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NO. 66137-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents/Cross-Appellants,

v.

GARDA CL NORTHWEST, INC., f/k/a AT SYSTEMS, INC. a
Washington Corporation

Appellant/Cross-Respondent.

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CROSS-APPELLANTS' REPLY BRIEF

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ARGUMENT	2
A. Garda Waived the Right to Demand Arbitration.....	2
1. Discovery	3
2. Motions Practice.....	4
3. Class Certification and Notice to the Class.	5
4. Trial Preparation.....	6
B. Plaintiffs Did Not Waive Their Right to Sue in Court.....	9
1. There is a Presumption Against Waiver of a Judicial Forum for Vindication of Statutory Rights.	10
2. Garda’s Labor Agreements Lack a Clear and Unmistakable Waiver of the Right to Seek Judicial Relief for Statutory Violations.	14
C. The Arbitration Provision is Unconscionable.	19
1. <i>Concepcion</i> Did Not Overrule Washington Law on Unconscionable Contracts.....	19
2. A 14-day Filing Requirement is Unconscionable.....	21
3. Fee-Splitting is Unconscionable.	21
4. Limiting Statutory Remedies is Unconscionable.	22
5. Forbidding Class Arbitration Would be Unconscionable.....	23
III. CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>14 Penn Plaza v. Pyett</i> , 129 S. Ct. 1456 (2009)	15, 16, 24
<i>52 Street Hotel Assoc.</i> , 321 NLRB 624 (2000)	24
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004)	21, 22
<i>Altex Ready Mixed Concrete v. NLRB</i> , 542 F.2d 295 (5th Cir. 1976)	24
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	<i>passim</i>
<i>B & D Leasing Co. v. Ager</i> , 50 Wn. App. 299, 748 P.2d 652 (1988)	7
<i>Brady v. National Football League</i> , 2011 U.S. App. LEXIS 14111 (8th Cir. July 8, 2011)	24
<i>Brundridge v. Fluor Fed. Servs., Inc.</i> , 109 Wn. App. 347, 35 P.3d 389 (2001)	10, 11, 15
<i>Curtis v. United States</i> , 59 Fed. Cl. 543 (Fed. Cl. 2004)	18
<i>Davis v. Dept. of Trans.</i> , 138 Wn. App. 811, 159 P.3d 427 (2007)	17
<i>Eastex Inc. v. NLRB</i> , 437 U.S. 556 (1978)	24
<i>Frese v. Snohomish County</i> , 129 Wn. App. 659, 120 P3d 59 (2005)	14
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	25
<i>Green Tree Fin. Corporation-Alabama v. Randolph</i> , 531 U.S. 79 (2000)	20
<i>Harco Trucking, LLC</i> , 344 NLRB 478 (2005)	24

<i>In re 127 Restaurant Corp.</i> , 331 NLRB 269 (1996)	24
<i>Ives v. Ramsden</i> , 142 Wn. App. 369, 174 P.3d 1231 (2008)	8
<i>Kramer v. Hammond</i> , 943 F.2d 176 (2d Cir. 1991)	8
<i>Lake Wash. Sch. Dist. No. 414 v. Mobile Modules NW, Inc.</i> , 28 Wn. App. 59, 621 P.2d 791 (1980).....	3, 7
<i>Leviton Mfg. Co. v. NLRB</i> , 486 F.2d 686 (1st Cir. 1973)	24
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002)	22
<i>Minter v. Pierce Transit</i> , 68 Wn. App. 528, 843 P.2d 1128 (1993)	11
<i>Mohave Elec. Co-op Inc. v. NLRB</i> , 206 F.3d 1183 (D.C. Cir. 2000)	24
<i>Mudge v. United States</i> , 59 Fed. Cl. 527 (Fed. Cl. 2004).....	15, 18
<i>Otis Housing Ass'n v. Ha</i> , 165 Wn.2d 582, 201 P.3d 309 (2009)	9
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985)	6
<i>Seattle Prof'l Eng'g Emples. Ass'n v. Boeing Co.</i> , 139 Wn.2d 824, 991 P.2d 1126 (2000).....	21
<i>Steele v. Lundgren</i> , 85 Wn. App. 845, 935 P.2d 671 (1997)	7, 8, 9
<i>United Parcel Serv., Inc.</i> , 252 NLRB 1015 (1980).....	24
<i>Wright v. Universal Maritime Serv. Corp.</i> , 525 U.S. 70 (1998)	<i>passim</i>
<i>Zuver v. Airtouch Comm'ns Inc.</i> , 153 Wn. 2d 293, 103 P.3d 753 (2004).....	22

Statutes

29 U.S.C. § 157.....24

RCW 47.64.150..... 17

RCW 49.12..... 17

RCW 49.52.070..... 17

Other Authorities

WASH. DEPT. LABOR & INDUSTRIES, Admin. Policy ES.C.6
(rev. June 24, 2005)..... 13, 14

I. INTRODUCTION

The threshold question in this appeal is whether Garda waived any right to demand arbitration by failing to demand it within a reasonable time and litigating the Plaintiffs' claims instead. Garda offers a different characterization of the 19 months of litigation than Plaintiffs, but the record speaks for itself. Prior to demanding arbitration in July 2010, Garda had unequivocally expressed its intent to litigate the Plaintiffs' claims. Even when it finally filed a motion to compel arbitration, Garda presented and noted the motion in such a way as to require continued litigation of the claims in court. By the time its motion was heard, the trial court had certified a litigation class and notified over 300 class members of the litigation, and the case was only three months from trial. It is too late to insist on a change of forums.

Even if it had not waived arbitration, Garda must establish that arbitration is the exclusive means of resolving Plaintiffs' claims. To do that, Garda must demonstrate that the Labor Agreements it relies upon contain a "clear and unmistakable" waiver of Plaintiffs' right to have their statutory state wage claims determined in a judicial forum. The agreements do not contain such a waiver, and arbitration is not required or appropriate.

And, regardless of waiver, the terms of arbitration in Garda's Labor Agreements are plainly unconscionable under Washington law. The arbitration clause gives employees only two weeks in which to file claims, forces them to split the steep costs of arbitration with Garda, limits them to a maximum of four months' back pay, and—if Garda has its way—forces each employee to prosecute his or her claim alone. Garda's only significant defense of these exceedingly one-sided provisions is to argue that the United States Supreme Court has said they are acceptable. Their case, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), does not have the sweeping and draconian impact Garda tries to give it, and does not overrule settled Washington law which establishes this arbitration clause is unconscionable.

The order compelling arbitration should be reversed.

II. ARGUMENT

A. Garda Waived the Right to Demand Arbitration.

Garda's attempt to recharacterize the record of litigation in this case is unavailing. There is no dispute that the parties litigated continuously throughout the 19 months prior to the hearing on arbitration, including extensive discovery, trial preparation, motion practice, class certification, and notice to the class.

1. Discovery. Garda attempts to minimize the discovery that took place in this case but cannot deny that it took much more discovery than it would have been entitled to in arbitration, and in fact the parties' pre-trial discovery was almost complete. In *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules NW, Inc.*, 28 Wn. App. 59, 621 P.2d 791 (1980), this Court expressly noted that taking substantial discovery which is not permissible in arbitration is evidence of waiver. *Id.* at 64.

Here, the parties took four depositions (three of which were taken by Garda) and exchanged thousands of pages of documents. Contrary to Garda's assertion, this discovery was not "limited" in any way to the issue of arbitration, but rather covered all aspects of the case, from class certification to liability and damages. Garda Reply at 27; *see, e.g.*, CP 429-32, 439-45, 450-53 (Garda deposed Plaintiffs on all issues). None of this discovery would likely have been permissible in arbitration. CP 549 ¶ 13 (applicable arbitration rules do not provide for discovery).

In addition to formal discovery, the parties also interviewed and took testimony from dozens of class members, both for purposes of class certification and for trial. Each side relied on declarations of many such class members in litigating the issue of

class certification. CP 994-1095. These witnesses, along with those whom the parties deposed, are likely to comprise most of the parties' witnesses at trial.

2. Motions Practice. As detailed in Plaintiffs' Opening Brief, Garda repeatedly indicated an intent to litigate in filings with the court, and repeatedly passed up opportunities to demand arbitration. It moved for a protective order and to seal court files and asked for multiple extensions of time to respond to Plaintiffs' motion for class certification, never stating any intent to arbitrate.

Garda's intent to litigate rather than arbitrate continued unabated even after Plaintiffs filed their motion for class certification, even after mediation efforts failed, and even after Garda hired new counsel to represent it in this case. The final straw came after Garda retained new counsel and filed a motion for yet another extension to oppose class certification. The purpose for another extension, explained Garda, was not to seek arbitration of Plaintiffs' claims, but to "engage in additional discovery necessary to both defend against class certification and to file a dispositive motion potentially limiting the scope of this action." CP

855.¹ Thus, even new defense counsel unequivocally confirmed that Garda intended to litigate this case, which he admitted was already a “relatively mature class action.” CP 860.

Furthermore, when Garda finally demanded arbitration, it chose to combine its motion with one for summary judgment on the merits, based on the affirmative defenses of preemption and waiver. See CP 15-39. This not only ensured class certification would be decided first, but also required both parties to obtain and present extensive evidence and argument to the trial court on these substantive defenses. See CP 28-39, 536-45, 617-21.

3. Class Certification and Notice to the Class.

During Garda’s conscious delay in presenting its motion to compel arbitration, the court certified the class and approved notice to the over 300 members of the class. CP 519, 896. The notice advised class members of the litigation and of their rights with respect to the litigation. CP 899-902. It said nothing about arbitration, and affirmatively indicated that the issues in the case would be decided on a class basis in the Superior Court. CP 900-

¹ The only “additional discovery” specified was the depositions of the named plaintiffs, and to interview other employees “at each facility.” CP 858-59. Garda then undertook all of this additional discovery in the trial court, before demanding arbitration. CP 51, 61, 75, 1048-95.

01. Garda participated in crafting the terms of this notice, but never mentioned any prospect of arbitration and instead only requested more and additional descriptions of the litigation. CP 866-72.

Due process requires that absent class members receive accurate information upon which to make a decision whether to participate. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Some 300 Garda employees were notified their rights will be determined in a public court through a certified class action. They relied upon that notice in deciding whether to participate, and due to Garda's delay, they were not informed their claims may be arbitrated under the Labor Agreements.

4. Trial Preparation. Finally, contrary to Garda's suggestion to this Court, this case was nearly ready for trial in the Superior Court. *See* Garda Reply at 25. Trial had originally been set for August 2010. CP 776. In March 2010, at the parties' joint request, the court set a new trial date of December 6, 2010. CP 802. Garda has no basis to doubt the case would have been tried at that time. Indeed, when Garda moved to continue the class certification motion in June, suggesting that it would also move for a second new trial date, the court denied the motion and expressly reiterated and confirmed the December 6 trial date. CP 824, 922.

This case will not require significantly more depositions, because Plaintiffs will rely primarily on the documents and the testimony of class members to whom they have privileged access. Even their damages calculations are already practically done because their expert has already obtained the necessary data and already calculated damages for the mediation. This case was very nearly ready to go to trial when arbitration was ordered.

Garda's attempt to distinguish the cases on waiver is similarly unavailing. For example, it argues that *Steele v. Lundgren*, 85 Wn. App. 845, 935 P.2d 671 (1997), does not support waiver here because the defendant in that case failed to assert arbitration in its Answer, and engaged in "contentious discovery." Reciting a duty to arbitrate in the Answer is not dispositive, and nor is the level of "contentiousness" in the litigation. See *B & D Leasing Co. v. Ager*, 50 Wn. App. 299, 303, 748 P.2d 652 (1988) ("parties to an arbitration contract may expressly or impliedly waive that provision either by failing to invoke the provision when an action is commenced, or by conduct inconsistent with any other intention but to forgo the right to arbitration" (emphasis added)) (citing *Lake Wash. Sch. Dist.*, 28 Wn. App. 59 (1980)). As this Court recognized in *Steele*, there is no "bright line rule or litmus test" for

determining whether arbitration has been waived, and the decision should be based on the totality of the circumstances. *Id.* at 853.

The ultimate question is whether the defendant's acts were inconsistent with the intent to arbitrate. *Steele*, 85 Wn. App. at 853.² While Garda raised the issue of arbitration earlier than defendant Lundgren in *Steele*, it failed to pursue arbitration even longer than Lundgren did. A party who clearly chooses to litigate rather than arbitrate cannot avoid waiver by simply having mentioned arbitration from time to time along the way. Here, as in *Steele*, the defendant “passed up several obvious opportunities to move for arbitration,” and thereby “effectively chose to litigate in superior court, which is inconsistent with arbitration.” *Id.* at 855.

Similarly, Garda attempts to distinguish *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008), by pointing out that the pro se defendant waited until “the eve of trial” to argue that the case should be arbitrated. Garda Reply at 28. But that is also the case here—as noted above, the parties had taken depositions of major witnesses and obtained declarations from dozens of other

² Garda does not dispute that its delay in moving for arbitration caused Plaintiffs prejudice. See *Steele*, 85 Wn. App. at 858-59 (being required to relitigate an issue constitutes prejudice; delay without reasonable justification constitutes prejudice) (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)).

witnesses, litigated class certification and notified the entire class of the pendency of the litigation and their rights to participate in it, and trial was three months away. As defense counsel put it, this was a “relatively mature class action lawsuit” at the time Garda moved to compel arbitration. CP 860.

Finally, Garda fails to distinguish *Otis Housing Ass’n v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009), where the defendant waited until it had litigated and lost an issue in the case. Garda Reply at 28. As the Court pointed out, a party cannot use arbitration to “seek to relitigate the same issue in a different forum.” *Id.* at 588. That, of course, is precisely what Garda seeks to do here. It expressly asks this Court to order the individual Plaintiffs to arbitration, and to force them to re-litigate the issue of class certification in arbitration. CP 712 (seeking an order that Plaintiffs arbitrate individually); Garda Brief at 5; Garda Reply at 1-2. Given the advanced stage and complexity of proceedings that occurred in court, Garda must be held to have waived arbitration.

B. Plaintiffs Did Not Waive Their Right to Sue in Court.

If Garda waived the right to demand arbitration, all of the other issues in this appeal are moot. *See Steele*, 85 Wn. App. at 860 (finding of waiver disposes of appeal and cross-appeal). If this

Court finds Garda did not waive arbitration, then it must determine whether arbitration of Plaintiffs' claim is mandatory, i.e., whether the Plaintiffs waived the right to sue in court.

1. There is a Presumption Against Waiver of a Judicial Forum for Vindication of Statutory Rights.

Garda concedes that in order for an arbitration clause in a collective bargaining agreement to waive an employee's right to sue in court, such a waiver must be "clear and unmistakable." See Garda Reply at 29; *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 355, 35 P.3d 389 (2001). But Garda proceeds to ignore this standard throughout its brief. In fact, Garda appears to think the opposite standard applies—that there is a presumption in favor of arbitration such that any doubt about the scope of the arbitration clause should be resolved in Garda's favor with a finding that the employees waived their rights. See, e.g., Garda Reply at 30, 34.

Garda misunderstands the law. As the United States Supreme Court explained in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), in the context of labor agreements, the so-called "presumption of arbitrability" applies only to claims that call for interpretation of the terms of the collective bargaining agreement. *Id.* at 78-79. That presumption does not apply to

claims that depend on the meaning of a statute, because arbitrators have no advantage in that endeavor over the courts. *Id.* at 79.

In fact, as previously noted, where the claims are statutory, an opposite presumption applies: the defendant must demonstrate a “clear and unmistakable” waiver of the employees’ right to have their claims heard in a judicial forum. *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.

Accordingly, much of Garda’s argument is misplaced. For example, in *Minter v. Pierce Transit*, 68 Wn. App. 528, 843 P.2d 1128 (1993), the plaintiff claimed wrongful termination in violation of the collective bargaining agreement. 68 Wn. App. at 530 (cited in Garda Reply at 30). Accordingly, as explained by the Supreme Court in *Wright*, the presumption of arbitrability applied. *Minter*, 68 Wn. App. at 529. (noting employee overcame presumption and was allowed to proceed in court). Because Plaintiffs here assert statutory claims based on Washington’s wage laws, the presumption of arbitrability does not apply, and instead the opposite presumption applies.

Garda suggests that Plaintiffs' claims are not, in fact, statutory claims, and instead actually do depend on contract interpretation. Garda Reply at 34-35. This is a bogus argument. To support it, Garda seizes on two sentences in the Plaintiffs' Complaint, which mention not the Labor Agreements but Garda's "policy" of providing only "on-duty" lunch breaks, and assert that Garda's "policy and practice" violate Washington law. Garda Reply at 35 & n. 8 (citing CP 6-7). A full reading of the Complaint plainly shows that Plaintiffs' claims are statutory, not contractual. They assert solely statutory claims, make no claim based upon the Garda Labor Agreements, and do not even mention those agreements. CP 7.

Garda knows that Plaintiffs' claims do not challenge the Labor Agreements. Plaintiffs have never argued that any break policy in Garda's Labor Agreements violates the law, and Garda has acknowledged that its liability in this case depends on its break practices—the "number, length and nature of breaks" it actually afforded to class members—not on whether its policies, as stated in the Labor Agreements, comply with the law. *See, e.g.*, CP 864.

Garda also suggests the Labor Agreements are relevant to establish that Plaintiffs waived their right to take meal breaks.³ Garda Reply at 35 (citing WASH. DEPT. LABOR & INDUSTRIES, Admin. Policy ES.C.6 (rev. June 24, 2005) (copy at CP 45-49) (hereafter “L&I Policy ES.C.6)). First, this goes to a defense, and does not change the fact that Plaintiffs’ claims depend on interpretation of state statutes, not collective bargaining agreements.

Second, Garda’s waiver defense can be dismissed on its face. Regulatory guidance on the Industrial Welfare Act does indeed suggest that meal breaks (but not rest breaks) may be waived. L&I Policy ES.C.6 at 4 (CP 48). But Garda’s Labor Agreements do not contain a waiver; they expressly call for an “on-duty” lunch break. CP 166 (“The employees hereto agree to an on-duty meal period.”). And the regulatory guidance makes clear that an “on-duty” meal period is not a “waiver” of a meal period. An “on-duty” meal break refers to the situation when an employee must remain on the premises “in the interest of the employer” and be subject to having his or her meal break interrupted.

When employees are required to remain on duty on the premises or at a prescribed work site and act in

³ Garda admits that rest breaks cannot be waived, and therefore the Labor Agreements are irrelevant to that claim.

the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

L&I Policy ES.C.6 at 3-4 (CP 47-48) (emphasis added); *see also Frese v. Snohomish County*, 129 Wn. App. 659, 666, 120 P3d 59 (2005) ("unremitting work" is not consistent with a paid "on-duty" meal period). Thus, an "on-duty" meal break is plainly not the same as a waiver of any meal break. Garda's Labor Agreements provide for only an "on-duty" meal break, not a waiver.

Plaintiffs assert solely statutory claims that will require statutory interpretation, not contract interpretation. As such, there is no presumption that they must be arbitrated, and instead, as Garda admits, it is Garda's burden to show Plaintiffs "clearly and unmistakably" waived any right to resort to the courts to vindicate these claims.

2. Garda's Labor Agreements Lack a Clear and Unmistakable Waiver of the Right to Seek Judicial Relief for Statutory Violations.

Garda's grievance and arbitration clause does not meet the clear and unmistakable standard to waive the right to a judicial

forum with respect to statutory claims. As the Supreme Court held in *Wright*, such a waiver must be “explicit.” 525 U.S. at 80 (“the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA”); accord, *Brundridge*, 109 Wn. App. at 355-56.⁴ In other words, the agreement must actually say that the arbitration procedure is the exclusive means of resolving disputes over alleged wage violations. See, e.g., *Mudge v. United States*, 59 Fed. Cl. 527, 535 (Fed. Cl. 2004) (where the term “grievance” was defined in the bargaining agreement to include “any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment” but “nothing in the bargaining agreement ... explicitly purport[ed] to divest an individual unit member of the right to a judicial forum,” “this language does not expressly and unmistakably waive the right to seek judicial redress.”).

⁴ Garda attempts to distinguish *Brundridge* by invoking *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009). Garda reply at 36. The CBA in *Penn Plaza* contained a provision that unequivocally provided that arbitration was the “sole and exclusive” means of remedying all contractual and statutory claims. *14 Penn Plaza*, 129 S. Ct. at 1461. There was no such explicit exclusivity in *Wright* or *Brundridge* and nor is there here, so employees are free to choose a judicial forum for vindicating their statutory rights.

It is not enough, as Garda contends, to simply point to scattered provisions in the arbitration clause containing mandatory words such as “shall,” because in each instance, the object of the phrase is only some step within the process, usually to impose a temporal deadline. CP 165:

- “Any grievance shall be presented in writing to the Company by a Union Representative within fourteen (14) calendar days ...”;
- “... both the Company and the Union shall prepare a written position statement ...”;
- “The arbitrator shall be selected from a list of seven (7) provided by the Federal Mediation and Conciliation service within five (5) calendar days....”

None of these explicitly states that the overall grievance/arbitration procedure is the exclusive means of resolving complaints under state wage statutes, as required for a finding of waiver. See, e.g., *14 Penn Plaza*, 129 S. Ct. at 1461. As in *Wright*, the intent of these provisions “could be understood” to mandate arbitration only if sought by the union, and only as to those matters involving “a

legitimate as well as significant issue of contract application.”

Wright, 525 U.S. at 80.⁵

Indeed, many of the features of Garda’s arbitration clause support the conclusion that it only applies to disputes over contractual terms and does not preclude judicial relief for statutory claims. For example, the clause does not permit arbitration at all until and unless several less formal attempts at resolution fail and “a legitimate as well as significant issue of contract application remains open.” CP 165 ¶ (c) (emphasis added). On its face, this provision explicitly forecloses giving broad scope to Garda’s arbitration clause.

The clause also expressly forbids the arbitrator to “amend, modify, add to, change, or disregard any of the provisions of this Agreement,” and deprives the arbitrator of any discretion “in situations where the Company has retained sole discretion in this Agreement.” CP 165 ¶ (e). These provisions clearly attempt to

⁵ Garda argues that even if arbitration is not mandatory under the Labor Agreements, filing a grievance is. Garda Reply at 36 (citing *Davis v. Dept. of Trans.*, 138 Wn. App. 811, 825, 159 P.3d 427 (2007)). The Agreements do not require grievances before filing suit in court, and *Davis* does not support Garda’s position. There the court held that the plaintiff employees were required to grieve and arbitrate their claims because the statute governing their claims, RCW 47.64.150, required arbitration rather than litigation. 138 Wn. App. at 824. That is not the case here. CP 7 (asserting claims based on RCW 49.52.070 and RCW 49.12, which provide civil judicial remedies).

limit the arbitrator to the provisions of the Labor Agreements, which is inconsistent with requiring an arbitrator to resolve statutory claims as well as contract-based claims.⁶

Nor would it make practical sense to interpret the arbitration clause in the manner suggested by Garda. As demonstrated previously and not disputed by Garda, the “union” in this case is essentially a creation of the company, with no independent resources or bargaining power. CP 606-07. It has never filed a grievance, much less invoked arbitration. CP 607, 571-72. But Garda’s arbitration clause requires action by the union in order for an employee to use it. CP 165. In this context, it would be highly impractical and patently unfair to find that Plaintiffs waived all other means to enforce their statutory rights. See *Mudge*, 59 Fed. Cl. at 535 (where “arbitration of disputes is in the hands of the union, and available only at the union’s discretion, there is no mandatory

⁶ Like the CBA at issue in *Wright*, Garda’s Labor Agreements do not explicitly incorporate the requirements of Washington wage laws. See *Wright*, 525 U.S. at 80 (noting that CBA “contains no explicit incorporation of statutory nondiscrimination requirements”); see also *Curtis v. United States*, 59 Fed. Cl. 543, 549 (Fed. Cl. 2004). Accordingly, Plaintiffs’ claims cannot be resolved by sole reference to the terms of the agreements, but depend on analysis and application of Washington statutes, regulations, and case law.

arbitral remedy that would displace or waive the right of the individual employees to seek judicial relief”).

Because the arbitration clause in Garda’s labor agreements do not contain a clear and unmistakable waiver of Plaintiffs’ rights to a judicial forum, the court erred when it compelled arbitration.

C. The Arbitration Provision is Unconscionable.

In addition, the arbitration clause at issue is not enforceable against Plaintiffs because it is unconscionable under Washington law. Plaintiffs identified four separate aspects of the clause which have been held unconscionable by Washington courts. Garda does not dispute that these provisions cannot reasonably be severed, and if the Court finds them unconscionable, the entire arbitration clause should be stricken.

1. *Concepcion* Did Not Overrule Washington Law on Unconscionable Contracts.

First, Garda is wrong that the cases Plaintiffs relied upon have been overruled by *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). As Garda acknowledges, *Concepcion* held that a

California rule forbidding class action waivers in certain arbitration contracts was preempted by the Federal Arbitration Act (FAA).⁷

Nothing in the Court's opinion suggests, as Garda contends, that arbitration agreements must now be enforced no matter how harsh and one-sided their terms. Garda Reply at 40. In the sentence relied upon by Garda, the majority dismissed the concern that depriving small claimants of class procedures might be prohibitive, but only because it had concluded that mandating class arbitration "is inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1753, 1751 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"). Thus, the Court's reasoning was specifically grounded in its perception that requiring class adjudication would undermine the goals of the FAA. *Concepcion*, 131 S. Ct. at 1751-53.

The Supreme Court has explicitly recognized that States may still impose other requirements on arbitration clauses, such as mandating that the costs of arbitration not be prohibitive to small claimants. *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) (recognizing arbitration agreement may be

⁷ As explained in subsection 5 below, even this holding does not apply here, in the context of a class action by employees, because the National Labor Relations Act protects such actions and would override the FAA.

invalidated “on the ground that arbitration would be prohibitively expensive”). *Concepcion* did not overrule Washington’s cases striking unconscionable arbitration agreements.

2. A 14-day Filing Requirement is Unconscionable.

The Washington Supreme Court has held that shortening the limitation period on an employee’s claims is unconscionable because it gives the employer unfair advantage. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 356-57, 103 P.3d 773 (2004) (180-day limitation on discrimination claims). Garda’s grievance/arbitration clause gives employees just 14 days to assert a claim. CP 165. Washington law provides Plaintiffs with three years to bring a wage violation claim. *Seattle Prof’l Eng’g Emples. Ass’n v. Boeing Co.*, 139 Wn.2d 824, 838, 991 P.2d 1126 (2000). Garda attempts to excuse its extremely shortened limitation period by observing that the clock starts only when employees have “knowledge of an offending act,” but does not explain how this distinguishes this case from *Adler*, or how it would help employees avert this major obstacle to vindicating their statutory rights.

3. Fee-Splitting is Unconscionable.

Similarly, the Supreme Court has been clear that if an employee demonstrates that an arbitration agreement’s fee-splitting

provision is prohibitive, it is unconscionable. *Adler*, 153 Wn.2d at 308-09. Garda misrepresents the evidence on that point here. While Plaintiffs' individual claims may be worth \$15,000, the cost of arbitration is likely to be \$50,000 to \$100,000. CP 599 (noting that a case which took only four hours of arbitrator time cost \$5,000). This ratio is similar to that found unconscionable in *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 465, 45 P.3d 594 (2002) (likely fees of \$2,000 to resolve \$1,500 claim). And the Plaintiffs here have testified that they would not have been able to pursue their claims if fee-splitting were required. CP 600-05.

4. Limiting Statutory Remedies is Unconscionable.

Again, the Supreme Court has already ruled that a limitation on the remedies is unconscionable. *Zuver v. Airtouch Comm'ns Inc.*, 153 Wn. 2d 293, 315, 318, 103 P.3d 753 (2004). Garda's arbitration clause forbids any award of back pay of more than four months. CP 165. Garda claims the clause does not mean what it says, pointing to the qualifying phrase, "unless specifically mandated by federal or state statute or law." However, Washington's wage laws at least arguably do not "specifically mandate" any specific amount of back pay, and in this context, the provision must be strictly construed. See *Zuver*, 153 Wn.2d at 355

(rejecting employer’s post-hoc offer of more moderate interpretation and construing provision against employer).⁸

5. Forbidding Class Arbitration Would be Unconscionable.

Garda does not dispute that if class arbitration is not allowed—as it advocates—then the Plaintiffs will be effectively deprived of any recourse, because they cannot and will not take on Garda alone for missed meal and rest breaks.⁹ This fact distinguishes this case from *Concepcion*, where the court had expressly concluded that the plaintiffs would be able to pursue their claims in individual arbitration because of the generous provisions in AT&T’s arbitration provisions. 131 S. Ct. at 1753.

In addition, *Concepcion* would not apply in the employment context because the National Labor Relations Act (NLRA) protects employees’ right to seek class relief, and depriving employees of this substantive right would be unconscionable. Section 7 of the NLRA expressly protects “concerted activity” by employees for their

⁸ Garda argues that its Labor Agreements are negotiated bilaterally between it and the “union,” but this is not supported by the evidence. As the designated “shop steward” in Seattle testified, the only subject that is negotiated is pay rates. CP 607. Garda is the drafter of its Labor Agreements.

⁹ As explained previously, Plaintiffs believe Garda’s Labor Agreements clearly contemplate adjudication of group rights, and therefore permit class arbitration. Plaintiff’s Opening Brief at 38-40.

“mutual aid and protection.” 29 U.S.C. § 157. This includes the right to improve the terms and conditions of their employment “through resort to administrative and judicial forums.” *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978). “[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.”¹⁰

Thus, the NLRA provides employees with a substantive legal right to bring collective and class actions to redress the conditions of their employment. And waivers of such substantive legal rights will not be upheld, even when found in an arbitration clause. See *14 Penn Plaza*, 129 S. Ct. at 1474.

Concepcion was not an employment case, and the consumer plaintiffs had no substantive right under federal law to engage in concerted legal activity for their mutual aid and

¹⁰ *Brady v. National Football League*, 2011 U.S. App. LEXIS 14111 *34 (8th Cir. July 8, 2011) (emphasis in original) (citing *Mohave Elec. Co-op Inc. v. NLRB*, 206 F.3d 1183, 1189 & n.8 (D.C. Cir. 2000); *Altex Ready Mixed Concrete v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973)). The National Labor Relations Board (NLRB) has repeatedly held that the filing of a civil action by or on behalf of a group of employees constitutes protected activity. See, e.g., *Harco Trucking, LLC*, 344 NLRB 478, 481 (2005) (class action); *In re 127 Restaurant Corp.*, 331 NLRB 269, 275-76 (1996) (joint action by 17 employees); *52 Street Hotel Assoc.*, 321 NLRB 624, 633-636 (2000) (collective action); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018 (1980) (class action).

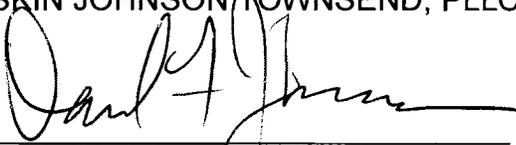
protection. Therefore, the Court had no reason to apply the settled rule that an employer may not use an arbitration agreement to deprive its workers of their substantive federal statutory rights. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). *Concepcion's* holding permitting class action waivers under the FAA does not apply here.

III. CONCLUSION

For the foregoing reasons, Plaintiffs ask that the Court reverse the trial court's order compelling arbitration and remand for further proceedings in the Superior Court. If this Court does not reverse, Plaintiffs ask that it strike the unconscionable provisions in Garda's arbitration agreement and affirm the trial court's order requiring class arbitration, consistent with its previous order certifying a class.

Dated this 12th day of August, 2011.

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CERTIFICATE OF SERVICE

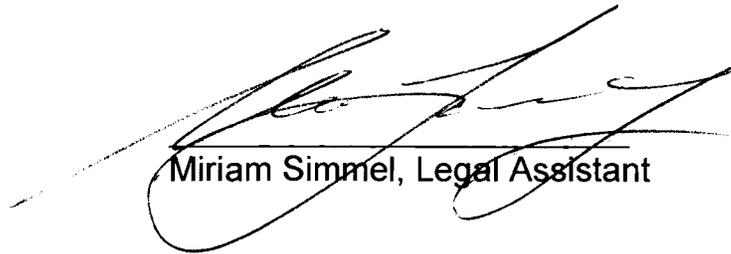
I, Miriam Simmel, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 12th day of August 2011, I served true and correct copies of the document to which this Certificate is attached on the following in the manner listed below.

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- VIA FACSIMILE
- Via First Class Mail
- Via Electronic Filing
- Via Email**
- Via Messenger

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



Miriam Simmel, Legal Assistant

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