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STATE OF WASHINGTON
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No. 94847-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CINDIUS ROMNEY as PERSONAL REPRESENTATIVE for the ESTATE OF MICHAEL ROMNEY; FARON BAUER; and KRISTEN CHILDRESS, individually and on behalf of a class of all others similarly situated,

Plaintiffs – Respondents,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation; FRANCISCAN HEALTH SYSTEM, a Washington Corporation; FRANCISCAN HEALTH VENTURES, a Washington Corporation; FRANCISCAN NORTHWEST PHYSICIANS HEALTH NETWORK, LLC, a Washington Corporation; and CATHOLIC HEALTH INITIATIVES, a Colorado Corporation,

Defendants – Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Cindius Romney as Personal Representative of the Estate of Dr. Michael Romney, Dr. Faron Bauer, and Dr. Kristen Childress individually and as class representatives (collectively "Plaintiffs") answer the petition for review filed by Franciscan Medical Group and the related entities (collectively "Defendant FMG"). This Court should deny the petition for review.

II. COURT OF APPEALS DECISION

Division I of the Washington Court of Appeals ("COA") correctly applied existing and established Washington law on waiver, reversing the trial court's order that erroneously forced Plaintiffs and putative class members to arbitrate individually and separately, effectively extinguishing class claims. The COA's decision properly applying waiver does not announce a new holding, clarify the law, or conflict with any precedent. It does not raise any of the considerations for review under RAP 13.4(b). Defendant's petition should be denied.

III. ISSUES PRESENTED

Consistent with controlling law, the COA held that "FMG waived its right to object to the putative class preceding to arbitration," based on Defendant's many inconsistent actions, including its agreement on the record that an arbitrator can certify the class. The COA remanded this case

to the trial court to enter an order sending the individual claimants and the putative class to a single arbitrator. COA Opinion at 17.

Did the COA correctly rule that Plaintiffs' individual and class claims must be heard together before a single arbitrator and that Defendant waived any right to oppose this when:

1. Defendant repeatedly agreed in sworn pleadings before the trial court and the COA that the Arbitration Agreements it drafted allowed class arbitration, but then claimed the exact opposite after this Court denied review of the original appeal on September 30, 2015;

2. Defendant affirmatively moved to compel Plaintiffs' Consolidated Class Complaint with individual claims into arbitration before a single arbitrator, without raising any issues, as required under Civil Rule 7, that the Agreements precluded class claims or required separate arbitrations;

3. Defendant appealed the trial court's decision to void the Arbitration Agreements as unconscionable requesting that the COA compel Plaintiffs' consolidated class complaint into arbitration before a single arbitrator without ever claiming class arbitration was precluded;

4. Defendant waited two years to make the new claim that its Arbitration Agreements precluded class actions and required individual arbitration after previously agreeing that a single arbitrator could certify class claims, thus prejudicing Plaintiffs' through delay, unnecessarily

forcing them to expend additional time, energy, and resources, and denying them the ability assert important legal arguments to invalidate these unconscionable Arbitration Agreements during the first appeal?

IV. STATEMENT OF THE CASE

A. History of the Case Over Nearly Four Years of Litigation.

Plaintiffs filed "Plaintiffs' Class Action Complaint" on November 13, 2013, after Defendant fired Dr. Michael Romney[1] and Dr. Faron Bauer for demanding wages due to healthcare providers negotiated under their contracts, and for reporting a physician at their clinic who was physically harming patients. CP 1-11. Both doctors filed a single class complaint, along with co-Plaintiff and co-class representative, Dr. Kristen Childress, against Defendant for wrongfully withholding wages owed to hundreds of Washington physicians, physician's assistants, advanced nurse practitioners, and nurse midwives, along with their individual claims. *Id.*

Before Plaintiffs filed their class action complaint, and prior to this Court's decision in *Hill v. Garda CL Northwest Inc.*,179 Wn.2d 47 (2013), (which prompted Plaintiffs to move to invalidate the Arbitration Agreements), the parties were in discussions to begin arbitration of all claims before a single arbitrator. CP 1540-1550. On July 22, 2013, Plaintiffs

[1] Dr. Romney passed away during this litigation and his widow Cindius Romney is pursuing his claims on behalf of his estate. CP 1213.

sent a single arbitration demand letter to arbitrate Dr. Romney and Dr. Bauer's claims together in one arbitral proceeding. CP 1526. Defendant agreed to a single arbitration, and never indicated or claimed that the arbitrations must be individual and separate. CP 1540-1550.

On November 15, 2013, Plaintiffs filed a Motion to Void the Arbitration Agreements as unconscionable. CP 12-37. Defendant filed its own **cross-motion** to compel arbitration on December 23, 2013. CP 169-189. Defendant's cross-motion acknowledged that Plaintiffs were bringing class claims. CP 174. The cross-motion asked the court to "compel Plaintiffs to bring their claims in arbitration" (without excluding class claims). CP 180. The cross-motion never challenged Plaintiffs' ability to bring class claims in arbitration, and Defendant did not move to compel individual or separate arbitrations. CP 169-189. Instead, Defendant represented in its reply that "Plaintiffs are bound to arbitrate employment-related claims **such as those brought here**." CP 235.

The Superior Court found the Arbitration Agreements unconscionable, void, and unenforceable and denied Defendant's motion to compel the consolidated class action complaint into arbitration. CP 255-258. Defendant appealed on March 3, 2014, but did not raise issues related to severing the individual Plaintiffs or in any way challenge a class arbitration. CP 554-563.

While the case was pending before the COA, lead Plaintiff and class representative Dr. Michael Romney received a diagnosis of terminal cancer. CP 585. Because he had essential testimony as the lead class representative, Plaintiffs successfully moved the COA to lift the stay in the case so he could participate in discovery before he died. Plaintiffs also successfully moved the Superior Court to compel discovery, including class discovery. CP 564-576. Plaintiffs argued that class discovery was essential and should not be delayed because "[t]he needed [class] discovery must occur **regardless of the forum in which this case proceeds** (arbitral tribunal or court) and therefore will occur regardless of this Court's decision on appeal." CP 588. Defendant never disputed this truth. It did not disagree that class claims would proceed in arbitration. Rather, Defendant **agreed** and confirmed numerous times in signed pleadings that an arbitrator had the power to certify a class and that the Arbitration Agreements permit class arbitration. Not once did it claim that the Agreements precluded class arbitration. The following are just a few examples of Defendant's admissions with bracketed facts added for context:

- "Plaintiffs, however, have failed to demonstrate that putative class members would be harmed in any way should class-related discovery occur after these issues have been determined by either a court **or an arbitrator.**" CP 676.
- "Should a class be certified, those class members would have access to all discovery related to...all claims under the wage statutes, as well as

the opportunity to conduct class discovery **in the forum which ultimately presided over this matter.**" CP 676;

- "Additionally, if this Court orders full discovery and then **compels the parties to arbitration,** FMG may be forced to participate in discovery that is unnecessary for the arbitration, as **an arbitrator could decline to certify the putative class** or narrow other issues in the case." CP 611;

- [In addressing why Dr. Romney's status as the lead class representative did not require him to participate in discovery before he succumbed to cancer, Defendant stated], "[T]here is no indication that Dr. Bauer will be unable to pursue his individual claims or proceed as a class representative **once the forum is determined and a decision is made as to class certification.**" CP 667;

- "This court should consider all facts, including whether it is appropriate to allow class discovery when it is **still uncertain as to whether a court <u>or an arbitrator</u> will preside over this matter and <u>whether a class will be certified</u>.**" CP 667;

- "It is unclear as to **who will preside over this matter [court or arbitrator] and whether a class will be certified**[.]" CP 667;

- "It is undisputed, however, that Dr. Bauer is healthy and will be available to assist in the prosecution of [Dr. Romney's] individual claims**, and those of any class he may ultimately be allowed to represent, once the proper forum [court or arbitration] for this matter is determined.**" CP 669-70;

- "The discovery Plaintiffs seek is unduly burdensome and potentially unnecessary, as the putative class is not certified, **it is unlikely that Dr. Romney will proceed as a class representative <u>if a class is certified</u>, and Drs. Bauer and Childress remain adequate class representatives.**" CP 673;

- "Plaintiffs cannot establish that justice requires this Court to permit discovery regarding class claims **when it is uncertain whether this Court or an arbitrator will determine whether a class exists**, when no class has been certified, and when Dr. Bauer will be able **to pursue his individual claims, as well as those of the putative class, once the question of forum is decided.**" CP 674;

- "Here, good cause exists to enter a Protective Order because allowing discovery on class claims when it is still uncertain whether this matter will proceed in this court or in arbitration, where it is uncertain **whether a class will even be certified** (and even if one is, it is unlikely that Dr. Romney will be class representative given his medical condition) and where **Dr. Bauer will be able to pursue his individual claims and any class claims once the arbitration issue has been decided**, would be unduly burdensome, expensive, and unnecessary – especially if it is ultimately decided that this matter **should proceed in arbitration and/or that no class should be certified**." CP 675.

Had the Arbitration Agreements precluded class arbitrations or required Plaintiffs to arbitrate individually, Defendant would have argued this at the time – it was its best argument. Defendant, however, ***agreed*** in writing to the COA and trial court that issues of class certification could be decided by an arbitrator, and that Dr. Bauer and Dr. Childress were adequate class representatives in ***any forum*** after Dr. Romney died. The trial court granted Plaintiffs' Motion to Compel discovery and the parties commenced the discovery process, including class discovery. CP 974-976.

Additionally, while still on appeal and while Plaintiffs' petition for review was pending in this Court, the parties scheduled a mediation to resolve both individual and class claims. At no point before the petition for review was denied on September 30, 2015 did Defendant claim or do anything other than represent and agree that a class action and individual

claims could be heard by a single arbitrator.[2] The first time Defendant ever claimed otherwise was after it had already moved to compel the class complaint to arbitration, filed an appeal with the COA, and the Supreme Court denied review on September 30, 2015, nearly two years after Plaintiffs filed their consolidated class complaint.

B. The COA Remanded the Entire Consolidated Complaint, Filed On November 13, 2013, including Class Claims, to Arbitration.

On February 17, 2015, the COA issued an opinion reversing the decision of the Superior Court. CP 1167-1182; *Romney v. Franciscan Medical Group*, 186 Wn. App. 728, 349 P.3d 32 (2015). The COA's opinion remanded the entire case to the Superior Court "for an order compelling arbitration." CP 1182. The COA knew that Plaintiffs brought claims "on behalf of themselves and the class of physicians, medical assistants, and nurse practitioners." CP 1168. The COA compelled Plaintiffs' entire complaint, as pleaded, to arbitration. CP 1165-1182.

Plaintiffs moved for discretionary review to this Court, which declined review on September 30, 2015. CP 1165. Again, Defendant never raised any issue with respect to class arbitrability or severance. The COA issued a Mandate on November 20, 2015 which used the boiler-plate

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[2] "Scott, We would never have agreed to mediation if we were not interested in settling with plaintiffs **and the class**." CP 1569 (emphasis added).

language that "This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision." CP 1166.

C. Defendant Agreed to Class Arbitration Until After this Court Denied Plaintiffs' Petition for Review on September 30, 2015.

On December 14, 2015, before the Superior Court complied with the Mandate and could order arbitration of Plaintiffs' entire complaint as pleaded, Defendant filed a **second** motion to compel arbitration, completely changing its position and raising new issues not previously raised. Defendant again asked the Court to compel arbitration. CP 1183-1189. However, Defendant flipped on its prior agreements and argued for the first time that class claims could not be arbitrated and that Plaintiffs must arbitrate separately and individually. CP 1452. Defendant admitted it failed to raise these issues in its Reply. *Id.* On January 8, 2016, the trial court granted Defendant's new motion to compel individual arbitration. CP 1503-04. The Order, drafted by Defendant, stated that Plaintiffs must "submit to individual arbitration and to arbitrate, separately, their claims." CP 1504.

Plaintiffs moved for reconsideration. CP 1506-1519. The trial court denied Plaintiffs' motion for reconsideration. CP 1616-1620.

D. Plaintiffs Successfully Moved for Discretionary Review, and the COA Reversed the Trial Court Properly Applying Existing Law Holding That Defendant Waived Any Right to Compel Individual Arbitrations or Oppose Class Arbitration.

Plaintiffs moved for discretionary review. It was granted on May 3, 2016. Br. of Appellants at Appx. Plaintiffs argued that the language in the Agreements allow for class arbitration, as evidenced by Defendant's conduct and admissions, and that Defendant waived any right to argue for individual arbitration. Br. of Appellants. As to waiver, Plaintiffs reiterated to the COA that Defendant's words and actions throughout litigation precluded it from taking a contrary position on class arbitration, given the substantial delay and prejudice. Id. Defendant admitted to the COA that it **agreed "that an arbitrator has the power to *certify* a class."** Br. of Resp'ts at 23.

The COA issued its decision on July 10, 2017, reversing the trial court and holding that Defendant waived any right it had to compel individual arbitration. The COA found waiver "[b]ecause FMG's conduct in the superior court and during the first appeal was inconsistent with a right to compel individual arbitration, and the delay in asserting the right prejudiced Romney." COA Opinion at 2. The COA remanded the case "to enter an order sending the putative class to a single arbitrator." COA Opinion at 17.

V. ARGUMENT AND AUTHORITY AS TO WHY THIS COURT SHOULD NOT TAKE DISCRETIONARY REVIEW

No reason exists to review the COA decision on waiver. Defendant's petition raises only one basis for review under RAP 13.4(b). It claims that the Court of Appeals decision on waiver "involves an issue of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4). Petitioners' Brief at 1. Washington law, however, is well settled on issues of waiver. Defendant's petition fails to raise any novel issues, does not seek to change existing law, and does not claim that the COA decision conflicts with any other appellate decisions or any decision of this Court. The COA correctly held that Defendant "waived its right to object to the putative class preceding to arbitration." There is no basis to disturb the COA's well-reasoned decision.

A. The COA Correctly Held that Defendant Waived Any Right to Object to Class Arbitration by Acting Inconsistently With Its Claimed Right to Compel Individual Arbitration.

The COA correctly analyzed and applied well-established Washington law to find waiver. "Washington courts have consistently recognized that contractual rights to … arbitration may be waived." *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 237, 272 P.3d 289, 297 (2012)(finding waiver of arbitration). "The determination of whether a party waived arbitration by conduct depends

on the facts of the particular case." *Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 298, 322 P.3d 1229, 1234 (2013). "[T]he doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote the just, speedy, and inexpensive determination of every action." *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 39 (2000) (citing CR 1(1)). "If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised." *Id.*

Here, the COA looked at Defendant's actions throughout litigation and determined that they were "inconsistent with the intent to assert a right to compel individual arbitration." COA Opinion at 12. Through its actions and statements on the record, Defendant not only demonstrated a clear intent to forego any right to compel individual arbitration, but also their **affirmative agreement** to proceed with consolidated class arbitration. The COA's holding is consistent with Washington law.

1. *Defendant acted inconsistently with a right to individual arbitration by moving to compel the entire consolidated class action to arbitration before a single arbitrator.*

As the COA correctly observed, "FMG's original motion to compel arbitration did not include any objections to class arbitration." COA Opinion at 12. If Defendant truly believed that class claims could not

be arbitrated under the contracts, it had to raise that when it affirmatively moved to Compel Arbitration. Motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." CR 7(b)(1). Here, Defendant moved to, "compel Plaintiffs to bring their claims in arbitration." CP 180. Defendant's motion did not ever mention individual arbitration. CP 169-189, CP 235-247. As the COA observed:

> [W]hen FMG wanted a determination on the right to compel arbitration of those issues, it was content to litigate against the putative class. Thus, FMG was able to establish the enforceability of the arbitration agreements against all three named plaintiffs in one action rather than in three individual actions. By participating in class adjudication to resolve issue of arbitrability before asserting a right to avoid class adjudication, **FMG evinced its intent to waive that right in the same way it would have if it had litigated the issues in a court and then asserted a right to arbitrate those issues**.

COA Opinion at 11-12, n. 10 (emphasis added).

Contrary to Defendant's legally baseless assertion, it could not tactically and prejudicially wait to challenge Plaintiffs' right to class arbitration until after other issues of arbitrability had been decided. Defendant's reliance on the COA's decision in *Hill v. Garda CL Northwest, Inc.*, an opinion that was reversed by this Court, is unavailing. 169 Wn.App. 685, 281 P.3d 334 (2012), *rev'd by Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013). Unlike the Defendant here, the employer in *Hill* specifically asked the trial court to

order arbitration on an individual basis as part of its motion to compel arbitration. *Id.* at 689 (noting that "[a]t the hearing on Garda's motion to compel, the trial court ordered supplemental briefing on its authority to order class arbitration."). While the COA in *Hill* did not find waiver, the parties there presented no argument about whether the employer had waived its right to compel *individual* arbitration. In reversing the COA's decision in *Hill*, this Court reiterated that "a party must raise objections to arbitration in the trial court or on first review or risk having waived the challenge." *Hill*, 179 Wn.2d at 54.

Additionally, the non-binding federal cases Defendant cites are readily distinguishable and not helpful to Defendant. In *Oxford Health Plans LLC v. Sutter*, the Supreme Court held that an arbitrator did not exceed his powers when ruling that an arbitration agreement that did not mention class claims nevertheless allowed for class arbitration. 133 S.Ct. 2064, 2071 (2013). *Oxford* did not deal with the issue of waiver at all. Similarly, in *Henderson v. U.S. Patent Commission, Ltd,* the issue of waiver was not before the court, and unlike here, the defendant in that case never stated on the record that an arbitrator had the power to certify the class. 188 F.Supp.3d 798 (N.D.Ill., 2016); *see also Crook v. Wyndham Vacation Ownership, Inc.*, 2015 WL 4452111 (N.D.Cal., July 20, 2015)(no waiver analysis).

Here, Defendant moved to compel Plaintiffs' entire consolidated class complaint to arbitration and agreed that class issues could be decided by a single arbitrator. Defendant acknowledged from the outset that Plaintiffs had class claims, yet waited until review was denied by this Court on the original appeal to assert a contrary position. It then filed a **second motion to compel arbitration**. Defendant violated Plaintiffs' right to "the just, speedy, and inexpensive determination" of this issue, *Lybbert,* 141 Wn.2d at 39, and this constitutes waiver.

2. *Defendant agreed to class arbitration, as evidenced by its admissions on the record that an arbitrator had the power to certify the class.*

Defendant's recent statement to the COA that it "acknowledge[s] that an arbitrator has the power to *certify* a class," COA Br. of Resp'ts at 23, is evidence of Defendant's **agreement** to class arbitration. As the COA correctly observed, "the arbitrator would have the power to certify a class **only if the [parties'] agreement permits class arbitration.**"[3] COA Opinion at 14 (emphasis added).

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[3] The COA's decision that the parties' arbitration agreements do not permit class arbitration is contrary to the language of the agreements themselves and inconsistent with Defendant's agreement that an arbitrator had the "power to certify the class." COA Opinion at 10. While Plaintiffs do not believe review is necessary or appropriate in this case, should the Court nevertheless grant review, it should also review whether the COA's determination that FMG had a contractual right to avoid class arbitration is incorrect. "This court has inherent authority to consider issues not raised by the parties if necessary to reach a proper

Through its actions, statements and admissions, Defendant did not simply waive its right to argue for individual arbitration – it agreed to consolidated class arbitration. Just as the parties in *Oxford* consented to an arbitrator determining whether class arbitration was permitted, Defendant in this case consented in writings and pleadings before multiple courts to a single arbitrator determining class issues. *See Oxford*, 133 S.Ct. at 2066.

Even prior to its recent admission at the COA, Defendant agreed in writing at least 16 times in signed pleadings that under the Agreements a single arbitrator had the power to certify a class. Defendant agreed to this while attempting to prevent Dr. Romney's participation and class discovery. Defendant cannot ignore the fact that it agreed in writing that the arbitrator could certify the class. Lying in wait until this Court denied Plaintiffs' petition for review underscores, and does not erase that Defendant's words and actions were consistent with its agreement to arbitrate class claims. The irrefutable truth is that Defendant **never argued that class discovery should not proceed because class arbitrations were precluded;** it **agreed** in writing that the Agreement allowed for class arbitration. As the COA pointed out, "[o]ne would have expected FMG to argue that, if it won the appeal, class arbitration would not be available at all." COA Opinion at 14.

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decision." *State v. Cantu*, 156 Wn. 2d 819, 822, n. 1, 132 P.3d 725, 726 (2006), *as amended* (May 26, 2006).

Had the actual Agreement said otherwise, Defendant would have made this silver bullet argument. Instead, it agreed that an arbitrator could certify the class. These actions demonstrate Defendant's intent to arbitrate the class and constitute absolute waiver.

Finally, as the COA recognized, Defendant used the availability of class arbitration as a legal basis to argue the arbitration agreements were conscionable during the first appeal. COA Opinion at 15. Defendant cannot now renege on what it agreed to in pleadings and represented to the COA during the first appeal. It is disingenuous for it to now claim that it did so because "it was focused on whether the Agreements were enforceable." Br. of Petitioner at 14.

For over two years, when it suited Defendant, it represented and agreed that class claims could be arbitrated. Under well-established Washington law regarding waiver, Defendant cannot now take the opposite position and prejudice Plaintiffs and the putative class.

3. *Defendant acted inconsistently with its supposed right to compel individual arbitration.*

The COA held that because Defendant drafted the Arbitration Agreements, it is presumed to know its rights under those agreements. COA Opinion at 12. While Plaintiffs strongly disagree that the Agreements preclude class arbitration, the COA correctly held that since

Defendant drafted them it should have known what they said. Thus, Defendant waived the right to make that argument by not timely raising it.

Defendant's new claim that it "presumed" individual arbitration was allowed bolsters the COA's holding that Defendant waived any right to compel individual arbitration by its acts and omissions. If Defendant truly had such a presumption that the right to individual arbitration was clear, Defendant needed to assert it or it is waived. *See Hill*, 179 Wn.2d at 54. Defendant did not assert it and agreed in writing to the exact opposite, thus demonstrating its clear intent to arbitrate class claims.

B. As the COA Correctly Held, Plaintiffs Suffered Prejudice by Defendant's Substantial Delay in Asserting Any Right to Compel Individual Arbitration.

Plaintiffs were prejudiced by the years of delay caused by Defendant's change in position, including expending substantial fees and costs associated with this latest round of appeals. Plaintiffs filed this case in 2013 and have already been through one appeal and a prior petition for review to this Court. Had Defendant complied with CR 7 when it first moved to compel class arbitration, the parties and the three courts that have already reviewed this case, could have addressed Defendant's arguments then. Instead, Defendant agreed that the Agreements allowed for class arbitration in order to gain a tactical advantage, forcing delay and the parties to spend time, money, and resources litigating two motions to compel, two

appeals, and now two motions for discretionary review. "[D]elay amounts to prejudice when there is no good excuse for it." *Steele v. Lundgren*, 85 Wn. App. 845, 858, 935 P.2d 671, 678 (1997). Here, Defendant has no legitimate excuse.

In addition, due to Defendant's years of delay, the statute of limitations for the putative class members has the potential to extinguish class claims. The original COA opinion in this case was issued on February 17, 2015 where the court ordered the entire consolidated class action complaint to Arbitration. *Romney*, 186 Wn.App. at 748. It has now been an additional-two-and a-half years of litigating class arbitration issues that should have been resolved in the first round. While the class claims are tolled and will proceed in arbitration, Defendant's delay would be devastatingly prejudicial if class arbitration was denied.

Moreover, during this long and unnecessary litigation caused by Defendant's failure to timely raise a supposed right, Dr. Romney died. Defendant now seeks to force his widow to litigate his claims separately from both the class and her co-Plaintiffs, who are the primary witnesses to the violations. Had Defendant originally moved to compel individual arbitration, the parties and courts could have addressed all these issues in an efficient manner, and saved significantly on time, energy, and resources.

Defendant's waiver also denied Plaintiffs the opportunity to argue during the first appeal that any class arbitration waiver was unconscionable. However, since Defendant moved to compel the entire class complaint to arbitration, "never even hinted" that class arbitration was precluded, and more importantly agreed that class arbitration was permitted, Plaintiffs had no reason to raise this argument. This was and is a viable argument. An employment agreement that fails to inform an employee that he or she is waiving their right to litigate as a class is unconscionable under state law, and violates the right to act collectively under federal law. *See McKee v. AT & T Corp.*, 164 Wn.2d 372, 397-98 (2008); *Morris v. Ernst & Young*, LLP, 834 F.3d 975 (9th Cir. 2016) (arbitration agreements in employment contracts that preclude class actions and force employees to arbitrate claims individually illegally violate the rights of employees to collectively seek legal remedies). Defendant's failure to assert a purported right to individual arbitration prevented Plaintiffs from being able to raise these arguments and is prejudicial.

VI. CONCLUSION

The COA's well-reasoned decision on waiver should not be disturbed. Defendant agreed on the record that an arbitrator could determine class issues and waived any argument to the contrary. Plaintiffs' class claims must proceed to arbitration before a single arbitrator.

DATED this 15th day of September, 2017.

THE BLANKENSHIP LAW FIRM, P.S.

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DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date listed below I caused to be served a copy of the attached document to the following attorneys for Defendants - Petitioners in the manner indicated below:

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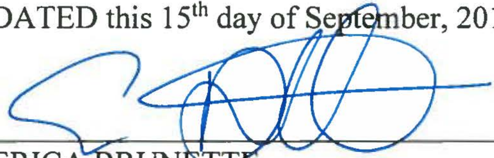
DATED this 15th day of September, 2017, at Seattle, Washington.



ERICA BRUNETTE
Paralegal

THE BLANKENSHIP LAW FIRM, P.S.

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