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Supreme Court No. 87877-3

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IN THE SUPREME COURT  
STATE OF WASHINGTON

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

Petitioners

v.

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

Respondents

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2013 APR 30 P 12:43

STATE OF WASHINGTON

SUPREME COURT

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**BRIEF OF AMICUS CURIAE OF NORTHWEST CONSUMER  
LAW CENTER**

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Kimberlee L. Gunning, WSBA #35366  
Email: [kgunning@tmdwlaw.com](mailto:kgunning@tmdwlaw.com)  
TERRELL MARSHALL DAUDT  
& WILLIE PLLC  
936 North 34th Street, Suite 400  
Seattle, Washington 98103  
Telephone: (206) 816-6603  
Facsimile: (206) 350-3528

*Attorneys for Amicus Curiae Northwest Consumer Law Center*

 ORIGINAL

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## I. IDENTITY AND INTEREST OF AMICUS

The Northwest Consumer Law Center (“NWCLC”) is a not-for-profit corporation organized under Washington law. NWCLC advocates for the rights of consumers and as a non-profit law firm, provides reduced-rate or no-cost assistance to individuals with consumer-related legal issues. NWCLC has an interest in defending consumers’ access to the civil judicial system to vindicate their rights, including challenging the validity and enforceability of mandatory arbitration clauses in consumer agreements and advocating for consumer class actions.

NWCLC is interested in this case because it raises the issue of whether a party has waived its right to arbitration pursuant to a contractual arbitration clause when it litigates a dispute in court. The Court of Appeals incorrectly conflated a party’s assertion of the right to arbitration with taking action to enforce that right. Guided by this flawed reasoning, and based on Respondent Garda CL Northwest, Inc.’s (“Garda”) invocation of the arbitration clause in its answer and its occasional references throughout the litigation to its purported right to arbitrate, the Court of Appeals found Garda had not waived its right to arbitrate the statutory wage and hour claims brought by Lawrence Hill, Adam Wise and Robert Miller, on their own behalf and on behalf of other similarly situated Garda employees and former employees (collectively, the “Employees”). Mandatory arbitration provisions are ubiquitous in

consumer agreements and this issue arises frequently in consumer disputes. The Court of Appeals decision will only encourage forum shopping by defendants in consumer cases, emboldened by the Court of Appeals' endorsement of Garda's inconsistent actions in this case.

NWCLC is also interested in this case because the Court of Appeals' holding that Garda had not waived its right to arbitration, even after the Superior Court had certified the class and class notice had been sent, jeopardizes consumers' ability to pursue their claims on a class basis. Washington has a strong public policy of encouraging class actions as a means of vindicating consumers' rights under the Washington Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"). The Court of Appeals decision undermines this public policy.<sup>1</sup>

## II. INTRODUCTION

Mandatory arbitration clauses are ubiquitous in consumer and employment agreements. One 2008 study of employment and consumer contracts used by major corporations found that over 75 percent of consumer contracts contained mandatory arbitration clauses. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer*

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<sup>1</sup> NWCLC understands that, assuming the Court determines Respondent did not waive its right to arbitration and that the arbitration agreement is otherwise enforceable, the issue of whether class arbitration is appropriate is also before the Court. NWCLC supports Petitioners' arguments on these issues as set forth in Petitioners' Supplemental Brief, filed March 22, 2013. Pursuant to RAP 10.3(e), NWCLC does not repeat Petitioners' arguments on those issues.

*and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 881-83 (Summer 2008) (“*Summer Soldiers*”)<sup>2</sup>. Many, if not most, arbitration clauses in consumer agreements contain class action waivers. *Id.* at 884 (noting that of the agreements reviewed, “every consumer contract with an arbitration clause also included a waiver of class arbitration” and that “80% of consumer contracts waived class action litigation rights...No litigation class action waivers were found in consumer or other contracts in the absence of an arbitration clause”). After the United States Supreme Court’s 2011 decision in *AT&T Mobility LLC v. Concepcion*, “[t]here is substantial reason to believe that many more companies in the consumer setting...will use arbitration to prevent consumers from joining together in class actions either in arbitration or in litigation.” Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers From Presenting Procedurally Difficult Claims*, 42 Sw. L. Rev. 87, 88-89 (2012) (noting that “*Concepcion* has greatly reduced the likelihood that consumers can enforce certain of their legal rights...”).<sup>3</sup>

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<sup>2</sup> Professors Eisenberg, Miller and Sherwin also note that “[a]rbitration clauses appear routinely in employment contracts (92.9%).” *Summer Soldiers* at 886.

<sup>3</sup> The federal Consumer Financial Protection Bureau is currently engaged in an empirical study of mandatory arbitration clauses in contracts for consumer financial products and services and last year issued a request for information relating to such a study. The results of the study have not yet been released. *See Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, 77 Fed. Reg. 25148 (April 27, 2012), *available at* <https://www.federalregister.gov/articles/2012/04/27/2012-10189/request-for-information-regarding-scope-methods-and-data-sources-for-conducting-study-of-pre-dispute> (last visited April 16, 2013).

In this context, clarification of the proper standard courts should use to determine when a party has waived its right to invoke an arbitration clause is extremely important. This Court's precedent confirms that "a party waives a right to arbitrate if it elects to litigate instead of arbitrate" and distinguishes between merely "claim[ing] the right to arbitration" and "tak[ing] some action to enforce that right within a reasonable time." *Otis Housing Ass'n v. Ha*, 165 Wn.2d 586, 588, 201 P.3d 309 (2009).

The Court of Appeals incorrectly conflated a party's assertion of the right to arbitration with taking action to enforce that right, erroneously concluding that Garda had not waived its right to arbitrate merely because Garda mentioned the arbitration clause in its answer and referred to its purported right to arbitrate throughout the litigation. *See Hill v. Garda*, 169 Wn. App. 685, 691-94, 281 P.3d 334 (2012). The Court of Appeals gave short shrift to the fact that even after Garda asserted its alleged right to arbitration, it acted inconsistently with that right, occasionally invoking it but never acting affirmatively to enforce it until after the machinery of litigation had been invoked.

Indeed, as the record in this case makes clear, Garda did not just litigate this case, but it aggressively took advantage of the tools available to it in a judicial forum, including the broad scope of discovery. By moving to compel arbitration after taking significant discovery, including discovery relevant to class certification, and then moving to compel

arbitration, Garda constructed a hybrid forum to defend against the Employees' claims – a forum that cherry-picked the dispute resolution procedures that best suited Garda's interests. As detailed below, the Court should not condone this type of forum shopping, which acts against the interests of the less powerful, including consumers.

The Court of Appeals' endorsement of Garda's litigation "strategy" has serious implications for consumers. This Court has repeatedly recognized the importance of class actions for vindicating consumers' rights. Allowing a defendant to effectively decertify a class by switching forums mid-stream undermines that public policy.

### III. ARGUMENT

#### A. **This Court's Precedent Confirms That Assertion of a Right to Arbitrate Is Distinct from Acting Affirmatively to Enforce That Right**

This Court's precedent makes clear that "a party waives a right to arbitrate if it elects to litigate instead of arbitrate." *Otis*, 165 Wn.2d at 588. Such conduct is unambiguous evidence of a party's intent to waive its contractual right to arbitration, notwithstanding the fact that it has acknowledged and asserted the right to arbitrate. *See id.* (internal citations and marks omitted) (recognizing the distinction between a party "claim[ing] the right to arbitration" and "tak[ing] some action to enforce that right within a reasonable time").

Adopting this reasoning, and relying on this Court's decision in *Otis*, Division III of the Court of Appeals recently explained that "[t]he party arguing for waiver is not required to show that its adversary has never mentioned arbitration or equivocated about the process to be followed." *River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 238, 272 P.3d 289 (2012) (emphasis added). Rather, the party arguing for waiver "need only show that as events unfolded, the [opposing] party's conduct reached a point where it was inconsistent with any other intention but to forego the right to arbitrate." *Id.*

In *River House*, as here, the party seeking to enforce the arbitration agreement, River House Development, Inc. ("River House") made its intent to pursue arbitration clear before choosing to actually enforce that right. *River House*, 167 Wn. App. at 225. Indeed, River House even communicated its intention pre-litigation, in a demand letter. *Id.* It referenced arbitration in its pleading. *Id.* at 226. Notwithstanding River House's undisputed knowledge of its right to arbitration and assertion of that right, it proceeded to actively litigate the case, including propounding and responding to discovery. *Id.* at 226-28. It was only after the Superior Court granted the opposing party's motion to compel discovery that River House moved to compel arbitration, over a year after it first asserted the right to arbitration in its demand letter. *Id.* at 228. Notwithstanding River House's early and repeated assertion of its purported right to arbitration,

the *River House* court held that River House “took too many steps down the path of litigation and too few down the path of arbitration to reasonably claim that its conduct was consistent with a continuing right to arbitrate” and affirmed the trial court’s denial of the motion to compel arbitration. 167 Wn. App. at 224.

Division III’s reasoning in *River House*, which correctly applies the legal standard confirmed by the Court in *Otis*, is starkly at odds with Division I’s decision in this case. In finding Garda had not waived its right to arbitration, the Court of Appeals emphasized the number of times Garda claimed it had the right to arbitrate the Employees’ wage claims, including inclusion of the arbitration clause among its affirmative defenses, but failed to focus on that undisputed fact that Garda did not act to enforce that right until after it had benefited from the discovery process and the class certification motion had been briefed. *See Hill*, 169 Wn. App. at 691-92 (discussing the number of times arbitration was mentioned during the course of the litigation). The Court should reject this mechanical analysis and confirm that Division III’s reasoning in *River House* illustrates the proper application of the principle set forth in *Otis*.

The Court of Appeals ignored the other facts that a court must consider when determining whether, under the totality of the circumstances, a party has waived its right to arbitration. As *Otis* and *River House* make clear, significant among these facts is the party’s

conduct after acknowledging and declaring its belief that it has the right to arbitrate the dispute. The timing of the original arbitration demand – if a bare-bones reference to an arbitration clause in a pleading can be considered a “demand” – is less important than when the party took affirmative steps to enforce its purported right to arbitration. In the interim period between raising an arbitration clause as a defense and seeking to enforce it, engaging in litigation conduct to the degree Garda did here waives its right to arbitration. *See, e.g., Hoover v. Am. Income Life Ins. Co.*, 142 Cal. Rptr. 3d 312, 316-18 (Cal. Ct. App. 2012) (holding defendant waived right to arbitration in wage and hour class action notwithstanding arbitration clause in collective bargaining agreement of which both parties were aware; parties engaged in discovery and an unsuccessful mediation before defendant moved to compel arbitration).<sup>4</sup>

The Employees’ briefing sets forth the detailed chronology of events in the Superior Court, and NWCLC will not repeat those facts here. Suffice to say, the record supports the conclusion that Garda made “a conscious decision to continue judicial judgment on the merits” of its defenses. *See Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754,

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<sup>4</sup> In *Hoover*, as here, the parties actively litigated a wage and hour class action and participated in an unsuccessful mediation before the defendant moved to compel arbitration. 142 Cal. Rptr. 3d at 317-18. The defendant finally made a demand for arbitration over 10 months after the complaint was filed, but when the demand was rejected, continued to engage in discovery and finally filed a motion to compel arbitration 15 months after the lawsuit began. *Id.* at 318.

759 (9th Cir. 1988) (reversing district court's order compelling arbitration in part because defendant waived right to arbitrate certain claims because it "chose instead to litigate actively" in court). In so doing, Garda gained a significant advantage over the Employees.

By taking advantage of the broad scope of discovery and motion practice available in litigation before moving to compel arbitration, Garda was able to "create [its] own unique structure combining litigation and arbitration." *Burton v. Cruise*, 118 Cal. Rptr. 3d 613, 618, 621 (Cal. Ct. App. 2011) (quoting *Guess?, Inc. v. Superior Court*, 94 Cal. Rptr.2d 201 (Cal. Ct. App. 2000) (noting that "a party [can] not blow hot-and-cold by pursuing a strategy of courtroom litigation only to turn towards the arbitral forum at the last minute, thereby frustrating the goal of arbitration").

Garda made a strategic choice to defend its employment practices in court, when it could have pursued those defenses in arbitration. Garda made a strategic choice to oppose class certification in court, when it could have done so in arbitration. It was only at the eleventh hour that Garda finally took affirmative steps to enforce its alleged right to arbitration.

This Court should not reward Garda for its procedural gamesmanship, where it has used the courts to ensure that should the Superior Court issue an unfavorable ruling – such as certification of a class – a party has an "escape hatch" in the form of an arbitration clause.

Permitting a corporate defendant to demand arbitration only when it decides that arbitration will favor its interests is “a strategy to manipulate the legal process.” *See Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 427 (D.C. Cir. 2008). This tactic is nothing more than a tool with which a party can play “heads I win, tails you lose.” *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (Posner, J.) (noting that “[p]arties know how important it is to settle on a forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election against arbitration”) (emphasis added).

Ignoring the distinction between claiming the right to arbitrate, including making the other party aware of an arbitration agreement (assuming the other party was not previously aware of it), and acting to enforce that right has serious consequences, not only for the Employees in this case, but for other employees and consumers who seek redress for a more powerful party’s violation of their rights. If all a defendant had to do to avoid waiving the right to arbitration was to raise the issue in a responsive pleading, then defendants would have the incentive to always raise an arbitration clause as a defense and then wait to enforce it, depending on whether they were able to obtain favorable rulings from the trial court. This is the essence of forum shopping and is particularly prejudicial towards parties who did not draft the arbitration clause in an

employment contract or customer agreement: employees and consumers. To affirm the Court of Appeals decision under these facts would only encourage gamesmanship of this type in the future, resulting in a waste of judicial resources and further eroding workers and consumers' access to justice.

NWCLC recognizes that any participation in litigation of a claim allegedly subject to a mandatory arbitration clause does not waive a party's right to enforce the arbitration clause. But, "at some point, litigation of the issues in dispute justifies a finding of waiver." *Hoover*, 142 Cal. Rptr. 3d at 320. As one court has noted, "[e]specially in class actions, the combination of ongoing litigation and discovery with delay in seeking arbitration can result in prejudice." *Hoover*, 142 Cal. Rptr. 3d at 322.

For these reasons, Amicus NWCLC respectfully requests the Court reverse the Court of Appeals decision to permit Garda to defend this dispute in arbitration.

**B. The Court of Appeals' Conclusion That Garda Did Not Waive Its Right to Arbitrate Undermines the Well-Established Public Policy of Encouraging Class Actions as a Means of Vindicating Consumers' Rights**

This Court has repeatedly underscored the importance of the class action mechanism as a means to enforce the Washington Consumer Protection Act, RCW 19.86 *et seq.* ("CPA"). *See, e.g., Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007) (explaining that "class

suits are an important tool for carrying out the dual enforcement scheme of the CPA” and declining to enforce forum selection clause that would render class action unavailable); *Scott v. Cingular Wireless*, 160 Wn.2d 843, 854, 161 P.3d 1000 (2007) (noting that “we conclude that without class actions, consumers would have far less ability to vindicate the CPA” and declining to enforce class action waiver in arbitration clause as exculpatory); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 385, 191 P.3d 845 (2008) (finding that to enforce choice of law clause in consumer agreement “conflicts with our state’s fundamental public policy to protect consumers through the availability of class actions”). Affirming the Court of Appeals’ determination that Garda did not waive its right to arbitration would undermine this public policy.<sup>5</sup>

Here, the named plaintiffs are prejudiced, having expended significant resources to conduct discovery, litigate the motion for class certification and engage in other motion practice. Mr. Hill, Mr. Wise and Mr. Miller have been representatives of the proposed class since the case was filed. In this capacity, the named plaintiffs and their counsel are trying to vindicate not only their interests but the interests of other unrepresented class members.

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<sup>5</sup> As noted above, Amicus NWCLC understands that the issue of whether class arbitration is appropriate (assuming the Court determines Garda did not waive its right to arbitration and that the arbitration agreement is otherwise enforceable) is also before the Court.

To affirm the Court of Appeals decision that Garda had not waived its right to arbitration would encourage other class action defendants to engage in gamesmanship when an arbitration clause is at issue. A defendant could wait in the weeds and delay moving to compel arbitration. As Garda did here, it could litigate the named plaintiffs' legal theories, conduct extensive discovery, including depositions of the named plaintiffs, and oppose the motion for class certification. If and when a class was certified, the defendant could simply move to enforce its arbitration right and defeat certification of the previously-certified class. To do so would be to render the class action device useless in many consumer class actions, and absent class members, the anonymous consumers who depend on class actions to protect their interests, would have no recourse against unfair and deceptive business practices.

#### **IV. CONCLUSION**

For the reasons set forth above, Amicus Curiae The Northwest Consumer Law Center respectfully requests the Court consider the arguments advanced in this brief in the course of resolving the issue of whether Garda waived its right to arbitration.

RESPECTFULLY SUBMITTED AND DATED this 19th day of  
April, 2013.

TERRELL MARSHALL DAUDT  
& WILLIE PLLC

By: 

Kimberlee L. Gunning, WSBA #35366

Email: [kgunning@tmdwlaw.com](mailto:kgunning@tmdwlaw.com)

936 North 34th Street, Suite 400

Seattle, Washington 98103

Telephone: (206) 816-6603

Facsimile: (206) 350-3528

*Attorneys for Amicus Curiae Northwest  
Consumer Law Center*

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19th day of April, 2013, caused to be served a true and correct copy of the following upon the persons indicated below:

**BRIEF OF AMICUS CURIAE OF NORTHWEST CONSUMER LAW CENTER IN SUPPORT OF PETITION FOR REVIEW**

Daniel F. Johnson, WSBA #27848  U.S. Mail, postage prepaid  
BRESKIN JOHNSON  Hand Delivered via  
& TOWNSEND PLLC  Messenger Service  
1111 Third Avenue, Suite 2230  Overnight Courier  
Seattle, Washington 98101  Facsimile  
 Electronic Service

*Attorneys for Petitioners*

Martin S. Garfinkel, WSBA #20787  U.S. Mail, postage prepaid  
Adam J. Berger, WSBA #20714  Hand Delivered via  
SCHROETER GOLDMARK  Messenger Service  
& BENDER  Overnight Courier  
500 Central Building  Facsimile  
810 Third Avenue  Electronic Service  
Seattle, Washington 98104

*Attorneys for Petitioners*

Clarence Belnavis  U.S. Mail, postage prepaid  
FISHER & PHILLIPS LLP  Hand Delivered via  
111 SW 5th Avenue, Suite 1250  Messenger Service  
Portland, Oregon 97204  Overnight Courier  
 Facsimile  
*Attorneys for Respondent*  Electronic Service

Jeffrey L. Needle  
LAW OFFICES OF JEFFREY  
L. NEEDLE  
119 First Avenue South, Suite 200  
Seattle, Washington 98104

- U.S. Mail, postage prepaid
- Hand Delivered via
- Messenger Service
- Overnight Courier
- Facsimile
- Electronic Service

*Amicus Curiae on behalf of  
Washington Employment Lawyers,  
Washington State Labor Council  
and SEIU Local 925, Local 6,  
Healthcare 775NW, and Healthcare  
1199NW*

Kathleen Phair Barnard  
SCHWERIN CAMPBELL  
BENARD IGLITZIN & LAVITT  
18 West Mercer, Suite 400  
Seattle, Washington 98119

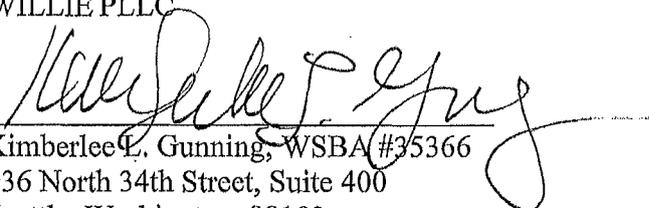
- U.S. Mail, postage prepaid
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- Electronic Service

*Amicus Curiae on behalf of  
Washington Employment Lawyers,  
Washington State Labor Council  
and SEIU Local 925, Local 6,  
Healthcare 775NW, and Healthcare  
1199NW*

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

DATED this 19th day of April, 2013.

TERRELL MARSHALL DAUDT  
& WILLIE PLLC

By: 

Kimberlee L. Gunning, WSBA #35366  
936 North 34th Street, Suite 400  
Seattle, Washington 98103  
Telephone: (206) 816-6603  
Facsimile: (206) 350-3528

*Attorneys for Amicus Curiae The Northwest  
Consumer Law Center*

Clarence Belnavis  
FISHER & PHILLIPS LLP  
111 Southwest 5111 Avenue, Suite 1250  
Portland, Oregon 97204

*Counsel for Defendant*

Jeffrey L. Needle  
LAW OFFICES OF JEFFREY L. NEEDLE  
119 First Avenue South, Suite 200  
Seattle, Washington 98104

*Amicus Curiae on behalf of Washington Employment  
Lawyers, Washington State Labor Council and SEIU Local  
925, Local 6, Healthcare 775NW, and Healthcare 1199NW*

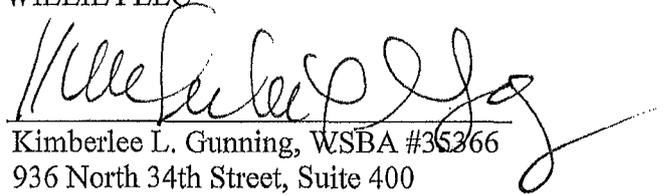
Kathleen Phair Barnard  
SCHWERIN CAMPBELL BERNARD  
IGLITZIN & LAVITT  
18 West Mercer, Suite 400  
Seattle, Washington 98119

*Amicus Curiae on behalf of Washington Employment  
Lawyers, Washington State Labor Council and SEIU Local  
925, Local 6, Healthcare 775NW, and Healthcare 1199NW*

Executed at Seattle, Washington, this 19th day of April, 2013.

TERRELL MARSHALL DAUDT  
& WILLIE PLLC

By:



Kimberlee L. Gunning, WSBA #35266  
936 North 34th Street, Suite 400  
Seattle, Washington 98103  
Telephone: (206) 816-6603  
Facsimile: (206) 350-3528

*Attorneys for Amicus Curiae The Northwest  
Consumer Law Center*

## OFFICE RECEPTIONIST, CLERK

---

**To:** Kim L. Gunning  
**Cc:** Dan Johnson; Garfinkel, Marty; Berger, Adam; [cbelnavis@laborlawyers.com](mailto:cbelnavis@laborlawyers.com); [jneedlel@wolfenet.com](mailto:jneedlel@wolfenet.com); [barnard@workerlaw.com](mailto:barnard@workerlaw.com)  
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**Subject:** Hill v. Garda CL Northwest, Washington Supreme Court no. 87877-2

Dear Supreme Court Clerk:

Attached for filing in *Hill v. Garda CL Northwest*, Supreme Court No. 87877-2, are:

1. Motion for Permission to File Amicus;
2. Brief of Amicus Curiae of Northwest Consumer Law Center; and
3. Declaration of Service

**Please confirm receipt of the above documents.**

Copies have been mailed today for service to the parties and they are copied as a courtesy on this email.

Respectfully,

Kimberlee Gunning, WSBA #35366  
Counsel for Northwest Consumer Law Center

Kimberlee L. Gunning  
**Terrell Marshall Daudt & Willie PLLC**  
936 North 34th Street, Suite 400  
Seattle, WA 98103  
(206) 816-6603  
(206) 350-3528 (fax)  
[kgunning@tmdwlaw.com](mailto:kgunning@tmdwlaw.com)