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SUPREME COURT  
OF THE STATE OF WASHINGTON

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LAWRENCE HILL, ADAM WISE, and ROBERT MILLER,  
on behalf of themselves and all persons similarly situated, Petitioners,

v.

GARDA CL NORTHWEST, INC., Respondent.

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**SUPPLEMENTAL BRIEF OF RESPONDENT  
GARDA CL NORTHWEST, INC.**

---

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## I. INTRODUCTION

This case is about a group of employees who believe they are not bound to follow the dispute resolution process that was freely negotiated between their exclusive collective bargaining representative and their employer. Relying on unfounded assumptions that their unions would not support them, their substantive rights would not be protected, and the costs of arbitration would be prohibitive, these employees seek to defy their contractual obligations and circumvent binding United States Supreme Court precedent by pursuing this class action wage and hour lawsuit in state court. The Court of Appeals aptly redirected the employees to the appropriate forum for resolution. This Court should affirm that decision and allow the parties to proceed with the individual arbitration of their claims.

## II. STATEMENT OF THE CASE

Petitioners are former driver/messenger guards of Garda, an armored car company with seven branches in the state of Washington. CP 4, ¶ 8. All of Garda's Washington driver/messenger guards are and were at all times relevant to this lawsuit represented by unions specific to each branch. CP 133. Each union negotiated a collective bargaining agreement ("CBA") with Garda. CP 65-66. Each CBA included a mandatory

grievance/arbitration procedure covering, in pertinent part, “any claim under any . . . state . . . law, statute or regulation . . . or any other claim related to the employment relationship.” CP 142-143, 206-207, 229-230.

Ignoring the grievance/arbitration procedure in their respective CBAs, Petitioners filed this lawsuit on February 11, 2009, alleging that Garda denied employees meal and rest breaks, altered their time records, and failed to pay them for “off-clock” work. CP 3-8. On April 23, 2009, Garda filed its answer to Petitioners’ complaint, in which it unambiguously asserted as affirmative defenses, *inter alia*, that Petitioners’ claims (1) could only be resolved by interpreting the CBAs; (2) must be resolved by arbitration under the CBAs; and (3) were waived in whole or in part by the CBAs. CP 12.

On March 26, 2010, Petitioners filed a motion for class certification. CP 806-807. On July 1, 2010, Garda filed a motion to compel arbitration or for partial summary judgment. CP 15-40. On July 23, 2010, the Superior Court granted Petitioners’ motion for class certification. CP 519-521. On September 24, 2010, the Superior Court granted Garda’s motion to compel arbitration, but directed the parties to arbitrate the dispute as a class “in light of its prior decision to certify a class.” CP 767-768.

On October 20, 2010, Garda appealed the Superior Court's order to the extent it compelled Petitioners to arbitrate the dispute *as a class*. CP 913-917. On October 28, 2010, Petitioners cross-appealed the Superior Court's order to the extent it compelled arbitration. CP 918-920. On July 30, 2012, the Court of Appeals issued its decision upholding arbitration, but on an individual basis. *See Hill v. Garda CL Northwest, Inc.*, 281 P.3d 384 (Wash. Ct. App. 2012).

On August 27, 2012, Petitioners filed a petition for review of the Court of Appeals' decision, which this Court accepted on February 6, 2013. Pursuant to RAP 13.7(d), Garda hereby submits this supplemental brief.

### III. ARGUMENT

#### A. GARDA DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION.

Petitioners would have the Court believe that, from the outset of this case, Garda disguised its intent to compel arbitration and unscrupulously delayed the proceedings in an effort to gain some tactical advantage in that forum. The fallacy of Petitioners' theory, however, is that it disregards uncontested facts and ignores the reality of the situation.

The complaint was filed on February 16, 2009, CP 3, and Garda unambiguously raised arbitration as an affirmative defense in its answer on April 23, 2009, CP 12. After the initial pleadings were filed, *neither*

*party sought to advance the case* because a substantially similar matter, *Pellino v. Brinks*, was pending before a Washington trial court.<sup>1</sup> Both sides knew full well that the outcome of *Brinks* might impact their respective settlement positions and litigation strategies.

Perhaps most telling is Petitioners' counsel's express acknowledgement in an early brief to the trial court that "[t]he parties delayed significant investment in prosecuting and defending the case because trial was imminent in a very similar matter, *Pellino v. Brinks* . . . ." CP 841. Petitioner's counsel further acknowledged in early briefing that, after *Brinks* was decided in January 2010, "the parties . . . spent some time discussing the possibility of settlement, but nothing materialized . . . ." CP 580. These settlement discussions not only contributed to the delay in Garda moving to compel arbitration, they contributed to Petitioners' 13-month delay in moving to certify the class.

According to Petitioners' counsel, "Nothing materialized [in settlement discussions], so [Petitioners] moved for class certification on March 26, 2010." CP 841. Even after moving for class certification, however, Petitioners were not itching to advance the case because they had not yet given up on the prospect of settling it. Indeed, on April 1,

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<sup>1</sup>*Brinks* was a class action lawsuit filed by messengers and drivers of an armored truck company alleging that they did not receive meal periods or rest breaks in violation of Washington law.

2010, Petitioners' counsel emailed Garda's former counsel and stated, "[Petitioners] are willing to postpone further briefing on class certification in order to attempt a class-wide settlement through mediation . . . ." CP 626.

That Petitioners had no interest in advancing the litigation prior to formal settlement discussions is further illustrated by their willingness to join Garda in filing a motion on March 10, 2010, to postpone the trial date.<sup>2</sup> CP 799-801. Of particular interest in the joint motion is the parties' representation that the "stipulation and motion is made without prejudice to Garda's position (which is contrary to [Petitioners'] position) that this matter is properly subject to arbitration under the applicable Labor Agreements." CP 799. Garda's "position," of course, was not coming out of left field.

Again, it is uncontested that Garda raised arbitration as an affirmative defense in its answer to the complaint on April 23, 2009. CP 12. It is also uncontested that after *Brinks* was decided some nine months later, Petitioners' counsel emailed Garda's former counsel on February 1, 2010, and stated, "As we discussed this morning, if we proceed to litigate the arbitration issue we'll want discovery on it, so we are providing these written requests now to keep things moving." CP 625. Quite clearly then,

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<sup>2</sup>The trial court granted the joint motion, continuing the trial date to December 6, 2010. CP 802-803.

Petitioners' counsel knew and understood early on that a significant issue moving forward would be whether Petitioners waived the right to pursue their statutory claims in court. Moreover, they recognized that both sides would need to pursue discovery on the issue to acquire evidence to support their respective positions.

Why else would Petitioners' counsel reference arbitration in the context of settlement other than because it was readily apparent the arbitration issue was going to be litigated? Specifically, in the same April 1, 2010 email that Petitioners' counsel sent to Garda's former counsel regarding postponing class certification briefing, Petitioners' counsel represented that Petitioners would consider agreeing to arbitration should mediation fail:

We also remain willing to give serious and good faith consideration to a comprehensive proposal for arbitration should mediation fail. However, we are not prepared to make a decision on arbitration vs. litigation prior to mediation, and prefer to spend our immediate resources on that effort.

CP 626. It would have been disingenuous for Petitioners' counsel to represent to Garda's former counsel that Petitioners were willing to consider agreeing to arbitration after a May 6, 2010 mediation if they did not reasonably anticipate that Garda would assert its position once it had sufficient evidence to support it.

Because settlement is favored public policy in this and all states, Garda should not be penalized for making good faith efforts to resolve the case rather than litigate or arbitrate it any more than Petitioners should be penalized for delaying 13-months before moving to certify a class. *See Steele*, 85 Wn. App. at 854 (“Settlement is favored in public policy. Parties should be able to pursue settlement at any time without being viewed as acting inconsistently with arbitration.”).

Petitioners simply cannot establish that Garda had an ulterior motive here. Garda raised arbitration as an affirmative defense in its answer; the parties delayed doing virtually anything on the case pending a decision in the substantially similar *Brinks* case; the parties discussed settlement and participated in mediation in the months following the decision in *Brinks*; Garda then promptly moved for summary judgment and to compel arbitration, after which the Superior Court certified the class. Garda’s actions plainly demonstrate that it acted in good faith and with the intent to pursue arbitration at the earliest reasonable time under the circumstances.

**B. THE CBAs CLEARLY AND UNMISTAKABLY REQUIRE PETITIONERS TO ARBITRATE THEIR STATUTORY WAGE CLAIMS.**

It is readily apparent that Petitioners are attempting to fit a square peg into a round hole in arguing that they did not clearly and unmistakably

waive their right to a judicial forum. The round hole is the *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), line of cases. The agreements at issue in those cases did not expressly provide for the arbitration of statutory claims. Those agreements included statutory-type protections for workers (e.g., employees shall not be discriminated against), and they provided for binding arbitration in the event the contract was violated (e.g., if employees were discriminated against), but they did not state or imply that arbitration was mandatory for statutory claims.

Here, the grievance/arbitration provisions in the CBAs expressly cover Petitioners' statutory wage/hour claims: "[A]ny claim under any . . . state . . . law, statute or regulation . . . or any other claim related to the employment relationship." CP 142-143, 206-207, 229-230. Moreover, the agreements mandate that arbitration is the next step following an unsatisfactory response by the Company. *Id.* Consequently, as in *14 Penn Plaza v. Pyatt*, 556 U.S. 247, 261, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), and its progeny, Petitioners have clearly and unmistakably waived their right to pursue statutory claims in court.

Petitioners' arguments to the contrary are clearly misplaced. For example, in an attempt to distinguish *Pyatt*, Petitioners contend that to be a

clear and unmistakable waiver, the grievance/arbitration provision must explicitly identify every statutory claim for which waiver of a judicial forum is intended. Construing *Pyatt* in such a manner is illogical and unreasonable. And, not surprisingly, there is no case law to support it.

Petitioners' argument also contradicts their deposition testimony. Petitioners admittedly understood that the CBAs provided a procedure for the equitable resolution of grievances. CP 56, 66, 78. They further agreed that they could grieve claims arising under state law, including the state wage claims at issue in this case. CP 59, 66-67, 79. Additionally, Petitioners agreed that they were supposed to present their specific grievances to the Company within fourteen days of each event at issue. CP 56, 67, 79. Finally, Petitioners failed to pursue the grievance/arbitration process with respect to the claims that are the subject of this lawsuit and do not contend otherwise. CP 67, 79. For Petitioners to now argue that their claims are not subject to the grievance/arbitration process is to pretend that they did not testify that their CBAs covered this workplace dispute.

As a final matter, Petitioners' repeated attempts to discount Garda's position by lodging accusations that it is unlawfully affiliated with a "sham union" are entirely unsupported and highly inappropriate. There is absolutely no evidence in the record that Petitioners were unable to

vindicate their rights through arbitration. Moreover, if Petitioners are unhappy with the state of their unions, they can decertify them or file unfair labor practice charges with the National Labor Relations Board (“NLRB”) arguing that they have breached their duty of fair representation. The judicial system is not the proper forum for directly raising those challenges.

**C. PETITIONERS’ UNCONSCIONABILITY ARGUMENT DOES NOT WARRANT DISCRETIONARY REVIEW.**

**1. No substantial public interest involved.**

Petitioners have failed to identify an issue of substantial public interest that is raised by the Court of Appeals’ decision to deny discretionary review of their unconscionability argument. If private parties could seek discretionary review of every decision that might potentially affect others in similar cases, there would be no limit on discretionary review. Of course, every situation *might* recur. Discretionary review is only intended to review decisions that are truly of public concern. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (“This case presents a prime example of an issue of substantial public interest. The Court of Appeals’ holding, while affecting parties to this proceeding, also has the potential to affect every [drug offender] sentencing proceeding in Pierce County after November 26, 2001 . . .”).

A collective bargaining agreement negotiated between a union and its employees necessarily involves the interests of specific parties to that agreement. As discussed in Garda's answer to the petition for review, this case is easily distinguishable from other cases in which the court has granted discretionary review as a matter of public policy. Consequently, the Court should not entertain Petitioners' argument that the CBAs (which their collective bargaining representatives freely negotiated) are unconscionable.

## **2. FAA Preemption**

Even if the Court were to consider Petitioners' unconscionability argument, it can easily dismiss it under binding U.S. Supreme Court precedent, as recently applied by the Ninth Circuit Court of Appeals to Washington law.

In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), the Supreme Court ruled that the Federal Arbitration Act ("FAA") preempted California law classifying most class action waivers in arbitration agreements as unconscionable. Applying *Concepcion*, the Ninth Circuit in *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), held that Washington's law on unconscionability of class action waivers is likewise preempted.

The plaintiffs in *Coneff* argued that Washington's unconscionability law – espoused in *Scott v. Cingular Wireless*, 160 Wn. 2d 843, 161 P. 3d 1000 (2007) – was “meaningfully different” from the California law rejected in *Concepcion*.<sup>3</sup> *Coneff*, 673 F.3d at 1160. The Ninth Circuit quickly dismissed that notion, pointing out that the “concerns underlying those two states’ rules are almost identical” and further observing that *Scott* “contains reasoning similar to the reasoning of [the California case], on which it relied heavily.” *Id.* Thus, the Court concluded, “if California’s substantive unconscionability rule is preempted by the FAA, then so is Washington’s similarly reasoned rule.” *Id.*

Notwithstanding the Ninth Circuit’s decision, Petitioners continue to posit that the CBAs are unconscionable under Washington law inasmuch as they “effectively exculpate” Garda from a whole class of wrongful conduct. Pet. Rev. p. 16 (citing *Scott*). As the *Coneff* case makes clear, however, *Concepcion* squarely forecloses any such argument. Consequently, even if the Court were inclined to consider Petitioners’ unconscionability argument notwithstanding that the Court of Appeals denied discretionary review of the issue, the Court is bound by Supreme Court precedent to reject the argument.

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<sup>3</sup>Notably, Petitioners have relied heavily on *Scott* and its progeny to support their position that the CBAs are unconscionable.

**D. THE PARTIES CANNOT BE COMPELLED TO SUBMIT TO CLASS ARBITRATION.**

Not only does U.S. Supreme Court precedent halt Petitioners' attempt to circumvent the CBAs and pursue their statutory wage claims through class action litigation, it also frustrates their attempt to collectively pursue those claims in arbitration.

It is now black-letter law that parties cannot be compelled to arbitrate a dispute as a class unless there is a "contractual basis" for concluding that they agreed to do so. *See Stolt-Nielsen v. Animal Feeds Int'l*, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010). Petitioners readily acknowledge there is no *express* "contractual basis" for concluding that the parties agreed to submit to class arbitration here. Instead, they contend the Court should *infer* a contractual basis because, in the labor context, unions and employers typically agree to such an arrangement. Once again, Petitioners cannot escape the impact of binding precedent and the bargained-for exchange negotiated by their unions.

At the outset, Petitioners argue themselves right out of this Court. If, indeed, the contractual basis from which one could conclude that the parties agreed to class arbitration must be inferred from the CBAs, the issue is for an arbitrator, not the court to decide. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)

(plurality opinion) (holding that the question of whether a contract forbids class arbitration is a procedural question for an arbitrator to decide); *Garcia v. DIRECTV, Inc.*, 115 Cal.App.4th 297, 302-303, 9 Cal. Rptr. 3d 190 (2004) (Cal.App. 2004) (“*Green Tree* quite plainly mandates a decision made in the first instance by the arbitrator, not a decision made by the trial court and imposed on the arbitrator.”); *Johnson v. Gruma Corp.*, 08-56911, 2010 U.S. App. LEXIS 16765, \*3 (9th Cir. Aug. 13, 2010) (explaining that, per *Green Tree*, arbitrator erred when he stayed arbitration to allow judicial determination regarding class arbitration, and trial court erred in ruling on the question of class arbitration that should have been addressed by arbitrator); *Pedcor Management v. Nations Personnel of Texas*, 343 F.3d 355, 359 (5th Cir. 2003) (“The clarity of *Green Tree*'s holding – that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration – leaves us to decide only whether the instant case is sufficiently analogous to *Green Tree* to come within its rule”).

The only other conclusion the Court can make is that reached by the Court of Appeals: “[T]he contracts here, as in *Stolt-Nielsen*, are silent on the issue of class arbitration.” *Hill v. Garda CL Northwest, Inc.*, 169 Wn. App. 685, 699, 281 P.3d 334 (Wash. Ct. App. 2012). And under *Stolt-Nielsen*, if the Court reaches that conclusion, it need not remand to

either the Superior Court or an arbitrator to decide whether the CBAs allow class arbitration.

As a final matter, Petitioners' reliance on the NLRB's decision in *D.R. Horton*, 357 NLRB No. 184, slip op. (2012), for the proposition that compelling individual arbitration would effectively deprive them of their substantive rights under the National Labor Relations Act is a nonstarter. The D.C. Circuit Court of Appeals recently held in *Noel Canning v. NLRB*, Case No. 12-1153 (D.C. Cir. Jan 25, 2013), that the Board has not had a proper quorum to act since August 27, 2011. Consequently, any decisions issued since that time – including *D.R. Horton* – are void.

Regardless of *D.R. Horton's* validity, and even assuming it would be binding on this Court, the decision undermines, rather than supports, Petitioners' position. The waiver in *D.R. Horton* did not arise in the context of a collective bargaining agreement. The Board recognized a significant distinction on that basis: “[F]or purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.” *D.R. Horton*, 357 NLRB at 10. Thus, where, as here, a union collectively

bargains away employees' right to class proceedings, that waiver does not deprive employees of their Section 7 rights.

#### IV. CONCLUSION

Petitioners have not been denied their substantive right to challenge Garda's compensation practices. Their respective unions freely negotiated collective bargaining agreements that provide for mandatory arbitration of statutory wage claims. There is absolutely no evidence that Petitioners have even attempted to follow those procedures. Try as they might to convince this Court that it would be fruitless to do so, binding Supreme Court authority precludes them from advancing that argument here. Accordingly, the Court should affirm the Court of Appeals' decision reversing the Superior Court's order compelling class arbitration and remanding the case for individual arbitration.

Respectfully submitted,

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Attached please find Respondent's Supplemental Brief in the above-referenced matter. **Please confirm receipt of the same.** Thank you.

Sincerely,

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Dear Clerk of the Court,

Attached please find Respondent's Opposition to Motion of WELA, State Labor Council, and SEIU Locals for Leave to File Amici Curiae Memorandum in the above-referenced matter.

Sincerely,

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