbooks, those promises may be enforced *against the employer*. *See Gagliardi v. Denny's Rests., Inc.*, 117 Wn.2d 426, 432–33, 815 P.2d 1362 (1991) (discussing the "leading case in Washington on when employee handbooks give rise to contractual obligations *on the part of the employer*") (emphasis added); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984) (summarizing holdings relating to when an employer's ability to terminate an employee at will is limited by the terms of an employee manual or handbook); *Grovier v. N. Sound Bank*, 91 Wn. App. 493, 499, 957 P.2d 811 (1998) ("The rationale for allowing *an employee* to enforce a written personnel policy is that the

employer has derived a benefit in the nature of workplace harmony and productivity from its policy's existence.") (emphasis added).

The argument that an employer may bind employees to arbitration by simply putting an arbitration clause in a handbook is fundamentally flawed. This flaw is exposed by the Employer's assertion that "bilateral contract analysis, *i.e.*, the exchange of reciprocal promises does not apply to employee handbooks." Opening Br. at 16 (quoting *Grovier*, 91 Wn. App. at 399, 957 P.2d 811) (internal quotation marks omitted). An agreement to arbitrate is by its nature a bilateral exchange of promises.

A unilateral contract is one in which the offeror makes promises and the offeree accepts by performance. *See* 25 Wash. Practice, Contract Law & Practice § 1:4 (2017) (A "unilateral contract" is one where "only one party has made a promise, and therefore, only that party is subject to a legal obligation.") The offeree makes no promises in return—a unilateral contract "is given in exchange for an act or forbearance." *Id.* That is why the legal obligations created by handbooks are enforceable *only against an employer*. *See Gagliardi*, 117 Wn.2d at 432–33, 815 P.2d 1362; *Thompson*, 102 Wn.2d at 233, 685 P.2d 1081; *Grovier*, 91 Wn. App. at 499, 957 P.2d 811. If an employee's performance does not meet the standards set forth in a handbook, the employer's remedy is to terminate the employee, not sue the employee for breach of contract. These basic

rules also explain why an employer can modify the obligations to which it may have bound itself in a handbook unilaterally.

An arbitration agreement is a promise to resolve any future disputes using a specific method of dispute resolution. The Employer argues that it offered the Employee a unliteral contract, which the Employee accepted by working, but that the terms of the contract included the *Employee's* promise to resolve future disputes by arbitration. The Employer's argument seeks to invent a hybrid contract that is imposed unilaterally but creates bilateral obligations. The Court should forcefully reject this argument.

Gagliardi does not support the Employer's arguments. The Employer characterizes the issue in *Gagliardi* as whether the employee was bound by the provisions in two handbooks, but that is incorrect. In *Gagliardi*, the issue was whether the *employer* breached its contractual obligations to the employee when it terminated her employment. 117 Wn.2d at 431, 815 P.2d 1362. The court found the employer was bound by the terms of its handbooks, but could unilaterally modify those terms in subsequent handbooks. *Id.* at 436, 815 P.2d 1362. The employer in *Gagliardi* was not trying to bind the *employee* to any obligation; it was defending a breach of contract action by saying that it met its own obligations under the contract.

The only contract-by-handbook case involving an arbitration agreement that the Employer cites is *Browning v. 24 Hour Fitness, Inc.*, No. C05-5732RBL, 2006 WL 151933 (W.D. Wash. Jan. 19, 2006). *Browning* is an unpublished federal district court decision that is not binding on this Court. *See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 823–24, 881 P2d 986 (1994) ("a federal district court [opinion] . . . is not controlling on this court when state substantive law is interpreted"). To the extent *Browning* interprets *Gagliardi* as supporting the employer's argument here, *see Browning*, 2006 WL 151933 at *1–2, it is wrong for the reasons set forth above.

Browning is also distinguishable because there the employee signed the employee handbook containing the arbitration clause. *Id.* at *1. Here, the Employee never signed the Little Book of Answers. Indeed, the Employer's motion to compel arbitration in the trial court focused on the Employee having signed a separate document, the Employee Relationship Agreement. CP 43–44. The Employee Relationship Agreement that the Employee signed makes no mention of arbitration and sets forth procedures for addressing wage disputes—like the ones in this case—that are inconsistent with the arbitration provision contained in the Little Book of Answers. CP 58.

The Employer's proposed rule ignores the bedrock principle that "[a]s an important policy of contract, one who has not agreed to arbitrate generally cannot be required to do so." *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 934–35, 231 P.3d 1252 (2010). It also runs headlong into the Washington Supreme Court's holding in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004). There the Court ruled that employers may not enforce arbitration agreements against employees when those agreements are obtained in a manner that deprives the employees of a meaningful choice regarding arbitration. *Id.* at 348–50, 103 P.3d 773. Indeed, the Employer acknowledges that if its argument regarding unilateral formation of arbitration agreements were accepted, there would have to be an exception for unconscionable agreements. Opening Br. at 18. But the Employer nonetheless fails to address unconscionability based on its false assertion that the Employee's unconscionability arguments were "rejected" below. *See* § IV.D.1 *infra*.

C. The trial court correctly ruled that the Employer's Mandatory Arbitration Policy is not incorporated by reference into the Employee Relationship Agreement.

The Employer's motion to compel arbitration argued that the Employee is bound by the arbitration agreement in the Little Book of Answers because it is incorporated by reference into the Employee Relationship Agreement the Employee signed. The motion presented the

trial court with a question of contract interpretation: is there language in the Employee Relationship Agreement that clearly and unequivocally incorporates by reference the arbitration provision?

The trial court read the Employee Relationship Agreement and concluded that it does not incorporate by reference the arbitration provision. CP 281–286. The employment agreement the Employee signed is a one-page document entitled "Employee Relationship Agreement." CP 58. The trial court carefully analyzed the Employee Relationship Agreement and explained that "it just never says there's an arbitration provision. I mean, it doesn't even say it indirectly. And that's pretty important to me because this agreement looks complete on its face." CP 281 (RP 19:20–23). The court went on to explain there is no language in Employee Relationship Agreement expressly incorporating the terms of the Little Book of Answers, including the arbitration provision. The court also explained that because the terms of the Employee Relationship Agreement signed by the Employee are inconsistent with the dispute resolution procedures—including the arbitration provision—in the Little Book of Answers, there is no agreement to arbitrate. CP 285.

A person who has not signed an arbitration agreement may nevertheless be bound by that agreement if it is incorporated by reference into a contract they have signed. *See Raven Offshore Yacht, Shipping, LLP*

v. F.T. Holdings, LLC, 199 Wn. App. 534, 541, 400 P.3d 347 (2017) (listing incorporation by reference as rule that may bind a person who has not signed an arbitration agreement). But incorporation by reference "must be clear and unequivocal." *See W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc*., 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (citing *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 861 (1994)).

To establish incorporation by reference, the Employer relies on the following statement in the Employee Relationship Agreement: "On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers." Opening Br. at 19; CP 58. Whether that language is sufficient to accomplish incorporation by reference is a pure legal question. *See Navlet v. Port of Seattle*, 164 Wn.2d 818, 842, 194 P.3d 221 (2008) ("Contract construction involves the application of legal principles to determine the legal effect of contract terms."); *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 521, 826 P.3d 664 (1992) (explaining "there are cases where the question whether the employment at will relationship has been modified may be decided as a matter of law by the court" based on the "familiar principle that interpretation of contracts is a question of law for the courts"). The trial court correctly ruled that language in an employment contract telling an employee to read "on your own time" a separate employment handbook is

not "clear and unequivocal" incorporation by reference that binds the employee to terms inconsistent with those in the contract he signed.

Rather than confront the correctness of the trial court's legal conclusion, the Employer maintains the Employee waived any argument that the Little Book of Answers is not incorporated by reference into the Employee Relationship Agreement. The basis for this assertion is that counsel for the Employee said during oral argument there is language in the Employee Relationship Agreement that is "probably sufficient for incorporation by reference." CP 267 (RP 5:6–8). That is an equivocal statement of a legal conclusion, not a statement of fact. This Court is free to disregard counsel's remark, as the trial court did. Even if the Court concludes the Employee is bound by the position that the Employee Relationship Agreement incorporates by reference the Little Book of Answers, the Court should find the arbitration agreement unconscionable for all the reasons discussed below.

D. The Employer's Mandatory Arbitration Policy is unconscionable.

An unconscionable arbitration clause is unenforceable. *See Zuver*, 153 Wn.2d at 302–03, 103 P.3d 753; *Adler*, 153 Wn.2d at 344–45, 103 P.3d 773. "In Washington, either substantive *or* procedural unconscionability is sufficient to void a contract." *Gandee*, 176 Wn.2d at 603, 293 P.3d 1197 (emphasis in original) (holding arbitration clause in

debt adjusting contract substantively unconscionable and unenforceable). The Employer's Mandatory Arbitration Policy is unenforceable because it is presented in a procedurally unconscionable manner and contains substantively unconscionable terms.

1. The trial court adopted the Employee's unconscionability arguments on the record.

In his briefing to the trial court, the Employee argued that the Mandatory Arbitration Policy is unconscionable, both procedurally and substantively. The Employer maintains that the court "rejected" this argument, Opening Br. at 18, but the Employer's assertion is belied by the record. The trial court addressed unconscionability at length in its oral ruling, explaining that if it were to reach unconscionability, the court would find the arbitration provision unconscionable. CP 286–89. The Employer cites to the second page of the trial court's written order denying the motion to compel arbitration. Opening Br. at 18 (CP 227). If the Employer is suggesting the trial court rejected language regarding unconscionability in the proposed order prepared by the Employee's counsel in advance of the hearing, that is false. Counsel for the Employee crossed out the provisions—at the request of counsel for the Employer—before submitting the proposed order to the court.

The Employer's attempt to sandbag by failing to address an obvious alternative ground for affirmance in its opening brief should be

deemed a waiver of the ability to address those arguments in reply. The failure to address unconscionability here is inexcusable because the Employee argued for denial of the Employer's motion for reconsideration based on its failure to address the unconscionability grounds discussed by the trial court on the record. CP 299–300. The notion that the Employee was required to file a cross-appeal to preserve arguments on which it prevailed below is meritless. The Employer seeks reversal of the trial court's denial of its motion to compel arbitration. But to obtain a reversal, the Employer must address each of the reasons given by the trial court for its decision. This the Employer fails to do.

2. The Employer's Mandatory Arbitration Policy is procedurally unconscionable.

An arbitration agreement is procedurally unconscionable when the circumstances surrounding the parties' transaction show that the weaker party lacked meaningful choice. *Zuver*, 153 Wn.2d at 304, 103 P.3d 753. When a prospective employer presents new employees with a standard form contract to be signed as a condition of employment, it is self-evident that the employee cannot negotiate the terms with the employer, and the contract is an adhesion contract. *Id.*

Courts consider the following factors to determine whether an adhesion contract exists:

> (1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a take it or leave basis, and (3) whether there was no true equality of bargaining power between the parties.

Adler, 153 Wn.2d at 347, 103 P.3d 773 (internal quotation marks omitted). As the Employer admitted, the Employee Relationship Agreement is a form contract that new employees were "required" to sign to work for the Employer. CP 41; CP 55 at ¶ 6 ("Upon hire, [Employee] was *required* to attend new employee orientation and sign various [Employer] documents to begin employment") (emphasis added). And there is nothing in the record to suggest the Employee and the Employer had true equality of bargaining power. Thus, the Employee Relationship Agreement is an adhesion contract.

To determine whether an employee lacked meaningful choice when presented with an arbitration agreement in an adhesion contract, courts consider whether the arbitration term was hidden and whether the employee had a reasonable opportunity to understand the terms of the agreement. *Adler*, 153 Wn.2d at 350, 103 P.3d 773.

The Employer went to great lengths to hide its purported arbitration agreement from new employees. Indeed, the Employee Relationship Agreement that the Employee signed does not use the term "arbitration" or say anything about the employee giving up his right to sue

the Employer in court. Rather, the Employee Relationship Agreement contains a section entitled "INCONSISTENCIES IN HOURS/PAY/BREAKS" that directs employees to promptly inform Human Resources if an employee does not receive pay or breaks to which he is entitled. CP 58. It says nothing about arbitration or the FAIR policy.

The Employee Relationship Agreement contains a section entitled "RULES AND POLICIES" that refers to the Little Book of Answers. *Id.* That section directs employees: "On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR policy." *Id.* Consistent with the terms of the Employer's form contract, the Employee was given a copy of the Little Book of Answers but was not given time to review the document before the Employer required him to sign to the Employee Relationship Agreement. CP 142 (Burnett Decl. ¶¶ 7–8).

The Little Book of Answers further hides the arbitration policy the Employer seeks to enforce by burying it on page 18 of a 23-page handbook. Indeed, if an employee were to turn to page 17 of the Little Book of Answers, containing the FAIR Policy referenced in the Employee Relationship Agreement, the employee still would not find the Mandatory Arbitration Policy because it appears on the next page.

The circumstances here are similar to those in *Mattingly v. Palmer Ridge Homes LLC,* 157 Wn. App. 376, 238 P.3d 305 (2010) (addressing arguments based on both procedural unconscionability and improper incorporation by reference and resolving case on the basis of unconscionability). In *Mattingly*, the court found procedurally unconscionable and refused to enforce an arbitration agreement buried in a 32-page booklet, even though the contract signed by the Mattinglys (the party opposing arbitration) expressly referred to an arbitration policy in capital letters. *Id.* at 387–88, 391, 238 P.3d 505. The Mattinglys had no opportunity to review and understand the arbitration clause because they did not receive the referenced booklet until after they signed the contract.

Like the Mattinglys, the Employee had no "reasonable opportunity to understand the terms" of the Mandatory Arbitration Policy before the Employer required him to sign the Employee Relationship Agreement. *Id.* at 390–91, 238 P.3d 505. The document the Employee signed says nothing about arbitration, while the one presented to the Mattinglys did. *Id.* In addition, the agreement the Employee was required to sign to get a job directs the employee that "you will" (in the future tense) learn and comply with the Little Book of Answers "[o]n your own initiative." The Employee Relationship Agreement directs prospective employee *not* to spend time reading the Little Book of Answers before signing. As the trial court put it,

"That's sort of procedural unconscionability on its face." CP 287 (RP 25:23–24).

In the trial court, the Employer cited *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.2d 823 (2001), for the well-worn proposition that ignorance of the terms of a contract is not a defense to enforcement. *Tjart* is not relevant here. First, *Tjart* was decided three years before *Zuver* and *Adler*, the Washington Supreme Court's leading decisions on unconscionable arbitration provisions in employment contracts. Second, the arbitration provision the court enforced in *Tjart* was "obvious in the fairly short contract" that the employee signed. *Id.* at 899, 28 P.3d 823. *Tjart* has no relevance to determining whether an arbitration clause that was not included or expressly referenced in the employment contract presented to the employee is procedurally unconscionable.

The Employee signed an Employee Relationship Agreement that does not contain an arbitration clause and that conflicts with the Employer's FAIR and Mandatory Arbitration policies. Further, the Employee Relationship Agreement directs employees not to read the Little Book of Answers containing the Mandatory Arbitration Policy before signing. Thus, the arbitration clause the Employer seeks to enforce is procedurally unconscionable and unenforceable.

3. The Employer's Mandatory Arbitration Policy is substantively unconscionable.

An arbitration clause is substantively unconscionable "where it is overly or monstrously harsh, is one-sided, shocks the conscience, or is exceedingly calloused." *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 55, 308 P.3d 635 (2013) (affirming refusal to enforce arbitration provision in employment contract in a case involving wage and hour violations). Arbitration provisions that require an employee to arbitrate her claims, but do not require her employer to do so, are unfairly one-sided and unconscionable. *See Zuver*, 153 Wn.2d at 316–17 & n.16, 103 P.3d 753 (explaining that unilateral arbitration agreements imposed on the employee by the employer reflect the very mistrust of arbitration that the FAA is supposed to remedy (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 120–21, 6 P.3d 669 (2000)); *see also Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 724, 13 Cal. Rptr. 3d 88 (2004) (finding a contract "may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party").

In *Zuver*, the Court found a provision that limited the remedies the employee could recover in arbitration was unfairly one-sided. *Id.* at 315–19, 103 P.3d 753; *see also Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d

1254, 1261 (9th Cir. 2005) (applying Washington law and holding that an arbitration clause requiring the employee to arbitrate his claims but not requiring Circuit City to arbitrate claims it might have is substantively unconscionable and unenforceable). Similarly, in *Adler*, the Court agreed that a one-sided arbitration clause in an employment contract is unconscionable. 153 Wn.2d at 351–52, 103 P.3d 773. The Court found the clause before it, however, required both parties to submit their claims to arbitration. *Id.*

As the trial court explained, the Employer's Mandatory Arbitration Policy is substantively unconscionable because it is one-sided—it applies only to claims the employee may have against the Employer. The trial court emphasized the one-sided nature of the clause in its oral ruling denying the motion to compel arbitration. CP 287 (describing the Mandatory Arbitration Policy as "very, very one-sided" in "a way that always offends courts, which is it only binds one side").

The Mandatory Arbitration Policy expressly provides that "you" must comply with the company's mandatory arbitration policy. CP 71. It goes on:

> If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the

> dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration.

Id. (emphasis added). The one-sided nature of the arbitration is plain from its repeated statement that "you"—the employee—must arbitrate with no concurrent duty placed on the Employer. In addition, the only claims subject to arbitration are claims the employee can bring against the Employer. Any claim by the Employer against an employee, for example a claim that an employee took money from the company, does not fall within the scope of the arbitration clause.

The Mandatory Arbitration Policy is also unconscionable because the FAIR Policy contains a "LIMITATIONS ON ACTIONS" that is shockingly harsh. The Limitations Provision precludes an employee from commencing arbitration or a lawsuit if the employee fails to comply with "the steps and procedures in the FAIR Policy." CP 70. Under the Limitations Provision: "If you do not comply with a step, rule or procedure in the FAIR Policy with respect to a claim, you waive the right to raise the claim in any court or other forum, including arbitration." *Id.* The FAIR Policy calls for a two-step process. *Id.* First, the employee must "informally report the matter to the employee's supervisor." Second, the employee must "initiate non-binding Conciliation." *Id.*

The Limitations Provision is overly harsh. First, it effectively shortens the statute of limitations for any claim by an employee who no longer works for the Employer. *See Hill*, 179 Wn.2d at 55–56, 308 P.3d 635 (holding that a limitations provision that shortens the statute of limitations is unconscionable). How is a terminated employee to "informally report the matter and all details to your supervisor"? A former employee no longer has a supervisor and certainly does not have informal access to a supervisor. Second, the provision contains no exception to the first step in the FAIR Policy when the employee's supervisor is the person subjecting the employee to unfair conduct or harassment.

Moreover, the FAIR Policy is inconsistent with the Employee Relationship Agreement's requirement that the employee promptly report issues related to hours, pay, or breaks to Human Resources. *Compare* CP 70 with CP 58. An employee who follows the "INCONSISTENCIES" section of the Employee Relationship Agreement, could be deemed to have violated the FAIR Policy and thereby be deprived of the ability to bring any action related to unpaid wages.

Finally, the Mandatory Arbitration Policy is unconscionable because the Employer reserves for itself the ability to modify the terms of the Little Book of Answers at any time. CP 58 ("We will on occasion change the policies and procedures contained in this employee handbook.

The newest handbook supersedes any prior handbook or policy notices issued by Pagliacci Pizza."). An arbitration provision that grants the employer a unilateral right to terminate or modify it is unenforceable under Washington law. *Al-Safin*, 394 F.3d at 1261.

As the trial court correctly ruled, the Mandatory Arbitration Policy is unconscionable because the documents presented to employees contain conflicting and inconsistent instructions and a one-sided arbitration provision that the Employer may unilaterally modify at any time.

E. The unconscionable provisions cannot be severed from the Mandatory Arbitration Policy.

Washington courts strive to enforce the terms of an agreement if the agreement can be saved by severing unconscionable terms. *Gandee*, 176 Wn.2d at 607, 293 P.3d 1197. But where "the unconscionable terms pervade the entire clause," and severing the unconscionable terms would essentially require rewriting the clause, the court should instead deny enforcement. *Id.* In *Gandee*, the Washington Supreme Court found that the "short four-sentence arbitration clause containing three unconscionable provisions" could not be saved by severing provisions. *Id.*

Severance is even less appropriate here than in *Gandee*. First, the procedural unconscionability created by the way the Mandatory Arbitration Policy is presented cannot be cured by severance. Second, the Mandatory Arbitration Policy is just two sentences long and both

sentences impose a unilateral obligation on the employee to resolve disputes through arbitration. Severing the two unconscionable provisions would leave nothing to enforce. *Id*. For these reasons, if the Court finds the Mandatory Arbitration Agreement unconscionable, it must affirm the trial court's denial of the Employer's motion to compel arbitration.

V. CONCLUSION

For all of the foregoing reasons, the Employee respectfully requests that this Court affirm the trial court's denial of the Employer's motion to compel arbitration.

RESPECTFULLY SUBMITTED AND DATED this 27th day of August, 2018.

TERRELL MARSHALL LAW GROUP PLLC

By: _____

Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Erika L. Nusser, WSBA #40854
Email: enusser@terrellmarshall.com
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I certify that on August 27, 2018, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Michael W. Droke, WSBA #25972
Email: droke.michael@dorsey.com
Jasmine Hui, WSBA #49964
Email: hui.jasmine@dorsey.com
Todd S. Fairchild, WSBA #17654
Email: fairchild.todd@dorsey.com
Email: jaswal.stefanie@dorsey.com
Email: price.molly@dorsey.com
DORSEY & WHITNEY LLP
Columbia Center
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

☐ U.S. Mail, postage prepaid
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☒ Electronic Service

Attorney for Appellant/Defendant

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of August, 2018.

TERRELL MARSHALL LAW GROUP PLLC

By: _____
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Appellant/Plaintiff

TERRELL MARSHALL LAW GROUP PLLC

August 27, 2018 - 2:58 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78356-4
Appellate Court Case Title:	Steven Burnett, Respondent v. Pagliacci Pizza, Appellant
Superior Court Case Number:	17-2-25978-1

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

STEVEN BURNETT, Respondent, vs. PAGLIACCI PIZZA, INC., Appellant.	NO.: 78356-4-I **REPLY BRIEF OF APPELLANT**

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A. Employee Bears the Burden of Proof, Including the Burden to Prove that the Arbitration Policy is Unconscionable

Because Employer presented evidence of an agreement to arbitrate, Employee must prove that the agreement is not enforceable. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d, 773, 780 (2004); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753, 759 (2004). This includes the burden to prove that the arbitration policy is unconscionable. *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001).

B. The Strong Public Policy Favoring Arbitration Supports an Employee Handbook-Imposed Arbitration Duty

Employee argues that employers cannot unilaterally impose mandatory arbitration policies via handbooks. *See* Resp. Br. at 10. There is no support for that proposition. No reported Washington decision specifically addresses arbitration policies in the context of employee handbooks. But many Washington decisions hold that arbitration clauses contained in non-negotiated, form employment agreements are enforceable. *See Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740, 349 P.3d 32, 38 (2015); *Tjart*, 107 Wn. App. at 898, 28 P.3d at 830.

Given the strong public policy favoring arbitration, employers should be encouraged to use handbooks to require arbitration. Numerous

state and federal courts have found binding agreements to arbitrate based on employee handbooks.[1]

C. Employee Handbooks Can Create Binding Obligations for Employers and Employees

Lacking any direct support for his argument that employee handbooks cannot require arbitration, Employee relies on the broader proposition that employee handbooks create obligations that are binding on employers *only*, but not on employees. *See* Resp. Br. at 11-13. This is incorrect. The handbook in *Gaglidari* imposed a "contractual" obligation on the employee not to fight on company premises as a condition of her employment. *Gaglidari v. Denny's Rests.*, 117 Wn.2d 426, 433, 815 P.2d 1362, 1366 (1991). As explained by this Court: "The plaintiff in *Gaglidari*, a bartender, had signed a form saying she read and understood provisions about fighting on company premises. Thus, those provisions **were binding upon her**." *Govier v. N. Sound Bank*, 91 Wn. App. 493, 502, 957 P.2d 811, 817 (1998) (Div. II) (emphasis added).

Throughout *Gaglidari*, the Court makes it clear that a handbook can create obligations binding upon an employee, as long as the employee has

[1] *See Chanchani v. Salomon/Smith Barney, Inc.*, No. 99-9219, 2001 U.S. Dist. LEXIS 2036 (S.D.N.Y. Mar. 1, 2001); *Moreno v. Progistics Distrib.*, No. 18-1833, 2018 U.S. Dist. LEXIS 129386 (N.D. Ill. Aug. 2, 2018); *Baptist Health Sys. v. Mack*, 860 So.2d 1265, 1274 (Ala. 2003); *Johnson v. Trugreen Ltd. P'ship*, No. A-12-CV-166-LY, 2012 U.S. Dist. LEXIS 188280 (W.D. Tex. Oct. 25, 2012); *Daniels v. Raymours Furniture Co., Inc.*, No. 13-11551-MLW, 2014 U.S. Dist. LEXIS 44409 (D. Mass. Mar. 31, 2014).

reasonable notice of the handbook. "While the employee is bound by unilateral acts of the employer, it is incumbent upon the employer to inform employees of its actions." *Gaglidari*, 117 Wn.2d at 435; 815 P.2d at 1367.

The relevant facts here are almost identical to those in *Gaglidari*. Employer made an offer by presenting Employee with the Employee Relationship Agreement (CP 58) and a copy of the employee Handbook (CP 60-73). Employee accepted the offered terms of employment by signing the Employee Relationship Agreement, which states: "you will learn and comply with the policies outlined in our Little Book of Answers" (the Handbook) and "you agree to all the foregoing." CP 58. In addition, and "independent of this contract analysis," Employee accepted the rules and policies set out in the Handbook by commencing—and continuing—his employment after receiving notice of the Handbook. *Thompson v. St. Regis Paper Co.,* 102 Wn.2d 219, 228-29, 685 P.2d 1081, 1087 (1984); *see Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 520, 826 P.2d 664, 668 (1992).

Respondent misrepresents *Thompson*, *Gaglidari* and *Govier* as holding that employers—and *only* employers—are bound by the policies contained in their handbooks. *See* Resp. Br. at 11. All three courts held that employers can unilaterally impose binding obligations on employees through employee handbooks. *Thompson*, 102 Wn.2d at 228-29, 685 P.2d

at 1087 ("unilateral acts of the employer are binding on his employees …"); *Gaglidari*, 117 Wn.2d at 435; 815 P.2d at 1367 ("the employee is bound by unilateral acts of the employer …"); *Govier*, 91 Wn. App. at 502-503, 957 P.2d at 817 ("Thus, those provisions [of the handbooks] were binding upon [employee Ronda Gaglidari]. But she was not bound by unilateral revisions of company policies contained in an earlier version of an employee handbook that she never received.") *See Swanson*, 118 Wn.2d at 547, 826 P.2d at 682 ("Moreover, in *Gaglidari*, at 434-35, we held that 'employee[s] [are] bound by unilateral acts of the employer' as long as the employees are given reasonable notice of those actions") (brackets in original).

D. Employer Was Not Required to Include the Mandatory Arbitration Policy in the Employee Relationship Agreement

Employee argues that the Mandatory Arbitration Policy is not binding because it does not appear in the one-page Employee Relationship Agreement. CP 58. "Under Washington law, an express agreement to arbitrate is not required." *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 473, 369 P.3d 503, 507 (2016); *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 747, 349 P.3d 32, 42 (2015). "A party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document." *Romney*, 186

Wn. App. at 747, 349 P.3d at 42 (citation omitted); *see Keith Adams & Assocs. v. Edwards*, 3 Wn. App. 623, 477 P.2d 36 (1970).

Although the standard of review is *de novo*, this legal principle is important to understanding the trial court's error. The trial court believed that Employee could not be required to arbitrate unless there was either: (1) a document bearing his signature that expressly included the arbitration clause, or (2) the words "incorporated by reference" linking the Handbook to the signed agreement. RP 19-20. Neither proposition is true.

Employee is bound by the arbitration clause because he signed the Employee Relationship Agreement stating: "you will learn and comply with the policies outlined in our Little Book of Answers" and "you agree to all the foregoing." CP 58. In addition, and "independent of this contract analysis," Employee is bound by the arbitration clause because he received notice of the Handbook and thereafter commenced and continued his employment with Employer. *Thompson*, 102 Wn.2d at 228-29; 685 P.2d at 1087. Either method will bind Employee, as shown by *Thompson*, *Swanson*, *Gaglidari*, *Govier* and other cases.

E. The Legal Standard for Unconscionability

The legal standard for unconscionability was described by the Supreme Court in *Adler*:

> In Washington, we have recognized two categories of unconscionability, substantive and procedural. Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. **Shocking to the conscience, monstrously harsh, and exceedingly calloused are terms sometimes used to define substantive unconscionability.** Procedural unconscionability is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print. We have cautioned that these three factors should not be applied mechanically without regard to whether in truth a meaningful choice existed.

Adler, 153 Wn.2d at 344-45, 103 P.3d at 781 (2004) (citations and internal punctuation omitted) (emphasis added).

F. The Mandatory Arbitration Policy is Not Procedurally Unconscionable

1. Contracts of Adhesion Are Not ***Per Se*** Unconscionable

It is not the case in Washington that each employee has a right to negotiate all of the terms of his or her employment. It is well settled that non-negotiable, form employment agreements—"contracts of adhesion"—are not *per se* unconscionable. *Zuver*, 153 Wn.2d at 304 103 P.3d at 760 ("[T]he fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable."); *accord Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 362, 85 P.3d 389, 393-394 (2004). As held by this Court: "Most courts have rejected plaintiffs' arguments that predispute mandatory arbitration clauses are unconscionable contracts of

adhesion because of mere inequality of bargaining power between employer and employee." *Tjart, supra*, 107 Wn. App. at 830, 28 P.3d at 898 (citations omitted).

The Supreme Court found that the arbitration agreement in *Zuver* was "an adhesion contract," but that did **not** render it unconscionable. *Zuver*, 153 Wn.2d at 305-306, 103 P.3d at 760-761. The "key inquiry" is whether the party challenging an arbitration clause lacked a meaningful choice in assenting to the agreement. *Id.* at 305, 103 P.3d at 761; *Romney*, 186 Wn. App. at 739, 349 P.3d at 38; *Tjart*, 107 Wn. App. at 898-99, 28 P.3d at 830. The Court found that "Zuver had a meaningful choice" whether to accept the offered terms of employment. *Zuver*, 153 Wn.2d at 306, 103 P.3d at 761. The Court found the arbitration provision to be unconscionable because it unlawfully limited the employee's **substantive remedies**. *Id.* at 318, 103 P.3d at 767. The arbitration policy here does not limit the substantive remedies available to Employee.

The *Zuver* Court adopted the reasoning of a Federal Court of Appeals that "if a court found procedural unconscionability based solely on an employee's unequal bargaining power, that holding could potentially apply to invalidate every contract of employment in our contemporary economy." *Id.* at 307, 103 P.3d at 761 (*quoting Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002) (internal punctuation omitted)).

This Court held in *Romney* that a non-negotiable, form employment agreement containing an arbitration clause was not unconscionable. *Romney*, 186 Wn. App. 740, 735, 349 P.3d at 38. "In *Zuver*, our Supreme Court found that an adhesion contract of employment was not procedurally unconscionable when the employee's argument rested solely on a lack of bargaining power." *Romney*, 186 Wn. App. at 737, 349 P.3d at 37. "The key inquiry under Washington law is whether the employees lacked a meaningful choice. Here, as in other cases of employment, the employees could choose employment elsewhere. The arbitration clause is understandable and is printed in the same size font as the rest of the agreement under a bolded heading." *Id.* at 740, 349 P.3d at 38.

These same legal principles also apply to employee handbooks. The Supreme Court held in *Thompson* that "unilateral acts of the employer are binding on his employees," and "[o]nce an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged." *Thompson*, 102 Wn.2d at 228-29; 685 P.2d 1087.

2. An Employer Can Unilaterally Impose New Rules and Policies Even *After* an Employee Begins Working for the Company

The trial court thought it was important that Employee did not read the Handbook *before* commencing his employment. RP 19. But the case law shows that an employer can impose new terms of employment on

existing employees at any time, simply by amending a handbook and giving employees notice that the conditions of their employment have changed. That is exactly what happened in *Gaglidari.* The employee had been employed for six years before Denny's Restaurants issued the new handbook which "contained the provision that fighting on company premises was grounds for immediate dismissal." *Gaglidari*, 117 Wn.2d at 429, 815 P.2d at 1364.

The same thing happened in *Govier*. Two years after Deborah Govier began working for North Sound Bank, "the bank presented her with a new employment agreement that ***substantially*** changed the terms of her previous employment." *Govier*, 91 Wn. App. at 494, 957 P.2d at 813 (emphasis added). This Court rejected Govier's argument that the Bank was required to give her advance notice of the changes, before they became effective. *Id.* at 502, 957 P.2d at 816. This Court reached the same conclusion in *Tjart*, holding that the employee was bound by an arbitration clause contained in a form "application" that she was "told to sign" after her employment began. *Tjart*, 107 Wn. App. at 896-97, 28 P.3d at 829.

3. Ignorance of Contract Terms Is Not a Defense

Tjart argued that she should not be bound by arbitration clauses contained in "form" agreements that she did not read or understand. *Id.* This Court rejected that argument, holding:

> … whether or not Tjart read or understood the terms of the Shearson Application to constitute an agreement to arbitrate, she assented to its terms. … One who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party. Thus, ignorance of the contents of a contract expressed in a written instrument does not ordinarily affect the liability of one who signs it **or who accepts it otherwise than by signing it**.

Tjart, 107 Wn. App. at 896-97, 28 P.3d at 829 (emphasis added).

4. The Mandatory Arbitration Policy is Not "Hidden in a Maze of Fine Print"

Employee argues that *Tjart* is inapposite because it was decided before *Zuver* and because the arbitration clause enforced in *Tjart* was "obvious in the fairly short contract" signed by the employee. *See* Resp. Br. at 24, *quoting Tjart*, 107 Wn. App. at 899, 28 P.3d at 830. But *Zuver* did not change the legal standard for determining whether a provision is "hidden" in a contract. The legal standard is "whether the important terms were hidden in a maze of fine print." *Zuver*, 153 Wn.2d at 303, 103 P.3d at 759 (citations and internal punctuation omitted); *Tjart*, 107 Wn. App. at 898, 28 P.3d at 830.

The Mandatory Arbitration Policy is short, written in plain English—not "legalese"—and printed in the same size font as the rest of the Handbook. CP 71. The policy is captioned in bold, capital letters that state: "**MANDATORY ARBITRATION POLICY**." *Id.* The Handbook itself is well organized with bold captions for each section and topic. It contains

a table of contents at the beginning. CP 62. Employee admits that he was "told to read" the Handbook. CP 142. He agreed in writing he would "learn and comply with" its provisions. CP 58.

Employee was a delivery driver for almost two years after receiving a copy of the Handbook. As in *Tjart*, he "had a reasonable opportunity to understand that [he] was agreeing to arbitrate [his] future claims." *Tjart*, 107 Wn. App. at 898-99; 28 P.3d at 830. He also had "meaningful choice" whether to continue his "at will" employment with Employer or to "choose employment elsewhere." *Romney*, 186 Wn. App. 740, 735, 349 P.3d at 38. Employee chose to accept the conditions of his employment.

5. It is Not Necessary for the Arbitration Clause to Appear in the Employee Relationship Agreement

Employee argues that the Mandatory Arbitration Provision is not enforceable because it appears in the Handbook, but not the one-page employment agreement he signed. But the same facts appear in *Gaglidari* and *Govier*. Ronda Gaglidari received a copy of the Denny's Restaurants handbook upon employment, and she "signed a form acknowledging receipt of the manual and agreeing to abide by the rules." *Gaglidari*, 117 Wn.2d at 428, 815 P.2d at 1364. Six years later, she received a copy of the "alcoholic beverage handbook," and she "signed for this book in the same manner as the 1979 employee handbook …." *Id.* at 428, 815 P.2d at 1364.

The same facts appear in *Govier*, where the Bank "gave Govier a copy of its personnel handbook on her first day of work" and "she signed an acknowledgement of its receipt …." *Govier*, 91 Wn. App. at 495, 957 P.2d at 813. The Court found the terms of the handbook to be binding on Govier once she received notice, even though "she did not expressly agree to be bound by its terms." *Id.* at 499, 957 P.2d at 815.

It is clear from *Thompson*, *Gaglidari*, *Govier* and other cases that employers can unilaterally impose binding conditions through employee handbooks, and those conditions need not appear within the four corners of a document signed by the employee.

G. The Mandatory Arbitration Policy Is Not Substantively Unconscionable

Employee relies on the Supreme Court's decisions in *Adler*, *Zuver*, *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013) and *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 293 P.3d 1197 (2013) for his argument that the Mandatory Arbitration Policy is substantively unconscionable. In those four cases, the Court found arbitration provisions to be unconscionable because they *significantly* limited the employee's *substantive* rights and remedies, and unfairly shifted costs to the plaintiffs. Importantly, however, the Supreme Court held that substantively unconscionable provisions should normally be severed by the

court, unless doing so would "significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause." *Gandee*, 176 Wn.2d at 607; 293 P.3d at 1202 (quoted by *Hill*, 179 Wn.2d at 58, 308 P.3d at 640).

1. Mutuality Does Not Require "Mirror" Obligations

Employee's main argument is that the Mandatory Arbitration Policy is "one sided" and therefore substantively unconscionable. The term "one-sided," as used in the case law, does not mean that the parties are required to have "identical" or "mirror" obligations. The Supreme Court and this Court have expressly rejected that position. *Zuver*, 153 Wn.2d at 317, 103 P.3d at 766-767; *Romney*, 186 Wn. App. at 742, 349 P.3d at 39. "Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms—not that both parties have identical requirements." *Zuver*, 153 Wn.2d at 317, 103 P.3d at 766-767 (citations omitted). Here, the Handbook obligated Employer to provide numerous benefits and protections to Employee, including paid time off, available medical insurance, employee discounts, and a 401k retirement plan with Employer matching. CP 66-69; *see also, infra p. 23*.

The *Zuver* Court rejected the "mutuality" argument made by Employee. "[W]e are not concerned here with whether the parties have

mirror obligations under the agreement, but rather whether the effect of the provision is so "one-sided" as to render it patently "overly harsh" in this case." *Zuver*, 153 Wn.2d at 317 n.16, 103 P.3d at 767 n.16 (citations omitted); *see Romney*, 186 Wn. App. at 742, 349 P.3d at 39.[2]

This Court addressed the same issue in *Walters*, *supra*. Walters argued that an arbitration clause lacked mutuality and was unconscionable because it required him to arbitrate all employment disputes, but permitted his employer the option of bringing certain types of claims in court. This Court rejected that argument, holding:

> Next, Walters argues that the arbitration clause is invalid because the arbitration provision suffers from a lack of mutuality. But where the contract as a whole is otherwise supported by consideration on both sides, most courts have not ruled the arbitration clause invalid for lack of mutuality, even when the clause compelled one party to submit all disputes to arbitration but allowed the other party the choice of pursuing arbitration or litigation in the courts.

Walters, 120 Wn. App. at 359, 85 P.3d at 392 (citations omitted).

[2] The Court held: "While the concurrence/dissent asserts that our conclusion here 'opens the door' to claims of substantive unconscionability 'whenever only one party to an employment arbitration agreement is constrained under one term of the agreement,' see concurrence/dissent at [770,] that is simply not the case. Rather, future litigants must show, as was done in this circumstance, that the disputed provision is so 'one-sided' and 'overly harsh' as to render it unconscionable." *Zuver*, 153 Wn.2d at 319 n.18, 103 P.3d at 767 n.18.

2. The Mandatory Arbitration Policy is Not Shocking to the Conscience, Monstrously Harsh, or Exceedingly Calloused

The Handbook does not contain the any of provisions that the Supreme Court has found to be substantively unconscionable. In *Zuver*, certain provisions of an arbitration clause were unconscionable because they denied the employee substantive legal remedies while allowing the employer to pursue those same remedies. The Court held:

> [Zuver] contends that the effect of this provision is so one-sided and harsh that it is substantively unconscionable. We agree. Indeed, this provision appears to heavily favor Airtouch. It bars Zuver from collecting any punitive or exemplary damages for her common law claims but permits Airtouch to claim these damages for the only type of suit it would likely ever bring against Zuver, that is, for breach of her duty of nondisclosure of Airtouch's confidential information. The remedies limitation provision blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse. Consequently, we conclude that this provision is substantively unconscionable in these circumstances.

Zuver, 153 Wn.2d at 318-319, 103 P.3d at 767 (footnote omitted).

In *Hill*, the Supreme Court found an arbitration clause to be substantively unconscionable because of provisions that: (1) reduced the statute of limitations on the employees' claims from three years to 14 days; (2) imposed a two- and four-month limit on their ability to recover back pay; and (3) imposed arbitration cost-sharing requirements that effectively eliminated the employees' ability to litigate their claims. *Hill*, 179 Wn.2d at 55-58, 308 P.3d at 638-40.

In *Adler*, the arbitration agreement contained a "fee-splitting" provision that was found to be "substantively unconscionable because [it] would effectively bar [Adler] from bringing his claims." *Adler*, 153 Wn.2d at 352-353, 103 P.3d at 785 (footnote omitted). The agreement in *Adler* also reduced the limitations period for the employee's claims from three years to 180 days. *Adler*, 153 Wn.2d at 355-358, 103 P.3d at 786-788.

The arbitration agreement in *Gandee* required the arbitration to take place in Orange, County California, which made commencing an arbitration prohibitively expensive for the plaintiff. *Gandee*, 176 Wn.2d at 604-605; 293 P.3d at 1200. The agreement also required the losing party to pay the winning party's attorney fees and expenses, which "effectively chill[ed] Gandee's ability to bring suit …." *Id.* at 606, 293 P.3d at 1201. The arbitration clause also reduced the statute of limitations to 30 days. *Id.*

Unlike the agreements considered by the Supreme Court, the Handbook does not purport to limit the substantive rights or remedies available to Employee. The Mandatory Arbitration Policy does not shorten the statute of limitations, reduce the amount or type of damages that Employee can recover, nor shift any costs to Employee. Employee has not satisfied his burden to prove that the Mandatory Arbitration Policy is "shocking to the conscience," "monstrously harsh" or "exceedingly calloused."

3. The F.A.I.R. Policy Is Not Substantively Unconscionable

Employee argues that the F.A.I.R. policy renders the Mandatory Arbitration Policy unconscionable. As explained in the Handbook, F.A.I.R. stands for Fair and Amicable Internal Resolution of disputes. CP 70. The policy requires existing employees to first report a dispute to their supervisor. *Id.* If that does not lead to a resolution, the second step is to engage in "non-binding Conciliation" with "a responsible person at Pagliacci Pizza (who may be the owner) … ." *Id.* An existing employee is required to follow these two steps before resorting to arbitration. *Id.*

Employee asks this Court to interpret the F.A.I.R. policy as applying to him as a former employee. He argues that because he no longer has a supervisor at Pagliacci Pizza, a literal reading of the F.A.I.R. Policy would effectively prevent him from seeking arbitration of his current claims.

One basic rule of contract construction is that Courts must give a contract a practical and reasonable interpretation, while avoiding a literal interpretation that would lead to absurd results. "[W]hen a court examines a contract, it must read it as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results." *Forest Mktg.*

Enters. v. Dep't of Natural Res., 125 Wn. App. 126, 132, 104 P.3d 40, 43 (2005) (citations and internal quotation marks omitted).

The only reasonable interpretation of the F.A.I.R. policy is that it is intended to apply to current employees. By definition, the policy is designed for "internal" resolution of employee disputes, and does not apply to former employees. But even if the F.A.I.R. policy were found to be unconscionable – which it is not – it can easily be severed in whole or part from the Handbook without altering "the tone of the arbitration clause [or] the nature of the arbitration contemplated by the clause." *Gandee*, 176 Wn.2d at 607; 293 P.3d at 1202.

4. The F.A.I.R. Policy Can Be Severed From the Agreement

The Supreme Court's analysis in *Zuver* and *Gandee* shows that the F.A.I.R. policy can easily be severed. In *Zuver*, the Court held: "Although some courts have declined to sever unconscionable provisions where those provisions pervade an agreement, here we are faced with only two unconscionable provisions. … We can easily excise the confidentiality and remedies provisions but enforce the remainder." *Zuver*, 153 Wn.2d at 320, 103 P.3d at 768-69 (citations omitted).

By contrast, the *Gandee* Court found that severing the unconscionable provisions would essentially "rewrite" the arbitration

agreement:

> Here, we are confronted with a short, four-sentence arbitration clause containing three unconscionable provisions. Severing all three provisions would significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause. The location, fee structure, and timing of the arbitration would be changed. Little would be left of the arbitration "agreed" to by the parties. On these facts, the unconscionable terms pervade the entire clause and severing three out of four provisions would require essentially a rewriting of the arbitration agreement. Thus, the arbitration clause cannot be severed from the overall contract.

Gandee, 176 Wn.2d 607; 293 P.3d 1201-1202.

With regard to severance, this case is like *Zuver* and unlike *Gandee*. The F.A.I.R. policy concerns events that occur before an arbitration, not the arbitration itself. Severing the F.A.I.R. policy (CP 70) would have no effect on the separate Mandatory Arbitration Policy (CP 71). Severing the policy would have no effect on the nature, location, fee structure or timing of the arbitration. Severance would be the appropriate remedy if the F.A.I.R. policy were unconscionable.

H. The Mandatory Arbitration Policy is Incorporated by Reference into the Employee Relationship Agreement

There is no magic language required to incorporate a separate document into a written agreement. The Handbook is incorporated by reference through the following language: "you will learn and comply with the policies outlined in our Little Book of Answers" and "you agree to all

the foregoing." CP 58. Counsel for Respondent admitted in open court that the Handbook is incorporated by reference. RP 4-5.

The trial court asked the wrong question regarding incorporation by reference, and therefore got the wrong answer. The question is not whether the Employee Relationship Agreement mentions "arbitration." *See* Resp. Br. at 16. The question is whether the agreement clearly and unequivocally reflects an intent by the parties to incorporate the terms of the Handbook into their signed agreement. *Santos v. Sinclair*, 76 Wn. App. 320, 325-326, 884 P.2d 941, 943-944 (1994); *W. Wash. Corp. of Seventh Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494-495, 7 P.3d 861, 865 (2000).

The issue in *Santos*, a case cited by Employee, was whether a policy of title insurance covered an easement described in a separate document called "Short Plat No. 702." The insurance company argued that the scope of the title insurance was limited to the real property expressly described in Exhibit A to the policy. The insured argued that the title policy also covered an easement described in Short Plat No. 702, a separate document referenced in Exhibit A. This Court agreed that by referencing Short Plat No. 702 in Exhibit A, the title policy covered the easement described in that separate document. *Santos*, 76 Wn. App. at 325-326, 884 P.2d at 943-944.

As held by the Supreme Court: "It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms."

W. Wash. Corp. of Seventh Day Adventists, 102 Wn. App. at 494-495, 7 P.3d at 865. It is clear that Employee had knowledge of the Handbook as referenced in the agreement, and expressly agreed to "comply with" its rules and policies when he began and continued his employment. CP 58.

I. The Other Cases Cited by Employee Are Distinguishable

Employee relies on *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010) for his arguments that: (1) Employee had "no reasonable opportunity to understand the terms" of the Mandatory Arbitration Policy before he signed the Employee Relationship Agreement, and (2) the Handbook was not incorporated by reference into the Employee Relationship Agreement. *See* Resp. Br. at 23. Mattingly is distinguishable in many significant respects.

Mattingly does not concern an employment relationship, much less an "at will" employment relationship. The plaintiffs in *Mattingly* signed a land purchase and construction agreement, where they agreed to pay the defendant $563,750 to construct a new home. They could not simply walk away from that contract, as Employee was free to do in this case. CP 58. One reason employers can "unilaterally" impose rules and policies on "at will" employees, and even change those policies long after the employment begins, is because at will employees are free to terminate the relationship.

See Gaglidari, 117 Wn.2d at 433, 815 P.2d at 1366.

A second important distinction is that Employee received a copy of the Handbook when his employment began. The Mattinglys did not receive the "booklet" limiting their warranties until after the land purchase and construction agreement "closed," and they were obligated to pay $563,750 to the defendant. *Mattingly*, 157 Wn. App. at 382-383, 238 P.3d at 507-508.

The *Mattingly* Court held that "documents incorporated by reference usually must be reasonably available, at the least, so that the essentials of a contract can be discerned by the signer." *Mattingly*, 157 Wn. App. at 392, 238 P.3d at 512. Here, the Handbook was not just "reasonably available," it was in Employee's possession throughout his employment. CP 142.

Employee cites *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009) for the proposition that "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *See* Resp. Br. at 9-10. *Satomi* is not an employee handbook case. It concerns a dispute between a condominium owners association and a construction company. Here, Employee agreed to arbitrate under contract principles (signing the Employment Relationship Agreement) and through his actions (commencing and continuing his employment after being notified of the Handbook).

The Supreme Court recognized in *Satomi* that there are exceptions to the "general rule" that a signed arbitration agreement is required. *Id.* at 810-11, n.22, 225 P.3d at 230, n.22. The Court cited with approval a federal court decision holding that "a nonsignatory may be held to an arbitration clause where the nonsignatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009) (cited by *Satomi*, 167 Wn.2d at 810-11, n.22, 225 P.2d at 230, n.22).

Here, Employee benefitted from the policies and protections contained in the Handbook during his two years of employment with Employer. Those benefits include: free food during work shifts (CP 67 and CP 142 at ¶6); a 50% discount on Employer products (CP 66 and 67); paid time off (CP 66 and 67); and many other policies designed to benefit and protect employees. CP 66-71.

Employee cites *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (2002), where a motion to compel arbitration was denied because the plaintiff proved that filing an arbitration would be cost-prohibitive. *Mendez*, 111 Wn. App. at 450, 45 P.3d at 597. No such claim has been made here.

J. Employer did Not Waive Any Arguments

Employee argues that unconscionability "was one of the reasons given by the trial court for its decision," and therefore Employer should have assigned error to that purported finding and addressed the issue in its opening brief. *See* Resp. Br. at 20. In fact, the trial court's order contains only one finding: "The court finds there is no agreement to arbitrate." CP 227. All of the *proposed* findings regarding unconscionability were crossed out in the order, because the trial court did not actually find the arbitration clause to be unconscionable. *Id.*

The judge prefaced her oral remarks about unconscionability with the statements: "if I were to reach the issue about unconscionability" and "I'll give you the benefit of my thinking, for what it's worth … ." RP 286. Because the trial court did not actually make a finding regarding unconscionability, there was no reason for Employer to assign error to the court's comments or to address the issue in its opening brief.

Employee also argues that Employer waived the legal argument that Employee agreed to arbitration by working for Employer after receiving notice of the Handbook. *See* Resp. Br. at 10. Employee misconstrues the cited caselaw. This Court held that a motion for reconsideration was improper where it was based on "new legal theories with new and different citations to the record," but confirmed that "a new theory based on the

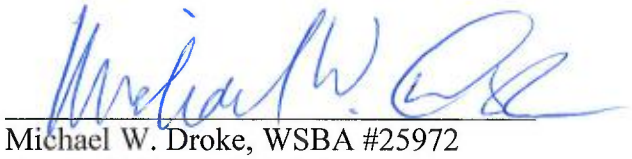
evidence presented in a nonjury bench trial could be raised for the first time in a motion for reconsideration." *Wilcox v. Lexington Eye Inst.*, 128 Wn. App. 234, 241, 122 P.3d 729, 732 (2005). Employer's motion for reconsideration was based on all of the same evidence that was in the record and discussed during the underlying motion to compel arbitration. Employer merely added additional legal authority for its argument that Employee had agreed to arbitration.

II. CONCLUSION

For the foregoing reasons, Employer respectfully requests that the Court reverse the Order Denying Defendant's Motion to Compel Arbitration (CP 226-27), and remand with instructions to stay the Superior Court action in favor of arbitration.

Respectfully submitted this 26th day of September, 2018.

DORSEY & WHITNEY LLP



Michael W. Droke, WSBA #25972
Email: droke.michael@dorsey.com
Todd S. Fairchild, WSBA #17654
Email: fairchild.todd@dorsey.com
Jasmine Hui, WSBA #49964
Email: hui.jasmine@dorsey.com
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800
Attorneys for Appellant Pagliacci Pizza, Inc.

CERTIFICATE OF SERVICE

On this 26th day of September, 2018, I caused to be served a true copy of the foregoing Appellant's Reply on the following:

TERRELL MARSHALL LAW GROUP PLLC
Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Erika L. Nusser, WSBA #40854
Email: enusser@terrellmarshall.com
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

DATED this 26th day of September, 2018.

MICHAEL W. DROKE

DORSEY & WHITNEY LLP

September 26, 2018 - 3:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78356-4
Appellate Court Case Title:	Steven Burnett, Respondent v. Pagliacci Pizza, Appellant
Superior Court Case Number:	17-2-25978-1

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- jaswal.stefanie@dorsey.com
- slavik.jackie@dorsey.com
- tmarshall@terrellmarshall.com

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Address:
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701 Fifth Avenue Suite 6100
Seattle, WA, 98104
Phone: (206) 903-8713

Note: The Filing Id is 20180926150943D1127126

Appendix C

unconscionable and probably illegal.

And I'd like to note that Pagliacci does appear to be preserving the argument that Mr. Burnett failed to comply with FAIR. Page three of their opening motion says, quote, "Plaintiff also never requested resolution via Pagliacci's FAIR policy." So maybe their intent is to go to arbitration and say this arbitration should be dismissed for failure to comply with a contractual term.

And then the third substantively unconscionable element is the ability to modify terms at any time. Again, I think it's undisputed that Pagliacci does reserve the ability to unilaterally modify the *Little Book of Answers*, including the arbitration clause, and the court's task is to just look at the contract and see if that language is there. It is, and it's language that courts have applied -- Washington courts have said is another example of a unilateral or unfairly harsh provision.

The *Al-Safin* is, I think, the leading case on this point, the 9th Circuit's authority. Pagliacci has said the court did not enforce -- that the court ultimately enforced an arbitration clause in that case. That's incorrect.

What the court said in that case is, no, Circuit

claims are subject to arbitration, under both sentences of the clause, and, if those are severed, there's just nothing left to enforce.

THE COURT: Thank you.

MS. CHANDLER: Thank you, your Honor.

THE COURT: Let me hear from Mr. Droke in response. You have up to five minutes.

MR. DROKE: Sure. Thank you. If I may confer form the bench.

THE COURT: Of course.

MR. DROKE: It's easier to hear. I'll try to do my best with five minutes, but also beg a little forgiveness, potentially.

So taking the issues in particular, we would, of course, agree that the contract was incorporated by reference properly, as was described.

I think the facts are very clear that he did -- that Mr. Burnett did have an opportunity to understand and review the terms of the FAIR policy. He said in his affidavit that he was given the policies in orientation. That's exactly the purpose of the orientation, is to go over those policies.

Counsel stretches the idea of own initiative beyond the natural meaning of that language. There's nothing in the policy that says that the person is required to

review the documents on their own time, rather, it's made clear what the law says anyway, which is that employees and others are required to read the things that they sign and to understand the terms of the documents that they have. So that would not be a basis for any kind of overturning of the agreement itself.

Now, Counsel addresses unilaterally, you know, to some degree, and I'd caution the court to -- in the same way that Justice Matson did in the concurring opinion in *Adler*, and that is that the nature of agreements in the employment context are such that if that argument would suffice, or that kind of argument -- she was addressing a different issue -- then virtually all employment-based arbitration clauses would be overturned. And that's simply not the law in the state of Washington.

Here there's no question it's not even a unilateral agreement. Pagliacci's bound by it, understands that, they're the one attempting to enforce the agreement. And so courts don't look just at that topic.

When courts are reviewing the context of unconscionability, they look at the phrase that includes shocking the conscience, that the terms are monstrously harsh, that they're exceedingly calloused, and there's no question that the mutual fairness

section and the policy that's at issue here meets none of those.

Zuver, other cases and the like, look at specific types of exclusions that are heavy-handed and one-sided, like statute of limitations restrictions that would limit the scope of damages, venue, out of state, that would preclude access to justice in real terms.

Here we have a contract that's more akin really to a choice of venue provision. To say, for example, that we'll litigate disputes in Pierce County versus King or the like. It's really that simple of a policy. It couldn't be more simple.

The limitation on actions section is raised, is, both, not such a shocking or a provision that would be monstrously harsh, it's, in fact, a similar kind of requirement to the mandatory mediation programs and the like that courts have. So it's a very standard kind of provision. It's something that Pagliacci would be willing to waive, if necessary, but, regardless, does not itself render the entire agreement unconscionable. It's also easily struck from the language itself. It's contained in a separate page of the document itself and the like. So we would contend that it's a very straightforward kind of provision, and not the kind of

thing that would shock the conscience of a reasonable person.

Finally, Counsel raises the argument about retaining the right to indemnify -- or to modify or change the provision. I would direct the court to *Mayne vs. Monaco*, in which the court found one agreement invalid but then remanded for enforcement on another agreement, as well.

This -- it's a moot point, because the same language that was issued to Mr. Burnett is at issue in front of this court, and so the mere retention of the right, as is very normal, as I'm sure your Honor is aware in the context of employment policies, they become modified from time to time. And so that is not, alone, sufficient to have substantive unconscionability, or procedural, for that matter.

And then, finally, I would address the severability issue. This agreement and the policy that's attempting to be enforced here is the mandatory arbitration policy. In the same way that the court would not throw out the entirety of the *Little Book of Answers*, literally, right below the arbitration policy is the sexual harassment policy. That doesn't go out because it's presented in the employee orientation. The same would be true for the arbitration policy. It is -- it

would be simple to modify that, if necessary, if the court found it necessary to remove the section requiring an employee to let the company know they have an issue, and would be easily severed if necessary.

THE COURT: Thank you. All right. Well, I'm still stuck, frankly, folks, on the first part of this, which is figuring out that there is, in fact, an employment agreement that includes an arbitration clause.

This is not normally a difficult inquiry for me, and I've seen plenty of cases before with employment agreements, including arbitration clauses, which of course the court would normally enforce, because arbitration clauses are favored in the law, both, under Washington law and federal law, as well as the cases interpreting.

But I have difficulty with this rather basic question in this case. Really, the only information I have about what happened here, in terms of Mr. Burnett adding his signature to the employee relationship agreement, which is Exhibit A to his -- the Ronovas declaration, is what the employment relationship agreement says, which is that somebody else, whose signature I can't make out, and, which, frankly, no human being could make out, signed this on behalf of Pagliacci Pizza about a month before Mr. Burnett, and

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August 12, 2019 - 2:17 PM

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