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No. 97201-0

NO. 77694-1  
(King County Superior Court No. 16-2-27488-9 SEA)

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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JEOUNG LEE and SHERRI MCFARLAND, on their own behalf  
and on behalf of all persons similarly situated,

Plaintiffs – Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER aka  
KING COUNTY PUBLIC HOSPITAL DISTRICT #2,

Defendant – Appellant.

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RESPONDENTS' RESPONSE TO  
APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

This is a certified class action. In March 2017, the trial court certified the claims for violation of the Washington Wage statute filed by Plaintiff Lee on behalf of a class of Emergency Department nurses at Evergreen Medical Center (“Evergreen”). The only claims alleged are that Evergreen violated Washington law by failing to provide 10-minute rest breaks and 30-minute meal breaks consistent with “RCW 49.12 and WAC 296-126-092.” Evergreen admits this in its Opening Brief.<sup>1</sup>

WAC 296-126-092 mandates that workers get a 10-minute rest break for every four hours worked and not work more than three straight hours without a break. The WAC also mandates that workers get a 30-minute meal break between the second and fifth hour of work and that meal breaks be provided no later than five hours after commencing work.

In the Second Amended Complaint (“SAC”), which is the operative Complaint, Plaintiffs and the Class allege that Evergreen violated these WAC requirements. The SAC does not mention the collective bargaining agreement (“CBA”) between Evergreen and the nurses’ union, the Washington State Nurses Association (“WSNA”). It does not allege any claim for breach of the CBA. Clerk’s Papers (“CP”) at 265. Evergreen admits the union is not a party to this action.

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<sup>1</sup> Opening Brief of Appellant (“OBA”) at 13.

There is a “Grievance and Arbitration” clause in Evergreen’s CBA. But it applies to claims for “an alleged breach of *the express terms and conditions of the Agreement.*”<sup>2</sup> It does not apply to an alleged violation of Washington law. Nor does it waive a union member’s right to sue Evergreen in court over violations of the Wage statute and WAC 296-126-092. *Id.* Evergreen admitted this in deposition. CP 1253-54.

Despite this and its admission that the SAC only alleges claims for violation of RCW 49.12 and WAC 296-126-092, in September 2017, Evergreen moved to compel arbitration of the claims. It did so after litigating the claims in the Superior Court for 10 months.

In moving to compel arbitration, Evergreen argued to the court that one of the Class members, nurse Sherri McFarland, in her July 26, 2017, deposition had changed the certified Class claim from a violation of the WAC to a breach of the CBA because she referred to the 15-minute rest break provided in the CBA and said that she should receive her meal breaks by the fifth hour of work – which is a WAC requirement but not mentioned in the CBA.<sup>3</sup> Ms. McFarland was not asked what her claim was based on, nor did she say her claim was for violation of the CBA. Instead she merely responded to questions formulated by defense counsel about whether she felt she “missed” her rest break if she only got a 10-minute

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<sup>2</sup> See, ¶ 16.1 of 2012-2015 CBA, CP 529, emphasis added.

<sup>3</sup> See, “Meal/Rest Period” clause, ¶ 7.7 of 2012-2015 CBA. CP 528.

break instead of a 15-minute break – she said “yes” – and whether she felt she had a “missed meal break” if the break was not provided by the fifth hour of work – she said “yes.” OBA at 14-15.

In its September 1, 2017 motion to compel arbitration, Evergreen argued to the court that when it granted Lee’s motion to file a Second Amended Complaint adding McFarland as a Plaintiff and Class representative on August 15, 2017, it meant that the Class claim was converted from a claim for violation of the WAC to a claim for breach of the CBA. But in opposing the motion to amend, Evergreen had earlier argued to the court that the motion to amend should be denied because, based on McFarland’s deposition testimony, her claim was *different than* the claims of Lee and the certified Class because their claims were for violation of the WAC. CP 580. It argued that because McFarland’s claim was for breach of the CBA and subject to arbitration, her claim was not “typical” of the Class claim, and she was not a proper Class representative. CP 277-78, 283-85. The trial court rejected these arguments, granted Lee’s motion and appointed McFarland as a Class representative. CP 432.

Evergreen did not ask the trial court to reconsider its August 15 ruling that McFarland’s claim, like those of Lee and the Class, was for violation of the WAC and not for breach of the CBA. It has not appealed that August 15 ruling or the order granting Lee’s motion to amend to this

Court. It only appealed the *subsequent* November 3, 2017, order denying its motion to compel arbitration that relied on the same argument that McFarland's testimony meant the Class claim was for breach of the CBA.

On November 3, 2017, the trial court heard Evergreen's motion to compel arbitration on oral argument. It again found that the only claims alleged by Lee, McFarland and the Class were for violation of Washington law, not breach of the CBA.<sup>4</sup>

It is well-settled that plaintiff is the "master of her complaint" and can choose to allege claims for violation of state law even if she could sue on a claim for breach of a CBA. *See, Burkhardt v. Swedish Health Servs.*, 2017 U.S. Dist. LEXIS 74711 at \*10 (W.D. Wash. May 16, 2017).

Because the CBA's grievance procedure only applies to an alleged breach of an "*express*" term *of the CBA* and none is alleged, Evergreen's appeal is baseless under the arbitration clause *as written* and rests on misstatements of law and fact. For example, it argues it is exempt from complying with the WAC because it is a public employer with a CBA that has a meal/rest break clause. OBA at 21. Therefore, it argues, the CBA governs the Class claim. *Id.* But that's not correct.

Under the law, a public employer *may negotiate* with a union to modify the WAC's requirements. But modifications must be agreed *to by*

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<sup>4</sup> *See*, 11/03/2017 transcript, Verbatim Report of Proceedings ("VRP") at 15.

*the union* and clearly stated in the CBA. *See, Frese v. Snohomish County*, 129 Wn. App. 659, 668 (2005). Evergreen does *not* discuss this case. The “Meal/Rest Period” provision (CBA ¶ 7.7), CP 528, states:

Meal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092).

The WAC is *expressly* referenced in the CBA, and Evergreen admitted in deposition through its CR 30(b)(6) representative, vice president Nancee Hofmeister, that it did not negotiate with WSNA to modify the WAC requirement in the CBA that RNs must get a 30-minute meal break by the fifth hour of the work. CP 1247. Nor did Evergreen negotiate with WSNA to modify the WAC mandate that RNs get rest breaks for every four hours of work and not be required to work more than three straight hours without a break. CP 1247-48.

Ms. Hofmeister admitted the only modifications in the CBA were changing the WAC’s 10-minute rest break to a 15-minute break and eliminating one 30-minute meal break for RNs on a 12-hour shift. CP 528. Otherwise, the CBA says: “Meal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092).”

Evergreen also argues the Class claim is only for meal breaks that were actually “missed” rather than “late,” i.e., not given by the fifth hour of work. OBA at 22-23. But the SAC says that “missed breaks” include

“late” breaks not given by the fifth hour of work, and the court confirmed that “late” breaks were part of the certified Class claim at the November 3 hearing on Evergreen’s motion to compel arbitration. CP 1491; VRP 26.

Evergreen also argues that the court erred by denying its motion because the “CBA’s *express* language” must be interpreted to decide if it had to administer meal breaks in the manner required by the WAC and therefore the claims must be arbitrated. OBA at 22. But the CBA *as written* does not say it modifies the WAC’s requirement for *when* meal breaks must be given, *i.e.*, by the fifth hour of work. Evergreen admitted in deposition it did not modify that requirement. CP 1247-48.

Nor does the CBA say meal breaks are given at the sixth hour of work or “the mid-point” of a 12-hour shift. The “express language” says Evergreen “*shall*” administer meal breaks consistent with the WAC. The CBA says breaks must be given by the fifth hour of work. “Shall” means compliance is mandatory. The CBA has no modification of the WAC mandate. Evergreen’s unilateral belief to the contrary is irrelevant.<sup>5</sup>

Also, because the CBA has no “*express* term” that breaks are given by the sixth hour of work, Plaintiffs’ “late” meal break claim is not subject to arbitration. The CBA’s grievance procedure only applies to claims for

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<sup>5</sup> Extrinsic evidence applicable to interpretation of a contract does *not* include the subjective and unilateral intent of one of the parties. *See, Lynott v. Nat’l Union Fire Ins. Co.*, 123 Wn. 2d 678, 684, 871 P.2d 146 (1994).

“an alleged breach of the *express* terms and conditions of the [CBA].”

Evergreen also argues that the rest break claim is subject to arbitration because it includes “missed breaks” where “the state law has been satisfied, either through continuous or intermittent rest during their shifts.” OBA at 24. It argues that because “Plaintiffs insist that such intermittent breaks constitute missed breaks,” their claims are for breach of the CBA, not violation of the WAC. *Id.* The argument makes no sense.

Evergreen admitted in deposition the CBA does not mention “downtime” or “intermittent breaks.” It did not contract with WSNA to count “downtime” or “intermittent breaks” as a WAC required break. CP 956-57. Instead, it relies on Washington law on “intermittent breaks.” *Id.*

The arbitration clause only applies to “an alleged breach of the *express* terms” of the CBA, not *implied* terms or WAC violations. Any modification of a WAC requirement has to be clearly stated in the CBA. There is none here. So, whether Evergreen violated WAC 296-126-092 by not giving a 10-minute rest break for every four hours of work as required because RNs got “downtime” or an “intermittent” break will be decided by interpretation of the WAC, not the CBA.

But even if Evergreen had a right to compel arbitration of the RNs’ claims, it waived that right by choosing to litigate the claims in court for 10 months before moving to compel arbitration in September 2017. The

fact that this was a voluntary and tactical decision by Evergreen as part of its litigation strategy is shown by its actions throughout the 10 months that Evergreen vigorously litigated this case in the Superior Court.

Indeed, only *one month after the Complaint was filed*, Evergreen alleged an affirmative defense in its Answer that the claims were subject to the CBA's grievance and arbitration provision. CP 10. But it did not move to compel arbitration. Instead, it *chose* to file an unrelated motion to dismiss arguing Plaintiff Lee lacked standing to sue as a former Evergreen nurse. After the motion was denied, Evergreen opposed Plaintiff's motion for class certification of the RN's claims but did *not* assert the claims were subject to arbitration. Then Evergreen proposed its *own* Class Notice and opposed Plaintiff's proposed Class Notice. Its Notice told the Class the claims were for *violation of the WAC*, not breach of the CBA.

Then, Evergreen opposed Plaintiff's motion to continue the November 6, 2017, trial date to March 5, 2018. It said it would be prejudiced if the Class claim for violation of the WAC was not tried in November. Instead of seeking arbitration, it again *chose* to take its chances with the trial court. It lost. The court granted Plaintiffs' motion. CP 1464.

Then, Evergreen opposed Lee's motion to add McFarland as a Class representative arguing her claims were for breach of the CBA and subject to arbitration based on her deposition. But instead of moving to

compel arbitration, it *chose* to take its chances with the court. It lost. The court granted the motion appointing McFarland as a Class representative.

When Evergreen finally moved to compel arbitration, it made the same argument again that the claims in the action were for breach of the CBA based on McFarland's deposition, despite the earlier ruling rejecting the argument. Before moving to compel arbitration, it did not seek review of that prior ruling. It has not appealed that prior order to this Court.

Arbitration may be favored, but not when a party repeatedly chooses to litigate in court, imposes substantial costs on the opposing party, and then moves to compel arbitration only after it has lost on issues important to the litigation. *See, Steele v. Lundgren*, 85 Wn. App. 845, 854, 935 P.2d 671, 675 (1997). Evergreen's active litigation of the case before moving to compel arbitration cost the Plaintiffs over \$140,000 in fees and costs. CP 658. In doing so, it waived any right it had to compel arbitration.

Finally, Evergreen argues that the court erred by considering its motion under CR 12, instead of CR 7. No Washington case holds that a motion to compel arbitration can only be considered under CR 7 and federal courts consider a motion to compel arbitration under CR 12 if the facts are not in dispute and under CR 56 if the moving party contends there are disputed facts. *See, e.g. Worth v. Worth*, 2016 U.S. Dist. LEXIS 164061, n. 18 (E.D. Pa. Nov. 29, 2016). Indeed, Evergreen *accepted* the

trial court's ruling that its motion was a "dispositive motion" under the Local Rule. As a result of doing so, it got oral argument on its motion.

Evergreen argues that the trial court failed to even consider the CBA. The argument is *unsupported* by citation to the record and baseless. The trial court's order *expressly* states that it ruled only after "having *considered* the pleadings filed in support and in opposition to the motion," which included the declarations of counsel that attached the CBA and referenced deposition excerpts for Lee, McFarland and Hofmeister. The order also states that the court was "fully advised of the matter" before it.

Evergreen's appeal is baseless. The trial court's order should be affirmed and fees awarded to Respondents.

## **II. STATEMENT OF THE CASE – PERTINENT FACTS**

The CBA's "Meal/Rest Period" provision, states (CP at 528) (emphasis added):

7.7 Meal/Rest Periods. Meal periods and rest periods *shall be* administered in accordance with state law (WAC 296-126-092). Nurses shall be allowed an unpaid meal period of one-half (1/2) hour. Nurses required by the Employer to remain on duty during their meal period shall be compensated for such time at the appropriate rate of pay. All nurses shall be allowed a rest period of fifteen (15) minutes on the Employer's time, for each four (4) hours of working time.

The referenced WAC, 296-126-092, states (emphasis added):

Meal periods – Rest periods.

- (1) Employees shall be allowed a meal period of at least third minutes which commences *no less than two hours nor more than five hours* from the beginning of the shift...
- (2) No employee shall be required to work more than *five consecutive hours without a meal period....*
- (4) Employees shall be allowed a rest period of *not less than ten minutes*, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work *more than three hours without a rest period.*

The "Meal/Rest Periods" provision in the CBA *agreed to by* WSNA, and *as written*, did *not* modify the WAC requirements that meal breaks be given by the fifth hour of work and RNs be given a rest break for every four hours worked. Addendum 2 to the CBA also makes this clear stating, CP 1248, emphasis added:

Work Day: The combined twelve (12) hour shifts and eight (8) hour shift schedules shall provide for a combination of twelve (12) hour work days consisting of twelve and one-half (12 ½) hours each, and eight (8) hour work days consisting of eight and one-half (8 ½) hours each. *Each shift will include one (1) thirty (30) minute unpaid lunch period and three (3) fifteen (15) minute or two (2) fifteen (15) minute paid rest breaks respectively.*

**A. Deposition of Evergreen on CBA's Meal/Rest Periods**

In 2017, Plaintiffs noted the deposition of Evergreen's representative who negotiated the CBA. Pursuant to CR 30(b)(6), Evergreen produced its vice-president, Nancee Hofmeister. At her

deposition on October 12, she admitted that Evergreen had not contracted with WSNA to modify the requirement in WAC 296-126-092 that meal breaks be given by the fifth hour of work; or the requirements that rest breaks be given for every four hours of work and no RN be required to work more than three hours without a rest break. CP 1243-1247.

Hofmeister testified the only modification in the CBA was increasing the rest break from 10 to 15 minutes. *Id.* But the claim alleged here as set out in the SAC is for the WAC's 10-minute break, not the CBA's 15-minute break. There is no claim for the five-minute difference.

**B. The CBA's Grievance and Arbitration Provision**

The CBA's Grievance Procedure ¶ 16.1 (CP 518) states:

Definition. A grievance is defined as an alleged breach of the express terms and conditions of the Agreement.

The Procedure's arbitration clause (CP 519) states:

Step 4. Arbitration:

If the grievance is not settled on the basis of the foregoing procedures, the Association may submit the issue in writing to final and binding arbitration....

As negotiated and written, the clause only grants the union, the Washington State Nurses Association the right to submit a grievance to arbitration, not RNs or Evergreen. It leaves to the union's discretion whether to seek arbitration (the "Association *may* submit" an issue to "arbitration.") As negotiate and written, the CBA does *not* give Evergreen

the right to compel RNs to arbitrate.

**C. Deposition of Evergreen on the Arbitration Provision**

At her deposition, Ms. Hofmeister admitted that Evergreen did not contract with WSNA for a grievance procedure that covers violations of state law or waives the rights of RNs to sue it over violations of state law. CP 1253-54. She admitted the term “Association” in the Arbitration clause refers to WSNA, not RNs, and that Evergreen had not contracted with WSNA for a provision that *requires* WSNA to seek arbitration. The clause does not permit Evergreen to compel arbitration. CP 1254-55.

In fact, WSNA sent RNs a letter telling them about the “class action lawsuit, *Lee v. Evergreen Hospital*, Case No. 16-2-27488-9 SEA filed in November 2016.” WSNA told RNs: “The new *Lee* case was not filed by WSNA (and) you are free to participate in the case.” CP 1221.

In other words, WSNA, the *other party* to the CBA, believed the claims in *this* Class action were *not* subject to arbitration under the CBA’s grievance procedure. It believed that its members, the RNs, were “*free to participate in the case*” in the Superior Court.

Indeed, Ms. Hofmeister knew in a prior case, WSNA had sued Evergreen for violating the WAC’s requirement for 10-minute rest breaks. It did not sue for breach of the CBA’s requirement for 15-minute breaks. Evergreen settled that case and paid WSNA’s claim. CP 1222.

WSNA had not file a grievance under the CBA before filing suit on its claims for violation of the WAC. Nor did Evergreen try to compel arbitration. *See, Pugh v. Evergreen Hosp.* 177 Wn. App. 351, 352 (2013).

**D. Lee and McFarland’s Class Action against Evergreen**

On November 10, 2016, Plaintiff Lee filed this Class action alleging that Evergreen violated RCW 49.12 by not providing 10-minute rest breaks and 30-minute meal breaks to Emergency Department (“ED”) nurses in the manner required by WAC 296-126-092 and that the nurses had not been paid for these “missed breaks.” On January 17, 2017, Lee filed a First Amended Complaint (“FAC”). The FAC alleged a Class damages claim for ED nurses who had “missed” 10-minute rest breaks and 30-minute meal breaks from May 1, 2011 to present. CP 13. The FAC alleged that “missed” breaks included “late” breaks.” *Id.*

**E. Evergreen Litigated Without Demanding Arbitration**

On December 23, 2016, *one month* after the Complaint was served, Evergreen’s attorney signed an Answer to the Complaint that asserted an Affirmative Defense that the claims were subject to the CBA’s arbitration clause and had to be arbitrated. CP10. But instead of serving the Answer, or moving to compel arbitration, Evergreen chose to litigate in the court.

On February 3, Evergreen moved to dismiss the original complaint even though Lee had filed the First Amended Complaint. It argued that

Lee lacked standing to sue. It did not allege that the claims were for breach of the CBA and subject to arbitration. CP 13.

The same day, February 3, Lee moved to certify the Class claim that Evergreen violated RCW 49.12 by not giving ED nurses 30-minute meal breaks and 10-minute rest breaks in the manner required by WAC 296-126-092. Evergreen opposed the motion but did not say the claim was governed by the CBA or seek arbitration despite its earlier Affirmative Defense. Nor did it ask the court to stay consideration of certification until the court could decide if the claims had to be arbitrated. CP 799.

On March 8, the court certified the Class claim under CR 23(b)(3) for “missed breaks” from May 1, 2011 to August 29, 2016. CP 1344. On March 20, Evergreen moved for reconsideration arguing the class period should be narrowed. It did *not* assert that the Class claim was governed by the CBA or had to be arbitrated. CP 1349.

On April 21, *Evergreen* asked the court to approve *its* proposed Class Notice. Its Notice told Class members that the claims in the action were based on alleged violations of Washington law. It did *not* tell them the claims were governed by the CBA or subject to arbitration. CP 1353.

Plaintiff Lee also moved for approval of her proposed Notice, which Evergreen opposed. The court approved Lee’s Notice. CP 645.

The court-approved Notice told Class members the Class claim

was for violation of Washington law, not breach of the CBA. Plaintiffs' counsel sent the Notice *at their expense* to 565 RNs who were Class members. *Id.* Evergreen did not oppose sending the Notice because the claim was actually governed by the CBA and had to be arbitrated. *Id.*

On July 11, 2017, Evergreen took Lee's deposition instead of moving to compel arbitration. At Lee's deposition she did *not* testify that her claims were based on breach of the CBA. *Id.*

On July 26, nurse Sherri McFarland was deposed. She was a class member and was listed as a witness. CP 480. She was asked by Defense counsel if she *felt* she "missed" her rest break if she "only received the first 10-minutes of a 15-minute break." She said yes. OBA at 14. She was also asked if she always got her 30-minute meal break within the first 5 hours of work and said "no." *Id.* She then added that she *thought* the CBA "states that we're supposed to get our meal break within the five-hour period." CP 484. But she was mistaken. That requirement is not in the CBA but is required by "state law," i.e. the WAC. The CBA has no reference to meal breaks being given at the mid-point of a 12-hour shift or "overriding" state law. It says that breaks "*shall be* administered in accordance *with* state law (WAC 296-126-092)." emphasis added.

Ms. McFarland was not asked and did not testify that her claim was for breach of the CBA. CP 480-498. To the contrary, she said that she

frequently was not given rest breaks *at all*, i.e. she was not even given the minimum 10-minute break required by state law. CP 482.

On July 31, Lee moved to continue the November 6, 2017 trial date to March 5, 2018. On August 4, Evergreen opposed the motion. It argued that Lee had failed to prepare the Class claim for trial while Evergreen would be fully prepared to try the Class claim for violation of Washington law on November 6. Evergreen did *not* say that the claims to be tried only 90 days later were governed by the CBA or had to be arbitrated. It said it would be prejudiced if the claims for violation of Washington law were not tried November 6. It made this representation to the court on August 4, i.e. 10 days *after McFarland's July 26 deposition*.

On August 4, the same day, Lee moved for leave to file a Second Amended Complaint (“SAC”) to add McFarland as a Class representative and to expand the Class period to December 31, 2016. The SAC did *not* change the claims. They were still for violation of WAC 296-126-092. The common Class issues alleged in the SAC related to Evergreen’s violation of Washington law, not breach of the CBA. CP 438-39.

Plaintiff served Evergreen with the motion for leave to file the SAC ten days *after* McFarland’s deposition. Like the Class claim, the SAC alleged an individual claim for violation of Washington law on McFarland’s behalf, not breach of the CBA. The motion alleged that

McFarland was a proper Class representative on the Class claim.

On August 11, Evergreen opposed the motion arguing it would be prejudiced if the Class claim went to December 31, 2016 because its experts had analyzed the WAC meal and rest break claims through August 29, 2016. CP 276. It also argued that McFarland was not a proper Class representative because her claim was for breach of the CBA, had to be arbitrated and was not “typical” of the Class claim. CP 283.

In support of its argument, Evergreen cited to the *same* McFarland deposition testimony it later argued to the court in its September 1, 2017 motion to compel arbitration required arbitration of *all claims* in the case, including Lee’s individual claim and the certified Class claim. But in its August 11 opposition to Lee’s motion to amend to add McFarland as a Class representative, it argued to the court the *exact opposite*. It argued Lee’s claim and the Class claim were for violations of Washington law while McFarland’s claim was for breach of the CBA. CP 283 stating:

McFarland reported a break as missed when it was late and expected to be paid for it. This claim is expressly based on her union contract and subject to arbitration...

Any amended case with this union contract-based claim should be dismissed and arbitrated under the Washington State Nurses’ Association Collective Bargaining Agreement grievance procedure.

On August 14, Plaintiff filed a Reply brief pointing out that

McFarland's claim and the claim alleged in the SAC were *not* based on the CBA but on Washington law. Plaintiff noted that the requirements for *when* meal and rest breaks had to be given under the WAC had not been modified in the CBA. The CBA had the same requirements as Washington law, i.e. meal breaks by the fifth hour of work and rest breaks for every 4 hours of work because the CBA stated that meal and rest periods "*shall be administered*" consistent with WAC296-126-092. CP 1399.

On August 15, the court granted Lee's motion for leave to file the Second Amended Complaint. The order also appointed McFarland as an additional Class representative. Because the court appointed her as a Class representative on the Class claim for violation of Washington law, it necessarily rejected Evergreen's argument that she was adding a claim for breach of the CBA and was an improper Class representative.

Evergreen did not seek review of the order. Nor had Evergreen sought review of the trial court's August 8 order that granted the motion to continue the November 6 trial but ordered "No further trial continuances will be granted *for any reason.*" CP 1403.

Instead, on September 1, three weeks later and the Friday before the Labor Day weekend, Evergreen filed a motion to compel arbitration and *to dismiss the action* or to stay proceedings. CP 555. While its motion asked for dismissal, it was noted on six days' notice in violation of the

Local Rule requiring that dispositive motions be set on 28 days' notice. The motion's request for a stay violated the court's August 8 order that the trial date would *not* be continued "for *any reason*." A stay would have required a continuance of the November 6 trial date, only 65 days later.

Evergreen then filed a *second* motion to compel arbitration at 4:00 p.m. on September 1. It did not seek dismissal but still asked that the case be stayed. CP 1217. This new motion was also noted on six days' notice. Plaintiffs objected that it was improperly noted. *Id.*

On September 18, 2017, the court agreed and advised the parties by email that the motion to compel arbitration was a "dispositive motion" under the Local Rule and had to be filed on 28 days' notice with oral argument. Evergreen *accepted that ruling* and filed a new notice setting the motion for oral argument on November 3, 2017.

On November 3, the court heard argument on the motion. It did not alter its prior ruling that the claims in the case were for violation of Washington law, not breach of the CBA. It stated that the claims included "late" breaks as well as "missed breaks." VRP 25-26. It doubted that it had the "right parties" in front of it to compel arbitration under the CBA's arbitration clause – the union was not a party to the action. VRP 16. It noted that Evergreen had engaged in "quite a long history of litigation in this court instead of any effort to enforce the right to arbitration." *Id.*

**F. Evergreen violated the WAC's Break Requirements**

While the merits of the claims were irrelevant to its motion to compel arbitration, Evergreen made factual assertions alleging compliance with the WAC's requirements. Its assertions were and are contrary to nurse deposition testimony and declarations submitted on the Class certification motion and reiterated in Plaintiffs' opposition to its motion to compel arbitration. For example, the WAC requires that meal breaks be given not more than five hours into a shift. But RNs testified that they did not get meal breaks until after the fifth hour of their shift. CP 1385, 1427.

Evergreen also did not train RNs to report late meal breaks as "missed" so that they could get paid. CP 1415, 1432. Instead, RNs were told that they got their meal break if they got a 30-minute break *any time in their shift*. CP 1479. This false information given to the RNs was one of the reasons why RNs did not report "late" breaks as "missed."

In its motion, Evergreen also made factual assertions alleging compliance with the WAC's rest break requirements that were contrary to the evidence of record. For example, the WAC mandates one 10-minute break for every four hours worked, so for a 12-hour shift that means at least *three* 10-minute rest breaks. But RNs testified that they did not get *three* breaks on 12-hour shifts because Evergreen's practice was to have RNs *combine* two breaks into a single longer break. CP 889-91, 1251-52.

By combining two rest breaks into a single longer break, the RN was necessarily denied at least one 10-minute break for every 4 hours worked and three 10-minute breaks on a 12-hour shift. She necessarily had to work more than three hours without a break in violation of the WAC. Evergreen admitted that it did not contract with WSNA to modify the WAC's requirement to permit combining two rest breaks into a longer single break. CP 1252. No such modification is stated in the CBA.

### **III. ISSUES PRESENTED – ALLEGED ERRORS**

Evergreen's appeal presents the following issues for resolution:

1. Did the court correctly rule that the CBA's Arbitration clause did *not* apply to Plaintiffs' claims set out in the SAC and the class certification order for violation of WAC 296-126-092? **Yes.**

Evergreen admits the SAC only states claims for violation of Washington law and not breach of the CBA. The CBA defines a "grievance" as a breach of the CBA, not as a violation of law.

2. Did the trial court correctly rule that the Class claim was limited to violations of Washington law and not changed by McFarland's deposition into claims for breach of the CBA? **Yes.**

Plaintiffs are the "masters of their complaint." They can choose to limit their claims to violation of the WAC and not breach of the CBA. Evergreen's cited cases do *not* say a defendant can usurp the Plaintiffs'

claim under the guise of a motion to compel arbitration, transform it into a claim for breach of a CBA and then demand arbitration on *its own refabricated claim*. Nor is there any authority that a single class member's testimony can change the Class claim alleged in the Complaint when it is the *only claim authorized by the court* in granting leave to amend under CR 15. There is no authority that the court can change the Class claim it certified under CR 23(b)(3) without notice to the Class and opportunity for them to opt out of this new, reformulated Class claim. That did not occur.

3. In the Alternative, should Evergreen's appeal be dismissed because it is bound by the trial court's *earlier* ruling that McFarland's deposition did *not* change the Class claim **Yes**.

Ten days *before* Evergreen moved to compel arbitration, the court rejected its argument that McFarland's deposition meant her claim was for breach of the CBA, had to be arbitrated and was not typical of the Class claim for violation of the WAC. It ruled McFarland was a proper Class representative on the Class claim. Evergreen did not appeal that August 15 order, which is the "law of the case." Its appeal of the later order denying arbitration rests on arguments contrary to the prior order and is barred.

4. In the alternative, should the court's order be affirmed because Evergreen has no right to compel RNs to arbitrate? **Yes**.

The right to compel arbitration is a matter of contract. A party

cannot be compelled to arbitrate claims the party did not *expressly* agree to arbitrate. Evergreen admitted in deposition the CBA’s arbitration clause it negotiated with WSNA does not grant it a right to compel arbitration or require RNs to arbitrate. The order denying arbitration should be affirmed.

5. Did the court err in considering the motion under CR 12 and if so, did such error affect the ruling? **No.**

Evergreen’s original motion asked the court *to dismiss the case*. Its subsequent motion asked for a stay in the Superior Court after 10 months of active litigation. Evergreen *accepted* the court’s order that its motion was properly regarded as a “dispositive motion” and re-noted it. Its argument that the court refused to consider the CBA is contradicted by the order denying arbitration. The order states the court only ruled after it “*considered* the pleadings filed in support and in opposition to the motion,” which included counsel’s declarations attaching the CBA.<sup>6</sup> The order says the court was “otherwise *fully informed of the matter*,” i.e. Evergreen’s motion. It must have read the CBA because it questioned if it had the “right parties in front of it” to compel arbitration.

5. In the alternative, should the order be affirmed because Evergreen waived any right it had to compel arbitration? **Yes.**

In December 2016, Evergreen’s attorney signed an Answer to the

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<sup>6</sup> See, Exhibit A to Evergreen’s Proof of Service of Notice of Appeal (Nov. 30, 2017).

Complaint asserting as an Affirmative Defense that the claims were subject to arbitration under the CBA. Evergreen then *voluntarily chose* to litigate zealously in court for 10 months and take its chances with trial court rulings on key motions, including its motion to dismiss, Plaintiff's motion for Class certification, competing motions on Class Notice, the motion to add McFarland and the motion to continue the trial date.

In the making that strategic choice and delaying its motion to compel arbitration until after it lost on the above motions, Evergreen cost Plaintiffs over \$140,000 in fees and costs. The fees and costs would not have been incurred if Evergreen had moved to compel arbitration and the motion was granted in December 2016 when it executed its Answer. Plaintiffs would be severely prejudiced by requiring arbitration of their claims at this point, mere months before trial was scheduled to take place. Evergreen waived its right to arbitration. The order should be affirmed.

#### **IV. LEGAL ARGUMENT**

##### **A. The Arbitration Provision is Irrelevant to the Dispute**

The CBA's arbitration clause is irrelevant because it does not cover the claims alleged and certified by the court. It defines a "grievance" as a breach of the "*express terms*" of the (CBA)," not WAC violations. *See, Hill v. Garda CL Nw., Inc.*, 179 Wn. 2d 47, 54 (2013) ("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.”) Nor does the Federal Arbitration Act (“FAA”) require arbitration because:

[T]he FAA does not require parties to arbitrate when they have not agreed to do so...[i]t simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

*Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248 (1989), emphasis added.

Because the arbitration here is limited to claims for breach of the “*express* terms and conditions” of the CBA and not state law, the FAA does not mandate arbitration.

Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they *may limit by contract the issues which they will arbitrate*.

*Id.* at 479, emphasis added.

In opposing the motion to add McFarland as a Class representative, Evergreen told the trial court that the claims alleged by Lee and the Class were for violation of the WAC, not the CBA and McFarland’s claim was different because it was for breach of the CBA and had to be arbitrated. But in granting leave to file the SAC, the court rejected Evergreen’s arguments. It ruled that McFarland’s claim was typical of the Class claim for violation of the WAC and she was a proper “Class representative.”

Evergreen has not appealed that August 15 order to this Court. It

only appealed the later November 3 order denying arbitration. Its motion to compel arbitration rested on the identical argument that McFarland's deposition meant her claim was for breach of the CBA, and because she was appointed a Class representative, it meant the Class claims were also for breach of the CBA. The trial court properly rejected these arguments.

Evergreen also argues in this appeal that arbitration is required because the CBA's arbitration clause must be "interpreted." But the clause is clear that it does not cover claims for violation of Washington law. Evergreen does *not* argue that it does. Instead, it admits the claims in the SAC, the operative Complaint, are for violation of Washington law, "RCW 49.12 and WAC 296-126-092." OBA 13.

It is well-settled that Plaintiffs are the "master of their complaint" and can chose to limit their claims to violations of state law instead of breach of the CBA. *See Burkhardt v. Swedish Health Servs.*, 2017 U.S. Dist. LEXIS 74711 at \*10 (W.D. Wash. May 16, 2017)("Even if plaintiff, as a member of the bargaining unit, had substantial rights under the CBA and could have brought suit under § 301, she remains master of her complaint and chose not to do so."). On its face, *as written*, the CBA's arbitration clause does not apply. *See, Hinterberger v. Catholic Health*, 2008 U.S. Dist. LEXIS 96105 (W.D. N.Y. Nov. 25, 2008 at \*19-20):

Plaintiffs' allegation that they worked during their unpaid lunch period sets forth an independent statutory right under section 162 of the NYLL4 [the New York Wage Statute]. As a result, any provisions *in the CBA* discussing meal periods are irrelevant to Plaintiffs' claim.

Evergreen also argues that the Plaintiffs have to prove that the CBA's arbitration provision is "unenforceable." OBA 17-18. That's not true because that's not the issue. The issues are whether the CBA *as written* requires arbitration of claims that are *not* based on breach of an "express" term of the CBA – it does not; whether the arbitration clause as negotiated and written imposes a duty on RNs to arbitrate their claims – it does not, and whether Evergreen has a right to compel RNs to arbitrate their claims under the clause as negotiated and written – it does not.

Washington courts enforce contracts *as written* and may not "add to, subtract from, modify, or contradict the terms of a fully integrated written contract..." *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327 (1997). If the CBA's grievance procedure on its face does not apply to plaintiff's claim, the court enforces the provision as written and denies a motion to compel arbitration. *Int'l Union of Operating Eng'rs Local 148, AFL-CIO v. Gateway Hotel Holding, Inc.*, 956 F. Supp. 2d 1071 (E.D. Mo. 2013). Because the CBA that Evergreen negotiated with WSNA, *as written*, does not mandate arbitration of claims for violation of the WAC, the court properly denied Evergreen's motion to compel arbitration.

**B. McFarland’s Testimony Did Not Change the Legal Claim**

The SAC did not allege a breach of an “*express* term or condition” of the CBA, so Evergreen’s demand for arbitration rested on its argument that McFarland’s deposition changed the claim in the SAC from a claim alleging violations of the WAC to a claim alleging breach of the CBA. But the court rejected the argument when it granted Lee’s motion to amend and appointed McFarland a Class representative on the claim for violation of the WAC. Evergreen cites no authority supporting its argument that the testimony of a single class member or a discovery request can change the legal claims that the court approved in granting leave to file the SAC.<sup>7</sup>

Nor is Evergreen’s argument consistent with CR 15 and 23. Under CR 15, the Complaint’s claims can only be amended by motion. The only motion after Lee’s July 11 deposition, McFarland’s July 28 deposition and the August 1 class member depositions cited in Evergreen’s Brief, was Lee’s August 4 motion to amend. The court granted that motion approving the SAC 10 days *before* the motion to compel arbitration was filed. Evergreen admits the SAC only states claims for violation of the WAC.

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<sup>7</sup> McFarland was not even asked what *her claims were*, or if they were based on the CBA. Neither her claim nor the Class claim in the SAC seeks a second meal break on a 12-hour shift or the 5-minute difference between the CBA’s 15-minute breaks and the WAC’s 10-minute breaks. Nor does Evergreen cite any authority that a Class member is competent to offer legal opinions about whether her employer complied with the law, *i.e.*, define the legal claim in the lawsuit. Lay witnesses may not do so and such testimony is inadmissible under ER 701.

Under, a Class claim certified under CR 23(b)(3) may only be amended by the court on motion, requires notice to Class members of the certified claim and an opportunity for them to opt-out. CR 23(b). No motion was filed to change the certified Class claim from a claim for violation of the WAC to breach of the CBA. No order was entered changing the certified claim. The SAC states the same claims for violation of the WAC as the court's class certification order. Evergreen admits as much. It cites no authority that a class member's deposition testimony can supplant the requirements of CR 15 and 23 on a certified Class claim.

**C. Plaintiffs Individual Claims are Not Subject to Arbitration**

Evergreen argues that Lee and McFarland have different claims than the Class because they claim a right to a 15-minute rest break rather than a 10-minute break. OBA 23-24. The court rejected this *very argument* ten days *before* Evergreen moved to compel arbitration.

Lee, McFarland and the Class are *not* suing to recover the 5-minute difference between the CBA's 15-minute break and the 10-minute break that is the *minimum* required by the WAC. They are suing for *not* getting 10-minute rest breaks in the manner required by the WAC *at all*, i.e. not getting at least *one* 10-minute break for every 4 hours of work.

Lee, McFarland and the Class are also suing over not getting their *one* 30-minute meal break *in the manner* required by the WAC, *i.e.*, by the

fifth hour of work. At the November 3 hearing, the court said that such “late” breaks were part of the Class claim for “missed” breaks. VRP at 26.

Evergreen also argues the CBA governs *when* meal breaks must be given because the CBA modified the WAC requirement that meal breaks be given by the fifth hour of work. OBA at 22-23. The argument is baseless. The CBA’s “Meal/Rest Period” clause does *not* say it “supersedes” WAC requirements on *when* breaks must be given. It says breaks “shall be administered in compliance with (the WAC).” The WAC requires that meal breaks be given by the fifth hour of work.

The CBA does *not* say that meal breaks are to be given at the “mid-point” of a 12-hour shift or by the sixth hour of work. Had Evergreen wanted to modify the WAC to say that, it had to negotiate with WSNA for WSNA’s agreement to modify the requirement and the modification had to be stated in the CBA. Evergreen admitted through Ms. Hofmeister it did not do so and the CBA does not have any such modification. CP 1247.

Evergreen also argues that Lee and McFarland have claims for “interrupted” meal breaks that are governed by the CBA because the CBA refers to work rules that Evergreen *may or may not* establish that may affect “interrupted” meal breaks. OPA 23. The argument is nonsense.

The law *permits* a public employer to modify WAC requirements

by *agreement* with the union but that modification must be clearly set out in the CBA. *See, Frese, supra.*<sup>8</sup> Evergreen admitted in deposition that the only modification in the CBA relating to meal breaks is the elimination of one of the two meal breaks required under the WAC for a 12-hour shift.

Nowhere does the CBA state that RNs are *not* entitled to be paid for “interrupted” breaks if the WAC requires payment. The CBA says meal breaks *shall be* administered in compliance with the WAC. If Evergreen wanted a different deal it had to negotiate for WSNA’s agreement that RNs would not be paid for “interrupted” meal breaks.

But Evergreen’s argument that work rules need to be “interpreted” to decide if Plaintiffs have a valid claim would only prove that the claims are *not* subject to arbitration. Under its argument the claims would *not be* for breach of an “*express* term or condition” of the CBA but would be for breach an *implied* term based on an interpretation of its work rules. As negotiated and written the arbitration clause *only applies* to a claim for breach of an “*express*” term of the CBA, not an *implied* term. Again, had Evergreen wanted a broader clause it had to negotiate with WSNA for it.

Finally, Evergreen argues that the Class is claiming “missed” rest breaks where according to Evergreen the break was satisfied by either

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<sup>8</sup> *See, also* RCW 49.12.187; L&I Guidance, E.S.C. 6 at p. 3. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300-01, 996 P.3d 582 (2000); *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 583-84 (2017)(waivers of worker’s statutory protections are disfavored and must be clearly stated.).

“continuous or intermittent rest during their shifts.” OBA 24. It asserts that this claim means Class members are relying on the 15-minute rest breaks required in the CBA and not the 10-minute breaks required by the WAC because when talking about “downtime” during their deposition, some of the RNs referred to 15-minute breaks. *Id.* The argument is baseless.

The claim approved by the court in the Class certification order and the order granting the SAC is that Evergreen violated the WAC by not providing *at a minimum* a 10-minute rest break for every 4 hours worked and forcing RNs to work more than 3 straight hours without a break in violation of the WAC. That claim is *not* dependent on whether the break is 15 minutes long or 10 minutes long. It makes no difference to the claim.

Evergreen admits that the CBA has *no provision* on “intermittent” breaks. CP 1249-50. Whether the WAC requirement of a 10-minute rest break can be satisfied by “downtime” or “intermittent rest” during a shift will be governed by Washington law and Department of Labor regulations implementing the Wage statute, not by the CBA. The claim is not for breach of the CBA and is not subject to the arbitration under the CBA.

The claims are for violation of the WAC, not breach of “an express term or condition of the CBA.” Interpretation of the CBA is not required. Nor is reliance on the conduct of the “parties” to the CBA, i.e. Evergreen and WSNA, necessary. Evergreen’s cited cases to the contrary simply do

not apply to the claims in the SAC and the court's certification order.

**D. Evergreen has no Right to Compel Arbitration**

Evergreen's CBA with WSNA is interpreted under the general rules of contract interpretation. *Hill, supra*. Washington courts interpret contracts "*as written*" and not as one of the parties "wishes" it had been written. *See, In re Marriage of Schweitzer*, 132 Wn. 2d at 327.

The Grievance Procedure's Arbitration clause, Step 4, says the "Association" (WSNA) "may" request arbitration. It does not say Evergreen can compel RNs, who are not parties to the CBA to arbitrate. Ms. Hofmeister conceded this at her deposition. CP 1254-55.

To the extent Evergreen argues an *implied* duty on the part of the RNs to arbitrate claims exists or Evergreen has an *implied* right to compel RNs to arbitrate when no such duty or right is in the CBA, the argument should be rejected. Evergreen could have *tried* to contract with WSNA for such a duty and right. But according to Evergreen's representative, it did *not do so*. Its desire to do so *now* by court order is unavailing.

**E. RNs have no Duty or Right to Arbitrate Claims**

Because the right to compel arbitration requires agreement, the party seeking to compel arbitration must *first* show there is a contract with *that party* requiring arbitration of *that claim*. *Volt Info. Scis, Inc. supra*. Evergreen's CBA is a contract with WSNA, not with individual RNs. CP

1264-65. Because RNs are not parties to the CBA, Evergreen's cited cases saying that "all questions upon which *the parties* disagree are presumed to be within the arbitration provision unless negated by clear implication," do not apply. OBA 18-19. This Class action does not involve a question upon which the *parties* to the CBA, Evergreen and WSNA disagree. To the contrary, WSNA sent the RNs a letter telling them they were "free to participate" in this action. The case involves a disagreement between Evergreen and its RNs over whether Evergreen has complied with the WAC, not the CBA. RNs are *not parties to the CBA*.

Nor does the CBA's arbitration clause state that RNs must arbitrate a claim or can be compelled to do so. It says "the Association *may*" request arbitration. It does not permit RNs to request arbitration nor does it grant Evergreen the right to compel an RN to arbitrate. Imposing a *duty* to arbitrate on RNs when they have no right to ask for arbitration is an unreasonable interpretation of the CBA. It would make the "grievance procedure" substantively unconscionable. *See, Hill*, 179 Wn. 2d at 55.

Evergreen admits it did not contract with WSNA to waive the rights of RNs to sue Evergreen for violations of the WAC. CP 1254. Nor did it contract for an arbitration clause that required RNs to arbitrate. *Id.*

Indeed, when WSNA sued Evergreen in a prior case over its failure to provide rest breaks to its members, it alleged a violation of the WAC's

10-minute break requirement, just as Lee and McFarland have done. Evergreen did not demand arbitration of WSNA's claim even though WSNA *is a party* to the CBA. Instead, it paid WSNA's claim on behalf of RNs who were WSNA members for an earlier time period. *Pugh*, 177 Wn. App. at 352. So, if one were to consider the *past* conduct of the parties to the CBA, Evergreen and WSNA, their conduct shows they both believe a claim for violation of the break requirements in WAC 296-126-092 are *not* subject to the CBA's grievance and arbitration provision.

**F. Evergreen Cannot Raise the Issue in this Court**

On August 15, 2017, the trial court rejected Evergreen's argument that Plaintiff McFarland's deposition testimony showed that her claim was for breach of the CBA and different than the claims asserted by Lee and the Class for violation of the WAC and subject to arbitration. The court's ruling and order appointing McFarland as a Class representative was a determination that the only claims alleged in the action were for violation of Washington law, not the CBA and those claims were not subject to arbitration. Evergreen did *not* seek discretionary review of the trial court's ruling and order. It has not appealed the trial court's order.

Instead, Evergreen only appealed the court's November 3, 2017 order denying its motion to compel arbitration. But that motion was based on the same McFarland deposition testimony and the same argument that

her claim was for breach of the CBA and subject to arbitration.

Evergreen argued that because her claim was for breach of the CBA based on her deposition testimony and subject to arbitration it meant that Lee's claim and the Class claim were also for breach of the CBA and subject to arbitration because the court had appointed McFarland as a Class representative. The obvious fallacy in Evergreen's argument is that the trial court had *already ruled* two weeks before it moved to compel arbitration that Evergreen was wrong. It ruled that McFarland's claim, like that of the Lee and the Class were *not* for breach of the CBA and hence were not subject to arbitration. Their claims were for violation of the WAC and not breach of the CBA. Because Evergreen did not seek review of that ruling and has not done so in this appeal, that ruling is the law of the case. Evergreen's appeal rests on the argument that the claims in the action are for breach of the CBA based on McFarland and Lee's testimony. Its appeal is barred by the "law of the case."

**G. The Trial Court Properly Considered Defendant's Motion**

The court denied the motion to compel arbitration under CR 12. Evergreen argues it should have considered it and denied it under CR 7 because it was not a dispositive motion. Evergreen cites no Washington case so holding and federal courts typically consider motions to compel arbitration under CR 12, if the facts are not in dispute, or under CR 56, if

the facts are in dispute. *See, e.g., Worth v. Worth*, 2016 U.S. Dist. LEXIS 164061 (E.D. Pa. Nov. 29, 2016) at fn. 18.

Evergreen's original motion to compel arbitration asked for *dismissal of the case*. Evergreen *accepted* the court's September 19 ruling that its revised motion was a "dispositive motion" that had to be noted on 28 days' notice. It re-noted its motion in compliance with *that* ruling. Indeed, Evergreen got the benefit of oral argument on its motion because it was a CR 12 or CR 56 motion. If the court had considered the motion under CR 7, it would not have gotten oral argument. This likely explains why Evergreen did not ask for reconsideration of the court's ruling.

In any event, the lynch-pin of Evergreen's argument is its baseless assumption the court "looked only at the plaintiff's allegations in their Second Amended Complaint, ignoring the existence of the CBA." OBA 27. The assumption is contradicted by the court's order denying its motion in which the court states that it ruled only after it "*considered* the pleadings filed in support and in opposition to the motion." The pleadings included the declarations of counsel that attached the CBA. The order also states the court was "otherwise fully informed of the matter," i.e. the motion. Evergreen points to *nothing in the record* supporting its argument.

The court's comments at the November 3 oral argument also *show* it considered the pleadings and CBA before ruling. For example, it noted

that Evergreen had engaged in “quite a long history of litigation in this court instead of any effort to enforce the right to arbitration.” VRP 118. The court also questioned if it had the right parties in front of it to compel arbitration. The court had to have read the CBA to make this comment.

Having wrongly *assumed* the court did not consider its pleadings despite the statement to the contrary in its order, Evergreen then argues that by only looking at the allegations in the Second Amended Complaint, the court reached the wrong conclusion. OBA 27. It argues that “Plaintiffs cannot avoid arbitration through ‘artful pleading,’ avoiding mention of the governing CBA and its grievance and arbitration provisions.” *Id.*

But Evergreen admits no case so holds and argues *instead* that the situation is “*analogous*” to pleading a state law claim that is really a federal claim and pre-empted. The argument is baseless and ignores cases *directly on point* and *contrary* to its argument like *Burkhardt, supra* at \*10 (“Even if plaintiff, as a member of the bargaining unit, had substantial rights under the CBA and could have brought suit under § 301, she remains master of her complaint and chose not to do so.”).

Plaintiffs Lee and McFarland had a right to limit their claims to violation of the WAC rather than the “express terms and conditions of the (CBA).” They are not suing on a state law claim that is really a federal claim and pre-empted. They are suing on the *same* state law claim WSNA

chose to sue Evergreen on in a prior case rather than breach of the CBA. As a result of “arms-length” negotiations with WSNA, Evergreen chose to have a grievance and arbitration clause that was limited to disputes over the “*express* terms and conditions of the Agreement” and not for violation of Washington law, or every dispute arising from the RNs employment.

Evergreen could have tried to get WSNA to agree to more expansive language but it did not. It’s stuck with the agreement *as written* and not how it *now* wishes the CBA was written. It cannot impose on RNs or WSNA its *unilateral* changes. *See, In re Marriage of Schweitzer*, 132 Wn. 2d at 327 (“We emphasized, “[i]t is the duty of the court to declare the meaning of what is written, and not what was intended to be written.”)

**H. Evergreen waived any Alleged Right it had to Arbitrate**

Even if Evergreen had a right to compel arbitration of the claims in this Class action under the CBA, which it did not, it waived that right by actively litigating the claims in court and taking its chances on the court’s rulings for 10 months before moving to compel arbitration. In doing so, it imposed on Plaintiffs over \$140,000 in fees and costs. Such conduct waives a right to compel arbitration. *See, Steele v. Lundgren*, 85 Wn. App. 845 (1997) (delay of 10 months before seeking to compel arbitration after litigating in court and taking discovery depositions, sufficient to support court’s ruling that party waived right to compel arbitration.)

Like other contract rights, the right to arbitrate a claim can be waived by failure to timely request arbitration or by conduct inconsistent with a later assertion of the right to arbitrate, including litigating in court. *See, Romney v. Franciscan Med. Grp.*, 199 Wn. App. 589 (2017); *Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016). In *Romney*, the court held the defendant waived its right to arbitrate by litigating in court and allowing it to now assert a right to arbitrate would prejudice the opposing party. In *Martin*, the Ninth Circuit reached the same conclusion. It held that it would prejudice the other party to compel arbitration because that party had spent substantial fees and costs prosecuting the claims in court. The Ninth Circuit explained that the reason for the policy favoring arbitration was that arbitration provided *a quick and inexpensive* means to resolve individual claims and disputes. But when a party actively litigates in court and imposes on the other party both delay in resolving the dispute and extensive fees, the very basis for the rule favoring arbitration and the benefit to the party of arbitration no longer exist.

Evergreen tries to justify its long delay and extremely active litigation in court arguing that its motion to compel arbitration was “in swift response to plaintiffs’ claims in this lawsuit, which were a moving target.” OBA at 29. The argument is baseless and was rejected by the court at the November 3 hearing on its motion stating that: “I have quite a

*long history* of litigation in this court *instead of* any effort to enforce the right to arbitration.” VRP at 118, emphasis added.

Contrary to the argument of a “moving target,” in fact, the original Complaint filed in November 2016 alleged a violation of the WAC meal and rest break requirements, not breach of an “express term” of the CBA, as did the First Amended Complaint, as did the SAC. Indeed, Evergreen’s argument is contradicted by the fact that in *December 2016*, Evergreen’s attorney signed an Answer alleging an Affirmative Defense that the claims were subject to CBA’s grievance and arbitration provision. In order to sign that *pleading* under CR 11, Evergreen’s counsel had to have made a “reasonable inquiry” into the facts and law and believed the defense was proper. That occurred 10 months *before* he moved to compel arbitration.

Evergreen also argues that it moved to compel arbitration a mere 15 days after the trial court granted Lee’s motion to add McFarland as a Class representative. But in granting the motion, the court *rejected* its argument that McFarland’s July 26 deposition testimony showed her claim was for breach of the CBA, had to be arbitrated and was different than Lee’s claim and the Class claim for violation of the WAC. Evergreen did not ask for reconsideration or seek review of that ruling and order. Instead in disregard of the court’s order, it moved to compel arbitration making the *identical* argument the court had already rejected.

Evergreen also says Lee's July 11 deposition, McFarland's July 26 deposition, the July 28 deposition of class member Anderson, and the August 1 deposition of class member Hale showed that the claims for missed breaks were based on a breach of the CBA and not violation of the WAC. OBA at 24. But the depositions were four to six weeks *before* it moved to compel arbitration and each deponent was *already* a member of the Class certified by the court in March 2017. Given Evergreen's view of the class member depositions there was no reason for delay in seeking arbitration.

Indeed, Evergreen's September 1 motion to compel arbitration was entirely contrived and rested on an argument *already* rejected by the trial court that McFarland's July 26 deposition meant the claims in the case were for breach of the CBA because she referred to the CBA's breaks. The record of Evergreen's actions shows, as the trial court stated, "quite a long history of litigation in (the) court without any effort to enforce the right to arbitration." VRP at 118. That "long history" was based on Evergreen's strategic choice to repeatedly take its chances on the court's resolution of key motions and disputes in the case, including its motion to dismiss and plaintiff's motions for class certification and to amend.

It was only after Evergreen *repeatedly lost* on those key disputes that it decided to change its strategy of litigating in court and moved to

compel arbitration to avoid any further bad rulings. The claims asserted by Plaintiffs and the certified Class were not a “moving target.” Evergreen just changed its mind and was looking for a more favorable forum.

Indeed, Evergreen’s representations to the trial court also show that it repeatedly took positions inconsistent with its subsequent demand for arbitration. For example, it asked the court to approve *its* Class Notice that told the Class members the claims in the case were for violation of Washington law and would be tried in the state court. It opposed Lee’s motion to continue the trial telling the court it would be prejudiced if the case were not tried *in court* on November 6, only 90 days later. It opposed Lee’s motion to amend telling the court McFarland’s claim was *different* than Lee’s claim and the Class claim because their claim was for violation of the WAC, while McFarland’s claim was for breach of the CBA.

Evergreen’s actions and representations to the court make clear that its failure to move to compel arbitration when it drafted its Answer to the Complaint, a *month after* the case began, was tactical and strategic. Now that it has caused Plaintiffs over \$140,000 in fees and costs as a result, it should not be allowed to compel arbitration. It waived that right.

**I. The Nurse’s Union, WSNA, is Not a Party to the Action**

Evergreen argues that WSNA, the *other party to the contract*, is not a required party because the court can “interpret” the CBA’s clauses in

WSNA's absence even though RNs are *not* parties. OBA 30-31. In its Opening Brief, Evergreen says it will ask the court to decide if Evergreen can force RNs to arbitrate "grievances," in total disregard for the CBA's arbitration clause *as written*. As Evergreen admits, the clause leaves to WSNA the *sole discretion* whether to ask for arbitration of a dispute.

Evergreen also says the court has to interpret the CBA's Meal/Rest Period clause to decide if Evergreen can count "intermittent breaks" and "downtime" as a "rest break," even though as Evergreen admits, the CBA does not say that they can be. Evergreen also says the court has to interpret the clause to decide if meal breaks can be given by the sixth hour of work or mid-point of a 12-hour shift instead of by the fifth hour of work, even though the CBA does not say that and instead says that the meal breaks "shall be administered in compliance with state law (WAC 296-126-095.)"

Evergreen argues WSNA is not a necessary party because WSNA would have no interest in how the court might effectively rewrite the CBA's grievance/arbitration and Meal/Rest Period provisions in the contract WSNA has with its members' employer. The argument is absurd and only highlights that the Plaintiffs' claims are for violation of the WAC, not the CBA, and no interpretation of the CBA is required.

## V. CONCLUSION

The CBA's grievance and arbitration procedure that Evergreen negotiated with WSNA clearly states that the procedure only applies to a claim for an "alleged breach of the express terms or conditions of the Agreement." It does not apply to claims for violation of Washington law.

Both WSNA and Evergreen have acted with that understanding. WSNA sued Evergreen for violation of Washington law rather than breach of the CBA and when it did, Evergreen did not seek to compel arbitration of the claim. And in this action, WSNA sent RNs a letter telling them that they were "free to participate" in the litigation in the Superior Court.

Evergreen told the trial court that the claims alleged by Lee and the Class were for violation of Washington law and were not subject to arbitration. It did so in opposing Lee's motion to amend and in trying to prevent McFarland being added as a Class representative. It told the court this on August 11, four weeks after Lee's July 11 deposition, two weeks after the deposition of Class member Anderson and 10 days after the deposition of Class member Hale. Now it asserts in this appeal that their depositions showed that the claims were for breach of the CBA and not violations of the WAC meal and rest break requirements. Evergreen's argument that these events changed the claims authorized by the court in the SAC and in its Class certification order is baseless. The argument is a

pretext for a baseless demand for arbitration.

Evergreen is not exempt from complying with the WAC's requirements because it is a public employer with a CBA that has a "Meal/Rest Period" clause. The court must enforce the CBA as written. The CBA's Grievance and Arbitration clause states that it only applies to an alleged breach of the "express terms and conditions of the Agreement." It does not apply to the claims in this lawsuit. The CBA's "Meal/Rest Period" clause says breaks "shall be administered in compliance with WAC 296-126-092. Evergreen is stuck with the CBA it has with WSNA as written. It cannot change the Plaintiffs' claims or the CBA by fiat. Because the claims do not fall under the CBA's Grievance Procedure as written, Evergreen has no right to arbitrate the claims.

## **VI. REQUEST FOR ATTORNEY FEES**

This is a frivolous appeal. Evergreen cites no authority of any nature to support the lynch-pin of its appeal that a Class member's deposition testimony changed the claim the court approved in an amended pleading under CR 15 and certified under CR 23(b)(3) from the claim the Plaintiffs' chose to allege for violation of state law to a claim for breach of a CBA. Evergreen's argument is contrary to the court's order granting Lee's motion to amend that appointed McFarland a Class representative. It is contrary to the well-settled rule that Plaintiffs are the "masters of their

complaint” and can choose to limit the claims to violation of state law. It is contrary to Supreme Court law that Plaintiffs may choose to limit their claim to avoid a forum’s jurisdiction. Contrary to Evergreen’s argument, a defendant cannot “hijack” Plaintiff’s claim by interjecting a CBA defense that would render the claims subject to a different forum. *See, Caterpillar, Inc. v. Williams*, 482 U.S. 386-398-99, 107 S. Ct. 2425 (1987):

When a plaintiff invokes a right created by a collective bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant’s option. But a *defendant* cannot, merely by injecting a federal question into the action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be the master of nothing.

Evergreen’s other main argument supporting its appeal is that it is exempt from complying with the WAC because it is a public employer with a CBA that has a meal/rest period clause. But that’s not the law. This Court has held that public employers *may negotiate* with unions for WAC modifications but the modifications must be *agreed to* by the union and clearly stated in the CBA. *Frese*, 129 Wn. App. at 668. Evergreen does not even cite to *this Court’s* decision in *Frese*, let alone try to distinguish it. And, it does *not* tell this Court that it *admitted in deposition* it did *not* contract with WSNA to modify the WAC requirements for when breaks

must be given in the CBA. The CBA says Evergreen *shall* comply with the requirements in WAC 296-126-092 in administering breaks.

Evergreen's argument that the Federal Arbitration Act requires arbitration of the claims here when the CBA's Grievance procedure does not cover the claims and it admitted in deposition it has no right to compel RNs to arbitrate under the CBA is contrary to Supreme Court precedent. *See, Volt Info. Scis. Inc.*, 489 U.S. at 478. Its argument that the court can modify the CBA's terms *as written* through judicial interpretation of the CBA is contrary to established Washington rules of contract interpretation. *In re Marriage of Schweitzer*, 132 Wn. 2d at 327.

Evergreen's appeal is utterly baseless and has cost Plaintiffs unnecessary fees and costs. The trial court correctly denied Evergreen's motion to compel arbitration. This Court should affirm that ruling and award Plaintiffs their fees and costs in responding to Evergreen's appeal. Fees on appeal are properly awarded here because Evergreen's appeal is frivolous. *See, Reid v. Dalton*, 124 Wn. App. 113, 128 (2004) Fees are properly awarded under RAP 18.9 when an appeal is frivolous and:

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Fay v. N.W. Airlines, Inc.*, 115 Wn. 2d 194, 200-01, 796 P.2d 412 (1990).

The CBA's grievance procedure only applies to claims for an

alleged breach of the *express* terms and conditions of the CBA. Evergreen admits that neither the SAC approved by the court nor the Class claim certified by the court only state claims for violation of the WAC, its appeal is frivolous under controlling state court and Supreme Court precedent. Evergreen admitted in deposition that WSNA *never agreed* to modify the WAC mandates for *when* meal and rest breaks must be given. Plaintiffs' claims are based on those WAC mandates, not breach of the CBA. This confirms that the claims are not subject to the CBA's grievance procedure.

Evergreen's appeal is so totally devoid of merit based on the facts of record and the law that there is no *reasonable* possibility of reversal. Plaintiffs/Respondents respectfully request an award of their fees.

DATED this 20th day of April, 2018.

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### **CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that I electronically filed the foregoing Respondents' Response to Opening Brief with the Clerk of the Court and had a true and correct copy served on the following party, in the manner indicated:

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Dated April 20, 2018, at Seattle, Washington

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**Comments:**

Respondents' Response to Appellant's Opening Brief

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