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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., f/k/a AT SYSTEMS, INC. a
Washington Corporation

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. INTRODUCTION

Petitioners are approximately 300 employees and former employees of the Defendant armored car company, Garda CL Northwest. The employees brought suit against Garda for systematically denying them regular meal and rest breaks in violation of the Washington Industrial Welfare and Minimum Wage Acts. After significant discovery and trial preparation, and after the trial court certified the class, approved notice to the class, and notice was sent to all class members, Garda moved to compel arbitration. The trial court ordered class arbitration. On cross-appeals the Court of Appeals affirmed in part and reversed in part, requiring class members to individually arbitrate their claims.

Garda should have been found to have waived arbitration after litigating through class certification and almost all the way to trial. The Court of Appeals incorrectly concluded that Garda's choice to engage in extensive litigation was inconsequential because Garda had asserted the right to arbitrate earlier and it did not engage in "aggressive litigation behavior." The court's holding will encourage and reward delay, gamesmanship, and forum shopping, and it should be reversed.

Furthermore, the arbitration clause in Garda's agreements does not waive the right to a judicial forum for statutory wage violations. An arbitration clause in a collective bargaining agreement cannot deprive individual employees of the right to bring statutory claims in court unless

the CBA contains a “clear and unmistakable” waiver of a judicial forum. Garda’s contracts are ambiguous at best, and the Court of Appeals misconstrued that ambiguity in favor of arbitration, contrary to the law.

In addition, the unilateral arbitration clauses—which apply only to the employees and not Garda—contain a multitude of provisions such as shortened statute of limitations, cost-sharing, and limitations on damages, that are clearly unconscionable under Washington law. These harsh and one-sided terms permeate the agreement and render it unenforceable.

Finally, even if arbitration were found to be required, the Court of Appeals erred in ordering individual as opposed to class arbitration. Under the circumstances here, involving arbitration pursuant to a collective bargaining agreement, the class arbitration ordered by the trial court should have been upheld.

The Court of Appeals’ decision should be reversed and the case remanded for trial in the Superior Court. Alternatively, the Court should affirm the trial court’s decision to order class arbitration.

II. ARGUMENT

A. **The Court Of Appeals Applied The Wrong Standards For Determining Whether Garda Waived The Right To Arbitration By Litigating Instead.**

It is well-established that a contractual right to arbitration is waived if it is not timely invoked. *Otis Housing Ass’n Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). “[A] party to a lawsuit who claims

the right to arbitration must take some action to enforce that right within a reasonable time.” *Id.* at 588 (quoting *Lake Washington Sch. Dist. No. 414 v. Mobile Modules NW, Inc.*, 28 Wn. App. 59, 64, 621 P.2d 791 (1980)). “Simply put . . . a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Id.* This question is reviewed de novo. *Id.* at 586.

Whether a litigant has waived a right to arbitration depends on its *actions*, not its words. See *Otis*, 165 Wn.2d at 587 (party “must take some *action* . . . within a reasonable time”)(emphasis added). Otherwise, the option to change forums could remain open indefinitely. As Division Two recently explained:

The party arguing for waiver is not required to show that its adversary has never mentioned arbitration or equivocated about the process to be followed. It need show only that as events unfolded, the party’s conduct reached a point where it was inconsistent with any other intention but to forgo the right to arbitrate.

River House Dev., Inc. v. Integrus Architecture, P.S., 167 Wn. App. 221, 238, 272 P.3d 289 (2012). Here, the Court of Appeals found the fact that Garda “equivocated about the process” sufficient to defeat waiver. See *Hill v. Garda CL Northwest, Inc.*, 169 Wn. App. 685, 691-94, 281 P.3d 334 (2012). Yet Garda substantially delayed taking any *action* to move this case to arbitration, and its litigation conduct “reached a point” where it was inconsistent with the intent to arbitrate.

Garda “answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared

fully for trial.”¹ *Ives v. Ramsden*, 142 Wn. App. 369, 383-84, 174 P.3d 1231 (2008). In doing so, it “pass[ed] up several obvious opportunities to move for arbitration.” *Steele v. Lundgren*, 85 Wn. App. 845, 856, 935 P.2d 671 (1997). After Plaintiffs filed their motion for class certification in March 2010, the parties agreed to mediate, at which time Plaintiffs acknowledged that Garda had raised the issue of arbitration.² However, after mediation failed, Garda chose *not* to pursue arbitration, and instead single-mindedly proceeded to litigate.

A month after the mediation, on June 4, 2010, Garda filed a motion asking the court to continue the motion for class certification and the trial date. CP 823. That motion did not seek an order compelling arbitration, or even mention arbitration. Instead, it sought a continuance to allow it “to conduct discovery regarding the merits” and “to file a motion for summary judgment seeking dismissal of all or part of this action.” CP 823-24. Garda acknowledged that the case was already “a relatively mature class action lawsuit,” CP 860, and asserted that it needed more time “to prepare for depositions that are absolutely critical in this representative action.” CP

¹ Trial was set for December 2010, and in June 2010 the court denied Garda’s request to continue it, CP 578, 922. By then, the parties had identified all of their trial witnesses and obtained depositions and declarations from dozens of them. *See* CP 903-12; CP 994-1095.

² Plaintiffs indicated they would consider “a comprehensive proposal” for class arbitration if mediation failed. CP 626. After mediation failed, Garda never made any proposal or mention of arbitration. Instead, it asked Plaintiffs to re-note their motion for class certification two more times, for the express purpose of providing Garda more time to *litigate*. *See* CP 842, 823-30, 855-60.

828. On June 9, 2010, the court denied Defendant's motion and confirmed the motion for class certification would be heard July 16 and the trial date would remain December 6, 2010. CP 921-22.

Defendant then propounded more written discovery and took full-day depositions of each of the named Plaintiffs on all issues in the case. CP 548-549. This discovery would not have been allowed in arbitration. CP 549 ¶ 13 (applicable arbitration rules do not provide for discovery). *See Steele*, 85 Wn. App. at 858. By this time, the litigation had "reached a point where it was inconsistent with any other intention but to forgo the right to arbitrate." *River House*, 167 Wn. App. at 238.

Even when Garda finally moved to compel arbitration, on July 1, 2010, it deliberately set its motion for hearing almost two months later, long past the hearing on class certification, allowing it to "continue to weigh [its] options, even then." *Steele*, 85 Wn. App. at 856. This tactic wasted resources, prejudiced the Plaintiffs and the class, and allowed Garda to see whether a class was certified in court, and then revisit that same issue in arbitration, severely prejudicing the employees. *See Steele*, 85 Wn. App. at 858-59 (prejudice results when a party loses a motion and then attempts to relitigate the issue by invoking arbitration) (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)).

The Court of Appeals' decision allows a party to litigate for an extended time and take no action to seek arbitration but still preserve the

right to do so simply by continuing to “reserve” that right. This defeats the very purpose of arbitration, at great cost to the other party and the courts. *See Nino v. The Jewelry Exchange, Inc.*, 609 F.3d 191, 209 (3d Cir. 2010). The Court of Appeals’ decision contradicts precedent, produces an unjust and irrational result, and should be reversed.

B. The Court Of Appeals Applied The Wrong Rules Of Contract Interpretation To Find The Employees Waived Their Right To Bring Statutory Wage Claims In Court.

Even if Garda did not waive arbitration, it failed to establish that the CBA waived the employees’ right to a judicial forum for statutory wage violations. It is well-established that “an arbitration clause in a CBA will not waive an employee’s right to a judicial forum [for statutory claims] unless such a waiver is clear and unmistakable.” *Brundridge v. Fluor Fed. Services, Inc.*, 109 Wn. App. 347, 356, 35 P.3d 389 (2001) (citing *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-80 (1998)). Thus, the usual “presumption” in favor of arbitration does not apply to statutory claims, on which arbitrators possess no special expertise. *Wright*, 525 U.S. at 78. In fact, in cases involving statutory rights, the *opposite* presumption applies: the right to a judicial forum for such claims is *preserved* unless it is clearly and unmistakably waived. *Id.* at 79-80 (“not only is petitioner’s statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear.”); *accord*, *Brundridge*, 109 Wn. App. at 355.

The Court of Appeals expressly contradicted this rule, holding that ambiguity in the contract language must be read “in favor of arbitration,” and a CBA’s “grievance and arbitration procedure is presumed to be the exclusive remedy unless otherwise stated in the contract.” *Hill*, 169 Wn. App. at 696.³ This is precisely the approach the courts rejected in *Brundridge* and *Wright*. See 525 U.S. at 80 (“the right to a judicial forum is of sufficient importance to be protected against *less-than-explicit* union waiver in a CBA.”).

Garda’s “grievance and arbitration” clause (typically, Article 4 or 5) contains nothing even approaching an explicit waiver of the right to a judicial forum for statutory claims. See e.g., CP 164-65. First, there is no provision that mandates the arbitration of every grievance as the sole and exclusive remedy, let alone one that requires that all statutory claims must be arbitrated.⁴

Second, while the Article’s definition of the term “grievance” (at subsection (a)) can be read to reference, in a general sense, virtually every statutory claim related to working conditions, nothing in the Article waives the employees’ right to a judicial forum to litigate statutory claims.

³ The court relied on *Minter v. Pierce Transit*, 68 Wn. App. 528, 530, 843 P.2d 1128 (1993), which is inapposite because the plaintiff in that case claimed a breach of the CBA, not statutory violations.

⁴ Compare *14 Penn Plaza v. Pyett*, 556 U.S. 247, 252 (2009)(CBA provided that arbitration was the “sole and exclusive” means of remedying all contractual and statutory claims).

The mere fact that a grievance may permit contractual resolution of a dispute that also gives rise to a statutory claim does not establish waiver. It is settled that contractual claims may be and frequently are “similar to, or duplicative of” statutory claims that may be litigated in court. *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1207 (10th Cir. 2011) (citing *14 Penn Plaza*, 556 U.S. at 262).⁵

Third, not all grievances are even arbitrable under the Garda CBAs. Before a grievance can reach arbitration, it must be submitted to the company by the union, followed by a “management-union meeting” to attempt a resolution. CP 165. Thereafter, according to the plain language of the clause, only *contract* claims can actually reach arbitration, even if the range of disputes that can be informally grieved is broader: “If after such management-union meeting arbitration is still necessary because a legitimate as well as *significant issue of contract application* remains open,” arbitration shall commence. CP 165 ¶ (c) (emphasis added). The Court of Appeals opined that this provision, if taken literally, “would eliminate a remedy for certain conflicts.” *Hill*, 169 Wn.2d at 696. Yet this is a concern of the court’s own making; under a correct reading of the

⁵ Reliance on the definition of “grievance” also fails because it is insufficiently specific. There can be no waiver of a judicial forum unless the specific statute at issue is explicitly incorporated into the terms of the waiver contained in the CBA. See *Wright*, 525 U.S. at 80 (noting that CBA “contains no explicit incorporation of statutory nondiscrimination requirements”); *Ibarra v. United Parcel Serv.*, 695 F.3d 354, 359-60 (5th Cir. 2012) (citing cases). Like in *Wright*, Garda’s CBA does not mention any specific statutes.

CBA and the law, the employees would retain the right to seek judicial remedies for all non-contract claims.

The Court in *Wright* addressed a similarly ambiguous provision. There, the contract called for arbitration of “all matters under dispute,” which the Court said “does not expressly limit the arbitrator to interpreting and applying the contract,” but “could be understood” to cover only contract-related disputes. *Wright*, 525 U.S. at 79, 80. Applying the “clear and unmistakable” standard, the Court resolved this ambiguity against the waiver and concluded the CBA did not preclude employees from bringing statutory claims in court. *Wright*, 525 U.S. at 81.

This case is even clearer because, unlike in *Wright*, Garda’s CBA *does* explicitly limit the arbitrator to interpreting the contract. In order to waive the right to a judicial forum, an arbitration provision must “expressly grant[] the arbitrator authority to decide statutory claims.” *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d at 1206 (citing *14 Penn Plaza*, 556 U.S. at 264; *Wright*, 525 U.S. at 79-80). Garda’s arbitration clause contains no such grant and, to the contrary, forbids the arbitrator “to amend, take away, modify, add to, change, or disregard any of the provisions of this Agreement.” CP 165. *See Mathews*, 649 F.3d at 1206 (interpreting identical phrase to deprive arbitrator of authority to decide statutory claims, precluding a finding of waiver). Thus, Garda’s arbitration clause does not contain a “clear and unmistakable waiver” of

the employees' right to a judicial forum, and the Court of Appeals erred in assuming the arbitration clause encompassed statutory claims rather than applying the clause as it was actually written and executed by the parties.

Finally, regardless what the CBA says, employees cannot be forced to waive a judicial forum if the arbitral forum is not actually available to them. The Supreme Court long ago held that an employee need not resort to even mandatory grievance and arbitration procedures in a CBA "where the effort ... would be wholly futile." *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330-31 (1969). The principle remains vital today. *14 Penn Plaza*, 556 U.S. at 273-74 (circumstances amounting to "substantive waiver" of statutory rights "will not be upheld") (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 & n. 19 (1985)). Arbitration must provide "an effective and accessible alternative forum" in order for it to supplant the right to a judicial forum. *Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

Garda's arbitration clause requires action by the union in order for an employee to use it. CP 165.⁶ Yet, it is undisputed that the "union" has "no identity independent of Garda." CP 607. It does not collect dues, has

⁶ Some early versions permitted either the employee or the Union to present grievances, e.g., CP 142, but employees could not possibly afford the cost of arbitration on their own. See *infra* section C.

no financial resources, and does not pursue grievances on behalf of employees, much less arbitration. CP 606-07; 571-72. Accordingly, any effort to invoke the grievance and arbitration procedures would be futile, and the CBA cannot prevent a suit in court.

C. Garda's Arbitration Clause Is Void As Unconscionable.

Garda's arbitration clause is also unenforceable because it is riddled with unconscionable terms. *See Gandee v. LDL Freedom Enterprises, Inc.*, - Wn.2d -, No. 87674 (Wash. Feb. 7, 2013). The 14-day limitations period, two and four-month limitation on back pay damages, and cost-prohibitive fee sharing provisions are all substantively unconscionable and so pervade the arbitration clause that the clause as a whole must be deemed unenforceable.⁷

First, Garda's arbitration clause requires that employees or their Unions "shall" present any grievance to the Company "within fourteen (14) calendar days from the occurrence or knowledge of the occurrence giving rise to [the] grievance," CP 142, 165, compared to the three year limitation period applicable to Plaintiffs' claims under state law, *see*

⁷ The substantive unconscionability of an arbitration clause is a "gateway" issue that courts must decide before compelling arbitration. *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2778 (2010); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 394, 191 P.3d 845 (2008). Nonetheless, both the trial court and the Court of Appeals declined to address it in this case. CP 916-17; *Hill*, 169 Wn. App. at 690. However, substantive unconscionability is a question of law that is reviewed *de novo*, *see Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004), and this issue was properly raised in Plaintiffs' Petition for Review and thus has been preserved, RAP 13.7. This Court can and should review this issue and determine that the clauses are unconscionable.

SPEEA v. Boeing Co., 139 Wn.2d 824, 835-36, 991 P.2d 1126 (2000). Such a radical shortening of the limitation period is plainly unconscionable. *See Gandee, supra*, slip op. at 10 (30-day limitations period unconscionable); *Adler*, 153 Wn.2d at 356-57 (180-day limitations period for employment discrimination claim unconscionable).

Second, Garda's arbitration clause forbids the arbitrator from awarding back pay for more than two or four months. See CP 143, 165.⁸ In *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 315-19, 103 P.3d 753 (2004), this Court held that a provision limiting recovery of exemplary damages in an employment case was substantively unconscionable. The four-month limitation on back pay in Garda's clause, when statutory rights would extend back three years, is even more "harsh" and "one-sided." *Id.* at 318. (citations omitted).

Garda argues that this limitation can be disregarded because it is qualified by the phrase "unless specifically mandated by federal or state statute or law." CP 143. However, this qualifier does not salvage the provision. The statutes at issue in this case, RCW 49.12, 49.46, and 49.52, do not contain 'specific mandates' addressing recovery periods. It is unclear how an arbitrator would apply this language, and, because the presumptive limitation is mandatory on the arbitrator, it must be construed

⁸ The CBAs in force during the earlier portion of the time period covered by the claims in this case limited the arbitrator to awarding two months of back pay, while later CBAs extended this to four months. CP 143, 165.

against Garda. *See Adler*, 153 Wn.2d at 355 (ambiguous fee shifting provision must be construed against employer for purposes of assessing conscionability where its direction is mandatory on arbitrator); *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 324, 211 P.3d 454 (2009) (same). Garda's limitation on significant portions of Plaintiffs' remedies is unconscionable.

Third, Garda's arbitration clause requires the employees or their unions to pay half of all costs of arbitration, including "the fee charged by the arbitrator, the cost of the hearing room, the reporter's fee, per diem, and the original copy of the transcript for the arbitrator." CP 142, 165. This provision is unconscionable because it imposes prohibitive costs on Plaintiffs that "effectively deny [them] the ability to vindicate [their] rights." *Gandee, supra*, slip op. at 6; *see also Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 465, 45 P.3d 594 (2002).

In *Gandee*, this Court confirmed the use of a burden-shifting analysis to address prohibitive cost challenges to arbitration clauses. Slip op. at 7. Here, Plaintiffs satisfied the first step of the analysis "showing that arbitration would impose prohibitive costs." *Id.* Plaintiffs submitted evidence from the designated arbitration service that the costs would be substantial. *See* CP 550 ¶ 23, 599-600 (fees and costs of average arbitration with designated service were approximately \$5,000). Each class representative also submitted a sworn declaration describing his

limited financial resources and inability to pursue arbitration “if it would cost me several thousand dollars to do so.” CP 600-605. Finally, Plaintiffs presented uncontested evidence that their “unions” have no funds to pay for an arbitrator and therefore have never filed a grievance, much less an arbitration, on behalf of any employee. CP 571, 607.

The burden thus shifted to Garda to present “offsetting evidence as to the likelihood of bearing those costs.” *Gandee, supra*, slip op. at 7. However, Garda did not present any such evidence. Instead, Garda simply argued that because Plaintiffs estimated the value of their individual claims at about \$15,000 each, the costs of arbitration do not outweigh the potential rewards and the analysis adopted in *Mendez* and confirmed in *Gandee* does not apply.

However, prohibitive cost analysis does not hinge on any particular ratio between costs and potential recovery. In *Walters*, 151 Wn. App. at 321, 328-29, the court found that a venue provision requiring arbitration in Denver was unconscionable because it would impose costs of \$7,000 on the plaintiff, even though his overtime claim was worth \$70,000 and he had a household income over \$90,000, unlike the impoverished plaintiff in *Mendez*. Thus, the correct question is whether there is sufficient certainty that arbitration will impose costs on plaintiffs that they are not financially able to bear, regardless of the value of their claims. On this question, Garda has offered no offsetting evidence. The cost-splitting provision will

render the arbitral forum inaccessible to Plaintiffs here and result in a denial of access to justice. *Mendez*, 111 Wn. App. at 465.

The unconscionability of the above provisions is magnified by the unilateral nature of the provisions and the arbitration clause as a whole. The clause only requires employees to submit grievances to arbitration, not Garda. *E.g.*, CP 164 at Art. 5(a) (defining a grievance as a “legitimate controversy, claim or dispute by an employee, shop steward or the Union”); CP 165 at Art. 5(b) (requiring presentation of a grievance “to the Company by a Union representative,” without reciprocal duty on Garda). Therefore, claims that Garda may have against employees for wage theft, negligence, fraud, or any other issue are not subject to arbitration and are not encumbered by the 14-day filing period, any limitation on damages, or the heightened entryway costs for arbitration. These provisions are “so one-sided and harsh” that they are substantively unconscionable. *Zuver*, 153 Wn.2d at 318; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003) (unilateral nature of restrictive arbitration provisions rendered entire arbitration agreement unconscionable).

These unconscionable provisions pervade the entire arbitration clause and therefore require invalidation of the clause rather than severance of the offending items. *See Gandee, supra*, slip op. at 11. The entire grievance and arbitration clause contains five paragraphs, the first and largest of which addresses only the unilateral definition of a

grievance. CP 164-65. The second paragraph consists entirely of the 14-day limitation period. CP 165. The third paragraph provides additional deadlines, all of which key off the 14-day limitation period, and the fourth paragraph addresses the selection process for the arbitrator and the unconscionable cost splitting provision. *Id.* Finally, the fifth paragraph contains the limitation on damages and further states, “The arbitrator shall not have the right to amend, take away, modify, add to, change, or disregard any of the provisions of this Agreement,” including, presumably, the 14-day presentation and damages limitations. CP 165. Thus, four of the five paragraphs either contain or are directly linked to the unconscionable provisions, which, with the exception of the arbitrator selection process, also represent the bulk of the substantive commands in the clause. The provisions, taken as a whole, demonstrate that the “primary thrust” of the clause is not simply an agreement to arbitrate, *Adler*, 153 Wn.2d at 359, but rather creation of an “insidious pattern” that compels employees (though not Garda) to pursue their grievances in a time frame and forum where their rights and remedies are severely constrained. *Ingle*, 328 F.3d at 1180 (cited in *McKee*, 164 Wn.2d at 403).

In *Gandee*, this Court found that the entire arbitration provision was unconscionable where severance would change the “location, fee structure, and timing of the arbitration” and would “significantly alter both the tone of the arbitration clause and the nature of the arbitration

contemplated by the clause.” Slip op. at 11. Here, the unconscionable provisions similarly affect the fee structure, timing, and remedies or scope of the arbitration, and “[l]ittle would be left of the arbitration ‘agreed’ to by the parties,” after these provisions are removed. *Id.* Rather than rewriting the provision to make it conscionable, the Court should declare it unenforceable and remand for trial. *See McKee*, 164 Wn.2d at 403.

D. If Arbitration Is Required, Class Arbitration Is Appropriate.

The Court of Appeals reversed the trial court’s decision to order class arbitration and went even further than Garda had asked it to; it held as a matter of law that the CBA did not permit class arbitration; and that each class member must individually arbitrate his claim for missed meal and rest breaks. *Hill*, 169 Wn. App. at 698. If this Court were to affirm the order compelling arbitration, it should reverse the decision precluding class arbitration.

The Court of Appeals relied on *Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), which held that a party could not be compelled to submit to class arbitration “unless there is a contractual basis for concluding that the party agreed to do so.” *Id.* at 1775. The Court of Appeals misread *Stolt-Nielsen* to say that whenever an arbitration clause does not *explicitly permit* class arbitration, it must be interpreted to forbid it. *Hill*, 169 Wn. App. at 698. That is not the law; *Stolt-Nielsen* expressly

recognized that an arbitration agreement may *implicitly* permit class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1775.⁹

This Court can construe the parties' contract as a matter of law and determine that it permits class arbitration. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1750 (2011) (an order permitting class arbitration must be based on "the arbitration agreement itself or some background principle of contract law that would affect its interpretation"). First, it is undisputed that Garda is solely responsible for drafting the CBAs, and any ambiguities must be construed against it. *See* CP 555, 607; *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d 524, 528, 276 P.3d 1270 (2012); *Jock*, 646 F.3d at 117 (upholding conclusion that ambiguous contract permitted class arbitrations in part based on rule of construction against drafter).

Second, both custom and context indicate the parties intended to permit class or collective remedies. *See Stolt-Nielsen*, 130 S. Ct. at 1773-74 (determination "must give effect to the contractual rights and expectations of the parties"); *id.* at 1769 n.6, 1770 ("custom and usage" may be relevant to determining the parties' intent); *id.* at 1175 (referencing

⁹ *See also Fantastic Sams Franchise Corp. v. FSRO Ass'n. Ltd.*, 683 F.3d 18, 22 (1st Cir. 2012) ("we ... reject the ... argument ... that there must be express contractual language evincing the parties' intent to permit class or collective arbitration"); *accord Sutter v. Oxford Health Plans, Inc.*, 675 F.3d 215, 222 n. 5 (3d Cir. 2012); *Jock v. Sterling Jewelers*, 646 F.3d 113, 121 (2d Cir. 2011).

tradition and custom in applicable industry as indicative of intent regarding class arbitration).

There is a long tradition of class arbitrations arising from collective bargaining agreements. *See* Elkouri & Elkouri, *HOW ARBITRATION WORKS* 212 (Alan Miles Rubin, 6th ed. 2003) (“It is widely accepted that a union has standing to file a group grievance that affects a significant portion of the bargaining unit.”). Indeed, the very nature of “collective” bargaining is to establish rights and responsibilities for employees as a group, not as individuals. *See Brundridge*, 109 Wn. App. at 355. And, as a practical matter, any arbitral ruling concerning Garda’s wage practices would naturally apply to all employees, just as any determination in a class action applies to all class members.¹⁰ In certifying the class pursuant to CR 23(b)(3), the trial court already has concluded that the wage and hour practices at issue here are “common” to all employees. CP 520. The CBAs allow the “union” to bring grievances on behalf of its members and expressly state that “[t]he decision of the arbitrator shall be binding upon the grievant *and all parties to this Agreement.*” CP 143.¹¹ Garda cannot reasonably contend that it or its employees intended that challenges to its company-wide wage practices would be resolved through individual

¹⁰ *See* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOTIATION L. REV. 399, 407 (2008) (“Class arbitration shares a general similarity with labor arbitration in that both involve aggregate dispute resolution.”).

¹¹ Garda requires all of its driver/messengers to personally sign its labor agreements. *See* CP 156.

arbitrations, one employee at a time. Based on state contract law and the language, nature, and context of the parties' agreements, it is clear that Garda's labor agreements must permit class arbitrations.¹²

III. CONCLUSION

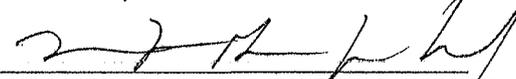
For the foregoing reasons, the Court should reverse the decision of the Court of Appeals and either deny arbitration or order class arbitration.

Respectfully submitted this 22nd day of March, 2013.

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¹² Requiring individual arbitration would also violate the employees' right to engage in "concerted activity" for their "mutual aid and protection," 29 U.S.C. § 157, which includes the right to take legal action. *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."). The National Labor Relations Act provides a substantive right to bring class actions to redress conditions of employment, and waivers of such right will not be upheld, even when found in an arbitration clause. See *D.R. Horton, Inc. v. Michael Cuda*, Case no. 12-CA-25764 (N.L.R.B. Jan. 3, 2012), appeal pending No. 12-60031 (5th Cir. Filed Jan 13, 2012).

DECLARATION OF SERVICE

I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury under the laws of the State of Washington that on March 22, 2013, I caused to be emailed and placed in the U.S. Mail, first class, postage prepaid, a true and correct copy of this document addressed to the following counsel of record:

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SEIU Local 925, Local 6, Healthcare
775NW, and Healthcare 1199NW

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SEIU Local 925, Local 6, Healthcare
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DATED at Seattle, Washington this 22nd day of March, 2013.



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Paralegal

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Dear Supreme Court Clerk:

I attach for filing the Supplemental Brief of Petitioners.

Regards,

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