

Supreme Court No. 93824-5
(Court of Appeals No. 74611-1-I)

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

FUTURESELECT PORTFOLIO MANAGEMENT, INC.,
FUTURESELECT PRIME ADVISOR II LLC, THE MERRIWELL
FUND, L.P. , and TELESIS IIW, LLC, Plaintiffs/Appellants,

v.

TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS,
INC., OPPENHEIMER ACQUISITION CORPORATION,
MASSACHUSETTS MUTUAL LIFE INSURANCE CO.,
GOLDSTEIN GOLUB KESSLER LLP, ERNST & YOUNG LLP and
KPMG LLP, Defendants/Respondents.

**DECLARATION OF PAUL F. RUGANI IN SUPPORT OF
KPMG LLP'S SUPPLEMENTAL BRIEF**

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I, Paul F. Rugani, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of Washington, and I am a partner in the law firm of Orrick, Herrington & Sutcliffe LLP, counsel of record for defendant-respondent KPMG LLP (“KPMG”) in this case. I have personal knowledge of the matters stated herein, and, if called upon to testify, could and would testify competently thereto. I make this declaration in support of KPMG’s supplemental brief filed pursuant to RAP 13.7(d).

2. Attached as Exhibit A to this declaration is a true and correct copy of the Court of Appeals’ commissioner’s ruling in *Hill v. Garda CL Northwest, Inc.*, dated December 29, 2010.

3. Attached as Exhibit B to this declaration is a true and correct copy of the petition for review in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated Aug. 29, 2012.

4. Attached as Exhibit C to this declaration is a true and correct copy of the respondent’s answer to the petition for review in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated October 18, 2012.

5. Attached as Exhibit D to this declaration is a true and correct copy of the brief of *amici curiae* Washington Employment Lawyers, et al., in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated October 29, 2012.

6. Attached as Exhibit E to this declaration is a true and correct copy of the respondent’s brief in answer to the brief of *amici curiae* in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated December 17, 2012.

7. Attached as Exhibit F to this declaration is a true and correct copy of the supplemental brief of the petitioners in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated March 22, 2013.

8. Attached as Exhibit G to this declaration is a true and correct copy of the supplemental brief of respondent Garda CL Northwest, Inc. in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated March 22, 2013.

9. Attached as Exhibit H to this declaration is a true and correct copy of the brief of *amicus curiae* of Pacific Legal Foundation in support of respondents in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated April 18, 2013.

10. Attached as Exhibit I to this declaration is a true and correct copy of the brief of *amicus curiae* of Northwest Consumer Law Center in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated April 19, 2013.

11. Attached as Exhibit J to this declaration is a true and correct copy of the brief of *amici curiae* of Washington Employment Lawyers Association, et al., in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated April 22, 2013.

12. Attached as Exhibit K to this declaration is a true and correct copy of the petitioners' answer to the brief of *amicus curiae* of Pacific Legal Foundation in *Hill v. Garda CL Northwest, Inc.*, No. 87877-3, dated May 9, 2013.

13. Attached as Exhibit L to this declaration is a true and correct copy of the final award in the arbitration designated *Eastham Capital Appreciation Fund LP et al. v. KPMG LLP*, dated August 21, 2013. The award was confirmed in *KPMG LLP v. Eastham Capital Appreciation Fund LP et al.*, No. 654139/2013 (N.Y. Supr. Ct. Feb. 10, 2014).

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

Executed this 6th day of October 2017, at Seattle, Washington



Paul F. Rugani

CERTIFICATE OF SERVICE

I, Malissa Tracey, do hereby certify and declare under penalty of perjury under the laws of the State of Washington as follows:

That I am an employee of Orrick, Herrington & Sutcliffe LLP, 701 Fifth Avenue, Suite 5600, Seattle, WA 98104, and on October 6, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court and served on the parties below via the court's ECF system.

Executed at Seattle, Washington this 6th day of October 2017.


Malissa Tracey

EXHIBIT A

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

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December 29, 2010

VIA EMAIL

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CASE #: 66137-0-1

Garda CL Northwest, Inc., Petitioner/Cross-Resps v. Lawrence Hill, et al., Resps/Cross-Petitioners

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on December 29, 2010, regarding Parties' Motions for Discretionary Review:

Before me are cross motions for discretionary review of a September 23, 2010 trial court order compelling class arbitration. The parties seek review under RAP 2.3(b)(2) and (3). Alternatively, they have stipulated that review is warranted under RAP 2.3(b)(4). The stipulation is well taken in part.

The lawsuit is a wage and hour action against Garda initially brought by three former employees alleging they were not afforded proper meal and rest breaks during their employment. In March 2010 plaintiffs/employees sought class action certification. Garda moved to compel arbitration of the employees' claims on an individual basis. The employees argued that Garda had waived the right to seek arbitration by litigating the action for some time before moving to compel arbitration. The employees also argued that certain aspects of the arbitration provision were unconscionable and unenforceable. On July 23, 2010 the trial court entered an order certifying the lawsuit as a class action involving 307 class members. On September 23, 2010, the court entered an order compelling arbitration on a class basis.

Garda filed a notice of appeal, and the employees filed a notice of cross appeal. The court informed the parties that it appeared the challenged order was not appealable under RAP 2.2(a) and was subject only to discretionary review under RAP 2.3(b). Garda filed a motion for discretionary review, the employees filed a response and cross motion for discretionary review, and both parties filed replies. I heard oral argument on December 10, 2010.

Garda continues to argue that the trial court order is appealable as of right. I disagree. Although the court denied some of the relief Garda sought, the court entered an order compelling arbitration. The rule in *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 17 P.3d 1266 (2001) and *Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 783 P.2d 1124 (1989), that an order denying a motion to compel arbitration is appealable under RAP 2.2(a)(3), is not applicable. Here review is only by discretionary review.

Garda seeks review of the trial court order to the extent the court compelled arbitration on a class wide basis. Garda contends that whether arbitration is to be on an individual or class wide basis is a decision for the arbitrator, not the court. The employees seek review of the trial court order, arguing Garda waived the right to compel arbitration. The employees also continue to argue that certain aspects of the arbitration provision are unconscionable and unenforceable.

As noted above, Garda and the employees have stipulated that review is warranted under RAP 2.3(b)(4): "all parties to the litigation have stipulated that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of litigation." The issue of whether it is for the court or the arbitrator to decide the question of class v. individual arbitration meets this criteria. See, e.g., *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009), rev. granted, 168 Wn.2d 1021 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Interna'l Corp.*, 130 S. Ct. 1758 (April 27, 2010); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402 (2003).

Review is also warranted on the issue of waiver. Although the employees disagree with the trial court's ruling on waiver, at this point they have not demonstrated there is a substantial ground for a difference of opinion within the meaning of RAP 2.3(b)(4), as it appears that resolution of the waiver issue will require the application of established case law. But the waiver issue does involve a controlling question of law and review now may materially advance the ultimate termination of the litigation.

The issue of unconscionability does not meet the criteria of RAP 2.3(b)(4). See RAP 2.3(e) (upon accepting discretionary review, the appellate court may specify the issue or issues to which review is granted). However, the parties may brief the issue. The panel of judges that considers the appeal on the merits will be in the best position to determine which issues it will address.

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December 29, 2010

CASE #: 66137-0-1

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Now, therefore, it is

ORDERED that Garda's motion for discretionary review and Hill's cross motion for discretionary review are granted. The clerk shall set a perfection schedule.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

lls

cc to Hon Julie Spector via email

EXHIBIT B

WASHINGTON SUPREME COURT NO. 87877-3

Court of Appeals No. 66137-0-I

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.

PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners are Larry Hill, Adam Wise, Robert Miller, and approximately 300 other similarly-situated employees and former employees of the Defendant armored car company, Garda CL Northwest. Petitioners brought suit against Garda for denying them regular meal and rest breaks in violation of the Washington Industrial Welfare and Minimum Wage Acts. Petitioners seek review of the decision of the Court of Appeals issued July 30, 2012, which reversed the trial court's decision to compel class arbitration and ordered the plaintiffs and class members to each arbitrate their claims individually.

The Court of Appeals permitted Garda to enforce an unconscionable arbitration clause even after litigating through class certification and almost all the way to trial, and ordered the class members to individually arbitrate their claims in what is, practically speaking, a non-existent forum. This Court should take review because the decision below would deprive workers of the right and ability to enforce minimum workplace health and safety standards in their workplace and would totally insulate an employer who violates those standards.

II. ISSUES PRESENTED FOR REVIEW

1. Does a litigant waive the right to demand arbitration by litigating for 19 months, engaging in discovery and motion practice, and waiting

until a class has been certified and notified before attempting to compel individual arbitration?

2. Did the courts below ignore well-settled rules of contract law by ordering individual employees to arbitrate under an arbitration provision in a union contract that did not purport to deprive individual employees of the ability to enforce statutory rights in court, and where there was no practical way for the claims to be brought in arbitration?

3. Did the courts below have an obligation to review the terms of arbitration which the Plaintiffs challenged as unconscionable before compelling arbitration?

4. Did the Court of Appeals misapply U.S. Supreme Court precedent by ordering the class of employees to arbitrate their claims individually because there was no explicit “class arbitration” provision in the CBA?

III. STATEMENT OF THE CASE

Petitioners/Plaintiffs are a class of over 300 messengers and drivers (“Plaintiffs”) who were employed by Garda CL Northwest (“Garda” or “Defendant”) in the State of Washington to pick up, transport, and deliver currency in armored trucks for Garda clients. Clerk’s Papers at (“CP”) 4. Plaintiffs allege that while working for Garda, they were not allowed meal and rest breaks as required under Washington Industrial Welfare Act, RCW 49.12, and Minimum Wage Act, RCW 49.46. CP 7.

At each Garda facility in Washington, Garda requires employees to sign a “labor agreement.” CP 560 at p. 37. Although the labor agreements are ostensibly between Garda and the “employee associations” at each of Garda’s branches, Garda’s employee associations are not “unions” in the normal sense. Employees do not pay dues to the associations, and the associations have no resources. CP 606-607. The associations do not in fact “negotiate” with the company and generally must accept whatever is offered. CP 555 at p. 16; CP 561 at p. 39. Although Garda has separate agreements with each branch association, the language of the agreements at each branch is materially identical. *See* Appellant’s Opening Brief in the Court of Appeals at 3-4.

All Garda’s labor agreements contain a clause entitled “Grievance and Arbitration” that sets forth an informal mechanism for resolving employee grievances. *See* CP 142. It does not say employees must arbitrate statutory wage claims, or forbid such claims in court.

The procedure is as follows: First, a grievance “shall be presented in writing to the company” by the employee and/or the union “within (14) calendar days of the occurrence giving rise to [the] grievance.” *Id.* The company then has 14 days to respond. If the *union* finds this response inadequate, *it* has 14 days to request arbitration. *Id.* However, even then no arbitration can occur unless, after a “management-union meeting” there

still exists “a legitimate as well as significant issue of contract application.” *Id.*

The contract calls for selection of an arbitrator from the Federal Mediation and Conciliation Service (FMCS), and requires the union to split the costs of arbitration with Garda. *Id.* It limits awards by the arbitrator to between two and four months of backpay. CP 142, 165.

This contractual arbitration process has *never* been used by any Garda employee in Washington. CP 571. According to the “senior shop steward” in Seattle, the “union” does not even file grievances for employees because it has no money to pay for arbitration. CP 607.

Plaintiffs Hill, Wise, and Miller filed this suit against Garda in King County Superior Court on February 16, 2009. CP 3. Defendant answered on April 23, 2009. CP 9. The parties litigated the case for 19 months. Throughout 2009, the parties each requested and obtained from the other extensive documentary discovery. CP 841. By March 3, 2010, Garda had produced nearly 7,000 thousand pages of documents and never once objected based on arbitration. CP 567-572, CP 828. In February 2010, Plaintiffs took the deposition of Garda’s District Manager for Washington. CP 841. In March, 2010, the parties filed a joint motion for a continuance of the trial date, from August 2010 to December 2010, to provide “additional time to prepare for trial,” which the court granted. CP

799, 802. Although Defendant indicated in the motion that it believed matter was “properly subject to arbitration,” Plaintiffs expressly disagreed, and Garda took no action to seek an arbitral forum. CP 799.

On March 26, 2010, Plaintiffs moved for class certification. CP 806, 841. Again, Garda took no action to compel arbitration. Instead, it filed a motion to seal under the extant protective order. CP 810. Before Garda responded to Plaintiffs’ motion, the parties agreed to mediate. CP 548. At Defendant’s request, Plaintiffs re-noted their motion for class certification to May 28, 2010, to provide Defendant with sufficient time to respond should the mediation be unsuccessful. CP 548, 815, 851.¹

Mediation took place on May 6, 2010, and was unsuccessful. CP 841. Defendant’s counsel then asked that Plaintiffs re-note their class certification motion again, to June 4, due to a planned vacation. There was no mention of any intent to seek arbitration. CP 849. Defendant then asked for yet *another* continuance of the class certification motion so they could conduct further discovery—specifically, depositions of each of the named Plaintiffs—before responding to the motion for class certification. CP 851. There was still no mention of arbitration. Plaintiffs re-noted the class certification motion for a final time to July 16, 2010. CP 817.

¹ While discussing mediation, Garda had asked Plaintiffs to agree to arbitration. Plaintiffs indicated they would consider “a comprehensive proposal” for class arbitration. CP 626. Garda never made any proposal or mention of arbitration.

Garda then retained new counsel. CP 842, 851-852. Its new counsel stated his intention to seek another continuance of Plaintiffs' class certification motion, in order to take additional discovery and file dispositive motions. CP 842-43. Plaintiffs' counsel opposed this, and on June 4, 2010, Garda filed a motion asking the court to continue the motion for class certification, in order to take more discovery and move for summary judgment. CP 823-824. Again, Defendant did not mention any intent to arbitrate and instead expressly confirmed its intent to continue to litigate *in court*. See CP 828 ("Counsel requires reasonable time to prepare for depositions that are absolutely critical in this representative action."). Counsel conceded that the case was already "a relatively mature class action lawsuit." CP 860. The court denied Defendant's motion to continue and confirmed the motion for class certification would be heard July 16 and the trial date would remain December 6, 2010. CP 921-22.

Defendant then propounded a second set of written discovery on Plaintiffs and conducted full-day depositions of each of the three named Plaintiffs on all issues in the case. CP 548-549. On July 1, 2010, Defendant filed its opposition to class certification. On this same date, Defendant filed a Motion to Compel Arbitration or for Summary Judgment and it noted this motion for hearing on August 27, 2010, six weeks after the hearing on class certification. CP 517-518.

On July 23, 2010, the trial court granted class certification. CP 519-521. On August 6, 2010, the parties submitted briefing to the trial court regarding class notice. CP 862-873, 874-895. Defendant did not mention arbitration or request a stay pending their motion to compel arbitration. CP 862-866. The Court entered an order approving class notice on August 9, 2010. CP 896. Notice was sent on August 16, 2010 to all 306 class members. CP 549. The same day, the parties exchanged their second and final disclosures of potential trial witnesses. *See* CP 903.

On August 27, 2010—a mere 14 weeks before trial was to begin—the court held a hearing on Defendant’s Motion to Compel Arbitration or for Summary Judgment. CP 517-518. The court denied summary judgment but ordered further briefing on arbitration. CP 767. On September 24, 2010, the court ordered class arbitration. *Id.* Defendant appealed the decision to compel arbitration on a class-wide basis, and Plaintiffs cross-appealed the decision to compel arbitration. The Court of Appeals affirmed the order compelling arbitration but reversed on the issue of class arbitration and concluded that all class members must arbitrate individually.

IV. ARGUMENT

The Court of Appeals’ decision conflicts in many ways with decisions of this Court and with other decisions of the Court of Appeals.

RAP 13.4 (b)(1) & (2). The decision also implicates issues of substantial public interest: *First*, whether employees in this state can be forced to waive the right to seek judicial enforcement of state wage and hour laws, even after their claims have been litigated for a substantial period of time and a class has been judicially certified and notified of the litigation. *Second*, whether a court or arbitrator can deprive those employees of the right to join together as a class for their common benefit, even where the alleged agreement to arbitrate does not forbid class actions and expressly contemplates group remedies. These are issues of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(4).

A. The Court of Appeals' Decision Sets Forth Unprecedented Standards for Waiver of Arbitration by Litigation.

It is well-established that a contractual right to arbitration is waived if it is not timely invoked. *Otis Housing Ass'n Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). “[A] party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.” *Id.* at 588 (quoting *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules NW, Inc.*, 28 Wn. App. 59, 64, 621 P.2d 791 (1980)). “Simply put . . . a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Id.* Garda failed to take action within a reasonable time and elected to litigate instead of arbitrate. The Court of Appeals’ decision to the contrary is reviewed de novo. *Id.* at 586.

Determining whether a litigant has waived a right to arbitration depends on its *actions*, not its words. *See Otis*, 165 Wn.2d at 587 (party “must take some *action* ... within a reasonable time” (emphasis added)). The Court of Appeals did not look to Garda’s actions in the litigation, but instead relied on its words. Slip Op. at 6-7, 8. That its decision conflicts with precedent is exemplified by recent decision from Division 2, *River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 272 P.3d 289 (2012). That case involved a very similar record of litigation, discovery and motion practice evincing an intent to litigate, while one party—River House—continued to say it intended to seek arbitration. *Id.* at 225-29. The trial court found waiver and the Court of Appeals affirmed, finding that regardless of its words, River House’s *actions* were inconsistent with an intent to arbitrate:

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

Id. at 238. If a party could litigate for an extended time and take no action to seek arbitration but still preserve the right to do so simply by continuing to “reserve” that right, all of the supposed benefits of arbitration would be lost, at great cost to the other party and the courts. *See Nino v. The Jewelry Exchange, Inc.*, 609 F.3d 191, 209 (3d Cir. 2010).

Here, Garda took no action to move this case to arbitration, while taking numerous actions that were inconsistent with arbitration and advanced the litigation. Garda “answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial.”² *Ives v. Ramsden*, 142 Wn. App. 369, 383-84, 174 P.3d 1231 (2008). It participated in extensive discovery which would not have been allowed in arbitration. CP 549 ¶ 13 (applicable arbitration rules do not provide for discovery). *See Steele v. Lundgren*, 85 Wn. App. 845, 858, 935 P.2d 671 (1997). Then, after mediation failed and it turned to the class certification motion, Garda proceeded to take three depositions and repeatedly requested extensions of time, never mentioning arbitration. CP 855, 828.

Meanwhile, Garda “pass[ed] up several obvious opportunities to move for arbitration.” *Steele*, 85 Wn. App. at 856. It did not pursue arbitration during extensive document exchange or when Plaintiffs demanded a corporate representative for deposition; or after mediation failed; or when it engaged new counsel; or when it sought an extension of time to respond to the motion for class certification. Instead, at each juncture, it continued to litigate.

² Trial was set for December 2010, and the court had already denied a request to move that date. CP 578, 922. And the parties had identified trial witnesses and obtained sworn declarations from dozens of them. *See* CP 903-12; CP 994-1095.

Garda's tactics gave it distinct advantages and severely prejudiced the Plaintiffs. Even when it finally filed a motion to compel arbitration, it deliberately set it for hearing almost two months out, long past the hearing on class certification, allowing it to "continue to weigh [its] options, even then." *Steele*, 85 Wn. App. at 856. Class certification is a watershed event affecting the status and rights of hundreds of class members. Garda's tactics allowed it to see whether a class was certified before changing forums.³ Garda then allowed the court to issue notice to all 300 class members advising them that their claims would be decided in this lawsuit by the court, and never even mentioned arbitration. CP 864, 899-902.

The Court of Appeals' decision contradicts the law on litigation waiver and would permit parties to switch forums at will. This Court should take review under RAP 13.4(b)(1), (2), and (4).

B. The Court of Appeals Erroneously Construed the Contract Against the Employees and in Favor of Arbitration to Find the Employees Waived All Access to the Courts.

In interpreting the language of Garda's arbitration clause, the Court of Appeals made a fundamental legal error, plainly contradicting prior decisions of state and federal courts.

³ See *Steele*, 85 Wn. App. at 858-59 (prejudice results when a party loses a motion and then attempts to relitigate the issue by invoking arbitration) (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)).

The arbitration clause at issue in this case is found in a “collective bargaining agreement” (CBA) between Garda and its employee “associations.” Such arbitration provisions are interpreted differently than other contracts because CBAs are contracts with a union rather than the individual. *See Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 356, 35 P.3d 389 (2001). As a result, “an arbitration clause in a CBA will not waive an employee’s right to a judicial forum [for statutory claims] unless such a waiver is clear and unmistakable.” *Id.* (citing *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-80 (1998)). Thus, the usual “presumption” favoring broad interpretation of arbitration clauses applies in the labor context only to contract disputes, not statutory claims, because “arbitrators are in a better position than courts *to interpret the terms of a CBA.*” *Wright*, 525 U.S. at 78 (emphasis in original). Where the dispute involves the meaning and application of statutory provisions, the opposite presumption applies: the right to a judicial forum for such claims is *preserved* unless it is clearly and unmistakably waived. *Id.* at 79-80 (“not only is petitioner’s statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear.”); *accord, Brundridge*, 109 Wn. App. at 355.

The Court of Appeals superficially acknowledged this legal rule,⁴ but nonetheless ignored it, and instead interpreted “ambiguity” in the contract language “in favor of arbitration.” Slip op. at 12. “A collective bargaining agreement’s grievance and arbitration procedure is presumed to be the exclusive remedy unless otherwise stated in the contract.” *Id.*⁵ This contradicts the rule of law expressed in *Brundridge* and *Wright*.

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. In other words, the agreement must actually say that the arbitration procedure is the *exclusive* means of resolving disputes over alleged wage violations.⁶ Garda’s arbitration clause contains no exclusivity clause.

Furthermore, it contains many ambiguities as to whether statutory claims even *can* be arbitrated, and in any event places insurmountable practical obstacles in the way of any employee who would try. First,

⁴ In fact, the Court of Appeals incorrectly associated the heightened standard to “the requirement to arbitrate” rather than the waiver of a judicial forum. Slip Op. at 9; see *Wright*, 525 U.S. at 80; *Brundridge*, 109 Wn. App. at 355.

⁵ The court cited *Minter v. Pierce Transit*, 68 Wn. App. 528, 530, 843 P.2d 1128 (1993), in which the plaintiff claimed a breach of the CBA, not statutory violations.

⁶ For example, in *14 Penn Plaza v. Pyett*, 556 U.S. 247, 252 (2009), the CBA contained a provision that unequivocally provided that arbitration was the “sole and exclusive” means of remedying all contractual and statutory claims.

while the clause defines “grievance” in a way that includes statutory wage and hour claims, it does not make all grievances subject to arbitration. CP 165. Arbitration is only available after all of the following occur: (1) the union requests arbitration, (2) a management-union meeting is held to attempt resolution, and (3) after such meeting, “a legitimate as well as significant issue of contract application remains open.” CP 165 ¶ (c). The Court in *Wright* found similarly ambiguous provisions to mean, under the “clear and unmistakable standard,” the CBA did not preclude employees from bringing statutory claims in court. *Wright*, 525 U.S. at 81.⁷

In addition, regardless what the CBA says, employees cannot be forced to waive a judicial forum for vindicating statutory claims if the arbitral forum is not actually available. *See Brown v. Services for the Underserved*, 2012 U.S. Dist. Lexis 106207, *5 (E.D.N.Y. July 31, 2012).⁸ Garda’s arbitration clause requires action by the union in order for

⁷ 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 reference to the terms of the agreements, but depend on analysis and application of Washington statutes, regulations, and case law.

⁸ *Brown* relied on *14 Penn Plaza*, 556 U.S. at 273-74, in which the Court confirmed that if an arbitration clause in a CBA permitted the union to prevent employee members from vindicating their federal statutory rights it would not be upheld (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 & n. 19 (1985)). *Brown* cited several other district court decisions after *Penn Plaza* that invalidated arbitration clauses when unions have prevented

an employee to use it. CP 165. Yet, it is undisputed that the “union” is essentially a creation of the company, with no independent resources or bargaining power. CP 606-07. As the shop steward in Seattle testified, the union has not pursued and does not pursue grievances on behalf of employees, much less arbitration. CP 607, 571-72. Accordingly, arbitration is not actually an available avenue for employees to vindicate their statutory rights, and the CBA cannot prevent a suit in court.

The Court of Appeals applied the wrong legal standard for interpreting an arbitration clause in a union contract, and in effect sent the employees to a non-existent forum to pursue their statutory rights. This Court should take review under RAP 13.4(b)(2) and (4).

C. The Court of Appeals Erroneously Refused to Consider the Threshold or “Gateway” Issue of Whether the Arbitration Provision Was Void as Unconscionable.

In opposing Garda’s belated motion to compel arbitration, the Plaintiffs also pointed out that the terms of arbitration in the CBAs were unconscionable. CP 534. The trial court did not address this issue. CP 916-17. The Court of Appeals also declined to address it. Slip Op. at 4. This was legal error. Any challenge to the validity of an agreement to arbitrate is a “gateway” issue that the courts must decide before ordering

their members from arbitrating statutory discrimination claims.” 2012 U.S. Dist. Lexis 106207 at *5.

arbitration. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403 (2010).

As noted above, the first problem with enforcement of Garda's arbitration agreement is that it effectively denies employees their fundamental and non-waiveable statutory rights. A contract that effectively exculpates a party from a whole class of wrongful conduct is unconscionable under Washington law. *Scott v. Cingular*, 160 Wn.2d 843, 847, 161 P.3d 1000 (2007).

In addition, Garda's grievance/arbitration clause gives employees just 14 days to assert a claim, as opposed to the three-year limitation period applicable under state law. CP 165; *see SPEEA v. Boeing Co.*, 139 Wn.2d 824, 835-36, 991 P.2d 1126 (2000). Such a radical shortening the limitation period is plainly unconscionable. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 356-57, 103 P.3d 773 (2004).

Similarly, Garda's arbitration provision requires fee-splitting; the "union" must pay half of the arbitrator's fees. CP 165. This 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. While Plaintiffs' individual claims may be worth a few thousand dollars, 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 would “effectively den[y]” plaintiffs the ability to bring their claims at all. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 465, 45 P.3d 594 (2002); CP 600-07.

Garda’s arbitration clause also forbids any award of back pay of more than four months. CP 165.⁹ Such a limitation on statutory remedies is unconscionable. *Zuver v. Airtouch Comm’ns Inc.*, 153 Wn. 2d 293, 315, 318, 103 P.3d 753 (2004).

The Court of Appeals erred in ignoring its duty to determine the legal validity of the arbitration agreement before enforcing it, and this Court should take review under RAP 13.4(b)(4).

D. The Court of Appeals’ Decision to Force Each Employee Class Member to Individually Arbitrate His Wage Claims Against His Employer Conflicts with Precedent and Deprives Plaintiffs of Their Statutory Rights.

After rejecting all of the Plaintiffs’ reasons to deny arbitration altogether, the Court of Appeals granted Garda’s appeal and reversed the trial court’s decision that Plaintiffs could arbitrate as a class as previously certified. Garda had taken the position that the arbitrator should decide whether the CBA permitted class arbitration. The Court of Appeals went

⁹ The qualifying phrase, “unless specifically mandated by federal or state statute or law” does not save the provision. It is not clear how an arbitrator would construe the language, and in this context, the provision must be strictly construed against the Defendant. *See Zuver*, 153 Wn.2d at 355 (rejecting employer’s post-hoc offer of more moderate interpretation and construing provision against employer).

even further: it held as a matter of law that the CBA did not permit class arbitration, and each class member must individually arbitrate his claim for missed meal and rest breaks.

The court relied entirely on *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). There, the Court held that a party could not be compelled to submit to class arbitration “unless there is a contractual basis for concluding that the party agreed to do so.” *Id.* at 1775. The Court of Appeals misread *Stolt-Nielsen* to mean that whenever an arbitration clause does not *explicitly* permit class arbitration, it must be interpreted to forbid it. Slip Op. at 15. That is not the law; *Stolt-Nielsen* expressly recognized that an arbitration agreement may *implicitly* permit class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1775.¹⁰

In *Stolt-Nielsen*, there was no need to consider the parties’ intentions because the parties had stipulated that they had not come to any agreement concerning class arbitration. *Id.* at 1770, 1776 n. 10. However, the Court reiterated the general rule that a court or arbitrator “must give effect to the contractual rights and expectations of the parties.” *Id.* at 1773-74. It acknowledged that “custom and usage” may be relevant to

¹⁰ See also *Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.*, 683 F.3d 18, 22 (1st Cir. 2012); *Sutter v. Oxford Health Plans, Inc.*, 675 F.3d 215, 222 n. 5 (3d Cir. 2012); *Jock v. Sterling Jewelers*, 646 F.3d 113, 121 (2d Cir. 2011).

determining the parties' intent, as well as other rules based on applicable state or federal law. *Id.* at 1769 n. 6, 1770.¹¹

Having misread the law, the Court of Appeals conducted no contractual analysis and simply concluded that class arbitration was prohibited under Garda's CBAs. Slip. Op. at 12. This is clearly erroneous. First, there is a long tradition of class arbitrations arising from collective bargaining agreements. As the leading commentator on labor arbitration law states, "It is widely accepted that a union has standing to file a group grievance that affects a significant portion of the bargaining unit." Elkouri & Elkouri, *HOW ARBITRATION WORKS* 212 (Alan Miles Rubin, 6th ed. 2003). Indeed, the very nature of "collective" bargaining is to establish rights and responsibilities for *all* employees as a group, not for individual employees. *See Brundridge*, 109 Wn. App. at 355. Any ruling in arbitration concerning Garda's wage practices would presumably apply to all employees, just as any determination in a class action applies to all class members.¹²

¹¹ *See also id.* at 1175 (referencing tradition and custom in applicable industry as indicative of intent regarding class arbitration); *see also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 79 L. Ed. 2d 742, 756 (2011) (*Stolt-Nielsen* held ordering class arbitration must be based on "the arbitration agreement itself or some background principle of contract law that would affect its interpretation.").

¹² *See* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOTIATION L. REV. 399, 407 (2008) ("Class arbitration shares a general similarity with labor arbitration in that both involve aggregate dispute resolution.").

The labor agreements at issue here reflect this; they expressly allow the “union” to bring grievances on behalf of its members and expressly state that “[t]he decision of the arbitrator shall be binding upon the grievant *and all parties to this Agreement.*” CP 143.¹³ The trial court already concluded that the wage and hour practices at issue here are “common” to all employees. CP 520. Garda cannot reasonably contend that it intended any challenges to its company-wide wage practices would be resolved through individual arbitrations, one employee at a time. Based on the language, nature, and context of the parties’ agreements, it is clear that Garda’s labor agreements must permit “class” arbitrations.¹⁴

¹³ Garda requires all of its driver/messengers to personally sign its labor agreements. *See* CP 156.

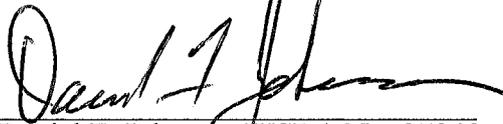
¹⁴ The Court of Appeals’ decision to order individual arbitration is wrong for another reason: it would have the effect of depriving Plaintiffs of their substantive rights under the National Labor Relations Act (NLRA) to engage in “concerted activity” for their “mutual aid and protection.” 29 U.S.C. § 157. This includes the right to take action “through resort to administrative and judicial forums.” *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the National Labor Relations Act.”). Thus, the NLRA provides a substantive legal right to bring class actions to redress conditions of employment, and waivers of such rights will not be upheld, even when found in an arbitration clause. *See 14 Penn Plaza*, 129 S. Ct. at 1474; *D.R. Horton, Inc. v. Michael Cuda*, Case no. 12-CA-25764 (N.L.R.B. January 3, 2012); *Owen v. Bristol Care, Inc.*, 2012 U.S. Dist. Lexis 33671, *10-13 (W.D. Mo. Feb. 28, 2012); *Cf. Delock v. Securitas Security Servs. USA, Inc.*, 2012 U.S. Dist. Lexis 107117, *8 (E.D. Ark. Aug. 1, 2012) (disagreeing and citing cases going both ways).

V. CONCLUSION

For the foregoing reasons, the Court should accept review of the decision of the Court of Appeals.

Dated this 29th day of August, 2012.

BRESKIN JOHNSON TOWNSEND, PLLC

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CERTIFICATE OF SERVICE

I, Sylvia Rollins, 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 29th day of August 2012, 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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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.


Sylvia Rollins, Legal Assistant

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SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

GARDA CL NORTHWEST, INC., Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This matter is before the Court on a petition for review of the Washington Court of Appeals' July 30, 2012 Decision reversing, in part, the Washington Superior Court's September 24, 2010 Order compelling Petitioners Lawrence Hill, Adam Wise, and Robert Miller (collectively "Petitioners") to arbitrate their statutory wage claims against their former employer, Respondent Garda CL Northwest, Inc. ("Garda" or "the Company"), on a class-wide basis. The Court of Appeals upheld the Superior Court's Order to the extent it compelled Petitioners to arbitrate their claims, but reversed the Order to the extent it compelled them to arbitrate as a class. Consequently, the Court of Appeals remanded the case for individual arbitration.

II. STATEMENT OF THE CASE

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

related to the employment relationship.” CP 142-143, 206-207, 229-230.

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

On March 26, 2010, Petitioners filed a Motion for Class Certification. CP 806-807. On July 1, 2010, Garda filed a Motion to Compel Arbitration or for Partial Summary Judgment. CP 15-40. On July 23, 2010, the Superior Court granted Petitioners’ Motion for Class Certification. CP 519-521. On September 24, 2010, the Superior Court granted Garda’s Motion to Compel Arbitration, but directed the parties to arbitrate the dispute as a class “in light of its prior decision to certify a class.” CP 767-768.

On October 20, 2010, Garda appealed the Superior Court’s Order to the extent it compelled Petitioners to arbitrate the dispute *as a class*. CP 913-917. On October 28, 2010, Petitioners cross-appealed the

Superior Court's Order to the extent it compelled arbitration. CP 918-920. On July 30, 2012, the Court of Appeals issued its Decision upholding arbitration, but on an individual basis. *See Hill v. Garda CL Northwest, Inc.*, 281 P.3d 384 (Wash. Ct. App. 2012).

III. ARGUMENT

Petitioners contend that discretionary review of the Court of Appeals' Decision is warranted pursuant to RAP 13.4(b)(1), (2) & (4). On all accounts, Petitioners' contentions are meritless.

A. THE COURT OF APPEALS PROPERLY RULED THAT GARDA DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION.

Petitioners first argue that Garda waived its right to compel arbitration by actively litigating this case without taking any steps to enforce its right until a class had been certified and Petitioners had been severely prejudiced. Pet. Rev. 8-11. Petitioners' arguments are not supported by the record.

1. Garda timely invoked its right to arbitration at the beginning of, and throughout, the proceedings.

In its Answer to Petitioners' Complaint, Garda unambiguously asserted the following affirmative defenses:

1. Plaintiffs' claims may only be resolved by interpreting the terms of the respective collective bargaining agreements with the applicable collective bargaining units.

2. Plaintiffs' claims must be resolved by arbitration pursuant to arbitration agreements.

* * *

4. Plaintiffs' claims have been waived in whole or in part by contract or collective bargaining agreement.

CP 12.

After the initial pleadings were filed, “[t]he parties delayed significant investment in prosecuting and defending the case because trial was imminent in a very similar matter, *Pellino v. Brinks*” CP 841. *Brinks* was decided in January 2010, after which “the parties . . . spent some time discussing the possibility of settlement, but nothing materialized” CP 580.

On February 1, 2010, Petitioners' counsel sent the following email to Garda's former counsel acknowledging Garda's intent to litigate the arbitration issue: “As we discussed this morning, if we proceed to litigate the arbitration issue—we'll want discovery on it, so we are providing these written requests now to keep things moving.” CP 625.

On March 10, 2010, the parties filed a joint motion to extend the trial date. CP 799-801. The joint motion provided, “Plaintiffs and Garda agree that this stipulation and motion is made without prejudice to Garda's position (which is contrary to Plaintiffs' position) that this matter is properly subject to arbitration under the applicable Labor Agreements.”

CP 799. The Superior Court granted the joint motion, continuing the trial date to December 6, 2010. CP 802-803.

According to Petitioners' counsel, "because nothing materialized in settlement discussions," Petitioners moved for class certification on March 26, 2010. CP 841. On April 1, 2010, Petitioners' counsel emailed Garda's former counsel and stated, "Plaintiffs are willing to postpone further briefing on class certification in order to attempt a class-wide settlement through mediation" CP 626. In the same email, Petitioners' counsel unequivocally acknowledged that *Petitioners* would consider agreeing to arbitration, *but only after mediation*:

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

CP 626 (emphasis added).

The parties unsuccessfully mediated the case on May 6, 2010. CP 841. On June 1, 2010, Garda substituted the undersigned counsel. CP 821-822. On June 4, 2010, Garda filed an unsuccessful Motion to Continue Plaintiffs' Motion for Class Certification, which was set for hearing on July 16, 2010. CP 823-830, 921-922.

Soon thereafter, Garda deposed all three Petitioners. CP 42. During each deposition, Garda's counsel solicited substantial testimony from Petitioners directly relevant to Garda's affirmative defenses concerning arbitration under the CBAs.¹

On July 1, 2010 – less than two months after the failed mediation and one month after substituting counsel – Garda filed its Motion to Compel Arbitration or for Partial Summary Judgment. CP 15-39. The Superior Court granted Plaintiffs' Motion for Class Certification on July 23, 2010. CP 519. The Court then heard oral arguments on Garda's motion on August 28, 2010, and subsequently granted the motion in part by ordering class arbitration. CP 772.

2. Garda did not act inconsistently with its right to compel arbitration.

From the outset of the case, Garda unambiguously invoked its contractual right to require Petitioners to arbitrate their statutory wage claims. This alone distinguishes the matter from the cases relied on by Petitioners. Pet. Rev. 8-11. *Cf. Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 585, 201 P.3d 309 (2009) (“OHA did not invoke the arbitration clause in

¹For example, Garda's counsel asked Petitioners to confirm that (1) they received a copy of their respective CBA (CP 55, 64, 77, 81); (2) the CBAs provided a procedure for the equitable resolution of grievances (CP 56, 66, 78); (3) they could grieve claims arising under state law, including the state wage claims at issue in this case (CP 59, 66-67, 79); (4) they were supposed to present their specific grievances to the Company within fourteen days (CP 56, 67, 79); and (5) they failed to pursue the grievance/arbitration process with respect to their current claims (CP 67, 79).

its answer.”); *Ives v. Ramsden*, 142 Wn. App. 369, 384, 174 P.3d 1231 (2008) (“[The] answer does not use the term ‘arbitration[.]’”); *Steele v. Lundgren*, 85 Wn. App. 845, 853, 935 P.2d 671 (1997) (defendant acted inconsistently where he did not express intent to arbitrate claim in answer or for 10 months thereafter); *River House Dev. v. Integrus*, 167 Wn. App. 221, 237-238, 272 P.3d 289 (2012) (plaintiff acted inconsistently where it initiated suit in superior court rather than filing for arbitration).

That Garda delayed moving to compel while the parties waited for *Brinks* to be decided and participated in mediation is insignificant, as the Court of Appeals aptly recognized. *See Hill*, 281 P.3d at 337-338 (“Because the delay in filing the motion to compel resulted in part from an effort to resolve this case without resorting to litigation and Garda asserted its arbitration rights in its answer, we do not find Garda’s acts to be inconsistent with arbitration.”) (citing *Steele*, 85 Wn. App. at 854).

Nor is it significant that Garda participated in limited discovery prior to moving to compel arbitration. Once the Superior Court denied Garda’s motion to continue, Garda responded quickly by deposing the named Petitioners and obtaining additional evidence to support its motion to compel.² By engaging in this limited discovery, Garda was not acting

²Contrary to Petitioners’ assertion, nowhere in its motion does Garda represent an intention to litigate this dispute rather than exercise its right to compel arbitration. Garda

inconsistently with its desire to arbitrate. *See Lake Wash. School Dist. v. Mobil Modules*, 28 Wn. App. 59, 64, 621 P.2d 791 (1980) (“Mobile Modules’ limited use of discovery was not inconsistent with its right to compel arbitration.”). Further, the discovery process was not “contentious” or “overly aggressive” as it was in the *Steele*, *Ives*, and *River House* cases cited by Petitioners. Pet. Rev. 9-10.

Finally, contrary to Petitioners’ assertion, Garda’s “tactics” did *not* allow it to see whether a class was certified before changing forums. Pet. Rev. 11. The record plainly establishes that Garda moved to compel arbitration on July 1, 2010, *twenty-two days before* the Superior Court issued its Order Granting Plaintiffs’ Motion for Class Certification, CP 15-39, 519. Clearly then, Garda gained no advantage – nor did it attempt to gain an advantage – by moving to compel when it did.

B. THE COURT OF APPEALS PROPERLY FOUND THAT THE CBAS CLEARLY AND UNMISTAKABLY REQUIRE PETITIONERS TO ARBITRATE THEIR STATUTORY WAGE CLAIMS.

Petitioners next argue that the Court of Appeals erroneously found they “clearly and unmistakably” waived the right to have their statutory wage claims heard in court. Pet. Rev. 11-15. Again, Petitioners’ arguments are without merit.

merely asked for a reasonable extension of time to allow its newly substituted counsel to become familiar with the legal and factual intricacies of the case.

1. Petitioners' argument is grounded in a narrow, illogical reading of the contract.

While acknowledging that the CBAs define a "grievance" as including their statutory wage claims, Petitioners argue that not all "grievances" are subject to arbitration. Pet. Rev. 13-14. Petitioners contend that only grievances involving a "legitimate as well as significant issue of contract application" are subject to arbitration. Pet. Rev. 14. Because their claims allegedly do not fall into that category, Petitioners argue, they are not subject to arbitration. Pet. Rev. 14.

Petitioners rely on *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998), in which the Supreme Court purportedly found "similarly ambiguous provisions to mean . . . the CBA did not preclude employees from bringing statutory claims in court." Pet. Rev. 14. *Wright* is easily distinguishable. In *Wright*, the Court of Appeals for the Fourth Circuit found that the following provision in the collective bargaining agreement was sufficiently broad to encompass the employees' claims under the Americans with Disabilities Act ("ADA"): "The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment" 525 U.S. at 73. The Supreme Court reversed the Fourth Circuit, finding that the arbitration provision was "very general" and contained "no

explicit incorporation of statutory antidiscrimination requirements.” *Id.* at 80. Consequently, the Court held, the agreement lacked “a clear and unmistakable waiver of the covered employees’ rights to a judicial forum for federal claims of employment discrimination.” *Id.* at 82.

Wright is more analogous to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), which the Court in *14 Penn Plaza v. Pyett*, 556 U.S. 247, 261, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), explicitly distinguished because the agreement in *Gardner-Denver* did not expressly provide for the arbitration of statutory claims: “*Gardner-Denver* and its progeny thus do not control the outcome where . . . the collective-bargaining agreement’s arbitration provision expressly covers both statutory and contractual discrimination claims.”

Here, as in *14 Penn Plaza* – and unlike in *Wright* and *Gardner-Denver* – the CBAs expressly cover Petitioners’ statutory wage claims and mandate that arbitration is the next step following an unsatisfactory grievance response by the Company. CP 142-143, 206-207, 229-230.

2. Petitioners’ argument ultimately proves irrelevant.

Petitioners’ theory that only grievances involving a “legitimate as well as significant issue of contract application” are arbitral is a mere academic exercise because the claims *do* involve a “legitimate as well as significant issue of contract application.” Petitioners plainly challenge the

lawfulness of Garda's meal and rest break policy set forth in the CBAs. CP 6, ¶ 28(c); 7, ¶ 31. Consequently, an arbitrator must *apply* the contract to determine if the policy violates Washington state law. *See Medrano v. Excel Corp.*, 985 F.2d 230, 234 (5th Cir. 1993) (where plaintiff argued provision in CBA itself violated state law, the "claim, without a doubt, is substantially dependent upon the meaning of a term of the CBA *and its applicability*") (emphasis added), *cert. denied*, 510 U.S. 822 (1993).

Moreover, Petitioners' statutory right to a meal break is a waivable right under Washington law. *See Washington Dept. of Labor & Industries Administrative Policy ES.C.6* ("If an employee wishes to waive [the right to a] meal period, the employer may agree to it."). Thus, an arbitrator must apply the CBAs to determine whether Petitioners waived their rights consistent with Washington law.

3. The CBAs allow employees to vindicate their rights.

In a last-ditch effort to avoid the impact of their waiver, Petitioners argue that regardless of what the CBAs say, they cannot be compelled to arbitration because the arbitral forum is not actually available. Pet. Rev. 14. Petitioners' argument is misplaced.

First, try as they might to litigate the issue in state court, the legitimacy of Petitioners' unions is not properly before the Court. The Supreme Court has long recognized that the National Labor Relations

Board (“NLRB”) exercises primary jurisdiction to decide whether certain activity violates the National Labor Relations Act (“NLRA”), including whether a union is an employer-dominated union in violation of Section 8(a)(2) of the NLRA. *See San Diego Unions v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). Thus, if Petitioners believe they are members of a “sham” union in violation of the NLRA, the proper avenue for relief is through the NLRB.³

Second, Petitioners unpersuasively rely on *Brown v. Services for the Underserved*, 12-CV-317, 2012 U.S. Dist. LEXIS 106207, at *5 (E.D.N.Y. July 31, 2012), for the proposition that a contractual waiver is unenforceable if the union can prevent the employees from pursuing arbitration. Pet. Rev. 14. Notwithstanding that *Brown* is an unreported decision from a federal court in New York, it is of no relevance here.

The plaintiff in *Brown* sued his employer under Title VII of the Civil Rights Act of 1964. *Id.* at *1. The employer argued that under the collective bargaining agreement, the plaintiff’s exclusive remedy was through arbitration. *Id.* at *2. The agreement, however, provided that,

³According to Petitioners, “it is undisputed that the ‘union’ is essentially a creation of the company, with no independent resources or bargaining power.” Pet. Rev. 15. Petitioners cite exclusively to an August 15, 2010 affidavit from Garda employee and shop steward Raymond Overgaard, who vaguely attested that he “is still not sure what [the union] is” and does not “consider it to be a ‘union’ because it does not have any power.” CP 606-607. In doing so, Petitioners ignore their own acknowledgment that each union negotiated their respective CBAs with Garda, and employees participated in the negotiation process. CP 65-66, 82.

following the grievance procedure, the union “*may*, within ten (10) days, proceed to binding arbitration.” *Id.* at *3 (emphasis added). After his discharge, the plaintiff attempted to proceed to arbitration, but the union refused to arbitrate his claims. *Id.* at *5.

The court held that because the arbitration provision effectively deprived the plaintiff of any remedy for his statutory claims, it could not be enforced against him. *Id.* at *5-6. Of critical significance, the court pointed out, was not that the arbitration provision permitted the union to decline to pursue his claims in arbitration, but that the union indeed refused to arbitrate: “I thus conclude that the CBA’s arbitration provision is unenforceable – at least as against Brown – because it gave the Union exclusive authority to decide whether to pursue Brown’s discrimination claims, *and the Union in fact denied Brown the opportunity to pursue those claims.*” *Id.* at *5 (emphasis added).

Neither *Brown* nor the cases cited therein stands for the proposition that whenever a collective bargaining agreement allows a union to decide whether to pursue a grievance in arbitration, it is *per se* unenforceable. On the contrary, the *Brown* court held that when an agreement “allows the union to block arbitration of its members’ claims, the arbitration clause *may* be unenforceable.” *Id.* at *4 (emphasis added). To hold otherwise plainly ignores the union’s role as the employees’ exclusive bargaining

representative and would serve to invalidate virtually all grievance/arbitration provisions that unions are charged with enforcing consistent with their duty of fair representation. *See 14 Penn Plaza*, 556 U.S. at 253 (“[T]he Union enjoys broad authority . . . in the . . . administration of [the] collective bargaining contract. . . . But this broad authority is accompanied by a . . . duty of fair representation.”) (citations omitted).

Here, the condition which compelled the *Brown* court to hold that the arbitration clause was enforceable does not exist – there is no evidence that Petitioners attempted to utilize the grievance procedure, let alone that their unions refused to pursue those claims in arbitration. CP 67, 79.

C. THE COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONERS’ UNCONSCIONABILITY ARGUMENT DID NOT WARRANT DISCRETIONARY REVIEW.

Petitioners next argue that review is warranted because the Court of Appeals’ decision to deny discretionary review of the Superior Court’s refusal to address their unconscionability argument raises an issue of “substantial public interest” under RAP 13.4(b)(4). Pet. Rev. 15-17. The Court of Appeals’ decision in no way affects the public’s interest. Rather, the holding addresses the specific remedies available to Garda employees under their CBAs, which they ratified following negotiations between Garda and their exclusive bargaining representatives. *See* CP 65-66.

This is a far cry from the types of cases that raise issues of substantial public interest warranting appellate review. *Cf. State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (“This case presents a prime example of an issue of substantial public interest. The Court of Appeals’ holding, while affecting parties to this proceeding, also has the potential to affect every [drug offender] sentencing proceeding in Pierce County after November 26, 2001 . . .”).

D. THE COURT OF APPEALS CORRECTLY FOUND THAT THE PARTIES COULD NOT BE COMPELLED TO ARBITRATE AS A CLASS.

As a final matter, Petitioners contend the Court of Appeals erred in finding that the parties did not agree to class arbitration. Pet. Rev. 17-20. Again, Petitioners’ arguments are baseless and should be rejected.

1. *Stolt-Nielsen* controls the result in this case.

In *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1766, 176 L. Ed. 2d 605 (2010), an arbitration panel compelled the parties to submit to class-wide arbitration despite the agreement’s silence as to the handling of class disputes. The Supreme Court reversed the panel, holding that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Id.* at 1775.

Properly applying *Stolt-Nielsen* to the facts of this case, the Court of Appeals held:

Turning to the arbitration agreements in this case, the contracts here, as in *Stolt-Nielsen*, are silent on the issue of class arbitration. When it compelled the parties to arbitrate on a class-wide basis, the trial court did not ascertain the parties' intent from the language of the agreement. Because no contractual basis existed allowing the court to order class arbitration, the trial court erred by doing so.

Hill, 281 P.3d at 341.

2. The CBAs do not include an implied agreement between the parties to submit to class arbitration.

Petitioners next contend that the CBAs *implicitly* permit class arbitration. Pet. Rev. 18-19. None of Petitioners' arguments offered in support of this position are valid.

a. History of class arbitration in labor context

First, Petitioners argue the Court overlooked the long tradition of class arbitrations arising from collective bargaining agreements. Pet. Rev. 19. Aside from Petitioners' failure to offer even a scintilla of record support in support of this proposition, *see State v. Weber*, 159 Wn. App. 779, 787, 247 P.3d 782 (2011) (“[A] reviewing court must only infer facts that have substantial evidentiary support in the record.”), their argument is squarely foreclosed by *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

In *Concepcion*, the Supreme Court rejected the argument that a common practice of parties agreeing to class arbitration is evidence that they did so in the subject contract:

The *Concepcions* contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the *Concepcions* admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation.

Concepcion, 131 S. Ct. at 1752.

Accordingly, *Concepcion* instructs that even though parties can and do sometimes agree in labor collective bargaining agreements to submit disputes to class arbitration, that fact has no impact on what the parties agreed to in the case at hand.

b. Arbitrator's decision binding on all parties

Petitioners next argue that class arbitration can be inferred because the CBAs provide that an arbitrator's decision is "binding upon the grievant *and all parties to this Agreement*." Pet. Rev. 20 (emphasis in original). Petitioners' strained construction of this language is not only illogical, it is irrelevant.

That the arbitrator's decision is binding on "all parties" to the CBA plainly means that the decision is binding *on the union and Garda*, who

are the only “parties” to the CBA. *See* CP 137, 201, 262. It defies logic to infer a “contractual basis” for class arbitration under *Stolt-Nielsen* from this plain language.

Regardless, Petitioners’ argument is irrelevant because, at best, they raise an ambiguity regarding whether or not the CBAs authorize class arbitration. As the Supreme Court’s decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), confirms, the issue of whether the parties agreed to class arbitration is a procedural question for the arbitrator to decide. Thus, if the Court finds that the CBAs are *not* silent on the issue of class arbitration, it must remand the case for the arbitrator to decide the issue.⁴

c. Deprivation of NLRA rights

Petitioners finally argue that compelling individual arbitration would effectively deprive them of their substantive rights under the NLRA. Pet. Rev. 20, fn. 14. This argument is mistakenly premised on the NLRB’s decision in *D.R. Horton*, 357 NLRB No. 184, slip op. (2012).

⁴*Stolt-Nielsen* does not require a contrary result. There, the Court held that class arbitration cannot be compelled where the agreement is silent on the issue. 130 S. Ct. at 1762. Because the parties in that case stipulated that their agreement was silent, it was unnecessary to remand the case to an arbitrator to decide because there could only be “one possible outcome on the facts . . .” *Id.* at 1770. The Court of Appeals in the instant case recognized this concept: “As in *Stolt-Nielsen*, only one possible outcome exists . . .; therefore, we do not remand to either the court or the arbitrator for determination of whether the arbitration agreement allows class arbitration.” *Hill*, 281 P.3d at 341.

In *D.R. Horton*, the Board held that an employer violates the NLRA when it requires employees, as a condition of employment, to sign an agreement precluding them from filing class claims addressing their wages, hours, or other working conditions. Notwithstanding that NLRB decisions are not binding on this Court, *D.R. Horton* undermines, rather than supports, Petitioners' position, because the class waiver found to be unlawful in that case was not in a collective bargaining agreement.

The waiver in *D.R. Horton* was in an arbitration agreement that all employees (unrepresented by a union) were required to execute as a condition of employment. The Board aptly recognized the significance of this distinction: “[F]or purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.” *D.R. Horton*, 357 NLRB at 10.

Consequently, the Board rejected the employer's attempt to rely on *14 Penn Plaza*, 556 U.S. at 255, in which the Supreme Court held that a union, in collective bargaining, may agree to an arbitration clause that waives employees' rights to bring an action in court alleging employment discrimination under Title VII and the ADEA. The Board explained that

the "negotiation of such a waiver stems from an exercise of Section 7 rights: the collective-bargaining process." *D.R. Horton*, 357 NLRB at 10.

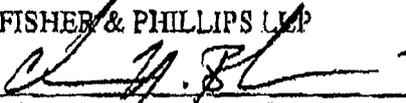
Like the employees in *14 Penn Plaza*, Petitioners exercised their Section 7 rights by agreeing, during the collective bargaining process, to waive the right to have their statutory wage claims heard in a judicial forum. Thus, the NLRB would not find that the class waiver in Petitioners' CBA violates the Act, and neither should this Court.⁵

IV. CONCLUSION

For these reasons, the Court should affirm the Court of Appeals' Decision reversing the Superior Court's Order compelling class arbitration and remanding the case for individual arbitration.

Respectfully submitted,

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⁵Since *D.R. Horton* was decided, courts have consistently rejected it. See, e.g., *Truby Nolen of America v. The Superior Court of San Diego County*, 208 Cal. App. 4th 487, 514, 145 Cal. Rptr. 3d 432 (2012) ("As have other courts, we find the NLRB's conclusion . . . to be unpersuasive and we decline to follow it."); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1133, 144 Cal. Rptr. 3d 198 (2012) ("For a number of reasons, we decline to follow *Horton* here."); *LaVoie v. UBS Fin. Servs., Inc.*, 11 Civ. 2308, 2012 U.S. Dist. LEXIS, 5277 (S.D.N.Y. Jan. 13, 2012).

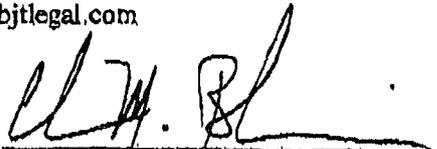
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 18th day of October 2012, I caused a true and correct copy of the:

Respondent's Answer to Petition for Review

to be delivered by email to the following:

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I. IDENTITY AND INTEREST OF AMICI

Washington Employment Lawyers Association is an association of lawyers dedicated to the advancement of employee rights. The Washington State Labor Council is a prominent advocate for the interests of working people in the state of Washington, representing approximately 550 local and statewide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members. The Service Employees International Union locals advocate for approximately almost 100,000 members in the fields of health care, long-term care, childcare, public services, education, and property services in Washington State. *See* Declaration of Kathleen Phair Barnard.

II. STATEMENT OF THE CASE

Petitioner employees (“Employees”) appeal from the Court of Appeals decision ordering them to individually arbitrate their claims that Respondent Garda CL Northwest (“Garda”) denied them regular meal and rest breaks in violation of the Washington Industrial Welfare and Minimum Wage Acts. The Court of Appeals held that (1) Garda had not waived its right to arbitration (Slip Op. at 5-9); (2) that the collective bargaining agreement (“CBA”) waived the Employees’ right to a judicial forum and that therefore the exclusive forum for Employees’ claims was arbitration under the CBA (Slip Op. at 9-12); and that (3) the Employees

could not pursue their grievances as a class (Slip Op. at 12-14). Citing RAP 2.3(b)(4), the Court of Appeals declined to address the Employees' contention that the arbitration provision of the CBA was unconscionable (Slip Op. at 4). This memorandum is submitted pursuant to RAP 13.4(h) in support of Employees' request for review under RAP 13.4.

III. AGRUMENT

A. The Erroneous Decision Below Concerns An Issue of Substantial Public Interest: The Intersection Of Individual Statutory And Common Law Claims With Contractual Rights Under Collective Bargaining Agreements.

Recent years have seen dramatic development of federal law concerning the intersection of litigation of individual employment rights under state and federal statutes and arbitration under labor agreements.¹ This case presents several core questions rising from this ferment which, because they have been answered erroneously by the Court of Appeals, will seriously negatively affect the lives of working people of Washington.

B. The CBA Does Not Clearly And Mistakenly Waive the Employees' Access To A Judicial Forum Because It Does Not Specifically Name the Statutory Causes Of Action Subject To Arbitration and Because It Does Not Subject Them To Arbitration As The Exclusive Forum.

¹ See e.g., Griffin Toronjo Pivateau, *Private Resolution Of Public Disputes: Employment, Arbitration, And The Statutory Cause Of Action*, 32 Pace L. Rev. 114 (2012); Kenneth M. Casebeer, *Supreme Court Without A Clue: 14 Penn Plaza LLC v. Pyett And The System Of Collective Action And Collective Bargaining Established By The National Labor Relations Act*, 65 U. Miami L. Rev. 1063 (2011); Clyde Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 Employee Rts. & Employment Pol'y J. 453 (2001). These articles are appended to this Memorandum.

An employee's statutory and contractual rights remain independent even if "the contours of the CBA's antidiscrimination protections [are] defined by reference to federal law." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 263 (2009) (a collective bargaining agreement giving the arbitrator "authority to resolve only questions of contractual rights," does not preclude bringing statutory claims in court "regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII").² However, it is possible for unions to effectively bargain arbitration CBA provisions that waive their bargaining unit members' non-substantive statutory right of access to judicial forums for vindication of statutory rights. However, that can be done only by expressly incorporating the statutory requirements into the CBA which an arbitrator is expressly empowered to adjudicate through the sole and exclusive forum of arbitration. *Pyett*, 556 U.S. at 265-66 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628

² See also, *Martinez v. J. Fletcher Creamer & Son, Inc.*, 2010 WL 3359372 (C.D. Cal. 2010) (CBA making compliance with California state wage order subject to arbitration as the exclusive remedy, but which did not specifically express the wage statutes at issue in the court litigation, did not constitute forum waiver because "mere parallelism with the statutes, when no statutes are specifically mentioned, does not constitute an express waiver of Plaintiff's statutory judicial forum rights"); *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1206 (2011) (citing *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 49-50 (1974) ("In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress."))

(1985)). Because the “NLRA governs federal labor-relations law” the standard for determining whether a union has negotiated a waiver of access to judicial forums requires that the collective bargaining agreement provision waiving access to a judicial be “explicitly stated” and “clearly and unmistakably” waive that right. *Pyett*, 556 U.S. at 255, 258-259, 274. *See also Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).³

In *Wright*, the Court held that the CBA provision was not sufficiently expressed to constitute a waiver of a judicial forum because it failed to “incorporate specific antidiscrimination requirements” as within the power of the arbitrator. *Id.* In *Pyett*, 556 U.S. at 258-59, the Court held that the CBA, which contained an express listing of statutory requirements that were expressly incorporated into the CBA, as well as an explicit waiver of bargaining unit employees’ right to seek redress in a judicial forum under review there “meets that obligation.”⁴

³ This requirement that the waiver of access to a judicial forum be explicit derives from the fact there is no presumption of arbitrability for statutory claims under the NLRA. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The presumption of arbitrability “does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA.” *Wright*, 525 U.S. at 78 (emphasis in original). *See also, Bratten v. SSI Services, Inc.*, 185 F.3d 625, 630-31 (6th Cir. 1999) (same). Thus, the Court of Appeals’ reliance on *Minter v. Pierce Transit*, 68 Wn. App. 528, 531-32 (1993), and *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965), for the proposition that the statutory claims are subject to the sole and exclusive arbitration forum is misplaced.

⁴ The CBA in *Pyett*, 556 U.S. 251-252, provided:
There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims

Since the Supreme Court's decision in *Pyett*, several courts have considered what constitutes an "explicitly stated" "clear and unmistakable" waiver of access to judicial forums. Unlike the now abandoned Fourth Circuit standard applied in *Brundridge v. Fluor Fed. Services Inc.*, 109 Wn. App. 347, 355-56, (2001), the consensus has been that, to effect a waiver, the CBA provisions must incorporate "specific [statutory] requirements" by specifically naming the statutes for which judicial access is waived in favor of sole and exclusive arbitration.⁵

made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, **the Age Discrimination in Employment Act**, the New York State Human Rights Law, **the New York City Human Rights Code**, ... or any other similar laws, rules, or regulations. **All such claims shall be subject to the grievance and arbitration procedures ... as the sole and exclusive remedy for violations.**

(internal quotation marks omitted) (emphasis added). Thus, the *Pyett* plaintiffs' access to court for their claims made pursuant to the ADEA and the New York State Human Rights Law was explicitly waived, as the plaintiffs there conceded.

⁵ In distinguishing prior cases holding, as in *Gardner-Denver Company*, that the statutory rights were distinct from the contract rights, the *Pyett* Court noted that those cases "did not expressly reference the statutory claim at issue," unlike the CBA at issue in *Pyett*. *Id.* at 263-264. Although the *Brundridge* court found no waiver in the CBA under review there, it applied a much less onerous waiver standard enunciated in *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir.) *cert. denied*, 534 U.S. 995 (2001), which is no longer viewed as sufficient. See e.g., *Ibarra v. United Parcel Serv.*, 11-50714, 2012 WL 4017348 at *4 (5th Cir. 2012) (comparing *Safrit* with *Mathews* and discussing post-*Wright* and *Pyett* cases and holding that a CBA must, "at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims..." because "[p]ost-*Wright* courts appear to be in agreement that a statute must specifically be mentioned in a CBA for it to even approach *Wright*'s 'clear and unmistakable' standard.") (internal quotations and citations omitted); *Cavallaro v. UMass Mem. Healthcare, Inc.*, 678 F.3d 1, 7 & n. 7 (1st Cir. 2012) ("a broadly-worded arbitration clause ... will not suffice; rather something closer to specific enumeration of statutory claims to be arbitrated is required") (citations omitted)); *Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679, 680 (9th Cir. 2011) (no waiver of access to court under a CBA that did not explicitly incorporate the plaintiff's disability discrimination claim under the California Fair Employment and Housing Act because the court "will not interpret a CBA to waive an individual employee's right to litigate

The CBA here does not explicitly name the statutes for which access to a judicial forum is purportedly waived. The CBA does define a grievance to include “any claim under federal, state or local law, statute or regulation, or under any common law theory” CP 142-143.⁶ The presumption of arbitrability does not extend to statutory claims, without a specific reference to those statutes and express language stating that arbitration is intended to be the sole and exclusive forum for those statutory claims.⁷ In this case, the CBA nowhere “explicitly incorporate[s] statutory requirements” so as to constitute a “clear and unmistakable”

statutory discrimination claims unless the CBA waiver ‘explicit[ly] incorporat[es] ... statutory antidiscrimination requirements’) (quoting *Wright*, 525 U.S. at 80); *Harrell v. Kellogg Co.*, 2012 WL 3962674, *7 (E.D. 2012) (CBA which explicitly referenced ADA but not 42 U.S.C. § 1981 did not waive access to judicial forum for Section 1981 action because “a statute must specifically be mentioned in a CBA for it to even approach *Wright’s* ‘clear and unmistakable’ standard.”); *Martinez*, 2010 WL 3359372 (CBA making compliance with California state wage order subject to arbitration exclusive remedy, but which did not specifically express the wage statutes at issue in the court litigation, did not constitute forum waiver); *Peterson v. New Castle Corp.*, 2011 WL 5117884, *2 (D. Nev. 2011) (no waiver of a judicial forum because the CBA “nowhere explicitly indicates that the employee waives the right to sue under Title VII or other anti-discrimination statutes” because it “does not mention these statutes by name, and it does not even state generally that the right to litigate under discrimination statutes is waived or must be arbitrated... .”) In *Petersen*, the court noted that “*Pyett* did not abrogate *Wright’s* requirement of a clear waiver of the right to a judicial forum for statutorily created claims, and it did not change Ninth Circuit law, as the case is consistent with *Renteria*.” *v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1108 (9th Cir.1997) (“[e]ven an individual waiver, as opposed to waivers in collective bargaining agreements ... does not occur where neither the arbitration clauses nor any other written employment agreement expressly put the plaintiffs on notice that they were bound to arbitrate [employment discrimination] claims”). *Id.* at *3 (internal quotations omitted).

⁶ This generic reference to public law may be interpreted by an arbitrator to create contractual obligations duplicative of public law protections, but that does not constitute a waiver of the right to bring the public law claims in court. See e.g., *Ibarra*, 2012 WL 4017348, at *4, *Mathews*, 649 F.3d at 1202.

⁷ For these reasons, the Court of Appeals erred in extending the presumptions of arbitrability and the exclusivity of the arbitration forum to the statutory claims here. (Slip Op. at 11)

waiver of the Employees' access to the Washington courts to vindicate their rights under the Industrial Welfare and Minimum Wage Acts.

C. Even If The CBA Arbitration Provision Waived The Employees' Access To Washington Courts, It is Not Enforceable Here, Where It Would Work An Unlawful Waiver Of the Substantive Statutory Protections.

Here, the union does not file grievances, let alone arbitrate them. Therefore, a reading of the CBA to preclude access to court for the statutory claims here works a waiver of the substantive protections of the state statutes, contrary to federal law. In *Pyett*, the plaintiffs argued that their substantive rights under the ADA and New York Human Rights Law could not be vindicated because the union declined to take them to arbitration. While acknowledging that "a substantive waiver of federally protected civil rights will not be upheld," the Court declined to resolve whether the CBA operated "as a substantive waiver" of their statutory rights because it was not clear from the record whether the plaintiffs could proceed to arbitration without the union. 559 U.S. at 273-274 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 637, and n. 19).⁸ Subsequent cases have made clear that, if the only forum for vindication of statutory rights is controlled by the union and not available to plaintiffs, the forum waiver

⁸ See also, *14 Penn Plaza*, 129 S.Ct. at 1481 (Souter, J., dissenting) ("the majority opinion ... explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which is usually the case." (citations omitted)).

may not be given effect. *See e.g. Brown v. Servs. for the underserved*, 2012 WL 3111903 (E.D.N.Y. 2012); *de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198 (D. Mass. 2011); *Morris v. Temco Serv. Indus., Inc.*, 2010 WL 3291810 (S.D.N.Y. Aug. 12, 2010); *Kravar v. Triangle Servs., Inc.*, 2009 WL 1392595 (S.D.N.Y. May 19, 2009).⁹

The Employees did not ask the union to file a grievance alleging violations of statutes; however, that request would have been a futility because the union does not have the resources to arbitrate and has never done so. CP 606-607, 571-72.¹⁰ Moreover, the CBA does not allow the Employees to take their grievances to arbitration without the union and

⁹ If indeed the Employees' claims are solely under contract, as incorporated claims, then their claims are governed by federal law insofar as they are being arbitrated under a CBA regulated by Section 301 of the Taft-Hartley Act, 29 USC 158, and governed by the federal common law developed under that statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). Thus, Garda's contention that under *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), the federal law under the FAA would preempt any argument under state law that the Employees would not be able to vindicate their substantive state statutory rights is inapposite. *See e.g. In re Am. Exp. Merchants' Litig.*, 667 F.3d 204, 212-17 (2d Cir. 2012) (majority opinion) and 681 F.3d 139 (2d Cir. 2012) (Pooler, J., concurring in denial or rehearing en banc) (the teachings of *Concepcion* do not apply to determine the arbitrability of federal causes of action because the FAA does not preempt other federal statutes, but rather must be accommodated to them). Accord: *Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 at *3-5 (S.D.N.Y. 2011).

¹⁰ Even if that were grounds for dismissal, it should have been without prejudice in order to allow the Employees to test their ability to arbitrate. *See e.g., Veliz v. Collins Bldg. Services, Inc.*, 2011 WL 4444498 (S.D.N.Y. Sept. 26, 2011) (dismissing suit because, unlike here, plaintiff did not allege that the person who informed him the union would likely not arbitrate had authority to make that representation, but dismissing without prejudice because if the union prevented plaintiff from resolving his "statutory claims through the procedures set forth therein, the CBA will be unenforceable and Veliz will have the right to refile his claim in federal court.") (citing *Borrero v. Ruppert Hous. Co., Inc.*, 2009 WL 1748060 (S.D.N.Y. 2009) and *Kravar*, 2009 WL 1392595, at *3 (both dismissing without prejudice for that reason)).

Garda's willingness to arbitrate with each employee individually does not cure this deficiency. *Kravar*, 2009 WL 1392595 at *4 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (rejecting argument that the lawsuit should be dismissed because the employer had notified employee of its willingness to arbitrate her ADA claim under the CBA but she had refused as "confus[ing] the issue. The arbitration provision that the Court must enforce is the one the union and the [employer] entered into, not a hypothetical agreement in which the employer's rather than the union's consent is critical.")).¹¹

D. Should The Court Hold That The Employees Claims Are Actionable Only Under The CBA, The Employees' Claims May Be Pursued In A Class Grievance Because They Arise Under Federal Law, Section 301 Of The Taft-Hartley Act.

Stolt-Nielsen v. AnimalFeeds Int'l Corp., ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), which does not arise in a Section 301 context, does not apply to preclude class arbitration, should the Court find that the Employees' claims must be arbitrated. The FAA is simply an overlay on Section 301 jurisprudence in labor arbitrations, *International Union of Painter and Allied Trades v. J & R Flooring, Inc.*, 616 F.3d 953, 962 (9th Cir. 2010). The acknowledgement in *Stolt-Nielsen* that arbitration agreements may implicitly allow class arbitrations and that "custom and

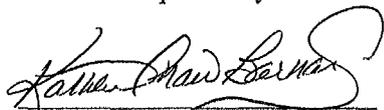
¹¹ *Cf.*, *Powell*, 457 F. App'x at 680 (no waiver of access to judicial forum because there was no explicit incorporation of statutory requirements and arbitration without the union was not contemplated under the CBA which required the union's participation)

usage” is relevant in determining the parties’ intent, as well as applicable state or federal law, requires interpreting the FAA in light of the NLRA as amended. *Id.* at 1769 n. 6, 1770, 1775. This leads to but one conclusion-- that the right of employees to pursue common grievances as a class grievance is both common in labor arbitration practice, and protected by the NLRA.¹² Therefore, if the Court should hold that the CBA did waive a judicial forum, the Employees may arbitrate as a class.¹³

IV. CONCLUSION

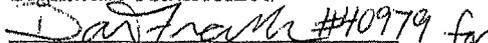
Amici respectfully submit that this Court should grant review.

Respectfully submitted this 29th day of October, 2012.



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¹² See e.g., *Elkouri & Elkouri*, *How ARBITRATION WORKS*, 212 (Alan Miles Rubin, 6th ed. 2003). See e.g., *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *D.R Horton, Inc. v. Michael Cuda*, Case no. 12-CA-25764 (N.L.R.B., 2012); *Owen v. Bristol Care, Inc.*, 2012 U.S. Dist. Lexis 33671, *10-13 (W.D. Mo. 2012)

¹³ Of course, if, as Employees and Amici here contend, there has been no waiver of the right to litigate, there also has been no waiver of the right under Section 7 of the NLRA, 29 U.S.C. § 157, to litigate as the class the trial court originally certified.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2012, I caused the Motion of WELA, Washington State Labor Council and SEIU Local Unions, the Declaration of Kathleen Phair Barnard in Support of the Motion, and the Amici Curiae Memorandum in Support of Petition for Review, to be served via email and First Class U.S. Mail to:

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EXHIBIT E

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OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

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

v.

GARDA CL NORTHWEST, INC., Respondent.

**RESPONDENT'S BRIEF IN ANSWER
TO BRIEF OF AMICI CURIAE**

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I. INTRODUCTION

On October 29, 2012, the Washington Employment Lawyers Association (“WELA”), Washington State Labor Council (“WSLC”), and the Service Employees International Union Local 925, Local 6, Healthcare 775NW, and Healthcare 1199NW (“SEIU”) (collectively “Amici”) filed a motion pursuant to RAP 10.6 seeking permission to file an amici curiae brief in this matter. The Court granted Amici’s motion on November 16, 2012. Pursuant to RAP 10.1(e), Respondent Garda CL Northwest, Inc. (“Garda” or “the Company”) hereby submits this brief in answer to Amici’s brief.

II. ARGUMENT

Amici argue in their brief that (1) the Court of Appeals’ decision concerns an issue of substantial public interest; (2) the collective bargaining agreements (“CBAs”) at issue do not clearly and unmistakably waive employees’ right to a judicial forum; (3) even if the CBAs do clearly and unmistakably waive employees’ right, the waiver is unenforceable because employees are denied substantive statutory protections; and (4) if employees’ claims are actionable only under the CBAs, they should be allowed to pursue a class grievance. All of Amici’s arguments are without merit.

A. THIS CASE DOES NOT CONCERN AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Amici first argue that this case involves an issue of substantial public interest because it “presents several core questions . . . which, because they have been answered erroneously by the Court of Appeals, will seriously negatively affect the lives of working people of Washington.” (Amici’s Br. 2). Amici’s conclusory and overgeneralized assertion cannot be reconciled with how this Court has interpreted and applied the phrase “substantial public interest” in other cases.

For example, in *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), this Court was asked to decide whether the Court of Appeals erred in holding that a county prosecutor’s ex parte contact with all judges in the county did not affect the sentencing decision of the judge in the case at bar.¹ The Court found that an issue of “substantial public interest” was raised and therefore granted review pursuant to RAP 13.4(b)(4) because “the Court of Appeals’ holding, while affecting parties to th[e] proceeding, also ha[d] the potential to affect every [drug offender] sentencing proceeding in Pierce County after November 26, 2001” *Id.* at 577.

Likewise, in *Marriage of Ortiz*, 108 Wn.2d 643, 740 P.2d 843 (1987), this Court was called to decide whether the Court of Appeals erred

¹The prosecutor’s ex parte contact consisted of a memorandum announcing that, as a matter of general policy, his office would no longer recommend drug offender alternative sentencing. *Watson*, 155 Wn.2d at 575-576.

by retroactively applying Washington Supreme Court precedent to invalidate an escalation clause in a child support decree. Although the Court of Appeals' decision obviously affected the rights of the custodial and non-custodial parents in that case, it also stood to affect the rights of all other parents who were parties to child support decrees with similar escalation clauses. *Id.* at 644. Thus, this Court granted review on the basis that the Court of Appeals' decision raise an issue of substantial public interest. *Id.* at 646.

In *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 796, 225 P.3d 213 (2009), this Court declined to review the factual question of whether a plaintiff agreed to arbitrate a dispute and the legal question of whether, if it did agree to arbitrate, it was legally bound by that agreement. According to the Court, "These are not questions of continuing and substantial public interest" *Id.* at 796.² This is consistent with the long-standing notion that judicial review of private arbitration awards "is extremely limited." *Morrell v. Wedbush Morgan Sec.*, 143 Wn. App. 473, 481, 178 P.3d 387 (2008) (citations omitted).

Here, unlike *Watson* and *Marriage of Ortiz* and like *Satomi*, the Court of Appeals' decision in no way affects the public interest. This case

²While the *Satomi* Court addressed the issue of whether a "substantial public interest" was raised in the context of an otherwise moot case, the rationale supporting the Court's finding equally applies in the context of RAP 13.4(b)(4).

does not involve public officials nor the retroactivity of binding precedent. The CBAs at issue were entered into between private unions representing private employees working for a private employer. Moreover, the questions answered by the Court of Appeals – whether Garda waived its contractual right to compel arbitration and, if not, whether the employees waived their right to a judicial forum – were purely of a private concern, and resolution of them only affects the parties in this case.

Consequently, this Court should not be called upon for further review of the lower court’s decision under the guise that a “substantial public interest” is involved.

B. PETITIONERS CLEARLY AND UNMISTAKABLY WAIVED THEIR RIGHT TO A JUDICIAL FORUM.

Amici next argue that Petitioners did not “clearly and unmistakably” waive their right to a judicial forum because the arbitration provision in their CBAs does not expressly name the statutory causes of action subject to arbitration or indicate that arbitration is the exclusive forum. (Amici’s Br. 2-7). Amici’s arguments are based on an incorrect and illogical reading of binding precedent.

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1. The CBAs need not name the specific statutory causes of action subject to waiver to be enforceable.

Amici mistakenly read *14 Penn Plaza v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), as requiring that a mandatory arbitration provision list every statutory cause of action for which waiver of a judicial forum is intended in order for the waiver to be deemed clear and unmistakable. *14 Penn Plaza* imposes no such requirement.

In *14 Penn Plaza*, the Supreme Court concluded that union-represented employees waived the right to pursue claims under the Age Discrimination in Employment Act (“ADEA”) because the arbitration provision in their collective bargaining agreement provided that statutory claims, including those arising under the ADEA, were subject to mandatory arbitration. *Id.* at 251. In reaching this holding, the Court sharply distinguished cases such as *Alexander v. Gardner-Denver*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), in which the agreement at issue encompassed employees’ statutory rights but provided for binding arbitration only for disputes arising out of the agreement.

The *Gardner-Denver* collective bargaining agreement, for example, specifically prohibited discrimination and provided that any disputes “as to the meaning and application” of the agreement were subject to mandatory arbitration. *Gardner-Denver*, 415 U.S. at 39-40.

Importantly, the *14 Penn Plaza* Court observed, “The [*Gardner-Denver*] employee’s collective-bargaining agreement did not mandate arbitration of statutory antidiscrimination claims.” *14 Penn Plaza*, 556 U.S. at 266. In contrast, the arbitration provision at issue in *14 Penn Plaza* “expressly cover[ed] both statutory and contractual discrimination claims.” *Id.* at 1470. Thus, unlike the employees in *Gardner-Denver*, the employees in *14 Penn Plaza* were not foregoing their substantive rights afforded by statute; they were merely agreeing to submit claims based on those rights to resolution in an arbitral, rather than a judicial, forum.

Contrary to Amici’s reading of the case, the *14 Penn Plaza* Court did not find waiver because the arbitration provision specifically identified the ADEA; rather, the Court found waiver because the agreement went beyond where the agreement in *Gardner-Denver* went – it expressly provided that statutory claims were subject to arbitration.

The instant case falls squarely in line with *14 Penn Plaza*. The CBAs expressly cover Petitioners’ statutory wage claims and mandate that arbitration is the ensuing step following an unsatisfactory grievance response by the Company. *See* CP 142-143, 206-207, 229-230 (defining grievance as including “any claim under any . . . state . . . law, statute or regulation . . . or any other claim related to the employment relationship”). In other words, like the agreement in *14 Penn Plaza*, the CBAs clearly

require that employees' statutory claims be arbitrated.³ That there is no specific reference to the Washington statute governing wage and hour laws in Petitioners' CBAs is of absolutely no consequence given this express requirement.

To read *14 Penn Plaza* as Amici suggest would lead to the illogical conclusion that if an employer wants to require its employees to submit all statutory claims to binding arbitration, it must expressly identify every conceivable statute on which employees might bring claims. *14 Penn Plaza* in no way imposes such an impractical and onerous burden on employers.

Moreover, such a strained construction of *14 Penn Plaza* ignores numerous other cases in which courts have enforced arbitration agreements as to statutory causes of action that are not specifically enumerated therein so long as those causes of action lie within the parameters of the types of claims the parties agreed to arbitrate. *See, e.g., Betkowski v. Kelley Foods of Alabama, Inc.*, 697 F. Supp. 2d 1296 (M.D. Ala. 2010) (compelling arbitration of plaintiff's ADEA claim where arbitration agreement covered "all disputes" involving plaintiff's employment or termination); *Koridze v. Fannie Mae Corp.*, 593 F. Supp.

³Notably, the *14 Penn Plaza* agreement not only provided that ADEA claims be arbitrated, but also claims arising under "any other similar laws, rules, or regulations." *14 Penn Plaza*, 556 U.S. at 250.

2d 863, 867 (E.D. Va. 2009) (finding parties agreed to arbitrate plaintiff's Title VII claims where agreement provided for arbitration of any dispute relating to or in connection with plaintiff's performance); *Maddox v. USA Healthcare-Adams, LLC*, 350 F. Supp. 2d 968, 975 (M.D. Ala. 2004) (granting motion to compel arbitration of ADEA and ADA claims where arbitration agreement applied to "all claims and disputes" between plaintiff and defendant).

In a lengthy footnote, Amici cite a myriad of post-*14 Penn Plaza* cases that they claim support Petitioners' position. (Amici's Br. 5, fn. 5). The arbitration provisions in all the cases cited by Amici, however, are plainly distinguishable from the one in Petitioners' CBAs and in *14 Penn Plaza* because they do not expressly cover statutory claims. *See Ibarra v. United Parcel Serv.*, 695 F.3d 354, 356-357 (5th Cir. 2012) (no waiver of judicial forum for Title VII claim where arbitration provision only covered "any controversy, complaint, misunderstanding or dispute arising at to interpretation, application or observance of any of the provisions of this Agreement"); *Cavallaro v. UMass Mem. Healthcare, Inc.*, 678 F.3d 1, 7, n.7 (1st Cir. 2012) ("A broadly-worded arbitration clause such as one covering 'any dispute concerning or arising out of the terms and/or conditions of [the CBA], or dispute involving the interpretation or application of [the CBA]' will not suffice."); *Powell v. Anheuser-Busch*

Inc., 457 F. App'x 679, 680 (9th Cir. 2011) (no waiver of judicial forum for California Fair Employment and Housing Act claim where agreement “recognizes [employer’s] duty to comply with FEHA” but fails to contain “any arbitration procedures governing the arbitration of [employee’s] statutory claim . . .”) (unpublished opinion); *Harrell v. Kellogg Co.*, Civil Action No. 11-7361, 2012 U.S. Dist. LEXIS 128970, *8 (E.D. Pa. Sept. 11, 2012) (no waiver of judicial forum for 42 U.S.C. § 1981 claim where grievances only defined to include “disputes or disagreements concerning interpretation and application of the provisions of this Agreement”); *Martinez v. J. Fletcher Creamer & Son, Inc.*, Case No. CV 10-0968 PSG (FMOx), 2010 U.S. Dist. LEXIS 93448, *2 (C.D. Cal. Aug. 13, 2010) (no waiver of judicial forum for FLSA and state wage claims where grievance procedure only existed for “enforcing all the terms and provisions contained in [the] Agreement”); *Peterson v. New Castle Corp.*, 2:11-cv-00764-RCJ-CWH, 2011 U.S. Dist. LEXIS 124734, *8 (D. Nev. Oct. 27, 2011) (no waiver of judicial forum for Title VII claims where agreement provided that “[a] grievance shall be defined as a dispute regarding the interpretation and application of the provisions of this Agreement.”).

Accordingly, Amici’s misreading of *14 Penn Plaza* does not support Petitioners’ case and should be disregarded.

2. The CBAs need not indicate that arbitration is the sole and exclusive forum for the resolution of statutory claims.

Amici next argue that the Court of Appeals erred in relying on *Minter v. Pierce Transit*, 68 Wn. App. 528, 843 P.2d 1128 (1993), *rev. den.*, 121 Wn.2d 1023 (1993), which cites *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965), to support its conclusion that arbitration is Petitioners' exclusive remedy in this case. (Amici's Br. 4, fns. 3, 7). Once again, Amici misread binding precedent.

Contrary to Amici's suggestion, the Court of Appeals did not apply the presumption of *arbitrability* to determine whether Petitioners clearly and unmistakably waived the right to pursue their statutory wage claims in court; rather, the Court applied the presumption of *exclusivity* to determine whether the grievance/arbitration procedure constituted Petitioners' exclusive remedy in this case.

As Amici point out, the Court in *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998), declined to apply the presumption of arbitrability to the question of whether matters that go beyond the interpretation and application of contract terms are subject to arbitration. However, the *Wright* Court did not disturb the principle espoused in *Republic Steel* (as cited in *Minter*) that "where a collective bargaining agreement has provisions for grievances, unless the

contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf.” *Minter*, 68 Wn. App. at 531.

Thus, Amici have yet again advanced an argument grounded in a misreading of Supreme Court precedent.

C. PETITIONERS ARE NOT DEPRIVED OF SUBSTANTIVE STATUTORY RIGHTS.

Amici next argue that because “the union does not file grievances, let alone arbitrate them,” reading the CBAs to preclude Petitioners’ access to court “works a waiver of the substantive protections of the state statutes, contrary to federal law.” (Amici’s Br. 7). Amici’s argument is not supported by the facts or law.

As Garda explained in its Answer to Petition for Review, the legitimacy of Petitioners’ unions is not properly before the Court, and there is no evidence in the record addressing the issue even if it were. (Pet’rs’ Br. 11-12). The Supreme Court has long recognized that the National Labor Relations Board (“NLRB”) exercises primary jurisdiction to decide whether certain activity violates the National Labor Relations Act (“NLRA”), including whether a union is an employer-dominated union in violation of Section 8(a)(2) of the NLRA. *See San Diego Unions v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

Thus, if Petitioners wish to challenge the validity of their unions, the proper avenue for relief is through the NLRB.

Second, Amici, like Petitioners, unpersuasively rely on *Brown v. Services for the Underserved*, 12-CV-317, 2012 U.S. Dist. LEXIS 106207, at *5 (E.D.N.Y. July 31, 2012), and similar cases for the proposition that a contractual waiver is unenforceable if the union can prevent the employees from pursuing arbitration.⁴ (Amici's Br. 8). As explained in Garda's Answer to Petition for Review, *Brown* undermines, rather than supports, Petitioners' position. The additional cases cited by Amici likewise undermine Amici's theory.

In *Brown* and the other cases cited by Amici, unionized employees suffered alleged discrimination, attempted to pursue grievances under their respective collective bargaining agreement's grievance/arbitration procedure, and were refused the right to grieve their dispute by their union. Thus, the court in each case found that the arbitration provision was unenforceable because it acted as a substantive waiver of the employees' statutory rights. The dispositive factor in every one of those cases, however, does not exist in the case at bar.

⁴The additional cases cited by Amici include *de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198 (D. Mass. 2011); *Morris v. Temco Serv. Indus., Inc.*, 09 Civ. 6194 (WHP), 2010 U.S. Dist. LEXIS 84885 (S.D.N.Y. Aug. 12, 2010); and *Kravar v. Triangle Servs., Inc.*, 1:06-cv-07858-RJH, 2009 U.S. Dist. LEXIS 42944 (S.D.N.Y. May 19, 2009). (Amici's Br. 8).

In the cases relied on by Petitioners and Amici, the courts concluded the arbitration provisions denied employees of their substantive rights because the unions in fact declined to pursue their claims through the grievance process. As explained in Garda's Answer to Petition for Review, in *Brown* the court explained: "I thus conclude that the CBA's arbitration provision is unenforceable – at least as against Brown – because it gave the Union exclusive authority to decide whether to pursue Brown's discrimination claims, *and the Union in fact denied Brown the opportunity to pursue those claims.*" *Id.* at *5 (emphasis added). (Pet'rs' Br. 13).

Similarly, in *de Souza Silva*, the court explained, "[W]here, as here, the union is the sole entity with authority to proceed to arbitration and it elected not to do so, the CBA provision constitutes an impermissible waiver of the employee's statutory anti-discrimination rights." 777 F. Supp. 2d at 204; *see also Morris*, 2010 U.S. Dist. LEXIS 84885, *12-13 ("[The employee] requested the Union to take action on her behalf. As an individual union member, she did not have an unfettered right to demand arbitration of a discrimination claim under the CBA – instead, she had to rely on the Union to arbitrate her grievances.") (internal quotations omitted); *Kravar*, 2009 U.S. Dist. LEXIS 42944, *8 (finding no valid waiver where only union could pursue arbitration and employee "told her

union representative . . . that she wanted to arbitrate her disability claims” and the union representative “laughed and told [her] that [she] could not do so because the union was most likely to dismiss [her] complaint.”).

Here, unlike in the cases relied on by Amici, there is no evidence that Petitioners attempted to utilize the grievance procedure, let alone that their unions refused to pursue those claims in arbitration. CP 67, 79. Thus Amici’s reliance on those cases, like Petitioners’ reliance on *Brown*, is misdirected and of no consequence.

D. THE PARTIES DID NOT AGREE TO CLASS ARBITRATION.

As a final matter, Amici argue that if Petitioners’ claims are actionable only under the CBAs, they should be permitted to arbitrate as a class because the right to pursue common grievances as a class is a common labor arbitration practice and is protected by the NLRA. (Amici’s Br. 9-10). These are the exact same arguments advanced by Petitioners in their Petition for Review, and they fail for the exact same reasons set forth in Garda’s Answer thereto. (Pet’rs’ Br. 18-20).

Without completely rehashing Garda’s response to Petitioners’ arguments, it is sufficient to point out that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011), squarely forecloses any argument that a common practice of class grievances in the labor context suggests that the parties in this case agreed to do so.

Moreover, as referenced in Garda’s Answer to Petition for Review, *D.R. Horton*, 357 NLRB No. 184, slip op. (2012), is not binding on this Court, and even if it were, it completely undercuts Amici’s theory. In that case, the waiver at issue arose in the context of an individual employment agreement, which the Board plainly distinguished from waivers arising in collective bargaining agreements: “[F]or purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.” *D.R. Horton*, 357 NLRB at 10.

Accordingly, Amici have offered no convincing arguments to support Petitioners’ position that the Court of Appeals erred in refusing to order class arbitration.

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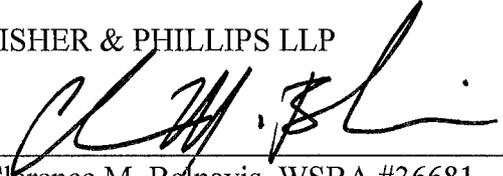
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IV. CONCLUSION

For these reasons, the Court should not be persuaded by Amici's brief.

Respectfully Submitted,

FISHER & PHILLIPS LLP

A handwritten signature in black ink, appearing to read 'C.M. Belnavis', written over a horizontal line.

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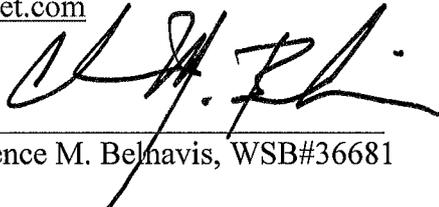

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LAWRENCE HILL, ADAM WISE, and ROBERT MILLER, on behalf
of themselves and all persons similarly situated

Petitioners,

v.

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

Respondent.

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I. INTRODUCTION

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

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

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

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

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

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

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

II. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

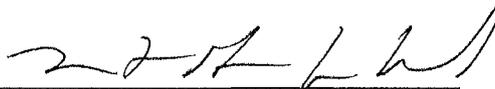
arbitrations, one employee at a time. Based on state contract law and the language, nature, and context of the parties' agreements, it is clear that Garda's labor agreements must permit class arbitrations.¹²

III. CONCLUSION

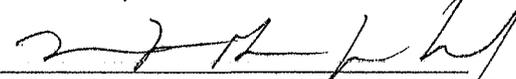
For the foregoing reasons, the Court should reverse the decision of the Court of Appeals and either deny arbitration or order class arbitration.

Respectfully submitted this 22nd day of March, 2013.

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

DECLARATION OF SERVICE

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

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

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Washington State Labor Council and
SEIU Local 925, Local 6, Healthcare
775NW, and Healthcare 1199NW

DATED at Seattle, Washington this 22nd day of March, 2013.



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Paralegal

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Re: Hill (petitioner) v. Garda CL Northwest, Inc. (respondent), Supreme Court Cause # 87877-3

Dear Supreme Court Clerk:

I attach for filing the Supplemental Brief of Petitioners.

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SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

GARDA CL NORTHWEST, INC., Respondent.

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

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I. INTRODUCTION

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

II. STATEMENT OF THE CASE

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

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

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

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

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

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

III. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. No substantial public interest involved.

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

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

2. FAA Preemption

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Respectfully submitted,

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I hereby certify under penalty of perjury of the laws of the State of Washington that on this 22nd day of March, 2013 I caused a true and correct copy of:

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

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Dear Clerk of the Court,

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

Sincerely,

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LAWRENCE HILL, et al.,

Petitioners,

v.

GARDA CL NORTHWEST, INC.,

Respondents.

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PACIFIC LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS**

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**IDENTITY AND
INTEREST OF AMICUS CURIAE**

Pacific Legal Foundation (PLF) respectfully submits this brief in support of the Respondents pursuant to Washington Rule of Appellate Procedure 10.6.

PLF was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008); and *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF THE ARGUMENT

In *Stolt-Nielsen v. AnimalFeeds International Corp.*, the U.S. Supreme Court held that where a contract is silent on the issue of class arbitration, a court cannot impose class arbitration on the parties unless there is a contractual basis for doing so. 130 S. Ct. at 1782. In that case, both parties agreed that their silence meant there had been no meeting of the minds with regard to class arbitration. Thus there was “no occasion to ‘ascertain the parties’ intention,’” because the parties were in “complete agreement” about what their silence meant. *Id.* at 1770. While the Court did not indicate how silence should be interpreted where the parties do not so stipulate, due process considerations suggest courts should not infer consent to class arbitration from mere silence.

There are many reasons why individuals may choose arbitration. Because of its informality and the parties’ ability to tailor it to their needs, arbitration “reduc[es] the cost and increas[es] the speed of dispute resolution.” *Concepcion*, 131 S. Ct. at 1749; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (“[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes.”). For these reasons, Washington

policy favors arbitration. *See Davidson v. Hensen*, 135 Wn.2d 112, 117-18, 954 P.2d 1327 (1998). In contrast to arbitration, judicial resolution of disputes is not a creature of contractual choice. Therefore it includes more rigorous procedural and substantive rules to safeguard important due process rights of the parties to the litigation. Where parties consent to arbitration, they elect to exchange these rules for procedures of their own choosing. *Mitsubishi Motors Corp.*, 473 U.S. at 628 (Parties to an arbitration “trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”). Because the parties’ consent to arbitration essentially waives the courtroom’s due process protections, *Stolt-Nielsen* implies that only express consent to arbitration provides clear and unmistakable evidence of an intent to waive such protections. *See Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (waivers of constitutional rights must be clear on their face); *see also Bellevue v. Acrey*, 103 Wn.2d 203, 208, 691 P.2d 957 (1984) (implied waivers of constitutional rights are inadequate).

Inferring consent from silence risks imposing a less formal, potentially less safe procedure on individuals who did not consent to them, in violation of the bedrock rule that arbitration “is a matter of consent, not coercion.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*,

489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *see also* *Balfour, Guthrie, & Co., Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199, 202, 607 P.2d 856 (1980) (“[A]rbitration stems from a contractual, consensual relationship.”). In order to protect the due process rights of both parties, and especially absent class members, courts must presume that where a contract is silent on class arbitration, the parties did not consent to that process.

ARGUMENT

I

ELECTING CLASS ARBITRATION INVOLVES WAIVING THE DUE PROCESS PROTECTIONS APPLICABLE IN COURTS

Generally, due process dictates that one cannot be bound to a judgment if he did not participate in the litigation. *See Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. Ed. 22 (1940). Given the legal tradition that “‘everyone should have his own day in court,’” it is unfair to bind someone to a judgment who has had no opportunity to be heard. *Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (citations omitted). Class-actions, however, are an exception, as the outcome binds similarly situated individuals who do not directly litigate their claims. In order to fairly bind absent class members to an outcome of a proceeding in which they did not participate, due process thus demands that their interests must be protected throughout that adjudication. *See Phillips Petroleum Co. v. Shutts*,

472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (“[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.”).

Due process requires at a minimum adequate notice, opportunity to appear, and adequate representation. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (“[T]he Due Process Clause . . . at a minimum . . . require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”); *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161, 516 P.2d 1028 (1973) (“An award made without notice and hearing, in absence of a waiver by the parties agreed, is a nullity.”); *Nobl Park, L.L.C. of Vancouver v. Shell Oil Co.*, 122 Wn. App. 838, 845, 95 P.3d 1265 (2004). Federal Rule of Civil Procedure 23 was grounded in the due process concern for the rights of absent class members; it provides for class certification, notice to class members, judicial approval of settlements, and appointment of adequate counsel. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 n.27 (3d Cir. 2001) (explaining Rule 23 as a “multipart attempt to safeguard the due process rights of absentees”). Washington Civil Rule 23 “is an exact counterpart” of Federal Rule 23, and is similarly rooted in due process considerations. *Johnson v. Moore*, 80 Wn.2d 531, 531, 496 P.2d 334 (1972).

No such procedural rules govern class arbitration. While Washington has enacted a Uniform Arbitration Act, the specific procedural rules that govern arbitration are largely left to the parties's choice. *See* RCW 7.04A. Indeed, parties may waive provisions of the Act. *Lents, Inc. v. Santa Fe Engineers, Inc.*, 29 Wn. App. 257, 262, 628 P.2d 488 (1981). Arbitration is “consensual and contractual in nature,” *id.* at 261, and much of its appeal lies in the parties' ability to tailor the governing rules and procedures to their specific needs. *See Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992) (The purpose of arbitration is “to avoid . . . the formalities, the delay, the expense and the vexation of ordinary litigation.”). The arbitrator is “part of a system of self-government created by and confined to the parties.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960) (citation omitted). Arbitration organizations often craft their own rules, which parties can elect to use in their arbitration agreements. *See* Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration*, 20 Ohio St. J. on Disp. Resol. 451, 452 (2005) (Arbitral organizations “have begun to create rules and standards” for parties to choose from.). Or, parties can design their own rules. In exchange for giving up the uniform due process guarantees provided in court, the parties choose a system they can design for their own purposes.

This presents no constitutional problem so long as that choice is voluntary. But imposing arbitration in the absence of clear and unequivocal consent risks denying individuals their due process rights. This is especially dangerous in the case of class arbitration, where absent class members are deprived of the opportunity to litigate their individual claims, potentially even without their knowledge. Arbitration should only be imposed on these individuals where they have expressly elected to trade the courtroom's procedural guarantees for the advantages of arbitration.

**A. The Due Process Requirement of
Notice Conflicts with the Presumption of
Confidentiality in Bilateral Arbitration**

Without notice and an opportunity to participate, absent class members cannot be bound to a judgment. *See, e.g., Shutts*, 472 U.S. at 811-12 (“If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide . . . notice plus an opportunity to be heard and participate in the litigation” (footnote omitted)); *Watson v. Wash. Preferred Life Ins. Co.*, 81 Wn.2d 403, 408, 502 P.2d 1016 (1972) (“The essence of procedural due process is notice and the right to be heard.”). Notice of an action to which one will be bound is an “elementary” requirement of due process, as without it, the fundamental right to be heard can be rendered irrelevant. *See Mullane*, 339 U.S. at 313.

In order to satisfy due process, the form of notice to class members must be “the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15). Under Federal Rule of Civil Procedure 23 and Washington Court Rule 23, courts must ensure that the notice is adequate. *See* Fed. R. Civ. P. 23(c)(2)(A) & (B) (mandating court oversight of notice in Rule 23(b)(3) class actions, and providing for discretionary oversight for classes certified under Rule 23(b)(1) and (b)(2)); *see also* CR 23(c)(2) & (3).

One common method of providing notice in class actions—where not all interested parties are ascertainable—is mass publication. *See Mullane*, 339 U.S. at 318 (upholding the constitutionality of mass publication as means of satisfying notice requirements where the parties’ “interests or addresses are unknown”). But such notice by publication conflicts with the confidentiality that parties traditionally enjoy in arbitration. Confidentiality is one of arbitration’s principal attractions. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n.4 (1st Cir. 1999) (“Each side may also prefer arbitration because of the confidentiality and finality that comes with arbitration.”); *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA

L. Rev. 949, 1086 (2000) (“Privacy can be an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum.”). The confidentiality of arbitration proceedings has good justification. It bolsters parties’ candor by allowing them to share information without fear that it will later be used against them, and shields trade secrets and business strategies. To this end, parties may include an express confidentiality provision, or incorporate specific arbitral rules into their agreements.

The notice requirement that due process rightly imposes on class action lawsuits inherently conflicts with this confidentiality. The notice necessary to satisfy due process would frustrate the arbitral parties’ expectations of privacy in electing arbitration. Class arbitration, therefore, may not accommodate the due process requirement of notice.

B. Class Arbitration Is Incompatible with the Requirements of Class Certification, Which Due Process Demands

In class action litigation, class certification serves an important gatekeeping role that protects the due process rights of absent class members. Under Federal Rule 23 and its Washington counterpart, a class may be certified only if the named plaintiff demonstrates the numerosity, commonality, and typicality of the class, and adequacy of the class representatives. *See* Fed. R. Civ. P. 23(a)(1)-(4); CR 23(a). By ensuring that

the class is sufficiently similar, and that the named plaintiff is representative of the class, these requirements guarantee that the named plaintiff's interests are aligned with absent class members', and ensure that class members' rights are adequately protected. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) (The adequacy requirement has "constitutional dimensions," and "implicates the due process rights of all members who will be bound by the judgment.").

Adherence to Rule 23's standards is also important "because it determines not only whether a representative suit may be brought, but also how it must be structured to ensure that all class members' interests are adequately represented." Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 112 (2000). Even after class certification, "[t]he district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts." *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983). These steps ensure that the trial is sufficiently individualized to protect the due process rights of both plaintiffs and defendants.

Because it is expensive for the party that loses a class certification decision to continue the litigation, class certification determinations are often outcome-determinative. *See Manual for Complex Litigation*, Third Ed.,

§ 30.1 at 212 (1995). This is especially true for defendants, who are under tremendous pressure to settle after a class is certified due to the increased amount of potential damages. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (defendants facing large damage awards against certified classes “will be under intense pressure to settle”). By ensuring that classes are only certified in appropriate circumstances, the class certification stage acts as a bulwark against frivolous litigation intended to secure settlements. Because of class certification’s importance, “a court should order class certification only after conducting a ‘rigorous analysis’ to ensure that the plaintiff seeking class certification has satisfied CR 23’s prerequisites.” *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007).

But this rigor, required by class certification rules and the principles of due process, is at odds with the very reason parties choose arbitration: quick and efficient dispute resolution. *See, e.g., Stolt-Nielsen*, 130 S. Ct. at 1775 (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize . . . lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”); *Munsey v. Walla Walla Coll.*, 80 Wn. App. 92, 95, 906 P.2d 988 (1995) (“[A]rbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than

litigation.”). While class certification often entitles the parties to discovery and complex evidentiary hearings, limitations on discovery are among “the hallmark[s] of arbitration.” *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 689, 99 Cal. Rptr. 2d 809 (2000). Under the Uniform Arbitration Act, an arbitrator “may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account . . . the desirability of making the proceeding fair, expeditious, and cost-effective.” RCW 7.04A.170(3). Thus the safeguards that protect parties to a litigation cannot be imported to arbitration without undermining the very rationale for arbitration; yet disposing of those safeguards would run the risk of allowing certification where it is not justified. Parties’ consent reconciles this conflict between class arbitration and the due process protection normally afforded by class certification.

In addition, arbitrators may not be able to determine when a group of potential plaintiffs should be treated as a class, because arbitrators are often neither lawyers nor judges. The Supreme Court has recognized the potential due process deficiencies that could result from allowing arbitrators to handle such complex tasks as class certification, writing that “while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of

absent parties.” *Concepcion*, 131 S. Ct. at 1750. In order for arbitration to maintain its attractive traits without infringing the due process rights of absent class members, courts must ensure that before class arbitration is imposed, all class members have consented to it.

C. Arbitrators May Be Unable To Protect the Due Process Rights of Absent Class Members

Even beyond the initial analysis of whether to certify a class, arbitrators may be unable to provide the same due process protections in class arbitration that courts normally afford. Through various uniform and mandatory rules of procedure, courts play an important role in protecting the due process rights of absent class members throughout class action litigation. *Berger*, 257 F.3d at 480 (“[T]he court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times.”). They are responsible for enforcing the parameters of Federal Rule 23 and Court Rule 23, which, in addition to requiring notice and class certification procedures, requires judicial scrutiny over settlements, and determinations of “manageability” and “superiority.” These rules are essential to ensuring the fundamental fairness of binding absent class members to the ultimate judgment of class litigation. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (Rule 23 was designed “so that the court can assure, to the

greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests.”).

Unlike judges, arbitrators may not be familiar with matters of constitutional law; they are generally chosen for their knowledge on discrete areas of the law or commerce. In many ways, this is a benefit; parties to an arbitration

trade the formalities of the judicial process for the expertise and expedition associated with arbitration, a less formal process of dispute resolution by an umpire who is neither a generalist judge nor a juror but instead brings to the assignment knowledge of the commercial setting in which the dispute arose.

See Lefkowitz v. Wagner, 395 F.3d 773, 780 (7th Cir. 2005), *cert. denied*, 546 U.S. 812 (2005). Unless absent class members consented to make that trade, subjecting them to class arbitration violates their rights that the rules of civil procedure were designed to safeguard.

D. Judicial Intervention in Arbitration Is Inconsistent with the Nature of Arbitration

One way to preserve the rights of absentees in class arbitration would be for courts to intervene. But such intervention is inconsistent with the principles of arbitration, and cannot compensate for class arbitration’s due process deficit.

First, both the U.S. and Washington Supreme Courts have limited the judiciary's role in arbitration to determining whether a valid arbitration agreement exists and deciding other "gateway matters," not monitoring the process to ensure it conforms with due process. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003); *Munsey*, 80 Wn. App. at 95-96 (superior and appellate courts' authority over arbitration is limited). Arbitration decisions are subject to very limited judicial review, and vacated in a narrow set of circumstances, including corruption, fraud, partiality, or misconduct. *See* 9 U.S.C. § 10; RCW 7.04A.230(1).

Second, judicial intervention would present logistical difficulties. Arbitration is meant to "avoid the courts insofar as the resolution of the dispute is concerned." *Barnett*, 119 Wn.2d at 160 (emphasis added). Arbitrators have therefore traditionally been afforded latitude in facilitating expeditious dispute resolution. *See* RCW 7.04A.150(1) ("The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding."). Judicial intervention may result in delay and increased costs, or "undermine the integrity of the arbitral process." *Johnson Controls, Inc. v. Edman Controls, Inc.*, Nos. 12-2308, 12-2623, 2013 WL 1098411, at *7 (7th Cir. Mar. 18, 2013) (court imposed high risk of sanctions for challenges to

arbitration decisions). By requiring two trials of every claim, judicial review of arbitrators' decisions would impair the central purpose of arbitration—efficiency. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (“If the courts were free to intervene . . . the speedy resolution of grievances by private mechanisms would be greatly undermined.”).

Third, even if judicial review were available, arbitration decisions do not lend themselves to such review. Arbitrators are not bound by precedent like courts are. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 719-20 (1999) (up to 90 percent of arbitrators would disregard the law to reach an equitable result in a case). Further, their decisions do not act as precedent for future courts, or other arbitrators and arbitration panels. See Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. Am. Arb. 1, 11-12 (2006). Accordingly, arbitrators are not required to explain the rationale behind their decisions. See *Barnett*, 119 Wn.2d at 156. This makes sense, as the arbitration process is a product of the parties' design, and meant to resolve the immediate dispute alone. The result is that arbitration decisions are not amenable to judicial review. And subjecting arbitration decisions to judicial review would undermine many of the policy reasons for Congress' and this state's declared preference for arbitration. See H.R. Rep.

No. 96, 68th Cong., 1st Sess., 1-2 (1924) (“It is practically appropriate that the [FAA should be enacted] at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”); *see also Davidson*, 135 Wn.2d at 117-18 (recognizing that Washington’s policy favoring arbitration promotes efficiency, and state policy therefore also favors the finality of arbitration awards). In order for class arbitration to retain the benefits that alternative dispute mechanisms provide, arbitration should retain its private nature.

II

FUNDAMENTAL RIGHTS CANNOT BE WAIVED BY SILENCE

In class arbitration, parties exchange the due process protections of courts for the gains in efficiency and specificity that arbitration provides. But this means that the election of class arbitration entails waiving certain fundamental rights. The U.S. Supreme Court has repeatedly held that it will not infer waivers of fundamental rights lightly. *See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999); *Ohio Bell Tel. Co. v. Public Utils. Comm’n of Ohio*, 301 U.S. 292, 307, 57 S. Ct. 724, 81 L. Ed. 1093 (1937) (“We do not presume acquiescence in the loss of fundamental rights.”). Indeed, “courts indulge every reasonable presumption against waiver.” *Aetna*

Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937); *State v. Ashue*, 145 Wn. App. 492, 503, 188 P.3d 522 (2008). A contract's silence cannot constitute a valid waiver of due process rights.

Even where contracts have included language purporting to waive fundamental rights, courts have found some such waivers constitutionally insufficient. Thus in *Fuentes v. Shevin*, 407 U.S. 67, the Court held that a conditional sales contract permitting the seller to repossess merchandise upon the buyer's default did not constitute a waiver of the buyer's right to prior notice and a hearing. In rejecting the waiver, the Court emphasized the importance of clarity, stating, "a waiver of constitutional rights in any context must, at the very *least*, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Id.* at 95 (emphasis added); *see also Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964) ("Waivers of constitutional rights to be effective, this Court has said, must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language."); *Acrey*, 103 Wn.2d at 207 (waiver of constitutional rights must be express).

There is even less reason to presume an individual has waived his or her constitutional rights where the contract does not even include ambiguous language on the subject to be waived. In *Fuentes*, the language was not clear enough; while it contained language permitting the seller to retake any property the buyer defaulted on, it “included nothing about the waiver of a prior hearing.” 407 U.S. at 96. In the present case, there is no language relating to class arbitration at all. Parties cannot be aware of the significance of their waiver if they did not include language constituting such a waiver. Accordingly, silence cannot constitute a valid waiver.

CONCLUSION

Federal law favors arbitration not only because of its efficiency gains, but also because such a policy bolsters individuals’ freedom of contract by effectuating their intent when they enter into arbitration agreements. *See Stolt-Nielsen*, 130 S. Ct. at 1773 (“[T]he ‘central’ or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’” (quoting *Volt*, 489 U.S. at 479)). Without evidence that the parties contemplated class arbitration, a court cannot glean consent to class arbitration from the mere agreement to arbitrate. *Id.* at 1775. The parties’ consent is paramount, and the differences between bilateral and class arbitration are such that the benefits that parties enjoy in the former are “much less assured” in the latter, making it doubtful that parties would have

consented to such a process. *Id.* But most importantly, consent to class arbitration involves the waiver of constitutional rights. A waiver inferred from silence threatens the constitutional rights of absent class members and undermines the purpose of the federal and state level policy favoring arbitration, which is to uphold arbitration in those cases where the parties have *agreed* to such a procedure. Courts should presume that where parties are silent as to the issue of class arbitration, the parties did not consent to class arbitration. Instead, courts should require express consent, manifested by unequivocal terms electing class arbitration. Such a policy would best respect the parties' intent, and bolster individuals' freedom to contract.

For the reasons stated above, the decision below should be affirmed.

DATED: April 18 2013.

Respectfully submitted,

TIMOTHY SANDEFUR
BRIAN T. HODGES
ANASTASIA KILLIAN

By



BRIAN T. HODGES
(WSBA No. 31976)

Attorneys for Amicus Curiae
Pacific Legal Foundation

DECLARATION OF SERVICE

BRIAN T. HODGES declares as follows:

RECEIVED BY E-MAIL

I am a resident of the State of Washington, employed at 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. I am over the age of 18 years and am not a party to this action. On the below date, true copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS were served to the following as indicated:

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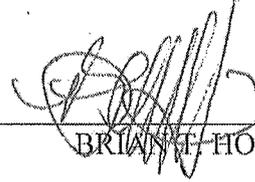
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 ORIGINAL

I declare under penalty of perjury that the foregoing is true and correct
and that this declaration was executed this 18th day of April, 2013, at
Bellevue, Washington.



BRIAN F. HODGES

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Subject: Hill v. Garda CL Northwest, No. 87877-3

Dear Clerk:

Attached for filing in *Hill v. Garda CL Northwest*, Supreme Court Case No. 87877-3 are the following pleadings:

1. Motion for Leave to File Brief as Amicus Curiae by the Pacific Legal Foundation with attached Declaration of Service; and
2. Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondents with attached Declaration of Service.

If you have any problems opening the attachments, or have any questions, please do not hesitate to contact this office.

Brian T. Hodges

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IN THE SUPREME COURT
STATE OF WASHINGTON

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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RONALD R. CARPENTER

2013 APR 30 P 12:43

STATE OF WASHINGTON

SUPREME COURT

FILED

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

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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.¹

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*

¹ 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*”)². 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...”).³

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

³ 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).⁴

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,

⁴ 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.⁵

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.

⁵ 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
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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:

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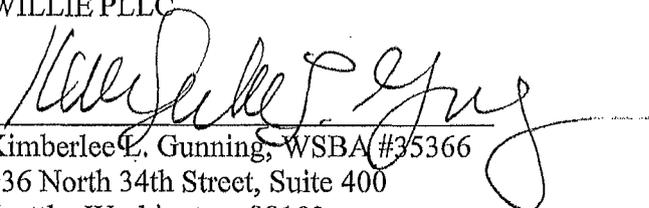
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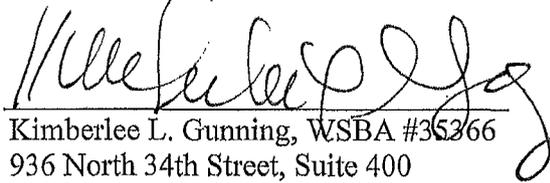
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Dear Supreme Court Clerk:

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

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Respectfully,

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BRIEF OF AMICI CURIAE OF WASHINGTON EMPLOYMENT
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I. IDENTITY AND INTEREST OF AMICI

Washington Employment Lawyers Association is comprised of approximately 143 Washington attorneys dedicated to the enforcement of state and federal law protecting individual employment rights. The Washington State Labor Council is a prominent advocate for the interests of working people and families in Washington, representing approximately 550 local and statewide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members. The Service Employees International Union locals, associated with Change to Win, advocate for approximately 100,000 members in health care, long-term care, childcare, public services, education, and property services in Washington State. *See* Declaration of Kathleen Phair Barnard.

II. STATEMENT OF THE CASE

Petitioners are approximately 300 messengers and drivers ("Employees") employed, or previously employed, by Garda CL Northwest ("Garda") in Washington who sued Garda in Superior Court because they were denied meal and rest breaks in violation of the Washington Industrial Welfare Act, RCW 49.12, and Minimum Wage Act, RCW 49.46. CP 7. Garda defended by arguing that the Employees had waived their right to a judicial forum for those claims because each collective bargaining agreement ("CBA") for each Garda location

contained an identical provision which, in Garda's view, required each employee to arbitrate any employment issue individually. The trial court certified the class but ordered arbitration on a class basis, and both parties appealed that decision. The Court of Appeals ordered that each Employee would have to individually arbitrate his or her claim. *Hill v. Garda CL Northwest*, 169 Wn. App. 685 (2012), *rev. granted*, 176 Wn.2d 1010 (2013). The Employees appealed.

III. ARGUMENT

A. THE COURT OF APPEALS ERRED IN COMPELLING ARBITRATION BECAUSE THE CBAS DO NOT FORECLOSE ACCESS TO WASHINGTON'S COURTS

1. CBAs That Contain Contractual Rights Identical To Public Law Rights Or That Do Not Subject Public Law Claims To Arbitration As The Exclusive Forum For Enforcement Do Not Waive The Statutory Right To A Judicial Forum

The right to litigate public law claims in court is a statutory right, which, under governing law, may be waived by a union only through a CBA that both expressly incorporates the law at issue and expressly makes arbitration the exclusive forum for enforcement of that right.

a. Statutory claims are not presumptively arbitrable under a CBA.

In order to further national labor policy, the National Labor Relations Act ("NLRA") requires a presumption that disputes arising out of a CBA must be arbitrated rather than litigated in court. Because a CBA is the

result of collective bargaining to establish the contractual rights and the work rules for the duration of one CBA (“the law of the shop”), arbitrators with expertise suitable for determining the contractual rights of the parties, rather than the courts, are called upon to decide contractual disputes, which are presumed to be arbitrable. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998).¹

Under long established precedent, the presumption of arbitrability does not extend to claims which arise in public law because national labor policy is not implicated in the resolution of public law claims, including those arising from statutes. *Wright*, 525 U.S. at 78. *See also, Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983) (there is no presumption of arbitrability for statutory claims under the NLRA).

CBAs may contain purely contractual rights that are similar, or even identical, to statutory rights but yet remain “the law of the shop” not the

¹ *See also, AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650-51, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648 (1986) (The “presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.”)(internal quotations and citation omitted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648, 105 S. Ct. 3346, 3365, 87 L. Ed. 2d 444 (1985) (the “special role of the arbitrator ... is to effectuate the intent of the parties rather than the requirements of enacted legislation.... the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-583, 80 S. Ct. 1347, 1352-1353, 4 L. Ed. 2d 1409 (1960)).

law of the land. *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1207 (11th Cir. 2011), citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 262 (2009), and *Gardner–Denver*, 415 U.S. at 53–54, 94 S. Ct. 1011. Those contractual rights do not displace the statutory rights they mimic, and enforcement of them does not preclude court enforcement. *Id.* Even where the CBA expressly incorporates statutory rights in clear and unmistakable terms, there is no presumption that the statutory rights are subject to arbitration. *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1207 (10th Cir. 2011) (citing *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)). Nor does incorporation of statutory rights preclude enforcement in court, unless they are subject to arbitration as the sole and exclusive forum for enforcement.

b. To waive access to a judicial forum, the CBA must be clear and unmistakable in expressly incorporating statutory claims and in precluding enforcement in court.

Although the Court of Appeals acknowledged that the standard set forth in *Wright*, 525 U.S. at 79, governs whether a CBA provision waives employees' statutory right to a judicial forum, it erred in applying that standard. To effectuate such a waiver, a CBA must contain express, clear and unmistakable provisions demonstrating the intent to incorporate statutory rights (not merely contractual rights defined by reference to

statutes), and demonstrating that those claims are subject to arbitration as the exclusive forum for remedy. The CBAs at issue here do neither.

In *Wright*, the Court held that if unions had the power to prospectively waive bargaining unit members' statutory rights of access to court, the waiver would have to be "explicitly stated," and "clear and unmistakable." 525 U.S. at 80.² See also, *Pyett*, 556 U.S. at 274 (holding that unions do have that authority and that a CBA which explicitly stated in clear and unmistakable terms that specific statutory claims were incorporated into the contract and that arbitration under the CBA was the sole and exclusive forum for enforcing those claims would waive access to a judicial forum).³ Therefore, while a union may waive employees' rights to a judicial forum for their public law claims, that can be done only by expressly incorporating the statutory requirements into the CBA which an arbitrator is expressly empowered to adjudicate through the sole and exclusive forum of arbitration. *Pyett*, 556 U.S. at 265-66. First, to overcome the normal expectation that a CBA embodies only contractual obligations

² Because the rights arguably being waived by the union were statutory rights arising from public law, not rights arising from a contract negotiated by the union, the Court adopted the longstanding standard under the NLRA for union executed waivers of bargaining unit members' statutory rights. *Id.* at 79-80 (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983), and *Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 281, 76 S. Ct. 349, 357, 100 L. Ed. 309 (1956)). Because that standard was not met by the CBA at issue in *Wright*, the Court did not reach the question of whether union's bargaining authority extended to such a waiver. 525 U.S. at 397.

³ In *Pyett*, the employee plaintiffs conceded that the waiver was sufficiently explicit and clear and unmistakable. 556 U.S. at 272.

(although those contractual obligations may be identical to obligations created by statute), there must be “a clear and unmistakable incorporation” into the CBA of the specific statutory right for which judicial access was allegedly waived. *Wright*, 525 U.S. at 79, 81. Second, the requirement that the statutory claim can be vindicated only through arbitration must be explicit and clear and unmistakable. *Id.* at 79-80.

Even if statutory rights are incorporated into the CBA, that alone does not waive the right to access court because there is no presumption that those statutory rights are arbitrable. In *Wright*, the Court rejected the employer’s argument that the plaintiff’s ADA claim could not proceed in court because the CBA “did not incorporate the ADA by reference, [and] even if it did so, however—thereby creating a contractual right that is coextensive with the federal statutory right—the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires; and that is not a question which should be *presumed* to be included within the arbitration requirement.” 525 U.S. at 78, 79.⁴ Therefore, the second condition must also be met to accomplish prospective waiver of employees’ access to court for those claims: there

⁴ The Court pointedly stated that the presumption of arbitrability ordinarily applied to grievances under a CBA did not apply to preclude the litigation of statutory claims in court. *Wright*, 525 U.S. at 78 (The presumption of arbitrability “does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to *interpret the terms of a CBA.*”) (emphasis in original)

must be clear and unmistakable language in the CBA making arbitration the exclusive forum for those claims. *Id.* at 79-80.

2. The CBAs Here Do Not Waive the Employees' Access To Court Because They Do Not Specifically Incorporate Causes Of Action Under The Washington Industrial Welfare Act And Minimum Wage Act And Because The CBAs Do Not Subject Those Causes of Action To Arbitration As The Exclusive Forum.

a. The CBAs define contractual rights by reference to public law and do not incorporate statutory claims.

The Court of Appeals erred in holding that “arbitration agreements require employees to submit *any* claim under *any* federal, state or local law to the grievance procedure outlined in the arbitration agreement[, including] wage claims under chapter 49.52 RCW and chapter 49.12 RCW.” *Hill*, 169 Wn. App. at 695. The court failed to correctly apply *Wright* or to address the subsequent decision in *Pyett* and the myriad of cases decided after *Wright* and *Pyett* which adhere to the rule that contract rights which parallel statutory rights do not supplant the statutory rights. Only a CBA that expressly incorporates specific statutory rights explicitly made subject to arbitration as the sole and exclusive forum for redress would meet the dual requirement of express incorporation and explicit waiver of employees’ right to seek redress in a judicial forum for those statutory rights. *Id.* at 258-59. The CBA in *Pyett* provided:

There shall be no discrimination against any present or future employee **by reason** of race, creed, color, age, disability, national origin, sex, union membership, or **any other characteristic protected by law, including**, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, **the Age Discrimination in Employment Act**, the New York State Human Rights Law, **the New York City Human Rights Code**, ... or any other similar laws, rules, or regulations. **All such claims shall be subject to the grievance and arbitration procedures ... as the sole and exclusive remedy for violations.**

556 U.S. 251-52 (internal quotation marks omitted) (emphasis added).

Such a clause would waive access to court for claims under the ADEA and the New York State Human Rights Law. *Id.* at 256-57.⁵ Subsequent cases decided have consistently held that CBAs that define contract claims with reference to statutory standards do not meet the first of the two requirements to waive judicial access, the specific incorporation of public law claims. In *Mathews*, the CBA provided:

The Employer and the Union acknowledge continuation of their policies of no discrimination against employees and applicants on the basis of age, sex, race, religious beliefs, color, national origin or disability in accordance with and **as required by applicable state and federal laws.**

649 F.3d 1199, 1206 (11th Cir. 2011) (emphasis added). The Court rejected the argument that discrimination statutes were incorporated,

⁵ This result differed from those cases in which the contractual and statutory rights were held to be distinct because, as the Court noted, the CBAs in those cases "did not expressly reference the statutory claim at issue," unlike the CBA at issue in *Pyett*. *Id.* at 263-264 (discussing *Alexander*, 415 U.S. 36, *McDonald v. West Branch*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984), and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)).

holding that the CBA did not encompass “statutory claims ... [because] the ‘distinctly separate nature’ of contractual and statutory rights ... does not change even though the contours of the CBA's anti-discrimination protections were defined by reference to federal law.” *Id.* at 1206 (quoting *Gardner–Denver*, 415 U.S. at 50, 54). *See also*, *Pyett*, 556 U.S. at 263.

In *Ibarra v. United Parcel Serv.*, the CBA provided:

The Employer and the Union agree not to discriminate against any individual ... because of such individual's race, color, religion, sex, sexual orientation, national origin, physical disability[,] veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law, nor will they limit, segregate or classify employees in any way to deprive any individual employees of employment opportunities because of race, color, religion, sex, national origin, physical disability, veteran status or age in violation of any federal or state law, **or engage in any other discriminatory acts prohibited by law. This Article also covers employees with a qualified disability under the Americans with Disabilities Act.**

695 F.3d 354, 357 (5th Cir. 2012) (emphasis added). The Court held that this provision did not incorporate statutory rights into the CBA because “[u]nder *Gardner–Denver*, an employee's statutory and contractual rights remain independent even if the contours of the CBA's antidiscrimination protections [are] defined by reference to federal law.” *Ibarra*, 695 F.3d at 358 (internal quotations omitted). “[P]ost-*Wright* courts appear to be in agreement that a statute must specifically be mentioned in a CBA for it to

even approach *Wright*'s 'clear and unmistakable' standard." *Id.* at 360, n. 37 (quoting *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631 (6th Cir.1999)).⁶

Here, the CBAs define contractual rights by reference to public law by stating that employees may file grievances alleging that statutory standards have been violated. The CBAs define a grievance as:

a legitimate controversy, claim or dispute by an employee, shop steward or the Union concerning rates of pay, entitlement to compensation, benefits, hours, or working conditions set forth herein, including without limitation, claims of harassment or discrimination or hostile work environment in any form, ... or any claim of retaliation for making any such or similar claim, or the interpretation or application of this Agreement or any agreement made supplementary thereto, or any claim under any federal, state or local law, statute or regulation or under any common law theory whether residing in contract, tort or equity or any other claim related to the employment relationship.

⁶(internal quotations and citations omitted). *See also, Cavallaro v. UMass Mem. Healthcare, Inc.*, 678 F.3d 1, 7 & n. 7 (1st Cir. 2012) ("a broadly-worded arbitration clause ... will not suffice; rather something closer to specific enumeration of statutory claims to be arbitrated is required") (citations omitted)); *Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679, 680 (9th Cir. 2011) (no waiver of access to court under a CBA that did not explicitly incorporate the plaintiff's disability discrimination claim under the California Fair Employment and Housing Act because the court "will not interpret a CBA to waive an individual employee's right to litigate statutory discrimination claims unless the CBA waiver 'explicit[ly] incorporat[es] ... statutory antidiscrimination requirements") (quoting *Wright*, 525 U.S. at 80); *Harrell v. Kellogg Co.*, 2012 WL 3962674, *7 (E.D. Pa. 2012) (CBA which explicitly referenced ADA but not 42 U.S.C. § 1981 did not waive access to judicial forum for Section 1981 action because "a statute must specifically be mentioned in a CBA for it to even approach *Wright*'s 'clear and unmistakable' standard."); *Martinez*, 2010 WL 3359372 (CBA making compliance with California state wage order subject to arbitration exclusive remedy, but which did not specifically express the wage statutes at issue in the court litigation, did not constitute forum waiver); *Peterson v. New Castle Corp.*, 2011 WL 5117884, *2 (D. Nev. 2011) (no waiver of a judicial forum because the CBA "nowhere explicitly indicates that the employee waives the right to sue under Title VII or other anti-discrimination statutes" because it "does not mention these statutes by name, and it does not even state generally that the right to litigate under discrimination statutes is waived or must be arbitrated ...").

CP 142-143, 206-207, 229-230. These CBAs create contractual rights which parallel but do not supplant the Employees' statutory rights. The CBAs do not explicitly state that the Washington Industrial Welfare Act and Minimum Wage Act are incorporated. Thus, the first prerequisite for waiver of a judicial forum has not been met. *See, e.g., Ibarra*, 695 F.3d at 360, n. 37; *Cavallaro*, 678 F.3d at 7 & n. 7; *Bratten*, 185 F.3d at 631; *Powell*, 457 F. App'x at 680; *Harrell*, 2012 WL 3962674, *7; *Peterson v. New Castle Corp.*, 2011 WL 5117884, *2; *Martinez*, 2010 WL 3359372. Compare: *Pyett*, 556 U.S. at 263–264. Nor, as explained below, do the CBAs subject statutory claims to arbitration.

- b. CBAs, like those at issue here, do not waive access to a judicial forum because they do not contain express and clear and unmistakable language making statutory claims subject to arbitration in lieu of enforcement in court.**

There is no presumption that statutory claims are arbitrable, and the CBAs here do not explicitly make public law claims arbitrable as the sole and exclusive means of enforcement. Therefore, the Court of Appeals erred when it rejected the Employees' argument that an arbitration agreement must contain an explicit statement that arbitration is the parties' exclusive remedy and instead *presumed* that the CBA waived the Employees' right to pursue their claims in court. *Hill*, 169 Wn. App. at 696 (citing *Minter v. Pierce Transit*, 68 Wn. App. 528, 531-32 (1993), and

Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965)). This ruling is directly contrary to the long line of NLRA precedent stretching from *Metropolitan Edison Co.*, 460 U.S. at 708, and *Mitsubishi Motors Corp.*, 473 U.S. at 648, through *Wright*, 525 U.S. at 578, and *Pyett*, 556 U.S. at 258 (all holding that no such presumption exists for statutory claims).

In *Pyett*, the CBA explicitly referenced the Age Discrimination in Employment Act, subjected that claim to “arbitration procedures ... as the sole and exclusive remedy for violations,” and stated that arbitrators “shall apply appropriate law in rendering decisions based upon claims of discrimination.” 556 U.S. at 252. This, the Court held was an “agreement to arbitrate statutory antidiscrimination claims” that was “explicitly stated” and, the plaintiffs conceded, was sufficiently explicit to constitute the clear and unmistakable language the Court required to effectively waive access to court for their age discrimination claims. *Id.* at 258-259.⁷

The *Mathews* Court held that it could not “be argued that the arbitration agreement required submission of statutory claims” 649 F.3d at 1207. “By its own terms, the arbitration agreement applied only to disagreements ‘as to the interpretation, application or construction of *this contract* [i.e. the CBA], including all disputes involving discharge or

⁷ In contrast, a collective bargaining agreement giving the arbitrator “authority to resolve only questions of contractual rights,” does not preclude bringing statutory claims in court “regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by” statutes. *Pyett*, 556 U.S. at 263.

discipline,”” *Id.* (emphasis added by the court). Moreover, the arbitration provision, “from which the arbitrator derived all authority stated that “[t]he arbitrator shall have no power to add to, subtract from, change or modify any provision of this Agreement, *but shall be authorized only to resolve the dispute submitted to him or her.*” *Id.* at 1207-08 (emphasis added by the Court).

Similarly in *Ibarra*, the grievance arbitration procedure set forth in Article 51 of the CBA defined grievance as “any controversy, complaint, misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this Agreement” and committed “any grievance, complaint, or dispute” to a procedure which “culminate[d] in submission of a grievance to an arbitrator....” 695 F.3d at 357-358. Despite the fact that the parties had agreed in Article 51 to commit *any complaint or dispute* to arbitration, the Fifth Circuit rejected the employer’s contention that “Title VII claims [were] within the scope of the controversies, complaints, and disputes that must be resolved via the grievance procedures set forth in Article 51,” even though “the nondiscrimination rights guaranteed by the CBA [in Article 36 were] coterminous with those under federal and state law.” *Ibarra*, 695 F.3d at 358. This was so “because Article 36 mention[ed] no specific federal or state statutes and ma[de] no reference to the grievance procedures set forth

in Article 51” and because the “CBA contain[ed] no express waiver of a judicial forum for claims brought pursuant to Title VII.” *Id.* at 357. *See also, Peterson,* 2011 WL 5117884, *2 (holding that there had been no waiver because the CBA “nowhere explicitly indicates that the employee waives the right to sue under Title VII or other anti-discrimination statutes” or “even state[s] generally that the right to litigate under discrimination statutes is waived or must be arbitrated”)

Here, the CBAs define grievances as including disputes defined by generic references to statutes and common law. Despite the fact that the contours of some grievances are defined by reference to statutory claims, those claims remain contractual. Moreover, the arbitration clause nowhere indicates that statutory claims are subject to arbitration or that access to court is waived for statutory claims. The arbitration provisions at issue here are similar to that in *Mathews*—they do not expressly state that statutory claims are arbitrable, and limit the arbitrator’s authority by stating that the arbitrator is not allowed to “amend, take away, modify, add to, change, or disregard any provision” of the CBAs. CP 142-143; 206-207, 229-230. Because the CBAs here do not contain clear and unmistakable provisions explicitly incorporating the wage statutes or waiving the Employees’ access to Washington courts to enforce their rights to wages owed, this Court should reverse.

B. EVEN IF THE CBAS WAIVED THE EMPLOYEES' ACCESS TO COURT, THEY ARE NOT ENFORCEABLE HERE, WHERE IT WOULD WORK AN UNLAWFUL WAIVER OF THE SUBSTANTIVE STATUTORY PROTECTIONS.

A reading of the CBA to preclude access to court for the statutory claims here works a waiver of the substantive protections of the state statutes, contrary to federal law. In *Pyett*, the plaintiffs argued that their substantive rights under the ADA and New York Human Rights Law could not be vindicated because the union declined to arbitrate those claims. While acknowledging that “a substantive waiver of federally protected civil rights will not be upheld,” the Court declined to resolve whether the CBA operated “as a substantive waiver” of their statutory rights because the record did not disclose whether the CBA required, or even allowed, the plaintiffs to arbitrate without the union. 559 U.S. at 273-274.⁸ Subsequent cases make it clear that, if access to the only forum for vindication of statutory rights is controlled by the union which prevents arbitration, the waiver may not be given effect. *See, e.g., Brown v. Servs. For The Underserved*, 2012 WL 3111903 (E.D.N.Y. 2012); *de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198 (D. Mass. 2011); *Morris v. Temco Serv. Indus., Inc.*, 2010 WL 3291810 (S.D.N.Y.

⁸ (citing *Mitsubishi.*, 473 U.S. at 637, and n. 19). *See also, Pyett*, 556 U.S. at 285 (Souter, J., dissenting) (“the majority opinion ... explicitly reserves the question whether a CBA’s waiver of a judicial forum is enforceable when the union controls access to and presentation of employees’ claims in arbitration, which is usually the case.”)

2010); *Kravar v. Triangle Servs., Inc.*, 2009 WL 1392595 (S.D.N.Y. 2009).

Here, any request by Employees to arbitrate would almost certainly have been a futility because the union does not have the resources to arbitrate and has never done so. CP 606-607, 571-72. Therefore, the case should be remanded to the trial court with instructions to allow the Employees to test their ability to arbitrate, and if not allowed, to resume the class litigation in the trial court. *See e.g., Veliz v. Collins Bldg. Services, Inc.*, 2011 WL 4444498 (S.D.N.Y. 2011) (dismissing suit without prejudice because if the union prevented plaintiff from resolving his “statutory claims through the procedures set forth therein, the CBA will be unenforceable and Veliz will have the right to refile his claim in federal court.”) (citing *Borrero v. Ruppert Hous. Co., Inc.*, 2009 WL 1748060 (S.D.N.Y. 2009) and *Kravar*, 2009 WL 1392595, at *3 (both dismissing without prejudice for that reason)).

Moreover, the CBA does not allow the grievances to go to arbitration without the union. CP 142-143, 206-207, 229-230. Therefore, Garda’s willingness to arbitrate with each employee individually does not cure this deficiency. *Kravar*, 2009 WL 1392595 at *4 (employer’s argument that it had notified employee of its willingness to arbitrate her ADA claim under the CBA, but employee had refused because that argument “confused the

issue. The arbitration provision that the Court must enforce is the one the union and the [employer] entered into, not a hypothetical agreement in which the employer's rather than the union's consent is critical.”).⁹

C. SHOULD THE COURT HOLD THAT THE EMPLOYEES' CLAIMS ARE ACTIONABLE ONLY UNDER THE CBA, THE EMPLOYEES' CLAIMS MAY BE PURSUED IN A CLASS GRIEVANCE BECAUSE THEY ARISE UNDER FEDERAL LAW, SECTION 301 OF THE TAFT-HARTLEY ACT.

Should the Court nevertheless find that the Employees' right to bring their claims in court has been waived and that they could pursue their claims in arbitration without the union, those claims should be arbitrated by the class the trial court certified. The Court of Appeals erred in holding that under *Stolt-Nielson v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), the CBA's failure to mention class arbitration precluded class arbitration. If the Employees' claims are incorporated in the CBAs, those claims are governed by Section 301 of the Taft-Hartley Act, 29 USC 158, and governed by the federal common law developed under that statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). The FAA does not preempt the NLRA; rather, it

⁹ Cf., *Powell*, 457 F. App'x at 680 (no waiver because there was no explicit incorporation of statutory requirements and arbitration without the union was not contemplated under the CBA). The fact that Garda required its employees to “sign” the CBA does not change this. This direct dealing with employees was in derogation of the union's representative status under Section 9(a) and an unfair labor practice in violation of Section 8(1)(5) of the NLRA. See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Pyett*, 556 U.S. at 248.

must be accommodated to the NLRA's purposes. *Cf., In re Am. Exp. Merchants' Litig.*, 667 F.3d 204, 212-17 (2d Cir. 2012) (majority opinion), and 681 F.3d 139 (2d Cir. 2012) (Pooler, J., concurring) (the teachings of *Concepcion* do not apply to determine the arbitrability of federal causes of action because the FAA does not preempt other federal statutes, but rather must be accommodated to them).¹⁰ That accommodation is not difficult because while *Stolt-Nielson* held that under the Federal Arbitration Act (FAA) arbitration is a matter of consent, it was equally clear that custom and usage are relevant to determining the parties' intent. *Id.* at 1769 n. 6, 1770, 1775. Here it is uncontroverted that collective resolution of grievances through arbitration *is* the custom in labor disputes.

Similarly, Garda's reliance on *AT&T Mobility LLC v. Concepcion*, U.S. 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), to contend that the undisputed custom of class arbitration in labor disputes "has no impact on what the parties agreed to in the case at hand," is misplaced. Ans. to Pet. at 17 (citing *Concepcion*, 131 S. Ct. at 1752, rejecting evidence of custom and usage because that argument flowed from usage that arose from *state*

¹⁰ See also, *Orman v. Citigroup, Inc.*, 2012 WL 4039850 (S.D.N.Y. 2012) ("It is clear ... that the vindication of federal statutory rights doctrine remains the law of the Second Circuit not withstanding *Concepcion*"); *Fromer v. Comcast Corp.*, 886 F. Supp. 2d 106, 113-14 (D. Conn. 2012) (holding that FAA preempts state unconscionability doctrine as to state unfair trade practices act but not Second Circuit doctrine as to federal antitrust claim); *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 310 (S.D.N.Y. 2011) (holding that *Concepcion* addressed only FAA's preemptive effect on state law and in no way abrogated federal arbitral law); *Chen-Oster v. Goldman*, 2011 WL 2671813 *3, n.2 (S.D.N.Y. 2011) ("the FAA may be subjugated to competing federal statutory rights").

common law requirements which were preempted by the FAA). As the Second Circuit observed, *Concepcion* held that “class arbitration, to the extent it is manufactured by *state common law of unconscionability* rather than consensual [agreement], is inconsistent with the FAA.” *Merchants' Litig.*, 667 F.3d at 213 (emphasis added). Where, as here, the obligation to engage in class arbitration arises through a CBA and the federal common law interpreting consensual agreements between a union and an employer, not only is the FAA’s concern for “consent” satisfied,¹¹ that concern must be accommodated to the body of common law under Section 301, which is “at the very heart of the system of industrial self-government.” *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).¹²

Arbitration of grievances that cover the entire bargaining unit, or all bargaining unit members affected by the alleged contract violation, are standard in labor arbitration, including arbitration of contractual parallels

¹¹ Amicus Pacific Legal Foundation (“PLF”) contends that the lack of consent by absent class members would violate their due process rights. That is an entirely misplaced argument in this context. If, as Garda contends, the union had the authority to waive the Employees’ access to court in favor of arbitration under the CBAs, then the union’s authority was sufficient to bring the employees into the normal process under the CBAs. Nor are PLF’s concerns about the fairness of class certification under Civil Rule 23 pertinent here, where the union has representational status under Section 9(a) of the NLRA to proceed to arbitration for all its bargaining unit members.

¹² Garda’s Supplemental Brief appears to abandon the mistaken argument made in its Answer to the Petition, contending that Employees’ statutory claims are preempted under Section 301 because the CBA must be interpreted to adjudicate those claims. Of course, the claims are not preempted. *See Hume v. American Disposal*, 124 Wn.2d 656 (1994), *cert. denied*, 513 U.S. 1112 (1995).

to state laws.¹³ Should the FAA not give way to this overriding purpose, the national labor policy would be subverted. This leads to but one conclusion—that the Employees have the right to pursue common grievances as a class is not forestalled by the FAA and is protected by the NLRA.¹⁴ Therefore, if the Court holds the CBAs waive access to court and that the Employees are required to arbitrate even if the union refuses to arbitrate, they must be allowed to arbitrate as a class.

IV. CONCLUSION

Amici respectfully submit that this Court should remand for class litigation in the superior court.

RESPECTFULLY SUBMITTED this 22nd day of April, 2013.


Kathleen Phair Barnard
WSBA No. 17896


Jeffrey L. Needle
WSBA #3646

¹³ See e.g. Grievance: Family Leave Benefits, AFA Case No. 36-99-02-49-03 (the negotiated ability to use paid time off to care for ill family members, a negotiated contractual right parallel to the Washington Family Care Act, must be apply to all bargaining unit members regardless of state of residence), a copy of which is appended to this brief.

¹⁴ See e.g., Elkouri & Elkouri, HOW ARBITRATION WORKS 212 (Alan Miles Rubin, 6th ed. 2003); *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *D.R. Horton, Inc. v. Michael Cuda*, 357 N.L.R.B No. 184 (2012). Garda's contention that *D.R. Horton* is no longer good law because of decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) is incorrect; the appeal of the NLRB's decision in *D.R. Horton* is pending in the 5th Circuit. Of course, if, as Employees and Amici here contend, there has been no waiver of the right to litigate, there also has been no waiver of the right under Section 7 of the NLRA, 29 U.S.C. § 157, to litigate as the class the trial court originally certified.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2013, I caused the Motion of WELA, Washington State Labor Council and SEIU Local Unions, the Declaration of Kathleen Phair Barnard in Support of the Motion, and the Amici Curiae Brief to be served via email and First Class U.S. Mail to:

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Kathleen Phair Barnard, WSBA # 17896

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants,

v.

GARDA CL NORTHWEST, INC.,

Defendant/Respondent.

No. 87877-3

**DECLARATION OF
KATHLEEN PHAIR
BARNARD IN SUPPORT
OF MOTION OF WELA,
STATE LABOR
COUNCIL AND SEIU
LOCALS FOR LEAVE
TO FILE AMICI
CURIAE
MEMORANDUM**

Kathleen Phair Barnard declares and states as follows based on her personal knowledge:

1. I am an attorney authorized to practice law in the State of Washington. I am the Chair of the Executive Board of Washington Employment Lawyers Association (“WELA”) and am authorized by its Amicus Committee to bring this motion, and to submit the Amici Curiae Memorandum filed together with this motion. For the past 24 years, in addition to representing individual employees in employment cases, I have represented labor unions in all aspects of collective bargaining and litigation. I am authorized by the Washington State Labor Council, AFL-CIO (“State Labor Council”) and the Service Employees International

Declaration of Kathleen Phair Barnard - 1

Union Local 925, Local 6, Healthcare 775NW and Healthcare 1199NW (“SEIU Local Unions”) to bring this motion, and to submit the Amici Curiae Memorandum filed together with this motion. I file this declaration in support of the Motion filed this date for leave to file an Amici Curiae Memorandum in the above referenced case.

2. WELA is a chapter of the National Employment Lawyers Association (“NELA”), a non-profit organization. WELA’s approximately 143 members are Washington attorneys who primarily represent employees in employment law matters, including, *inter alia*, cases brought under the Washington Law Against Discrimination and wage and hours laws. One of WELA’s principal goals is to advance the rights of employees against unlawful discrimination and to uphold the integrity of state and federal law protecting individual employment rights. WELA has appeared as amicus curiae in many cases before the Washington State Supreme Court involving statutory protections for employees and employees’ rights to litigate and arbitrate their rights under those statutes.

3. The Washington State Labor Council, a state federation of the AFL-CIO, is a voluntary non-profit organization dedicated to protecting and strengthening the rights and conditions of working people and their

Declaration of Kathleen Phair Barnard - 2

families. It is the largest and most prominent advocate for the interests of working people in the state of Washington. It represents approximately 550 local and statewide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members.

4. The SEIU Local Unions represent and advocate for almost 100,000 members in the fields of health care, long-term care, childcare, public services, education, and property services. SEIU Local 925 represents 23,000 members in education, local government and non-profit organizations. SEIU Local 6 represents over 4,000 janitors and security officers. SEIU Healthcare 775NW is an organization of over 45,000 long-term care workers who care for the state's most vulnerable elderly and disabled residents and who have joined together to have a stronger voice for quality care, living wages and good benefits. SEIU HealthCare 119NW is made up of 24,000 nurses, health care employees and mental health workers.

5. I have reviewed the briefs filed in this Court by the parties and proposed amici. The brief WELA, the State Labor Council and the SEIU locals seek to file delineates developments in the federal law concerning clear and unmistakable waivers of statutory rights in collective bargaining agreements since the decision in *Brundridge v. Fluor Fed. Services Inc.*,

109 Wn. App. 347, 355-56, (2001), and the interplay of Section 301 of the Taft-Hartley Act, 29 U.S.C. § 158 and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and provides analysis which should assist the Court on review..

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

SIGNED at Seattle, Washington, this 22nd day of April, 2013.

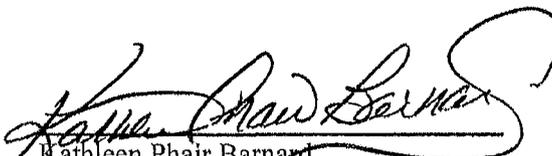

Kathleen Phair Barnard
WSBA # 17986

EXHIBIT K

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WASHINGTON SUPREME COURT
NO. 87877-3

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

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants.

**PETITIONERS' ANSWER TO BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION**

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 ORIGINAL

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I. INTRODUCTION

The brief amicus curiae of the Pacific Legal Foundation (PLF) focuses on only one issue—whether the trial court was correct to order class arbitration. This Court should not reach that issue because the trial court should not have ordered arbitration at all, for several reasons set forth in the Supplemental Brief, including Garda’s litigation waiver, the absence of a clear waiver of judicial remedies by the employees, and the unconscionable terms of the arbitration clause at issue.

If the Court nonetheless reaches the issue of class arbitration, it should disregard the policy-related concerns raised by PLF. Those concerns are entirely misplaced in this case. Whatever merits there may be in championing the rights of relatively low-wage employees “to litigate their individual claims” to compensation for missed meal and rest breaks rather than have those claims decided along with the rest of their workforce in a single class action, those rights have already been fully protected in this case. Thanks to Garda’s extraordinary delay in demanding arbitration, by the time arbitration was ordered the class had already been certified after a Superior Court judge’s “rigorous analysis,” and each class member had received individual notice of this case and the opportunity to opt out of the class adjudication of their claims. In fact, the only threat to the employees’ due process rights comes from the prospect

of forcing them to individually arbitrate rather than obtain a class resolution as previously promised by the court. All class members have elected to have their claims resolved in a class proceeding, and PLF's concerns have no application in this case.

II. FACTUAL SUMMARY

As the underlying and supplemental briefs explain, this case was litigated for 19 months in the King County Superior Court, with the Hon. Julie Spector presiding. The court certified the class under Civil Rule 23 and approved and directed actual personal notice to be mailed to each class member. CP 896-902. The 306 class members received notice and had the opportunity to opt out of the class action. CP 549. A total of 23 did opt out, leaving a total of 283 class members in the class. *See* CP 745 n. 1. Given this procedural background, the PLF's concerns for the "due process" rights of the class members are completely misplaced.

III. ARGUMENT

The PLF's brief takes the position that allowing this case to proceed in arbitration on a class basis would threaten the fundamental rights of the employee class members to the due process of law. In particular, PLF argues that Civil Rule 23 serves to safeguard absent class members' Fourteenth Amendment right to "adequate notice, opportunity to appear, and adequate representation." PLF Brief at 5. In class

arbitration, PLF argues, those protections may theoretically be altered or waived by agreement of the parties. Then, leaping from the theoretical to the absolute, PLF conflates class arbitration with a complete waiver of all Rule 23 protections, and argues Courts should accept class arbitration only in cases where the class members have clearly and expressly agreed to such a complete waiver. *See id.* at 4, 19.

PLF's arguments ultimately contradict *Stolt-Nielsen*, which expressly recognized that an arbitration agreement may *implicitly* permit class arbitration. *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).¹ PLF's arguments are also divorced from the reality that employees and other individual litigants face in attempting to make relatively small-value claims through an expensive legal process. For such litigants, it is far more likely that a waiver of their rights will result from the imposition of mandatory individual arbitration than from the use of class adjudication in arbitration. It is not genuinely disputed that depriving such litigants of a class action may often deprive them of *any*

¹ *See also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1750 (2011) held that an order permitting class arbitration must be based on "the arbitration agreement itself or some background principle of contract law that would affect its interpretation."; *Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.*, 683 F.3d 18, 22 (1st Cir. 2012) ("we ... reject the ... argument ... that there must be express contractual language evincing the parties' intent to permit class or collective arbitration; accord *Sutter v. Oxford Health Plans, Inc.*, 675 F.3d 215, 222 n. 5 (3d Cir.), cert. granted *Oxford Health Plans v. Sutter*, 133 S. Ct. 786 (2012); *Jock v. Sterling Jewelers*, 646 F.3d 113, 121 (2d Cir. 2011).

ability to enforce their statutory rights, especially where, as here, each employee would be compelled to bear costs of arbitration that could be \$5,000 or more. CP 550, 598 (one-day arbitration averaged \$4,469.96 in 2009). See *Scott v. Cingular*, 160 Wn.2d 843, 853-54 (2007); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011); see also *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 604 (2013) (describing cost-prohibitive defense to arbitration).

The employees do not disagree with PLF that arbitration is “a less formal, potentially less safe procedure” that sacrifices the due process protections of the courtroom, which is precisely why the courts have held that there must be a clear waiver of judicial remedies by the employees, and no unconscionable provisions in the arbitration agreement, neither of which condition is met here. Pet. Supp. Brief at 6-17. Of course, PLF fails to acknowledge the practical and logical result of its argument, which is that each employee in this case would be forced into this less protective forum by himself or herself, or might be left no remedy at all, a strange outcome given PLF’s supposed concern with protecting the due process rights of employees.

But the Court need not even consider logical and legal foundation of PLF’s position because none of the concerns it expresses are even present in this case. The class members in this case *have* received all of

the due process protections that Rule 23 protects, including notice, an opportunity to appear, and adequate representation. They all received *actual notice* of this case and their right to be represented by the named plaintiffs and their counsel or to opt out and pursue their claims individually. *See* CP 549, 899-902. The vast majority—283 of them—elected to have their claims decided by class-wide adjudication. CP 549. The only threat to their right to due process is for their election to be eviscerated, sub silentio, by an order compelling each of them to arbitrate their claims individually.²

Class members also received the guarantee of “adequate representation” in this case, because the trial court already undertook a “rigorous analysis” and certified the class under the standards of Rule 23. CP 520. In the months preceding that decision, the parties engaged in robust discovery and were permitted to present all the evidence they wished to present. CP 413-516, 923-1095. PLF’s premises are not even theoretically present in this case, because the class members had already received all the protections afforded by Rule 23 before arbitration was even considered.

² The court of appeals made no explicit ruling that would decertify the class or provide for notice to the class members that the trial court’s prior notice and their reliance on it were no longer valid.

Having ignored this circumstance, PLF did not argue that some future act in the case, by an arbitrator, would somehow deprive the class members of the protections already afforded to them. Instead PLF posits vague fears of unqualified arbitrators and minimal appellate review. Those concerns are intrinsic to any agreement to arbitrate, not from an agreement to arbitrate on a class-wide basis. And PLF offers absolutely no basis upon which to suspect that an arbitrator who is capable of determining an employee's statutory wage claim would not be capable of determining several hundred employees' statutory wage claims.

PLF's feigned concern for the rights of absent class members is particularly inapt in this case because the arbitration clause is found, at least nominally, in a collective bargaining agreement (CBA). By the very nature of a CBA the employees have agreed to be "represented" collectively, in an associational capacity. As previously noted in the Plaintiffs' Supplemental Brief, the context, custom, and purpose of the contract is to govern and determine the rights of the employees as a group. Pet. Supp. Brief at 18-19. Any arbitration of the merits of the claims in this case—i.e., whether Garda unlawfully deprived the employees of meal and rest breaks—will effectively determine the rights of all class members.

IV. CONCLUSION

For the reasons expressed in the prior briefing, this case should not have been ordered to arbitration. But if arbitration is required, none of the concerns expressed in the PLF's brief should give the Court any pause in affirming the trial court's order compelling class arbitration, which is the only realistic, appropriate and effective way of protecting the employees' statutory and due process rights in an arbitration context.

Dated this 9th day of May, 2013.

BRESKIN JOHNSON TOWNSEND, PLLC

By: s/ Daniel F. Johnson

Daniel F. Johnson, WSBA No. 27848

Attorneys for Plaintiffs/Petitioners

CERTIFICATE OF SERVICE

I, Jamie Telegin, 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 9th day of May 2013, 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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I certify under penalty of perjury pursuant to the laws of the State
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Jamie Telegin, Legal Assistant

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sent: Thursday, May 09, 2013 11:30 AM
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The attached Petitioners' Answer to Brief Amicus Curiae of Pacific Legal Foundation is for filing. Thank you.

Lawrence Hill, et al. v. Garda CL Northwest, Inc.
No. 87877-3

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EXHIBIT L

CPR ARBITRATION

EASTHAM CAPITAL APPRECIATION
FUND LP et al.,

Claimants

v.

KPMG LLP,

Respondent

FINAL AWARD

Parties and counsel.

Claimants are Eastham Capital Appreciation Fund LP; The Arthur E. Lange Revocable Trust and Arthur C. Lange; and Plaintiffs' State and Securities Law Settlement Class Counsel in "In re Tremont Securities Law, State Law and Insurance Litigation," acting for the benefit of the State Law Subclass and Securities Subclass and not in their individual capacities. Settlement Class Counsel are assignees of the claims against KPMG LLP of "nominal parties" Rye Select Broad Market Fund LP, Rye Select Broad Market Prime Fund LP, and Rye Select Broad Market XL Fund LP. Claimants are represented by Andrew J. Entwistle, Arthur V. Nealon, and Robert N. Cappucci of Entwistle & Cappucci LLP, New York; Jeffrey M. Haber, Stephanie Beige, and Michelle Zolnoski of Bernstein Liebhard LLP, New York; and Lee M. Gordon and Reed Kathrein of Hagens Berman Sobol Shapiro LLP, Pasadena and Berkeley.

Respondent KPMG LLP is a public accounting firm. It is represented by John K. Villa and David A. Forkner of Williams & Connolly, Washington; and Gary F. Bendinger and Gregory G. Ballard, Sidley & Austin, New York.

Arbitration panel.

The arbitrators are John S. Martin, Martin & Obermaier LLC, New York; Layn R. Phillips, Irell & Manella LLP, Newport Beach; and James Robertson, JAMS, Washington, chair. All of the arbitrators are neutral.

Arbitration agreement and rules, and applicable law.

The parties agree that the applicable arbitration agreement is set forth in letter agreements setting forth the terms of KPMG's engagement to audit the Rye Funds; that the 2007 Rules for Non-Administered Arbitration apply in this

proceeding; and that the substantive law applicable to this dispute is the law of the State of New York.

Summary of claims and responses.

This is a professional malpractice case. Claimants allege that, in planning and carrying out its audit of the Rye Funds' 2007 financial statements, KPMG violated generally accepted audit standards (GAAS) and its own procedures, negligently failing to discover that the existence of Rye Funds assets purportedly held by Bernard Madoff Investment Services (BMIS) could not be independently and externally confirmed. Claimants further allege that a proper audit would have discovered and reported at least that much, requiring the issuance of a qualified opinion or a GAAS disclaimer and giving Rye Funds investors the information they needed to avoid or mitigate the substantial losses they suffered when the Madoff fraud was later revealed. KPMG raises a number of defenses to the malpractice claim, principally that its planning for and execution of the audit satisfied the applicable standard of care, but also that claimants cannot adduce the necessary proof of causation, that the doctrine of *in pari delicto* bars or limits the Rye Funds' claims, and that the Rye Funds and Tremont assumed the risk of loss when they placed assets with BMIS.

Procedural history.

This case has a pre-history that need not be recited here. See Claimants' First-Amended Notice and Demand for Arbitration ¶¶ 13-18, 20-22. The arbitrators were appointed in May 2012, and a preliminary scheduling conference was held in June. In September, after hearing oral argument, the Panel granted as conceded KPMG's motion to dismiss Claimants' breach of fiduciary duty claims and their claims relating to KPMG's 2004 and 2005 audits but rejected KPMG's standing arguments and denied the motion as to KPMG's malpractice claims related to the 2006 and 2007 audits. In December, the Panel denied KPMG's motion for joinder of the Rye Funds as necessary parties, and in April 2013 the Panel denied KPMG's motion to dismiss based on an estoppel theory. In May, Claimants withdrew their claims related to the 2006 audit and their claims for damages related to investments made before March 24, 2008, leaving in dispute only their 2007 malpractice claims, for damages for investments made on or after March 24, 2008. The merits hearing, which had been scheduled to run for nine or ten days, commenced in New York on June 10 and adjourned on June 14. On June 18, the Panel ordered that post-hearing submissions be limited to the standard of care issue. Post-hearing briefing was complete on August 2.

Opinion.

From sometime in the early 1990s until he was exposed and arrested on December 11, 2008, Bernard Madoff took money from investors, promising to invest it in a basket of common stocks and options contracts using something he called a

“split strike conversion strategy.” For many years, investors with Madoff received handsome returns on their investments, but, in fact, BMIS was a huge and highly sophisticated Ponzi scheme. Madoff never made the promised investments, but only used newly invested money to pay off earlier investors. A staff of co-conspirators created phony stock trading tickets, account statements, and other documentary “evidence” of Madoff’s phantom transactions to camouflage his fraudulent activities.

The Rye Funds were dedicated BMIS investors: the Broad Market Fund and the Prime Fund were nearly 100 percent invested directly with BMIS, and the XL Fund was linked to the Broad Market Fund by synthetic investments and swap transactions. Tremont Partners Inc., a registered investment adviser under the Investment Advisers Act of 1940, was general partner and manager of the Rye Funds. It was Tremont that engaged KPMG to audit the Rye Funds – the Broad Market Fund and Prime Fund for the years 2004, 2005, 2006 and 2007, and the XL Fund for the years 2006 and 2007. KPMG’s engagement letters for all of those years undertook to perform GAAS audits that would be “planned and performed to obtain reasonable, but not absolute, assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud.”

Three KPMG partners testified about KPMG’s audits of the Rye Funds: Brian Kelly, Sean McKee, and Christine Buchanan. Buchanan was the engagement partner in charge of the 2007 audit; the others had worked on the account in previous years. The KPMG audits for all four years were done in a similar manner and closely followed the approach taken prior to 2004 by two other accounting firms: these were GAAS audits, not fraud or forensic audits, nor audits of internal controls. In the process of preparing for the audits, KPMG noted that the investment manager Tremont had retained to initiate and execute trades and to hold securities (BMIS) was a registered broker-dealer; that the publicly traded securities it bought were on the Standard & Poor’s 100 list; that BMIS converted its entire portfolio to T-bills at year-end; and that there was a “high degree of visibility” between Tremont and BMIS. KPMG decided, for the 2004 audit and each year thereafter, to take a “substantive” rather than a “controls-based” approach to the audit, *i.e.*, to confirm the existence of assets, rather than watch how transactions are handled.

The substantive testing that KPMG did is summarized at pp. 30-40 of the Report of Stephen M. McEachern, KPMG’s audit expert. Particularly important were third party confirmations of each fund’s cash with its bank, of the existence and value of the XL Fund’s swaps with counterparties, of a substantial loan to the Prime Fund with the lender Citibank, and of the Rye Funds’ investment in T-bills with BMIS, which was an SEC-registered broker-dealer (and by checking the serial numbers of the T-bills against public sources). There is no dispute about Mr McEachern’s summary of what KPMG did; the dispute is about what KPMG did not do.

As it turned out, the assets for which BMIS had provided “confirms” did not exist. KPMG witnesses nevertheless insisted that they had maintained the requisite

professional skepticism – “an attitude that includes a questioning mind and a critical assessment of audit evidence,” as the Panel was frequently reminded during the hearing. Thus, KPMG took note of BMIS’s annual liquidation of stock positions to T-bills but did not consider that procedure unusual for investment advisers who wished to protect proprietary trading strategies. KPMG observed BMIS’s returns on investment but did not find them suspiciously stable or high. KPMG found no need to add valuation specialists to the audit team because the assets in question at year-end were (purportedly) T-bills. KPMG noted the fact that BMIS did not charge a fee for its investment advisory services but was not alarmed by that fact. And KPMG derived particular comfort from the fact that BMIS was a federally registered broker-dealer, itself subject to independent audit and to inspection and investigation by both the SEC and the NASD.

Claimants’ audit expert was D. Paul Regan. His opinion was critical of KPMG’s professional skepticism – he thought the Rye Funds’ returns “implausibly” high and stable, BMIS’s compensation structure suspiciously low, and BMIS’s trades inconsistent with trading authorizations and directives – but those subjects were not explored at length at the hearing. What was explored at length, and became the crux of the case, was Mr Regan’s opinion that “KPMG failed to make necessary audit inquiries and perform requisite testing over BMIS/Madoff’s internal controls. . . .” Regan opinion p. 15.

KPMG points out, correctly, that no court has found that a fund auditor has the duty to “conduct what amounts to an audit of the accounts of entities in which their clients have invested,” *DeLollis v. Friedberg, Smith & Co.*, 2013 WL 1274742 at *9 (D. Conn. Mar. 27, 2013), and that Judge Griesa has in fact dismissed securities fraud claims against KPMG arising out of the very facts of this case, noting that “[t]he notion that a firm engaged to audit the financial statements of one client . . . must conduct audit procedures on a third party that is not an audit client on whose financial statements the audit firm expresses no opinion is unprecedented and has no basis,” *Meridian Horizon Fund, LP v. Tremont Group Holdings, Inc.*, 747 Supp. 2d 404, 413 (S.D.N.Y. 2010). Neither of those decisions, however, dealt directly with the argument that Claimants advance here, which sounds in negligence, not fraud, and is premised on a specific AICPA guidance provision, AU § 332.20. That provision reads, in part:

“If one service organization initiates transactions as an investment adviser and also holds and services the securities, all of the information available to the auditor is based on the service organization’s information. The auditor may be unable to sufficiently limit audit risk without obtaining audit evidence about the operating effectiveness of one or more of the service organization’s controls.”

It was Mr Regan's opinion that, because BMIS was a "service organization" that initiated transactions as an investment adviser and also "custodied" securities, GAAS required KPMG at least to have made the effort to investigate BMIS's controls.

KPMG responds, first, that the AICPA provision on which Mr Regan relies is guidance, not a requirement. It goes on to argue, following Mr McEachern's opinion, that several threshold questions must be answered in the affirmative before § 332.20 comes into play: Was the service provided by BMIS part of the "information system" of the Rye Funds? AU § 332.12. Custody and execution clearly were not, AU § 332.13, but initiation and certain ancillary services were, § 332.12. Were the controls at BMIS with regard to initiation and those ancillary services significant to the internal controls of the Rye Funds? AU § 324.06. The answer to that question, unquestionably a judgment call, depends in the particular audit on what the AICPA guidance calls the "degree of interaction between the activities at the user organization and those at the service organization." *Id.* If there is a high degree of interaction, nothing further is required in the way of assessing the controls of the service organization. If the degree of interaction is low, then the auditor is encouraged by § 332.20 to gain an understanding of the controls over the services provided.

The undisputed testimony of KPMG's audit partners was that they gave due consideration to the role of BMIS as a service organization, as well as the role of another independent entity that acted as Administrator for the Rye Funds (Bank of New York in 2007)¹. Ms Buchanan considered that there was a high degree of interaction between and among the Rye Funds, BMIS and BONY – "lots of touch points." Mr McEachern found KPMG's conclusions in this regard reasonable and appropriate. McEachern report at 25. He noted that confirmations of every trade were sent both to BONY and to Rye Funds management; that BONY did the accounting and bookkeeping, which was reviewed by several people within Tremont; that BONY independently determined when dividends had been issued and Tremont independently checked prices; and that, "on a monthly basis, all three organizations – Tremont, BONY and BMIS – prepared financial records which were reconciled with each other by both [BONY] and Tremont." Based on the high degree of interaction between BMIS and the Rye Funds, Mr McEachern found it "reasonable and appropriate for KPMG [without the benefit of hindsight] to conclude that it did not need to obtain a further understanding of the controls at BMIS." *Id.* at 27.

The only testimony that the 2007 audit did not comply with GAAS was the expert opinion of Mr Regan. His testimony was contradicted by the expert opinion of Mr McEachern and by the three KPMG partners who worked on the audit. The Panel finds the McEachern testimony and that of the KPMG witnesses to be the more

¹ See Claimants' Exhibit 1380, the record of KPMG's 2006 "evaluation of service organization function" as to SS&C, the predecessor Administrator to BONY, concluding that, instead of relying on SS&C's controls, KPMG would "take a substantive approach to testwork."

persuasive and credible and finds that Claimants have failed to prove that KPMG's 2007 audit did not comply with GAAS.

The applicable standard of care in any event does not begin and end with GAAS. It is measured, in New York as everywhere, by the "skill and care in the performance of the work [that] a reasonably skillful and diligent accountant would use under the same circumstances." N.Y. Pattern Jury Instr.--Civil 2:154 (3d ed. 2013). Here, Claimants adduced neither opinion testimony about what other reasonably skillful and diligent accountants would do under circumstances like those of the 2007 Rye Funds audit nor evidence that any other audit of a Madoff investor ever resulted in a qualified opinion. Claimants complain that KPMG's proffer of the unqualified audit opinions of other accountants is "no defense," Post-Hearing Memorandum at 5 n.12, but it was Claimants who had the burden of proof. They did not sustain it.

The Panel has carefully considered Mr Regan's other assertions about what KPMG should have done as part of the 2007 audit – seek confirmations from DTC, investigate Friehling & Horowitz, and investigate what Mr Regan called "fraud risks" – and finds them to be without merit.

Conclusion and award.

Because Claimants have failed to prove a necessary element of their malpractice claim by a preponderance of the evidence, it is unnecessary for the Panel to reach or decide any of the other issues presented by the parties.

The Panel **finds** in favor of Respondent KPMG LLP and **awards** the Claimants nothing. No claim for attorneys' fees has been made. The parties will bear their own costs, except for the fees of the chair and of JAMS and CPR, which are to be split 50-50.

/s/ John S. Martin
John S. Martin

/s/ Layn R. Phillips
Layn R. Phillips

/s/ James Robertson
James Robertson

August 21, 2013

ORRICK, HERRINGTON & SUTCLIFFE LLP

October 06, 2017 - 3:18 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 93824-5
Appellate Court Case Title: Futureselect Portfolio Management, Inc., et al. v. Tremont Group Holdings, Inc., et al.
Superior Court Case Number: 10-2-30732-0

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