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Court of Appeals No. 78356-4-I

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IN THE SUPREME COURT OF WASHINGTON

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STEVEN BURNETT, individually and on behalf of all others similarly  
situated,

Respondent,

v.

PAGLIACCI PIZZA, INC.,

Petitioner.

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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## **I. INTRODUCTION**

The issue before this Court is whether Pagliacci Pizza can compel Steven Burnett, a former delivery driver, to arbitrate claims for wage-and-hour violations. The Court should resolve the issue by applying well-established rules of contract formation and enforceability to two documents Pagliacci drafted: (1) the one-page Employee Relationship Agreement Mr. Burnett signed, which says nothing about arbitration; and (2) Pagliacci's employee handbook, the Little Book of Answers, which contains the company's Mandatory Arbitration Policy.

Both the trial court and the Court of Appeals ruled that Pagliacci's Mandatory Arbitration Policy is unenforceable, but each did so for different reasons. The trial court said that no agreement to arbitrate was formed. The Court of Appeals unanimously held that an agreement to arbitrate was formed, but the agreement is unenforceable because it is procedurally and substantively unconscionable.

This Court's decision should address whether any agreement to arbitrate was formed and whether Pagliacci's Mandatory Arbitration Policy is unenforceable because it is unconscionable.

## **II. STATEMENT OF THE CASE**

Mr. Burnett claims that Pagliacci violated numerous state and local laws in failing to pay employees all wages due. He seeks unpaid wages for

himself and a class of fellow drivers. CP 1–2. Pagliacci seeks to force the company’s drivers to arbitrate their wage-and-hour claims.

**A. Mr. Burnett signed an employment agreement that said nothing about arbitration.**

After being hired as a pizza delivery driver, Mr. Burnett attended a mandatory new employee orientation. Opinion at 2; CP 55. During the orientation, Pagliacci gave Mr. Burnett multiple forms and told him to sign them so that he could start working. Opinion at 2; CP 142. One of the forms Mr. Burnett signed was a one-page Employee Relationship Agreement. Opinion at 2; CP 49–50.

The Employee Relationship Agreement “does not mention arbitration.” Opinion at 2; CP 58. As the Court of Appeals put it: “the arbitration policy is not printed—or even mentioned—in the [Employee Relationship Agreement] itself.” Opinion at 2.

Instead, the Employee Relationship Agreement contains a section entitled “INCONSISTENCIES IN HOURS/PAY/BREAKS” that instructs employees to “promptly inform Human Resources” if they have concerns about hours, pay, or breaks. CP 58. It says nothing about arbitration of disputes over hours, pay, or breaks. *Id.*

A section of the Employee Relationship Agreement entitled “ACCOUNTABILITY” addresses employee till shortages and employee failure to return “non-cash property of Pagliacci Pizza.” CP 58. It

authorizes Pagliacci to deduct directly from an employee's pay the amount of any till shortage, money the employee otherwise owes to Pagliacci, or the cost of any non-cash property. *Id.*

**B. Pagliacci hid its Mandatory Arbitration Policy in a separate employee handbook.**

Pagliacci's Mandatory Arbitration Policy is printed in Pagliacci's employee handbook, the Little Book of Answers. CP 60–73. The Little Book of Answers is a 23-page booklet. *Id.* The Mandatory Arbitration Policy is on page 18. CP 71. Pagliacci's F.A.I.R. Policy is on page 17. CP 70. The Mandatory Arbitration Policy is not listed in the handbook's table of contents. CP 62 (listing only a "Mutual Fairness Benefits" section).

Mr. Burnett was given a copy of the Little Book of Answers during his orientation and told to read it at home. Opinion at 2; CP 142. Consistent with that instruction, the Employee Relationship Agreement contains a section entitled "RULES AND POLICIES." It provides: "On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR policy." CP 58. It also says that Pagliacci may unilaterally change the terms of the Little Book of Answers at any time. *Id.*

**C. The Mandatory Arbitration Policy is one-sided.**

The Mandatory Arbitration Policy is a single paragraph:

The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant the Washington Arbitration Act. CP 71 (emphases added). The employee must submit disputes “to resolution in accordance with the F.A.I.R. Policy” before commencing arbitration. CP 71.

The F.A.I.R. Policy is an informal process with at least two steps, supervisor review and conciliation. CP 70. It contains the following:

**LIMITATION ON ACTIONS**

You may not commence an arbitration of a claim that is covered by the Pagliacci Pizza Arbitration Policy or commence a lawsuit on a claim that is not covered by the Pagliacci Pizza Arbitration Policy unless you have first submitted the claim for resolution in conformity with the F.A.I.R. Policy and fully complied with the steps and procedures in the F.A.I.R. Policy. If you do not comply with a step, rule, or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in any court or other forum, including arbitration. The limitations set forth in this paragraph shall not be subject to tolling, equitable or otherwise. CP 70.

### III. ARGUMENT

This Court reviews de novo a trial court's decision to deny a motion to compel arbitration. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 602, 293 P.3d 1179 (2013). The party seeking to avoid arbitration must show that the clause is unenforceable. *Id.* at 602–03.

**A. Washington contract law governs the enforceability of Pagliacci's Mandatory Arbitration Policy.**

Pagliacci's Mandatory Arbitration Policy contains a choice of law provision that selects the Washington Arbitration Act.<sup>1</sup> CP 71. The Washington Arbitration Act requires courts to determine whether there is an agreement to arbitrate, and if so whether it is enforceable. *See Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (Courts “determine the threshold matter of whether an arbitration clause is valid and enforceable.”). “If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.” RCW 7.04A.070(2).<sup>2</sup>

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<sup>1</sup> Although the Washington Arbitration Act “does not apply to any arbitration agreement between employers and employees,” RCW 7.04A.030(4), an employer and employee may select the Washington Arbitration Act as the governing law in an agreement to arbitrate. *See Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783, 812 P.2d 500 (1991).

<sup>2</sup> Even if the Federal Arbitration Act were applicable, the analysis set forth above would be the same. *Granite Rock Co. v. Int'l Bhd. of Teamsters*,

Arbitration agreements stand on equal footing with other contracts and may be invalidated by “[g]eneral contract defenses such as unconscionability.” *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008); *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426, 197 L.Ed.2d 806 (2017) (court may invalidate arbitration clause “based on generally applicable contract defenses like fraud or unconscionability”).

**B. Mr. Burnett never assented to the arbitration agreement hidden in Pagliacci’s Little Book of Answers.**

“Mutual assent is required for the formation of a valid contract.” *Yakima Cnty. (West Valley) Fire Protect. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). This rule applies to the formation of an arbitration agreement just as it does to the formation of any other contract. “As an important policy of contract, one who has not agreed to arbitrate generally cannot be required to do so.” *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 934–35, 231 P.3d 1252 (2010). “While a strong public policy favoring arbitration is recognized under both federal and Washington law, arbitration is a matter of contract and a party cannot be required to submit to arbitration any

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561 U.S. 287, 297, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (arbitration may be compelled only “where the court is satisfied that the parties agreed to arbitration that dispute,” and the court must resolve any issues over “whether the clause was agreed to”).

dispute which he has not agreed so to submit.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009) (internal citations and quotation marks omitted); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415, 203 L.Ed.2d 636 (2019) (“[T]he first principle that underscores all of our arbitration decisions is that [a]rbitration is strictly a matter of consent.”) (quoting *Granite Rock*, 561 U.S. at 299).

The trial court found “there is no agreement to arbitrate” between Mr. Burnett and Pagliacci. CP 227. The court explained that a reasonable person could not find Mr. Burnett had agreed to arbitration by signing the Employee Relationship Agreement, “given the [agreement’s] failure to mention arbitration” and, “most importantly, because the terms of the *Little Book of Answers* directly contradict the [agreement’s] language about hours, pay, and break, as to what an employee is supposed to do and is agreeing to do.” CP 285 (Tr. 23:13–25). If an arbitration clause is not agreed to by both sides, “then it’s not binding.” CP 286 (Tr. 24:1–2).

The Court of Appeals echoed the trial court’s concerns, expressing skepticism that “under the circumstances presented here, Burnett [had] effectively waived any statutorily conferred right to maintain a civil action.” Opinion at 20. The court explained: “Burnett did not have a reasonable opportunity to understand that he was agreeing to arbitrate—much less to understand the types of claims he was agreeing to arbitrate or

to intentionally and voluntarily relinquish his right to pursue those claims in court.” *Id.* Nevertheless, the court concluded “that an agreement to arbitrate exists here” because the Little Book of Answers was incorporated by reference into the Employment Relationship Agreement. *Id.* at 7.

This conclusion is in error. As the Court of Appeals recognized, incorporation by reference does not, in and of itself, establish mutual assent to the terms being incorporated. *Id.* at 6. “It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.” *Id.* (brackets omitted) (quoting 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 30:25, at 234 (4th ed. 1999)).

Mutual assent is gleaned from outward manifestations and circumstances surrounding the transaction. *See Weiss v. Lonquist*, 153 Wn. App. 502, 511, 224 P.3d 787 (2009). The Court of Appeals held “there is no evidence in the record that Burnett had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—before he signed the [Employment Relationship Agreement (ERA)].” Opinion at 11. “Instead,” the court continued, “the record reflects that Burnett was not afforded an opportunity to review the Little Book before signing the ERA.” *Id.* Because he lacked knowledge of the incorporated terms, Mr. Burnett

never assented to the Mandatory Arbitration Policy. This alone is a basis for affirming the trial court.

**C. Employers cannot “impose” mandatory arbitration clauses on employees by putting them in unsigned employee handbooks.**

On a motion for reconsideration in the trial court, Pagliacci argued for the first time that a unilateral contract was formed by Mr. Burnett having worked for Pagliacci after receiving the Little Book of Answers. The Court of Appeals addressed (and rejected) this argument in its procedural unconscionability analysis. It appears Pagliacci will now assert both that a contract was formed under *Gagliadari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 432–33, 815 P.2d 1632 (1991), and that *Gagliadari* precludes finding the agreement procedurally unconscionable. Neither position is correct.

Mr. Burnett’s position is not that an employee and employer can never agree to an arbitration clause contained in an employee handbook. And that is not what the Court of Appeals said either. But an employer cannot rely on the *unilateral* contract formation principles discussed in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), and *Gagliadari* to establish the existence of a *bilateral* agreement to arbitrate future disputes.

*Thompson* and its progeny must be understood in context of the

background rule that employment is at will. 102 Wn.2d at 225–27 (discussing history of common law terminable-at-will rule). Generally, an employee can be fired at any time for any reason, so long as the reason is not otherwise unlawful. *Id.* at 226. But *Thompson* recognized two “exceptions” to the terminable-at-will doctrine. *Id.* at 228–29.

First, “the employer’s right to terminate an at will employee can be contractually modified and, thus, qualified by statements contained in employee policy manuals or handbooks issued by employers to their employees.” *Id.* at 228. Under this exception, the requisites of contract formation—offer, acceptance, and consideration—are “necessary predicates to establishing that policies in an employment manual” are part of the employee’s employment contract. *Id.* at 228. This does not, however, establish that an employer can bypass traditional contract formation requirements and “impose” mandatory arbitration on employees simply by putting an arbitration clause in an employment handbook. Mutual assent is still required.

Second, and “independent of contractual analysis,” *employers* may be obligated to “act in accordance with policies announced in handbooks issued to their employees.” *Id.* at 229. Under this exception, the employer is bound by policies in a handbook that create an “atmosphere of job security and fair treatment with promises *of specific treatment in specific*

*situations*” such that the employee is induced to remain at his or her job rather than seek other employment. *Id.* at 230 (emphasis in original). Only employers can be bound by handbook promises under this exception because only employers make the promises and derive therefrom the benefits of workplace peace and reduced employee turnover. *See id.*

Pagliacci argues that this second exception allows employers to unilaterally impose binding arbitration clauses on employees simply by inserting them into employee handbooks. This Court’s decision in *Gaglihari* does not support that view. There, the Court began by describing *Thompson* as “the leading case in Washington on when employee handbooks give rise to contractual obligations *on the part of the employer.*” 117 Wn.2d at 432–33 (emphasis added). The issue in *Gaglihari* was whether the *employer* breached its contractual obligations to the employee when it fired her. *Gaglihari*, 117 Wn.2d at 431. The first exception to the terminable-at-will rule identified in *Thompson* was thus at issue in *Gaglihari*, not the second. The Court found the employer was bound by promises it made in its handbooks regarding progressive discipline but could unilaterally modify those terms in subsequent handbooks. *Id.* at 436. It is important to recognize that the employer in *Gaglihari* was not trying to bind the *employee* to any obligation; the employer was defending a breach of contract action by saying there was

no contract or, if there was, the employer met its obligations under the contract. *Id.* at 434.

The Court of Appeals’ extensive analysis of *Gaglihari* and *Grovier v. North Sound Bank*, 91 Wn. App. 493, 957 P.2d 811 (1998), is correct. Opinion at 13–18. Pagliacci has seized on language in *Gaglihari* about the employee being “bound” by certain employer policies. Plainly, an employer can unilaterally set terms of employment through policies in a handbook. If the employee fails to comply with those terms, the employer can fire the employee. But the employer cannot sue the employee for breach of contract—or compel arbitration—based on handbook terms unless the employer can establish offer, acceptance, and consideration sufficient to form a bilateral contract. As the Court of Appeals explained:

An employee’s agreement to comply with a policy or risk immediate dismissal is readily distinguishable from an employee’s agreement to submit his or her claims to arbitration. That the former can be secured by providing the employee with handbook does not mean that the latter agreement can be secured in the same manner.

Opinion at 16. That analysis should be affirmed.

**D. Either procedural or substantive unconscionability is sufficient to void a contract in Washington.**

“In Washington, either substantive *or* procedural unconscionability is sufficient to void a contract.” *Gandee*, 176 Wn.2d at 603 (emphasis in original) (holding arbitration clause in debt adjusting contract

substantively unconscionable and unenforceable). The Court of Appeals incorrectly said this “is not a complete statement of the law” because *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004), left open the question of whether procedural unconscionability alone is sufficient to void a contract. Opinion at 18. The court then correctly held “that procedural unconscionability alone renders Pagliacci’s mandatory arbitration policy unenforceable.” Opinion at 19.

It is not debatable that procedural unconscionability alone may void a contract. *See Gandee*, 176 Wn.2d at 603; *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 55, 308 P.3d 635 (2013) (“Either substantive or procedural unconscionability is enough to void a contract.”); *Gorden v. Lloyd Ward & Assocs., P.C.*, 180 Wn. App. 552, 564, 323 P.3d 1074 (2014) (voiding term based solely on procedural unconscionability). This Court should re-affirm that a contract may be voided based on *either* procedural *or* substantive unconscionability.

**E. Pagliacci’s Mandatory Arbitration Policy was presented in a procedurally unconscionable manner.**

An arbitration agreement is procedurally unconscionable when the circumstances surrounding the parties’ transaction show that the weaker party lacked meaningful choice. *Zuver v. Airtouch Comms., Inc.*, 153 Wn.2d 293, 304, 103 P.3d 753 (2004). The Employee Relationship

Agreement is an adhesion contract because Pagliacci, a party with superior bargaining position, presented the standard form document to Mr. Burnett, and he had no opportunity for negotiation. *See id.*; *Adler*, 153 Wn.2d at 347; Opinion at 9 (finding Employee Relationship Agreement is adhesion contract). Mr. Burnett lacked meaningful choice about whether to accept the Mandatory Arbitration Policy because he had no notice of it before signing the Employee Relationship Agreement. The Employee Relationship Agreement doesn't use the word arbitration. CP 58. It merely refers to the Little Book of Answers, where the Mandatory Arbitration Policy is buried on page 18 of 23 and not even listed in the table of contents. CP 62, 71.

The Court of Appeals' analysis of procedural unconscionability is correct and should be affirmed. Opinion at 9–13. The court correctly relied on *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010), another case where the court considered an adhesion contract purporting to incorporate by reference a document containing an arbitration clause. The *Mattingly* court said the manner in which the agreement was formed was “suspect,” analyzed the facts under procedural unconscionability, and refused to enforce the arbitration clause. *Id.* at 512–13. This Court should do the same here.

The case of *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d

823 (2001), in which the court enforced an arbitration clause in an employment contract, is distinguishable. The arbitration provision in *Tjart* was “obvious in the fairly short contract” that the employee signed. *Id.* at 899. *Tjart* says nothing about enforcement of an arbitration clause found in a separate document that the employee did not have a reasonable opportunity to review or understand before the agreement was formed.

Any argument that *Gaglidari* validates the manner in which Pagliacci tried to impose arbitration on its employees should be rejected for the reasons discussed above, in Mr. Burnett’s prior briefs, and in the Court of Appeals’ Opinion.

**F. The Mandatory Arbitration Policy is substantively unconscionable.**

An arbitration clause is substantively unconscionable “where it is overly or monstrously harsh, is one-sided, shocks the conscience, or is exceedingly calloused.” *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 55, 308 P.3d 635 (2013) (affirming refusal to enforce arbitration provision in employment contract in wage-and-hour case). The Court of Appeals applied the standards this Court established in *Zuver* and subsequent cases and found the Mandatory Arbitration Policy substantively unconscionable. Opinion at 20–27. In doing so, the Court of Appeals relied on the plain language of the F.A.I.R. Policy’s Limitation on Actions, not any

“hypothetical facts.”

A provision that has the effect of potentially discouraging employees from pursuing valid claims is unconscionable. *Zuver*, 153 Wn.2d at 315. The “Limitation on Actions” in Pagliacci’s F.A.I.R. Policy discourages employees from pursuing valid claims. The “1st Step” in the F.A.I.R. policy is to “report the matter and all details” to your supervisor. CP 70. There is no exception for cases in which the supervisor has denied the employee the ability to take breaks, demanded off-the-clock work, discriminated against, or harassed the employee. *Id.* Many employees would be deterred from bringing a claim if they must either report the claim to a bad actor or waive the claim.

Likewise, provisions shortening statutes of limitations are unconscionable. *Hill*, 179 Wn.2d at 55. Because a former employee has no supervisor, he cannot comply with this requirement. Yet under the limitation on actions, if “you do not comply with a step, rule, or procedure in the F.A.I.R. Policy with respect to claim, you waive any right to raise the claim in any court or other forum, including arbitration.” CP 70. The language of the F.A.I.R. Policy is mandatory, not permissive.

Pagliacci has argued the “only reasonable” interpretation of the F.A.I.R. Policy is that applies to current employees. But that reading is foreclosed by the plain language of the Mandatory Arbitration Policy: “If

you believe . . . that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration.” CP 71. The plain language of the handbook requires those with claims for wrongful termination—who are never current employees—to follow the F.A.I.R. Policy before they can bring their claims in any other forum. Finally, the trial court Pagliacci said that Mr. Burnett filed this action “[i]n violation of the Mandatory Arbitration Policy and signed Employee Relationship Agreement” and that he “never requested resolution via Pagliacci’s internal F.A.I.R. Policy.” Opinion at 23 n.10; CP 42.

The Court of Appeals’ reading of Pagliacci’s agreements is correct. Pagliacci ignores two fundamental rules of contract interpretation: (1) words in contracts are given their ordinary meaning; and (2) written contracts are construed against their drafters. *See Hearst Comms., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *McKasson v. Johnson*, 178 Wn. App. 422, 429, 315 P.3d 1138 (2013). Pagliacci’s “liberal interpretation” of the language the company drafted was properly rejected by the Court of Appeals. Opinion at 23. This Court has held that parties “should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket

waiver.” *Gandee*, 176 Wn.2d at 608. Nor should employers be able to load their arbitration agreements full of terms intended to discourage employees from bringing claims and then, when challenged in court, offer a liberal interpretation that is contradicted by the plain language the employer drafted. *See Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 324, 211 P.3d 454 (2009) (invalidating arbitration clause after rejecting argument that it is “speculative” to say arbitrator will enforce one-sided provision according to its mandatory terms).

**G. An adhesion contract that requires only the weaker party to arbitrate its claims is unfairly one-sided and unconscionable.**

“Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.” *Zuver*, 153 Wn.2d at 303. In *Zuver*, this Court invalidated a clause that waived the employee’s ability to recover either punitive or exemplary damages but preserved the employer’s ability to do so. 153 Wn.2d at 315. The problem with the employee-only waiver of a remedy was not merely lack of mutuality. *Id.* at 317. Washington does not require that the parties to a contract have identical obligations under it to avoid unconscionability. *Id.* But a clause that “blatantly and excessively favors the employer in that it allows the employer alone to access a significant legal recourse” is unfairly one-sided and unconscionable. *Id.* at 318.

Pagliacci's Mandatory Arbitration Policy preserves Pagliacci's right to a jury trial on any claim it may have against the employee, while requiring the employee to bring her most valuable claims in arbitration. The only claims subject to arbitration are claims an *employee* can bring, as the clause says repeatedly that "you" must submit claims to arbitration. CP 71. Pagliacci does not dispute that claims it may have against an employee are outside the scope of the Mandatory Arbitration Policy.<sup>3</sup> That renders the clause unconscionable under *Zuver*.

In *Zuver*, this Court cited with approval the California Supreme Court's reasoning in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 120–21, 6 P.3d 669 (2000). *Zuver*, 153 Wn.2d at 315–17 & n.16. The arbitration clause in *Armendariz* required the employee to arbitrate wrongful discharge claims but did not require the employer to arbitrate related claims it might have. *Zuver*, 153 Wn.2d at 315 (quoting *Armendariz*, 24 Cal.4th at 120); *see also Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1261 (9th Cir. 2005) (applying Washington law and holding one-way arbitration clause substantively unconscionable and unenforceable).

To this extent it did not do so in *Zuver*, this Court should adopt the

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<sup>3</sup> Pagliacci also reserves another avenue to relief for itself: self-help by way of deduction from wages where it believes an employee owes the company money. CP 58 (Accountability section).

California Supreme Court’s rule that “an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party” is substantively unconscionable. *Armendariz*, 24 Cal.4th at 119, 6 P.3d at 693. Such a rule does not disfavor arbitration in violation of the FAA. *Id.* at 120, 6 P.3d at 693. “On the contrary, a unilateral arbitration agreement imposed by the employer without reasonable justification reflects the very mistrust of arbitration that has been repudiated by the United States Supreme Court.” *Id.* at 120, 6 P.3d at 693–94. Other states agree. *See, e.g., Iwen v. U.S. West Direct Mktg. Res. Grp., Inc.*, 293 Mont. 512, 977 P.2d 989, 996 (1999).

**H. Severance cannot save the Mandatory Arbitration Policy.**

Pagliacci’s arbitration clause cannot be saved by severance for three reasons: procedural unconscionability cannot be cured by severance; unfairness pervades Pagliacci’s Mandatory Arbitration Policy; and the Policy contains no severance provision. Opinion at 27–28; *Gorden*, 180 Wn. App. at 565 (severance “does not cure procedural deficiencies”).

**IV. CONCLUSION**

For the foregoing reasons, and those in Mr. Burnett’s prior briefs, this Court should affirm the denial of Pagliacci’s motion to compel arbitration.

RESPECTFULLY SUBMITTED AND DATED this 6th day of  
December, 2019.

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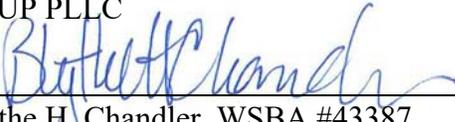
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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