

No. 74806-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CINDIUS ROMNEY as PERSONAL REPRESENTATIVE for the
ESTATE OF MICHAEL ROMNEY; FARON BAUER; and KRISTEN
CHILDRESS, individually and on behalf of a class of all others similarly
situated,

Plaintiffs – Appellants,

v.

FRANCISCAN MEDICAL GROUP, a Washington Corporation;
FRANCISCAN HEALTH SYSTEM, a Washington Corporation;
FRANCISCAN HEALTH VENTURES, a Washington Corporation;
FRANCISCAN NORTHWEST PHYSICIANS HEALTH NETWORK,
LLC, a Washington Corporation; and CATHOLIC HEALTH
INITIATIVES, a Colorado Corporation,

Defendants – Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Washington has a long and proud history of pioneering and protecting employee rights. Indeed, 40 years before Congress passed the federal minimum wage law, Washington enacted a law requiring an eight-hour workday. Chapter 49.28 RCW. Washington also favors class actions. “[A]ny error, if there is to be one, should be committed in favor of allowing the class action.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002) (emphasis added). *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003) (resolving cases in favor of class actions). Indeed, the Washington Supreme Court has never allowed a class waiver to stand. Defendants deliberately dodged this long and proud history by waiting 25 months to oppose Plaintiffs’ asserted right to class arbitration. Defendants could have timely and easily tried to compel Plaintiffs’ claims “separately and individually.” Instead, they moved to compel the entire consolidated class complaint (filed in November 2013) into arbitration on December 23, 2013.

This injustice cannot stand. It violates the established law and equity of Washington. The undisputed truth is that Defendants never mentioned any supposed belief that the agreements prohibit class actions. They did not argue what would have been their best argument had it been true, instead admitting the opposite. Their admissions include: (1) “[A]n arbitrator could decline to certify the class...” (2) “Drs. Bauer and Childress will remain adequate class representatives.” (3) “Dr. Bauer is

healthy and will be able to...assist in the prosecution of ...any class claims...once the proper forum for this matter is determined.” (4) [T]hen the arbitrator will be called upon to decide the certification question.” Once the forum is selected “an arbitrator will determine whether a class exists.” *See Appellee’s Response* 24-27.

This delay prejudiced Plaintiffs and the putative class in the extreme. Their tactics prevented Plaintiffs from timely challenging the unconscionability of class waivers. Class arbitration waivers are unconscionable and illegal when applied in the employment context. *Morris v. Ernst & Young LLP.*, 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016) (finding class arbitration waivers illegal and unenforceable under the National Labor Relations Act (NLRA), and recognizing that the US Supreme Court has never addressed class waiver in the employment context). Defendants’ newly hatched argument, that the Arbitration Agreements now preclude class actions and joinder, would create an illegal and unconscionable term.

The truth is that the parties always intended to arbitrate class claims. Defendants’ repeated admissions and inaction, reflects the parties understanding. Absent deception, no other explanation makes sense. Defendants knew: (1) that CR 12(g) precludes successive motions on the same issue; (2) the Washington civil and appellate rules prohibit piecemeal litigation and issues that could be timely brought to lower courts on appeal are waived if not timely made; (3) CR 1 requires a prompt and speedy resolution. Waiting 25 months violates this

fundamental right. Defendants also know that the COA has the power find that the Superior Court exceeded the scope of the mandate under RAP 12.9, and Plaintiffs get direct review as a matter of right. Defendants did not oppose Plaintiffs' RAP 12.9 arguments on the merits.

It is simply too late and without merit to claim that class actions and consolidated claims are not authorized in arbitration. Thus, a proper de novo review by the COA mandates reversal, a finding of waiver and estoppel, and an order sending this consolidated class complaint to a single arbitrator to decide class certification.

A. Equitable Estoppel Prevents Defendants From Demanding Individual Arbitration When Their Actions Prove A Clear Intent To Arbitrate Class Claims.

Defendants knew from the start that Plaintiffs believe the Arbitration Agreements allowed class claims. Plaintiffs openly asserted this in pleadings at the Superior Court and Court of Appeals. Rather than dispute that belief, Defendants spent over two years in litigation without ever challenging it. Defendants either agreed that class claims could be arbitrated – which seems true based on their conduct and admissions – or they deliberately misled Plaintiffs and the courts to gain a tactical advantage.

The agreement to arbitrate class claims need not be explicit. “There is no bright line rule that class arbitration is allowed only under an arbitration agreement that incants ‘class arbitration’ or otherwise expressly provides for aggregate procedures.” *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 222 (3d Cir. 2012), *as amended* (Apr. 4, 2012), *aff'd*, 133 S.

Ct. 2064 (2013) (citing *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 n. 10; see also *Stolt-Nielsen*, at 1783 (Ginsberg, J., dissenting) (“[T]he court does not insist on express consent to class arbitration.”)). When Plaintiffs moved the courts to begin class discovery based on Dr. Romney’s terminal illness, Defendants still made no indication of their supposed belief that class claims could not be arbitrated. Instead, they acted inconsistently by saying the arbitrator could certify a class.

1. *Defendants’ failure to raise the issues for 25 months proves inconsistent conduct for a finding of equitable estoppel.*

Defendants’ actions reflect their belief that class claims could be arbitrated. Most significantly, Defendants chose to compel the entire consolidated class complaint to arbitration, instead of timely compelling it “individually and separately.” Defendants further appealed the finding of unconscionability of the enforceability without raising this supposed belief. Defendants waited until five days after the Supreme Court denied review to raise these issues. By sitting silently for 25 months, Defendants misled Plaintiffs and the putative class, and each tier of the judiciary from Superior to Supreme Court. Defendants had every logical and legal reason to have not waited, and moved timely at the lower court.

In *Lybbert v. Grant County*, the Court analyzed equitable estoppel, and found that 9 months of delay was sufficient for estoppel. 141 Wn.2d 29, 35 (2000). It found that the defendant had acted inconsistently by delaying 9 months before asserting the defense of insufficient service of

process after the statute of limitations had run, thereby extinguishing the claims. *Id.* at 36.

2. *Plaintiffs reasonably relied on Defendants' conduct and admissions of compelling the entire consolidated class complaint to arbitration, and otherwise asserting that class claims could be certified in arbitration.*

Had Defendants timely moved to compel only “individual and separate claims,” Plaintiffs would have vigorously addressed these issues in response. Indeed, Plaintiffs convinced the Superior Court in 2014 to invalidate the arbitration agreements as unconscionable without some supposed class waiver. An additional unconscionable term would have further bolstered Plaintiffs then winning argument that the agreement was so permeated with unconscionable terms that could not be severed. Indeed, the very reason Plaintiffs moved the case from arbitration, was the September 12, 2013 Supreme Court’s unanimous en banc decision of *Hill v. Garda*, 179 Wash. 2d. 47 (2013), decided only weeks before Plaintiffs filed their Consolidated Class Complaint on November 13, 2013. *Hill v. Garda* voided an arbitration agreement that ordered class arbitration.

Thus, Plaintiffs were blindsided when Defendants first claimed five days after the Washington Supreme Court denied review that class claims could not be arbitrated. “[E]stoppel exists when the conduct of one party has induced the other party to take a position that would result in harm if the first party's act were repudiated.” *Schuster*, 193 Wn. App. at 631.

3. *Plaintiffs suffered substantial prejudice through delay, and the inability to address Defendants' recent claim of class waiver as unconscionable.*

Plaintiffs were never able to address this supposed class waiver on appeal. Defendants' actions induced Plaintiffs to take a position that has resulted in extreme harm and prejudice. Defendants have changed their position regarding class arbitration, and cannot dispute the prejudice they caused through substantial delay and inconsistent conduct. The entire class has had their claims extinguished. Dr. Romney's widow is forced to arbitrate her claims alone without the inherently inseparable claims of her co-plaintiffs. Most significantly, Plaintiffs could not timely address the unconscionability of class waiver in the employment context.¹ Under the law, such as clause is void, unconscionable and "illegal."

- a. Arbitration Agreements in employment contracts that preclude class actions and force employees to arbitrate claims individually illegally violate the substantive rights of employees to collectively seek legal remedies.

Extremely compelling from the first page to the last is the 9th Circuit Court of Appeals in *Morris v. Ernst & Young LLP*. The Ninth Circuit held that arbitration agreements in employment contracts that

¹ *Morris* is the most recent decision flowing from *D.R. Horton*, 357 NLRB No. 184 (2012). Plaintiffs' Class Action Complaint was not filed until November 2013. Had Defendants in any way indicated a belief that class claims were prohibited, Plaintiffs would have made the below arguments to show that the contracts were permeated with unconscionable terms. The COA did find the contracts enforceable but also found numerous terms in them unconscionable such as the confidentiality and fee sharing provisions. A main reason the COA refused to find the Agreements void was because of Defendants' last-minute concession at oral argument to refrain from trying to enforce the sections found to be unconscionable. The failure to make these concessions at the trial court is additional evidence of Defendants' delay tactics.

preclude class actions and force employees to arbitrate claims individually illegally violate the substantive rights of employees to collectively seek legal remedies. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016).² *Morris* reasoned that (unlike consumers) employees have a substantive right to collective action which includes the right to bring class action legal claims in *some* forum. *Id.* at *2. Therefore, Defendants' misguided interpretation of the Arbitration Agreements here (that Plaintiffs must arbitrate individually and separately) would render those provisions illegal. Plaintiffs have a legal right to pursue work-related legal claims together. *Id.*³

The facts of the present case are nearly identical. In *Morris*, the plaintiff employees were required to sign arbitration agreements that contained class action waivers and further required all legal claims to be brought exclusively in individual and separate proceedings. *Id.* at *2. The employees brought a wage and hour class action in court for failure by the employer to pay wages earned. *Id.*

Plaintiffs here bring class wage and hour claims on behalf of themselves and the class as alleged in the November 13, 2013 consolidated class complaint. CP 2, 4. Thus, Plaintiffs acted concertedly

² *Morris* was decided on August 22, 2016 after Plaintiffs submitted their appellate brief and before Defendants' response was due on August 31, 2016.

³ Plaintiffs do not believe the contracts contain these provisions. What is clear is that the contracts cannot be interpreted as Defendants argue, because such an interpretation would render them illegal and thus unenforceable. The Court must not interpret these contracts in a way that would make them illegal.

and collectively for the benefit of the entire putative class they now represent in court. “[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.” *Morris*, at *3. *Morris*, “turn[ed] on a well-established principle: employees have the right to pursue work-related legal claims together [...] Concerted activity – the right of employees to act *together* – is the essential, substantive right established by the NLRA” *Id.* at *2 (internal citations omitted, emphasis in original).

“The pursuit of a concerted work-related legal claim ‘clearly falls within the literal wording of § 7 [of the NLRA.]’” *Id.* at *4. An arbitration contract that requires a waiver of class claims or that contains a separate proceedings clause “prevents the initiation of any concerted work-related legal claim in any forum[,]” and is therefore illegal under the NLRA. *Id.*

- b. Relevant US Supreme Court jurisprudence addressing class action waivers relate solely to consumer or commercial disputes, not employment disputes.

Morris analyzed and distinguished all the relevant class action arbitration Supreme Court jurisprudence, noting that they do not involve employment disputes. *Id.* at *10. “*Concepcion* makes no such holding. *Concepcion* involved a consumer arbitration contract, not a labor contract, and there was no federal statutory scheme that declared the contract terms illegal. 563 U.S. at 338, 131 S.Ct. 1740.” *Id.* Employees have a substantive right to act together and the law specifically includes the right

to bring class legal claims. Parties are free to designate the exclusive forum for adjudication of disputes, but cannot force the waiver of the substantive right that employees have to act collectively in whatever forum is ultimately selected. “[N]othing in the Supreme Court’s recent arbitration case law suggests that a party may simply incant the acronym ‘FAA’ and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms.” *Id.*

“[S]ubstantive rights cannot be waived in arbitration agreements.” *Id.* “Thus, if a contract term in an arbitration agreement “operate[s] ... as a prospective waiver of a party’s right to pursue statutory remedies for [substantive rights], we would have little hesitation in condemning the agreement.” *Id.* at 637, 105 S.Ct. 3346 n.19; see also *Am. Exp. Co. v. Italian Colors Rest.*, – U.S.–, 133 S.Ct. 2304 (2013); *Green Tree Fin. Corp.–Al. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer*, 500 U.S. at 28; *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 240 (1987).” *Id.*

- c. Class Action waivers violate substantive employee rights to pursue legal claims together, regardless of whether the forum is judicial or arbitral.

The Court in *Morris* harmonized the NLRA with the FAA because “the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA.” *Id.* at *6. “The illegality of the “separate proceedings” term here has nothing to do with arbitration as a forum.” *Id.* “When an illegal provision not targeting arbitration is found in an

arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality.” *Id.* at *7.

Class arbitration waivers are illegal in employment contracts. Plaintiffs cannot be forced to waive substantive rights to concerted activity including the right to bring class claims. “An agreement to arbitrate work-related disputes does not conflict with the NLRA. Indeed, federal labor policy favors and promotes arbitration.” *Id.* at *6. The Arbitration Agreements here are enforceable and these employee Plaintiffs have the right to bring class claims in arbitration. “The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, fundamental protections of the Act, so the FAA does not mandate the enforcement of a contract that alleges their waiver.” *Id.* at *8.

Where “a substantive federal right is waived by the contract here, it is accurate to characterize its terms as ‘illegal.’” *Id.* at *9. Here, the Arbitration Agreements in this case cannot contain a class action waiver or force individual arbitration, because if so, that would make them illegal. If such a clause existed it should be severed, and Plaintiffs must be allowed to pursue their class claims in the same forum.

B. This Court Has The Authority To Rule On Defendants’ Waiver And Estoppel And Order Class Arbitration.

1. *Defendants’ 25 month delay and admissions that a single arbitrator in their case has the power to certify a class, constitutes waiver.*

The test for waiver is simple; defenses will be considered waived by a defendant as a matter of law if defendant's assertion of the defense is

inconsistent with the defendant's previous behavior, or defendant's counsel has been dilatory in asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 39 (2000) (citing, *Romjue v. Fairchild*, 60 Wn. App. 278, 281 (1991), and *Raymond v. Fleming*, 24 Wn. App. 112, 115 (1979)).

Defendants grossly overstate and conflate the burden for proving waiver and estoppel – which are two different doctrines with distinct applications and standards. Both separately apply to Defendants’ duplicitous conduct. They also ignore the fact that Plaintiffs are not seeking to avoid arbitration. Plaintiffs are now seeking to arbitrate in the manner agreed to, and in conformity with, Defendants’ actions and representations throughout 25 months of litigation. It is no surprise that Defendants intentionally failed to reference their first appeal in their “Statement of the Case” section. It makes it crystal clear that the onus was on them to timely raise a challenge or objection to class arbitration. Under Defendants’ theory, it was a gateway issue that should have been raised at the trial court and appellate level. Defendants further admit that Plaintiffs filed a class complaint and requested the need to do class discovery in either forum.

Looking to the unique facts here, Defendants committed waiver. “Whether waiver occurs necessarily depends on the facts of the particular case and is not susceptible to bright line rules.” *Schuster v. Prestige Senior Mgmt., L.L.C.*, 193 Wn. App. 616, 633 (2016). It is black-letter law that when analyzing waiver in the arbitration context “**[a]n extended silence before demanding arbitration indicates a conscious decision** to

continue judicial resolution of arbitral claims.” *Id.* at 634. “Silence coupled with knowledge of an adverse claim will estop a party from later asserting an inconsistent claim.” *Romjue v. Fairchild*, 60 Wn. App. at 282.

Where a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice. Such an estoppel may arise under certain circumstances from silence or inaction as well as from words or actions.

Bd. of Regents of Univ. of Washington v. City of Seattle, 108 Wn.2d 545, 553 (1987). “Where a party knows what is occurring and would be expected to speak, if he wished to protect his interests, his acquiescence manifests his tacit consent.” *Id.* Defendants’ 25-month silence raising any argument that class claims could not be arbitrated was intentional and constitutes waiver.

2. *Defendants’ claim of the supposed “knowledge” of the right to compel individual arbitration is “inconsistent with that [supposed] existing right” given their admitted 25 month delay in asserting it.*

Defendants knew the Agreements allow for class arbitrations. It would have been their silver bullet to contest class discovery in opposition to Plaintiffs’ motion to lift the stay for Dr. Romney to participate in class discovery prior to his death. If class claims could not be arbitrated, this would by far be the best reason to avoid class discovery prior to a decision on the ultimate forum. Defendants did not make this argument because they knew the truth that class arbitration is permitted. Moreover, they offer

no reasonable explanation for waiting 25 months before making that claim to Plaintiffs or the courts.⁴ Plaintiffs argued that class claims could exist in arbitration and therefore class discovery was needed regardless of the forum. CP 588.

3. *Defendants' claim that Plaintiffs had a duty to challenge class arbitration is absurd, when 1) Defendants moved to compel the entire consolidated class complaint to arbitration, 2) Plaintiffs prevailed at the Superior Court and 3) Defendants appealed and had the duty to raise all issues such as "individual arbitration."*

Defendants waived the issue of "individual and separate arbitration" by not raising it at the Superior Court prior to the first appeal. Defendants needed to raise the supposed issue of "separate and individual arbitrations" in its initial motion to compel arbitration. CR 12(g). To the extent Defendants had wanted to add that issue for reconsideration after losing at the Superior Court, Defendants needed to move for reconsideration within "within 10 days" of the entry of the Order. CR 59(b); *see also Schaeferco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn. 2d 366, 367 (1993). After 10 days it is too late and waived. "A trial court may not extend the time period for filing a motion for reconsideration." *Id.* at 368.

Had they not waived it already, failure to raise it timely on appeal is fatal and is further waiver. "Washington courts do not permit a party to ignore an issue on the first appeal only to raise the issue on remand when it becomes apparent the initially ignored issue is critical to the party's case."

⁴ It is true that Defendants indicated their intent to Plaintiffs to seek individual arbitrations on October 5, 2015, but not until the Supreme Court had already denied certification on September 30, 2015, and appellate review had terminated.

State v. Ramos, 163 Wn.2d 654, 663, 184 P.3d 1256 (2008). “Parties cannot use the accident of remand as an opportunity to reopen waived issues.” *State v. Fort*, 190 Wn. App. 202, 228-29, 360 P.3d 820 (2015).

Washington law is clear: “[Arbitration] waiver can be implied as well as express.” *Schuster v. Prestige Senior Mgmt.*, 193 Wn. App. at 633; *Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87 (2010) (“Waiver of an arbitration clause may be accomplished expressly or by implication.”). Affirmative defenses are waived if not plead (clear evidence of waiver by conduct).⁵ Challenges to arbitration are waived if not made “in the trial court or on first review.” *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54 (2013) (citing *Zuver*, 153 Wn.2d at 312 (declining to hear *Zuver*’s challenges to arbitration that were not raised below or in a motion for discretionary review).

Defendants make the exact same arguments and cite the same cases that *River House* rejects:

In arguing that the trial court wrongly found waiver, *River House* places its greatest reliance on the holding of Washington cases that a waiver cannot be found absent conduct “inconsistent with any other intention but to forego [the] right.” E.g., *Lake Wash.*, 28 Wash.App. at 62, 621 P.2d 791. It construes this principle as requiring the trial court to examine a party’s entire course of conduct for “consistency”; should the court find evidence of a party’s desire to arbitrate or equivocation at any point, then, it suggests, inference of voluntary and intentional waiver is too doubtful. This misapprehends what the trial court looks for in

⁵ Arbitration is an affirmative defense under CR 8(c). Defendants never raised a contractual obligation to arbitrate individually as a defense to Plaintiffs’ demand for class arbitration.

examining for inconsistency. 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.

Id. at 167 Wn. App. at 238.

Unlike the party in *River House* who at least asserted the right to arbitrate prior to waiver, Defendants never said a peep about “individual and separate” arbitrations being required under the agreements.

Thus, Defendants’ conduct unquestionably reached a point where the only inference that can be drawn is that they agreed with Plaintiffs that class claims can be arbitrated. Defendants made clear statements and representations that an arbitrator has the power under these contracts to rule on class certification in this case; an impossible task if class waivers had existed in the Arbitration Agreements. Defendants’ tortured after-the-fact clarifications about what they “really” meant but failed to state clearly are wholly unpersuasive, and rejected by *River House*.

Defendants said, amongst other admissions that **“Dr. Bauer will be able to pursue his individual claims and any class claims once the arbitration issue has been decided[.]”** CP 675. This is unequivocal and undeniable. It is a clear glimpse into Defendants’ state of mind that class claims can be arbitrated because Dr. Bauer can pursue class claims regardless of the court’s decision on the ultimate forum. Plaintiffs reasonably believed and relied on this, and at least 16 similar statements, that showed Defendants’ understanding that class claims can be arbitrated.

The simple truth is that an arbitral ruling on class certification cannot happen without an affirmative determination in a Clause

Construction Award that class claims can be arbitrated under the contracts. AAA Supplementary Rules for Class Arbitrations §§3-4.⁶ Defendants knew that certification could only occur if the agreements authorized it.⁷ Defendants admitted that class claims are arbitrable by admitting an arbitrator could certify a class in this case, not once but multiple times in multiple pleadings.

4. *Defendants have offered no credible explanation for waiting 25 months before ever saying class claims were banned in arbitration, which is longer than other Washington cases have found complete waiver of the right to arbitrate*

In *Schuster v. Prestige*, the court found waiver when there was an 18 month delay between case initiation and a demand for arbitration. 193 Wn. App. 616. Court decisions find waiver in the arbitration context when parties' delay was significantly shorter than Defendants' in this case. *See e.g. Saili v. Parkland Auto Center, Inc.*, 181 Wn. App. 221, *rev. denied*, 181 Wn.2d 1015 (2014) (finding waiver for among other reasons, a delay of seven months); *River House Development Inc. v. Integrus Architecture P.S.*, 167 Wn. App. 221 (2012) (finding waiver for, among other reasons, delay of 10 months); see also *Martin v. Yasuda*, 15-55696, 2016 WL

⁶ AAA Supplementary Rules for Class Arbitrations require at Step 3 a Clause Construction Award: "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." CP 1358. When the arbitration clause permits the arbitration to proceed as class arbitration, only then does the case move to Step 4: Class Certification. *Id.*

⁷ It is Defendants' new assertion that the contracts preclude class claims and the disagreement of the parties as to the proper interpretation of the contractual language that triggers Section 3 for an arbitral Clause Construction decision.

3924381, *5 (9th Cir. July 21, 2016) (finding waiver of arbitration by inconsistent conduct and a delay of 17 months before raising issues of arbitrability; considerably less than the 25 month delay here).

In *Steele v. Lundgren* this court found waiver of the right to arbitrate entirely after a delay of 10 months. 85 Wn. App. 845, 847 (1997). The defendant there had “obvious opportunities” to raise their arbitration arguments to the court and failed to. *Id.* In addition the defendant engaged in “overly aggressive” discovery by propounding 49 interrogatories and 20 requests for production. The court looked to the totality of the circumstances and found waiver. *Id.* at 856.

Here, Defendants had numerous opportunities to raise class arbitration issues such as in their motion to compel Plaintiffs’ Class Action Complaint to arbitration or in the appeal they initiated. Similarly, Defendants propounded 20 interrogatories and 45 requests for production to Dr. Romney, and 21 interrogatories and 48 requests for production to Dr. Bauer. These discovery requests mentioned the class or Plaintiffs’ Class Action Complaint at least 35 times, and many were directed specifically to the class issues. Appendix A *12. Under a totality of the circumstances, Defendants’ actions are inconsistent with their now-asserted belief that class claims are unavailable in arbitration.

Defendants’ actions during the discovery dispute to lift the stay further proves waiver, as was the case in *River House*. *Id.* at 167 Wn. App. 221. In opposition to a discovery dispute, River House did not raise arbitration as a challenge. River House instead argued that it had

“produced voluminous information, some of the discovery was objectionable, and it was continuing to supplement its production.” *Id.* at 228. It was highly relevant to the court that River House had contested the discovery motion but did not raise “an assumed obligation to arbitrate.” *Id.*

Similarly, Defendants here opposed Plaintiffs’ discovery motions not on the basis of “an assumed obligation to arbitrate individually,” but on other reasons. Notably admitting more than 16 times that the arbitrator could certify this class. Plaintiffs expressly stated that they were pursuing class claims in either court or arbitration, including: “The needed [class] discovery must occur regardless of the forum in which this case proceeds (arbitral tribunal or court) and therefore will occur regardless of this Court’s decision on appeal.” CP 588.

Plaintiffs have suffered extreme prejudice in delay alone from the actions of Defendants. Washington Courts have not decided whether prejudice is essential to show waiver, but have stated they “might follow the District of Columbia and Seventh Circuits and forgo the element, in part because of its inconsistency with the notion of waiver.” *Schuster*, 193 Wn. App. at 637. All the circuit courts “require little prejudice and do not demand strict proof of prejudice. The courts assume prejudice follows certain litigation practices.” *Id.* at 639. “Some degree of prejudice ordinarily may be inferred from a protracted delay in the assertion of arbitral rights when that delay is accompanied by sufficient litigation activity.” *Id.* Here, the prejudice of Defendants’ delay cannot be disputed.

Plaintiffs have been prejudiced by the significant delay which Defendants' change in position has already caused and which it will continue to cause.

Similarly prejudiced are the rights of the putative class, who have had their claims procedurally extinguished. Moreover, by being forced to arbitrate individually and separately, the Plaintiffs will further suffer prejudice because their claims have been severed despite all arising out of the same set of facts which are inherently inseparable. Plaintiff Cindius Romney, widow of Dr. Romney, will be forced to arbitrate her claims alone without the support of Dr. Romney's co-plaintiffs who worked at the same clinic and witnessed the same conduct. Requiring Plaintiffs to arbitrate separately is grossly inefficient and prejudicial.

Defendants drafted the Arbitration Agreements, and must not receive an unjust benefit from any supposedly ambiguous language as to class arbitration. *See, Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) ("Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt."). They excluded other claims but did not exclude class action – which would be illegal and void under Washington law as held in *Morris*. Class claims are an important substantive right to Plaintiffs and the putative class. Defendants have reciprocal agreements to arbitrate with every class member. Each one can join in this class arbitration because the claims are inherently inseparable. "For arbitration purposes, employees are agents of the employer if the parties intended the agreement to apply to them or if the alleged liability arises out of the same misconduct alleged against the employer." *Romney v.*

Franciscan Med. Grp., 186 Wn. App. 728, 747 (2015). “Where claims are based on the same set of facts and inherently inseparable, the court may order arbitration of claims against the party even if that party is not a party to the arbitration agreement.” *Id.* Litigating class claims in one arbitral proceeding is efficient and also a significant cost savings, compared to conducting potentially 300+ individual arbitrations; a completely untenable option here.

Defendants try to explain away their inconsistent conduct and clear representations about the powers of the arbitrator under the contracts. They cannot. “[A]t some point a party seeking to enforce an arbitration agreement must use it or lose it.” *Schuster*, at 621. The substantial delay by Defendants in challenging the arbitrability of class claims results in waiver; they have lost it. Moreover, Defendants wholly failed to preserve this issue by not raising it in their First Motion To Compel Arbitration, by not raising it the Motion To Reconsider they filed, CP 259-265, and by not raising on appeal. CP 1460-1501. The COA compelled the entire consolidated class complaint to arbitration as Defendants requested.

C. The Superior Court Erred By Usurping The Role Of The Arbitrator.

The arbitrator has the power to interpret the Arbitration Agreements. It is clear Defendants repeatedly admitted that one of the arbitrator’s powers is the power to certify a class. Defendants’ admissions should govern and mandate class arbitration. But, it is equally clear that, should the parties disagree about the meaning of the contract, the power of

contract interpretation has been delegated to the arbitrator. With a disputed issue of contract interpretation, Washington law is controlling. Even the US Supreme Court will not “ignore the fact that state law and not federal law normally governs such matters.” *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 450 (2003).

Washington courts place the duty of contract interpretation in the hands of the arbitrator when a contract mandates arbitration of all disputes “arising out of or related to” the contracts. *See, Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 887 (2009) (“An arbitration clause that encompasses any controversy ‘relating to’ a contract is broader than language covering only claims ‘arising out of’ a contract.”). “When a valid arbitration provision includes such broad language, “all doubts are to be resolved in favor of arbitrability.” *Wiese v. Cach, LLC*, 189 Wn. App. 466, 477 (2015). “Washington’s strong presumption in favor of arbitrability commands that ‘all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.’” *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 481 (2016). Absent waiver, estoppel, and the illegality of class action waivers in employment contracts, the interpretation of the Arbitration Agreements must be conducted by the arbitrator, not a court. The Superior Court committed reversible error.

“The question here – whether the contracts forbid class arbitration... concerns neither the validity of the arbitration clause nor its applicability to

the underlying dispute between the parties.” *Bazzle*, 539 U.S. at 452. “Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures.⁸ Arbitrators are well situated to answer that question.” *Id.* Five justices of the Supreme Court— including Justice Stevens in the concurrence — agreed in *Bazzle* that interpretation of the contract regarding class claims was for the arbitrator. *Id.* at 455. The court in *Bazzle* was dealing with a contract that similarly required the arbitration of all disputes arising from or relating to the contract. *Id.* at 448. It held that a “dispute about what the arbitration contract in each case means (i.e. whether it forbids the use of class arbitration procedures) is a dispute ‘relating to this contract[.]’” *Id.* at 451.

Washington Courts have reached the same conclusion when interpreting the broad language used in Plaintiffs’ Arbitration Agreements. “[A]n arbitration provision that encompasses any controversy “relating to” a contract is broader than language covering only claims “arising out” of a contract.” *Wiese v. Cach, LLC*, 189 Wn. App. at 477; *see also Townsend v. Quadrant Corp.*, 153 Wn. App. at 887. In both *Townsend* and *Wiese* the court was tasked with interpreting an arbitration clause to determine the scope of disputes committed to arbitration. The courts held that this was

⁸ Employees have a substantive right to bring class claims under the NLRA. Thus, as held in *Morris*, if it is a substantive gateway issue, this court must order class arbitration. Even if there was a class action waiver — and there is not - this court must sever the illegal term under the Agreements’ §4 Severability Clause. CP 64.

unequivocal broad language that requires arbitration of any dispute that even touches matters potentially covered by the agreement. *Wiese* at 477; *Townsend* at 887. “If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration[.]” *Townsend*, 153 Wn. App. at 887.

Binding authority from Washington Courts and highly persuasive authority of the U.S. Supreme Court supports that contract interpretation regarding arbitration procedures is a job for the arbitrator. This is also consistent with the AAA Rules that Defendants incorporated into the Arbitration Agreements by reference.

D. The Superior Court Exceeded The Mandate Of The COA, And This Court Must Review It Under RAP 12.9.

The Superior Court exceeded the Mandate of the COA. Defendants have offered no argument in opposition on the merits. Plaintiffs have a direct right of review under RAP 12.9. Plaintiffs have timely moved the COA directly to determine if the trial court had complied with the Mandate. “The question of compliance by the trial court may be raised by motion to recall the mandate[.]” RAP 12.9. The COA has authority here to determine if the Superior Court complied with the Mandate and must find that it did not.

“Upon issuance of the mandate by the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court[.]” RAP 12.2. Questions

that “*might have been determined had they been presented will not be considered by the Court of Appeals.*” *State v. Worl*, 129 Wn.2d 416, 425 (1996) (*emphasis added*). “If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration.” *Townsend*, 153 Wn. App. 870, 887 (2009). Disputes over contract interpretation are covered by the scope of the arbitration clause and ***must be sent to arbitration.*** *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 46 (2001).

The COA opinion and mandate did not explicitly or otherwise give the Superior Court the authority to interpret the contracts, sever Plaintiffs’ claims, or usurp the power of the arbitrator to determine if class claims could be arbitrated. The COA, in a well-reasoned opinion, acknowledged that Plaintiffs brought a class complaint, and remanded the entire case to the Superior Court for an order compelling Plaintiffs’ class complaint to arbitration. The Mandate allowed no other inquiry by the Superior Court.

II. CONCLUSION

In conclusion, Plaintiffs’ request the court to order class arbitration because (1) Defendants are equitably estopped from changing their position to deny class claims can be arbitrated when for 25 months they argued that an arbitrator had the power to certify a class; a power only available when class claims can be arbitrated. Plaintiffs relied on this, and suffered substantial delay and the ability to argue class waiver is illegal and unconscionable (2) Defendants waived any challenge to class arbitration by not raising it until remand 25 months after the filing of

Plaintiffs' class complaint, and failing to present the issue in their first Motion To Compel, Motion for Reconsideration, or Appeal; (3) interpreting the contracts to contain a class action waiver, as argued by Defendants, is illegal under *Morris* and usurps the power of the arbitrator in violation of established Washington law; and finally, (4) the Superior Court exceeded the Mandate from the COA which compelled Plaintiffs' consolidated class complaint to arbitration, and Defendants have not opposed this argument on the merits.

DATED this 30th day of September, 2016.

THE BLANKENSHIP LAW FIRM, P.S.

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Attorneys for Appellants

DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date listed below I caused to be served a copy of the attached document to the following attorneys for Defendants in the manner indicated below:

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- by Electronic Mail
- by Facsimile
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

Michele Haydel Gehrke
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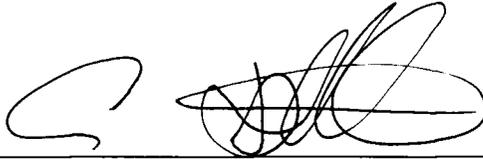
- by Electronic Mail
- by Facsimile
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

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- by Facsimile
- by First Class Mail
- by Hand Delivery
- by Notification via E-filing System

2015 OCT -3 PM 4:43
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON

DATED this 3rd day of October, 2016, at Seattle, Washington.

A handwritten signature in black ink, consisting of a large, stylized 'E' followed by a series of overlapping loops and a horizontal line.

ERICA BRUNETTE
Paralegal

APPENDIX A

The Honorable Julia Garratt

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MICHAEL ROMNEY; FARON BAUER; and
KRISTEN CHILDRESS, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

FRANCISCAN MEDICAL GROUP, a
Washington Corporation; FRANCISCAN
HEALTH SYSTEM, a Washington
Corporation; FRANCISCAN HEALTH
VENTURES, a Washington Corporation;
FRANCISCAN NORTHWEST PHYSICIANS
HEALTH NETWORK, LLC, a Washington
Corporation; and CATHOLIC HEALTH
INITIATIVES, a Colorado Corporation,

Defendants.

CASE NO. 13-2-38634-8 KNT

DEFENDANT FRANCISCAN
MEDICAL GROUP'S FIRST SET OF
INTERROGATORIES AND REQUESTS
FOR PRODUCTION TO PLAINTIFF
FARON BAUER

COMES NOW Defendant Franciscan Medical Group ("FMG" or "Defendant"), by
and through its attorneys of record, pursuant to Civil Rules 26, 33, and 34, and hereby
propounds the following Interrogatories to be answered, signed, and personally sworn to by
Plaintiff Faron Bauer ("Plaintiff" or "Bauer") within the time and manner established by the
Civil Rules and to produce the following documents for inspection and copying at the offices

1 of Michael Madden, Bennett Bigelow & Leedom P.S., 601 Union Street, Suite 1500, Seattle,
2 WA 98101 (Telephone: 206-622-5511), within thirty (30) days from the date of this
3 discovery.

4 **INSTRUCTIONS**

5 A. These Interrogatories and Requests are continuing in nature, and Plaintiff shall
6 promptly supplement his responses if he, or anyone acting on his behalf, obtains additional
7 documents after the initial responses are served.

8 B. If Plaintiff objects to an Interrogatory or Request, the objection is to be stated
9 in full. If an objection is stated with respect to a portion of a request, the remaining portion of
10 the request should be responded to notwithstanding the objection.

11 C. State if any Interrogatory cannot be answered in full after exercising due
12 diligence to secure the information, and answer to the extent possible, specifying your
13 inability to answer. If for any reason an answer is qualified, set forth the details of such
14 qualification.

15 D. Any sentence or phrase formed in the disjunctive shall also be read in the
16 conjunctive, and vice versa.

17 E. Any word formed in the singular shall also be read in the plural, and vice
18 versa.

19 F. Any verb formed in the present tense shall also be read in the past, imperfect,
20 and future tenses, and vice versa.

21 G. Any pronoun in the masculine gender shall also be read in the feminine gender,
22 and vice versa.

1 H. If any document was, but no longer is, in Plaintiff's custody, possession or
2 control, state what disposition was made of it, identify its present custodian, and state who
3 ordered or authorized such disposition.

4 I. If any form of privilege is claimed as grounds for not producing a document,
5 state:

- 6 1. the document's date, author, addressee, type (e.g., letter, memorandum,
7 note, chart, etc.), and general subject matter;
- 8 2. the nature of and basis for the privilege claimed;
- 9 3. the identity of all persons who have knowledge of the contents of the
10 document, and
- 11 4. the identity of each person to whom copies of the document have ever been
12 furnished.

13 J. These Requests encompass all documents in the possession, custody, or control
14 of Plaintiff or to which Plaintiff has access, regardless of whether such documents were
15 prepared by or for Plaintiff. It includes all documents in the possession, custody or control of
16 Plaintiff's attorneys, agents, investigators, employees, representatives or other parties acting
17 on his behalf, unless privileged.

18 K. The answers to the Interrogatories are to be made in writing under oath, and
19 are to be signed by the person making them.

20 DEFINITIONS

21 i. The terms "Plaintiff," "Bauer," "you," and "your" refer to Plaintiff Faron
22 Bauer, his agents, employees or other persons acting on his behalf.

23 ii. The term "FMG" refers to Franciscan Medical Group and its officers,
24 directors, agents, employees or other persons acting on its behalf.

25 iii. The term "Defendants" refers to Franciscan Medical Group, Franciscan Health
26

1 System, and Catholic Health Initiatives and their respective officers, directors, agents,
2 employees or other persons acting on their behalf.

3 iv. The term "identify" means to set forth:

4 (a) As used in reference to a natural person: full name, present home address,
5 phone number and place of employment;

6 (b) As used in reference to a corporation or other business entity: full name, type
7 of entity and its business address;

8 (c) As used in reference to a document: author, date of creation or receipt and
9 present custodian.

10 v. The term "Document" is defined to mean all documents in your possession,
11 custody or control, whether directly or indirectly. It is used in these requests in the broadest
12 sense and means any written, audio, electronically stored information or graphic matter of
13 whatever kind or nature, or any other means of preserving thought or expression (including,
14 without limitation, tape recordings, microfilm, microfiche, or digitally stored data), and all
15 tangible things from which information can be processed or transcribed, whether original,
16 copies or drafts (including without limitation, non-identical copies). A document with
17 handwritten or typewritten notes, editing marks, etc., is not and shall not be deemed identical
18 to one without such modifications, additions or deletions. "Document" specifically includes
19 all such items as kept by individuals at their desks, offices, homes or elsewhere. The term
20 "document" as defined herein, shall be construed to specifically include all electronically
21 stored information and data maintained on computers, hard drives, discs, networks and/or
22 shared drives. Any electronically stored information or data produced pursuant to these
23 requests shall be produced with all directory structure as the records were maintained. All
24 documents should be produced in paper format or PDF unless individual requests specify
25 otherwise or counsel have agreed to some other form of production.

26 vi. The term "Person" is defined as any natural person or business, legal or
governmental entity or association.

INTERROGATORIES

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2 **INTERROGATORY NO. 1:** Identify each and every person with whom you
3 consulted in connection with the preparation of your answer to these Interrogatories, other
4 than your attorney(s).

5 **ANSWER:**
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8 **INTERROGATORY NO. 2:** Identify all persons and/or entities, other than your
9 attorney(s), who have knowledge, or who you believe to have knowledge, about the
10 allegations contained in your lawsuit, and for each such person state the subjects on which
11 you believe they have information.
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13 **ANSWER:**
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16 **INTERROGATORY NO. 3:** Identify all other civil actions, lawsuits, and
17 administrative charges or filings asserted by you or to which you have been a party
18 (including claims for workers' compensation or unemployment compensation benefits) within
19 the past ten (10) years, whether before local, municipal, county, state or federal
20 commissions, agencies or courts and for each state the date of filing, place of filing
21 and case number for each claim and the nature of each claim asserted.

22 **ANSWER:**
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1 **INTERROGATORY NO. 4:** Identify each individual you expect to call as an expert
2 witness at trial. For each person so identified, please state his or her name, address,
3 occupation, subject matter on which the individual is expected to testify, the general nature of
4 the testimony to be presented, the data or information on which the expert relied, the
5 qualifications of the expert and the expert's hourly deposition fee.

6 **ANSWER:**

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9 **INTERROGATORY NO. 5:** Have you applied for employment between May 2012
10 and the present? If so, please identify all employers to whom you submitted an application,
11 the name of the position for which you applied, and the result of such application. If you
12 accepted any offers of employment during this time period, please identify the employer, your
13 job title, salary, benefits (including the cost of such benefits if known), dates, and, if
14 applicable, the reason for leaving any position. If you declined any offers of employment
15 during this time period, please identify who offered such employment, the wages and benefits
16 you declined and the reason(s) you declined the offer. Please sign and return the attached
17 authorization for release of employment records.

18 **ANSWER:**

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21 **INTERROGATORY NO. 6:** Identify all of your employers for the five (5) years prior
22 to your employment with FMG and any other employers that you worked for while you were
23 also employed by FMG. For each employer identified, please identify your dates of
24 employment, position, supervisor, compensation and benefits, and, if applicable, your reason
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1 for leaving employment. Please also sign and return the attached authorization for release of
2 employment records.

3 **ANSWER:**

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5 **INTERROGATORY NO. 7:** Identify all Facebook, Twitter, Pinterest, LinkedIn,
6 blogs, or other online profiles, web addresses (including, but not limited to, addresses for any
7 blogs you have maintained or posted to), or other social media sites where you have had an
8 account or presence at any time since January 2004. For each of your account(s), blog(s),
9 and/or website(s), please provide your username; the names of any other individuals who
10 have access to the account, blog, and/or website under your username(s); any email addresses
11 associated with the username; and the last time you accessed the account, blog, and/or
12 website.

13 **ANSWER:**

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16 **INTERROGATORY NO. 8:** Please identify all “adverse employment actions by
17 Defendants” that you allege you were subjected to during your employment with FMG, as
18 alleged in Paragraph 51 of the Class Action Complaint.

19 **ANSWER:**

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21
22 **INTERROGATORY NO. 9:** Please identify each and every employee or
23 representative of any Defendant to whom you “demand[ed] wages, earned and owing [and]
24 object[ed] to Defendants’ wrongful withholding of wages,” as alleged in Paragraph 3 of the
25 Class Action Complaint, as well as each and every employee or representative of any
26 Defendant to whom you “complained . . . both orally and in writing, about not being paid

1 wages earned and owing,” as alleged in Paragraph 30 of the Class Action Complaint, and state
2 the date(s) on which alleged reports or complaints were made, the substance of the report or
3 complaint, whether the alleged report or complaint was oral or in writing, and what response,
4 if any, you received.

5 **ANSWER:**

6
7 **INTERROGATORY NO. 10:** Please identify each and every employee or
8 representative of any Defendant to whom you “report[ed] clinical practices and treatment that
9 [you] reasonably believed jeopardized public health and safety of the citizens of Washington,”
10 as alleged in Paragraph 3 of the Class Action Complaint, and state the date on which the
11 report was made, whether the alleged report was oral or in writing, the substance of the report,
12 and what response, if any, you received.

13 **ANSWER:**

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16 **INTERROGATORY NO. 11:** Please state each and every instance that you “opposed
17 activity by Defendants that violated RCW 49.52 *et seq.*, RCW 49.48 *et seq.*, and established
18 public policies of Washington State,” as alleged in Paragraph 52 of the Class Action
19 Complaint, including, but not limited to, a description of each activity by Defendants
20 allegedly violating RCW 49.52 *et seq.*, RCW 49.48 *et seq.*, and established public policies of
21 Washington State, how you “opposed” such alleged activity, including whether you reported
22 such alleged activity to any employee(s) of Defendants, the date(s) on which you “opposed”
23 such alleged activity, and what response, if any, you received.

24 **ANSWER:**

1 **INTERROGATORY NO. 12:** Regarding any physical or mental injuries, ailments or
2 conditions, including emotional distress, which you allege to have sustained as a result of the
3 events described in Class Action Complaint, state as follows:

- 4 (a) Describe in detail the nature of the injuries, ailments or conditions;
- 5 (b) Identify all doctors, psychiatrists, psychologists or other medical care
6 providers, including clinics and clinicians, who treated or examined you for
7 your injuries, ailments or conditions and the approximate dates of treatment;
8 and
- 9 (c) State whether you were hospitalized for such injuries, ailments or conditions
10 and, if so, the phone number and current address of the hospital, the dates of
11 hospitalization, and the nature of the treatment received.
- 12 (d) Please also sign and return the attached HIPAA Compliant Authorization for
13 Release of Information

14 **ANSWER:**

15 **INTERROGATORY NO. 13:** State your work schedule during the time you were
16 employed by FMG from June 30, 2011 through your termination. For purposes of this
17 Interrogatory the term "your work schedule" seeks to have you provide your standard "work
18 week" (e.g., Monday through Friday, Wednesday through Sunday, etc.) and hours (e.g., eight
19 to five) that you worked. If your schedule fluctuated, please indicate so but provide as much
20 detail as possible concerning the fluctuation.

21 **ANSWER:**

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23 **INTERROGATORY NO. 14:** State in detail the factual basis for your allegation that
24 FMG failed to pay "Plaintiffs and Class Members wages earned and owing according to the
25 terms of the Employment Agreements," as alleged in Paragraph 45 of the Class Action
26 Complaint.

1 **ANSWER:**

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INTERROGATORY NO. 15: State in detail the factual basis for your allegation that FMG's alleged actions constitute knowing, intentional, and willful violations of the applicable wage statutes, as alleged in Paragraphs 22, 23, and 46 of the Class Action Complaint.

ANSWER:

INTERROGATORY NO. 16: State specifically which dates FMG allegedly failed to credit you for all hours worked, including, but not limited to, alleged failure to credit you "for time spent on patient charts, for time spent treating patients after official clinic hours, for time spent in training . . . and for time spent in mandatory meetings," as alleged in Paragraph 29 of the Class Action Complaint. For each date, please state the time spent working, and the work performed, for which FMG allegedly failed to credit as hours worked. For each quarter from June 30, 2011 through your termination, please state the number of hours you allegedly worked in excess of 423 hours.

ANSWER:

INTERROGATORY NO. 17: State whether you recorded, or otherwise kept track of, the hours and/or time that you spent on all work-related activities from June 30, 2011 through the date of your termination. If your answer is "Yes," please describe in detail how you recorded, or otherwise kept track of, the hours and/or time you spent on work-related activities, including, but not limited to, time spent on patient charts, time spent treating patients (before, during, or after official clinic hours), time spent in training or continuing

1 education, and time spent in mandatory meetings. If your answer is "Yes," please also state
2 whether you submitted any recorded hours and/or time to any representative, employee, or
3 agent of Defendants and, if so, identify the individual(s) to whom you submitted any such
4 records.

5 **ANSWER:**

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7 **INTERROGATORY NO. 18:** State whether you recorded, or otherwise kept track of,
8 all hours and/or time you worked from June 30, 2011 through the date of your termination
9 during which you had patient contact. If your answer is "Yes," please describe in detail how
10 you recorded, or otherwise kept track of, the hours and/or time during which you had contact
11 with patients. If your answer is "Yes," please also state whether you submitted any recorded
12 hours and/or time to any representative, employee, or agent of Defendants and, if so, identify
13 the individual(s) to whom you submitted any such records.

14 **ANSWER:**

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17 **INTERROGATORY NO. 19:** State whether you recorded, or otherwise kept track of,
18 the hours and/or time that you spent performing medical director duties and/or services during
19 the time that you held a medical director position. If your answer is "Yes," please describe in
20 detail how you recorded, or otherwise kept track of, the hours and/or time you spent on
21 medical director duties and/or services. If your answer is "Yes," please also state the average
22 time spent per week on medical director duties and/or services, whether you submitted any
23 recorded hours and/or time to any representative, employee, or agent of Defendants, and, if
24 so, identify the individual(s) to whom you submitted any such records.

25 **ANSWER:**

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INTERROGATORY NO. 20: Regarding your claims for damages in this case, specifically set forth each and every type of damage claimed, the amounts of each type of damage claimed and the formula utilized to determine the amount of each type of damage.

ANSWER:

INTERROGATORY NO. 21: Identify all FMG employees known to you or your representatives who allege that they are not being paid in accordance with the provisions of their Employment Agreements, including, but not limited to, payment for the patient contact hours worked in excess of 423 patient contact hours per quarter.

ANSWER:

REQUESTS FOR PRODUCTION

1. Any and all non-privileged documents you identified and/or relied upon in responding to Defendant's First Interrogatories to Plaintiff.

RESPONSE:

2. Your State and Federal Income Tax returns for the past five years.

RESPONSE:

3. All documents which relate to or support your claim for damages, including any alleged economic and/or liquidated damages.

RESPONSE:

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4. Any and all correspondence, letters, emails or other documents relating to any search for employment you made between May 2012 and the present including, but not limited to, applications, resumes, correspondence or letters received from or provided to any prospective employer.

RESPONSE:

5. Any and all documents related to any jobs or positions offered to you between May 2012 and the present including, but not limited to, documents containing salary and benefit information for each such job and documents regarding whether you accepted or denied the job or position.

RESPONSE:

6. Any and all documents and correspondence authored by you, or between you and anyone other than your attorneys, referencing, mentioning or relating to allegations contained in your Class Action Complaint.

RESPONSE:

7. Any and all correspondence between you and any other employee or former employee of any Defendant, including, but not limited to, documents, correspondence, emails, text messages, letters, and/or social networking or other website entries referencing, mentioning or relating to allegations contained in your Class Action Complaint.

RESPONSE:

1 8. Any and all correspondence between you and any putative class member
2 referencing, mentioning or relating to the allegations contained in your Class Action
3 Complaint.

4 **RESPONSE:**

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6 9. Any and all correspondence between you and Dr. Faron Bauer referencing,
7 mentioning or relating to the allegations contained in your Class Action Complaint, your
8 employment with FMG, and/or the termination of your employment with FMG.

9 **RESPONSE:**

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11 10. Any and all correspondence between you and Dr. Kristen Childress
12 referencing, mentioning or relating to the allegations contained in your Class Action
13 Complaint, your employment with FMG, and/or the termination of your employment with
14 FMG.

15 **RESPONSE:**

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17 11. Any and all correspondence between you and any person (other than your
18 attorneys) with whom you discussed the termination of your employment from FMG and/or
19 the allegations of this lawsuit including, but not limited to, documents, correspondence,
20 emails, text messages, letters, and/or social networking or other website entries.

21 **RESPONSE:**

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24 12. All diaries, logs, journals, calendars or notes (other than correspondence
25 between you and your attorneys) created or maintained by you at any time during or after
26 your employment referencing, mentioning or relating to any allegations contained in your

1 Class Action Complaint, including, but not limited to, any logs, notes, or other documents
2 relating to or recording hours worked that you allege you were not compensated for.

3 **RESPONSE:**
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5 13. All diaries, logs, journals, calendars or notes (other than correspondence
6 between you and your attorneys) created or maintained by you at any time during or after
7 your employment referencing, mentioning or relating to any damages you allege you
8 sustained as a result of the allegations in the Class Action Complaint, including, but not
9 limited to, any diaries, logs, journals, calendars, notes, or other documents relating to or
10 reflecting your state of mind as it relates to your claim for emotional distress damages.

11 **RESPONSE:**
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13 14. All tapes (audio, video, digital or any other format) and transcripts of any
14 conversations between you and any third party, other than your attorneys, that relate in any
15 way to the termination of your employment from FMG, any alleged complaints you made
16 about wages earned and owing, any alleged complaints you made about violations of RCW
17 49.46 *et seq.*, RCW 49.48 *et seq.*, RCW 49.52 *et seq.*, and established public policies of
18 Washington State, and/or any other allegations contained in your Class Action Complaint.

19 **RESPONSE:**
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22 15. All documents authored by any third party, other than your attorneys, relating
23 in any manner to the claims contained in your Class Action Complaint.

24 **RESPONSE:**
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1 16. The curriculum vitae of every individual identified as an expert in response to
2 Defendant's First Interrogatories to Plaintiff.

3 **RESPONSE:**
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5 17. All reports from any and all experts retained or specially employed by you or
6 on your behalf to provide expert testimony in this matter, including copies of all materials
7 relied upon by each expert in rendering his or her opinions.

8 **RESPONSE:**
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10 18. All documents provided by you to any expert(s) retained by you to testify at
11 the trial of this lawsuit.

12 **RESPONSE:**
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15 19. All decisions, letters, records, statements, forms, correspondence (other than
16 with your attorneys) or other documents relating to or regarding your contact with any federal,
17 state or local commission or agency (including, but not limited to, any unemployment
18 agencies and the Washington State Department of Health) concerning the allegations in your
19 Class Action Complaint, including, but not limited to, the allegations that you opposed
20 practices "jeopardiz[ing] public health and safety."

21 **RESPONSE:**
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23 20. Any and all documents filed with any federal, state or local commission or
24 agency, including, but not limited to, the Washington State Department of Health, regarding
25 any employee(s) of any Defendant that you believed engaged in practices that "jeopardized
26

1 public health and safety.”

2 **RESPONSE:**

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4 21. All statements, written or oral, signed or unsigned, memorandum of
5 statements, tapes or other recordings of statements which were obtained from Defendant or
6 any of its current or former employees or agents concerning any of the allegations set forth in
7 your Class Action Complaint.

8 **RESPONSE:**

9
10 22. Any and all documents or correspondence including, but not limited to, letters,
11 emails, memos or notes (other than correspondence between you and your attorneys), dating
12 from January 1, 2009 to present, regarding or relating to any complaints or concerns about
13 other FMG physicians “jeopardize[ing] public health and safety” including, but not limited to,
14 complaints or concerns relating to other FMG physicians’ ability to practice medicine,
15 complaints or concerns relating to other FMG physicians’ health issues potentially affecting
16 patient care, and any other patient safety concerns relating to other FMG physicians.

17 **RESPONSE:**

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20 23. Produce all documents related to any and all of your online profiles or other
21 social media sites, (including but not limited to Facebook, LinkedIn, Twitter, YouTube and/or
22 blogs), including postings or messages (including, without limitation, tweets, replies, re-
23 tweets, direct or instant messages, status updates, wall comments, groups joined, activity
24 streams, and blog entries), photographs, videos, and online communications that:

25 (a) refer or relate to the allegations contained in your Class Action Complaint,
26 including your claim for damages; and/or

1 (b) consist of or reference communications with current and/or former employees
2 of Defendant regarding your employment (or termination from employment) with FMG;
3 and/or

4 (c) refer or relate to hours worked and wages you claim were earned but not paid
5 between June 30, 2011 and the date of your discharge from FMG; and/or

6 (d) refer or relate to any emotion, feeling, or mental state you may have
7 experienced from January 2012 to the present.

8 **RESPONSE:**
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11 24. Any and all documents supporting your contention that you “demand[ed]
12 wages, earned and owing [and] object[ed] to Defendants’ wrongful withholding of wages,” as
13 alleged in Paragraph 3 of the Class Action Complaint.

14 **RESPONSE:**
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16 25. Any and all documents supporting your contention that you “complained . . .
17 both orally and in writing, about not being paid wages earned and owing,” as alleged in
18 Paragraph 30 of the Class Action Complaint.

19 **RESPONSE:**
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22 26. Any and all documents supporting your contention that you “report[ed] clinical
23 practices and treatment that [you] reasonably believed jeopardized public health and safety of
24 the citizens of Washington,” as alleged in Paragraph 3 of the Class Action Complaint.

25 **RESPONSE:**
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2 27. Any and all documents supporting your contention that you opposed activity
3 by Defendants that violated RCW 49.46 *et seq.*, RCW 49.48 *et seq.*, RCW 49.52 *et seq.*, and
4 established public policies of Washington State, as alleged in Paragraph 52 of the Class
5 Action Complaint.

6 **RESPONSE:**
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9 28. Any and all documents which relate to or support your claim for non-pecuniary
10 damages, including any alleged emotional distress damages.

11 **RESPONSE:**
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14 29. Any and all documents referencing or related to your medical director position,
15 the termination from your medical director position in 2011, and any attempts or efforts made
16 by you to regain a medical director position with FMG after 2011, including, but not limited
17 to, documents referencing or relating to concerns about your performance as a medical
18 director and/or management abilities and correspondence with FMG employees regarding the
19 need for a medical director for the St. Anthony Prompt Care Clinic.

20 **RESPONSE:**
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23 30. Any and all documents referencing, reflecting, or related to any formal or
24 informal counseling or discipline you received while you were employed by FMG, including,
25 but not limited to, formal or informal counseling or discipline related to your relationship with
26 Lisa Jahn, your interactions with other medical providers and staff at the St. Anthony Prompt

1 Care Clinic, closing the St. Anthony Prompt Care Clinic early, and/or failure to record or turn
2 in time spent performing "Additional Shift Work," as defined in your June 30, 2011 FMG
3 Physician Employment Agreement.

4 **RESPONSE:**

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7 31. All records, invoices, bills or statements for medical services, if any, which
8 resulted from your treatment for injuries including, but not limited to, emotional distress,
9 which you allege you sustained as a result of Defendants' actions.

10 **RESPONSE:**

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12 32. Any and all documents relating to or reflecting contract negotiations between
13 you and any representative of FMG, including, but not limited to, Cheree Green, regarding
14 your FMG Physician Employment Agreement, dated June 30, 2011, and any amendments.

15 **RESPONSE:**

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18 33. Any and all documents relating to or reflecting all hours you spent on work-
19 related activities from June 30, 2011 through your termination, including, but not limited to,
20 time spent on patient charts, time spent treating patients after official clinic hours, time spent
21 in training, time spent in continuing medical education, and time spent in mandatory
22 meetings.

23 **RESPONSE:**

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26 34. Any and all documents relating to or reflecting all hours you worked from June

30, 2011 through your termination during which you had patient contact.

RESPONSE:

35. Any and all documents relating to or reflecting all time you spent at any of Defendant's clinics from June 30, 2011 through your termination.

RESPONSE:

36. Any and all documents relating to or reflecting all hours you worked per quarter from June 30, 2011 through your termination, including, but not limited to, any and all documents supporting your contention that you worked in excess of 423 hours per quarter, as alleged in Paragraph 30 of the Class Action Complaint.

RESPONSE:

37. Any and all documents supporting your contention that FMG failed to pay "Plaintiffs and Class Members wages earned and owing according to the terms of the Employment Agreements," as alleged in Paragraph 45 of the Class Action Complaint.

RESPONSE:

38. Any and all documents supporting your contention that Defendants intentionally harmed your reputation, as alleged in Paragraph 53 of the Class Action Complaint

RESPONSE:

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2 39. All documents or materials showing the dates and hours you worked as a
3 physician at any of FMG's clinics, including, but not limited to, schedules, calendars, time
4 sheets or any other type of documentation.

5 **RESPONSE:**
6

7 40. All documents or materials reflecting or showing the dates and hours you
8 performed medical director duties and/or services, including, but not limited to, schedules,
9 calendars, time sheets or any other type of documentation.

10 **RESPONSE:**
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12 41. Any documents sent by you to Defendants (or any agent or employee of
13 Defendants) or by Defendants to you that concern:

14 (1) any complaint relating to FMG's alleged failure to pay wages due to you under
15 your FMG Physician Employment Agreement, entered into on or about June 30, 2011;
16 and/or

17 (2) any complaint relating to FMG's alleged failure to accurately record time or pay
18 for time worked under your FMG Physician Employment Agreement, entered into on
19 or about June 30, 2011.

20 **RESPONSE:**
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23 42. Any and all documents supporting your contention that you were employed by
24 FHS and CHI.

25 **RESPONSE:**
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1 43. Any and all documents reflecting or relating to any payments made by FHS
2 and/or CHI to you, including all payroll records, timesheets, pay stubs, cancelled checks, and
3 paychecks.

4 **RESPONSE:**

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6 44. Any and all documents reflecting or relating to any payments made by FMG to
7 you, including all payroll records, timesheets, pay stubs, cancelled checks, and paychecks
8 from your employment with FMG.

9 **RESPONSE:**

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11 45. All documents that identify any specific or general category of putative class
12 members that you claim are “similarly situated” to yourself.

13 **RESPONSE:**

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16 46. All documents that identify the putative group(s) of class members or
17 individual putative class members that Plaintiffs claim are “similarly situated” to themselves.

18 **RESPONSE:**

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20 47. All documents or copies of documents submitted by you to FMG requesting
21 “Additional Shift Work” payments for working in excess of 423 hours per quarter, pursuant to
22 the terms of your contract.

23 **RESPONSE:**

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Missouri, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

Scott C.G. Blankenship, WSBA #21431
Paul S. Woods, WSBA #42976
Attorneys for Plaintiffs
The Blankenship Law Firm, P.S.
1000 Second Ave, Ste. 3250
Seattle, WA 98104
Fax: (206) 343-2704
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pwoods@blankenshiplawfirm.com

- Hand Delivered
- Facsimile
- U.S. Mail
- Email

- Hand Delivered
- Facsimile
- U.S. Mail
- Email

Dated this 31st day of December, at Kansas City, Missouri.



Katharine Sangha

The Honorable Julia Garratt

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MICHAEL ROMNEY; FARON BAUER; and
KRISTEN CHILDRESS, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

FRANCISCAN MEDICAL GROUP, a
Washington Corporation; FRANCISCAN
HEALTH SYSTEM, a Washington
Corporation; FRANCISCAN HEALTH
VENTURES, a Washington Corporation;
FRANCISCAN NORTHWEST PHYSICIANS
HEALTH NETWORK, LLC, a Washington
Corporation; and CATHOLIC HEALTH
INITIATIVES, a Colorado Corporation,

Defendants.

CASE NO. 13-2-38634-8 KNT

DEFENDANT FRANCISCAN
MEDICAL GROUP'S FIRST SET OF
INTERROGATORIES AND REQUESTS
FOR PRODUCTION TO PLAINTIFF
MICHAEL ROMNEY

COMES NOW Defendant Franciscan Medical Group ("FMG" or "Defendant"), by
and through its attorneys of record, pursuant to Civil Rules 26, 33, and 34, and hereby
propounds the following Interrogatories to be answered, signed, and personally sworn to by
Plaintiff Michael Romney ("Plaintiff" or "Romney") within the time and manner established
by the Civil Rules and to produce the following documents for inspection and copying at the

1 offices of Michael Madden, Bennett Bigelow & Leedom P.S., 601 Union Street, Suite 1500,
2 Seattle, WA 98101 (Telephone: 206-622-5511), within thirty (30) days from the date of this
3 discovery.

4 **INSTRUCTIONS**

5 A. These Interrogatories and Requests are continuing in nature, and Plaintiff shall
6 promptly supplement his responses if he, or anyone acting on his behalf, obtains additional
7 documents after the initial responses are served.
8

9 B. If Plaintiff objects to an Interrogatory or Request, the objection is to be stated
10 in full. If an objection is stated with respect to a portion of a request, the remaining portion of
11 the request should be responded to notwithstanding the objection.

12 C. State if any Interrogatory cannot be answered in full after exercising due
13 diligence to secure the information, and answer to the extent possible, specifying your
14 inability to answer. If for any reason an answer is qualified, set forth the details of such
15 qualification.
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17 D. Any sentence or phrase formed in the disjunctive shall also be read in the
18 conjunctive, and vice versa.

19 E. Any word formed in the singular shall also be read in the plural, and vice
20 versa.

21 F. Any verb formed in the present tense shall also be read in the past, imperfect,
22 and future tenses, and vice versa.
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24 G. Any pronoun in the masculine gender shall also be read in the feminine gender,
25 and vice versa.
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1 H. If any document was, but no longer is, in Plaintiff's custody, possession or
2 control, state what disposition was made of it, identify its present custodian, and state who
3 ordered or authorized such disposition.

4 I. If any form of privilege is claimed as grounds for not producing a document,
5 state:

- 6 1. the document's date, author, addressee, type (e.g., letter, memorandum,
7 note, chart, etc.), and general subject matter;
- 8 2. the nature of and basis for the privilege claimed;
- 9 3. the identity of all persons who have knowledge of the contents of the
10 document, and
- 11 4. the identity of each person to whom copies of the document have ever been
12 furnished.

13 J. These Requests encompass all documents in the possession, custody, or control
14 of Plaintiff or to which Plaintiff has access, regardless of whether such documents were
15 prepared by or for Plaintiff. It includes all documents in the possession, custody or control of
16 Plaintiff's attorneys, agents, investigators, employees, representatives or other parties acting
17 on his behalf, unless privileged.

18 K. The answers to the Interrogatories are to be made in writing under oath, and
19 are to be signed by the person making them.

20 DEFINITIONS

21 i. The terms "Plaintiff," "Romney," "you," and "your" refer to Plaintiff Michael
22 Romney, his agents, employees or other persons acting on his behalf.

23 ii. The term "FMG" refers to Franciscan Medical Group and its officers,
24 directors, agents, employees or other persons acting on its behalf.

25 iii. The term "Defendants" refers to Franciscan Medical Group, Franciscan Health
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1 System, and Catholic Health Initiatives and their respective officers, directors, agents,
2 employees or other persons acting on their behalf.

3 iv. The term "identify" means to set forth:

4 (a) As used in reference to a natural person: full name, present home address,
5 phone number and place of employment;

6 (b) As used in reference to a corporation or other business entity: full name, type
7 of entity and its business address;

8 (c) As used in reference to a document: author, date of creation or receipt and
9 present custodian.

10 v. The term "Document" is defined to mean all documents in your possession,
11 custody or control, whether directly or indirectly. It is used in these requests in the broadest
12 sense and means any written, audio, electronically stored information or graphic matter of
13 whatever kind or nature, or any other means of preserving thought or expression (including,
14 without limitation, tape recordings, microfilm, microfiche, or digitally stored data), and all
15 tangible things from which information can be processed or transcribed, whether original,
16 copies or drafts (including without limitation, non-identical copies). A document with
17 handwritten or typewritten notes, editing marks, etc., is not and shall not be deemed identical
18 to one without such modifications, additions or deletions. "Document" specifically includes
19 all such items as kept by individuals at their desks, offices, homes or elsewhere. The term
20 "document" as defined herein, shall be construed to specifically include all electronically
21 stored information and data maintained on computers, hard drives, discs, networks and/or
22 shared drives. Any electronically stored information or data produced pursuant to these
23 requests shall be produced with all directory structure as the records were maintained. All
24 documents should be produced in paper format or PDF unless individual requests specify
25 otherwise or counsel have agreed to some other form of production.

26 vi. The term "Person" is defined as any natural person or business, legal or
governmental entity or association.

INTERROGATORIES

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INTERROGATORY NO. 1: Identify each and every person with whom you consulted in connection with the preparation of your answer to these Interrogatories, other than your attorney(s).

ANSWER:

INTERROGATORY NO. 2: Identify all persons and/or entities, other than your attorney(s), who have knowledge, or who you believe to have knowledge, about the allegations contained in your lawsuit, and for each such person state the subjects on which you believe they have information.

ANSWER:

INTERROGATORY NO. 3: Identify all other civil actions, lawsuits, and administrative charges or filings asserted by you or to which you have been a party (including claims for workers' compensation or unemployment compensation benefits) within the past ten (10) years, whether before local, municipal, county, state or federal commissions, agencies or courts and for each state the date of filing, place of filing and case number for each claim and the nature of each claim asserted.

ANSWER:

1 **INTERROGATORY NO. 4:** Identify each individual you expect to call as an expert
2 witness at trial. For each person so identified, please state his or her name, address,
3 occupation, subject matter on which the individual is expected to testify, the general nature of
4 the testimony to be presented, the data or information on which the expert relied, the
5 qualifications of the expert and the expert's hourly deposition fee.

6 **ANSWER:**

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8 **INTERROGATORY NO. 5:** Have you applied for employment between May 2012
9 and the present? If so, please identify all employers to whom you submitted an application,
10 the name of the position for which you applied, and the result of such application. If you
11 accepted any offers of employment during this time period, please identify the employer, your
12 job title, salary, benefits (including the cost of such benefits if known), dates, and, if
13 applicable, the reason for leaving any position. If you declined any offers of employment
14 during this time period, please identify who offered such employment, the wages and benefits
15 you declined and the reason(s) you declined the offer. Please sign and return the attached
16 authorization for release of employment records.
17

18 **ANSWER:**

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21 **INTERROGATORY NO. 6:** Identify all of your employers for the five (5) years prior
22 to your employment with FMG and any other employers that you worked for while you were
23 also employed by FMG. For each employer identified, please identify your dates of
24 employment, position, supervisor, compensation and benefits, and, if applicable, your reason
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1 for leaving employment. Please also sign and return the attached authorization for release of
2 employment records.

3 **ANSWER:**

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6 **INTERROGATORY NO. 7:** Identify all Facebook, Twitter, Pinterest, LinkedIn,
7 blogs, or other online profiles, web addresses (including, but not limited to, addresses for any
8 blogs you have maintained or posted to), or other social media sites where you have had an
9 account or presence at any time since January 2004. For each of your account(s), blog(s),
10 and/or website(s), please provide your username; the names of any other individuals who
11 have access to the account, blog, and/or website under your username(s); any email addresses
12 associated with the username; and the last time you accessed the account, blog, and/or
13 website.

14 **ANSWER:**

15
16 **INTERROGATORY NO. 8:** Please identify all “adverse employment actions by
17 Defendants” that you allege you were subjected to during your employment with FMG, as
18 alleged in Paragraph 51 of the Class Action Complaint.

19 **ANSWER:**

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22 **INTERROGATORY NO. 9:** Please identify each and every employee or
23 representative of any Defendant to whom you “demand[ed] wages, earned and owing [and]
24 object[ed] to Defendants’ wrongful withholding of wages,” as alleged in Paragraph 3 of the
25 Class Action Complaint, as well as each and every employee or representative of any
26 Defendant to whom you “complained . . . both orally and in writing, about not being paid

1 wages earned and owing,” as alleged in Paragraph 30 of the Class Action Complaint, and state
2 the date(s) on which alleged reports or complaints were made, the substance of the report or
3 complaint, whether the alleged report or complaint was oral or in writing, and what response,
4 if any, you received.

5 **ANSWER:**

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7 **INTERROGATORY NO. 10:** Please identify each and every employee or
8 representative of any Defendant to whom you “report[ed] clinical practices and treatment that
9 [you] reasonably believed jeopardized public health and safety of the citizens of Washington,”
10 as alleged in Paragraph 3 of the Class Action Complaint, and state the date on which the
11 report was made, whether the alleged report was oral or in writing, the substance of the report,
12 and what response, if any, you received.

13 **ANSWER:**

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16 **INTERROGATORY NO. 11:** Please state each and every instance that you “opposed
17 activity by Defendants that violated RCW 49.52 *et seq.*, RCW 49.48 *et seq.*, and established
18 public policies of Washington State,” as alleged in Paragraph 52 of the Class Action
19 Complaint, including, but not limited to, a description of each activity by Defendants
20 allegedly violating RCW 49.52 *et seq.*, RCW 49.48 *et seq.*, and established public policies of
21 Washington State, how you “opposed” such alleged activity, including whether you reported
22 such alleged activity to any employee(s) of Defendants, the date(s) on which you “opposed”
23 such alleged activity, and what response, if any, you received.

24 **ANSWER:**

1 **INTERROGATORY NO. 12:** Regarding any physical or mental injuries, ailments or
2 conditions, including emotional distress, which you allege to have sustained as a result of the
3 events described in Class Action Complaint, state as follows:

- 4 (a) Describe in detail the nature of the injuries, ailments or conditions;
- 5 (b) Identify all doctors, psychiatrists, psychologists or other medical care
6 providers, including clinics and clinicians, who treated or examined you for
7 your injuries, ailments or conditions and the approximate dates of treatment;
8 and
- 9 (c) State whether you were hospitalized for such injuries, ailments or conditions
10 and, if so, the phone number and current address of the hospital, the dates of
11 hospitalization, and the nature of the treatment received.
- 12 (d) Please also sign and return the attached HIPAA Compliant Authorization for
13 Release of Information

14 **ANSWER:**

15 **INTERROGATORY NO. 13:** State your work schedule during the time you were
16 employed by FMG from June 30, 2011 through your termination. For purposes of this
17 Interrogatory the term "your work schedule" seeks to have you provide your standard "work
18 week" (e.g., Monday through Friday, Wednesday through Sunday, etc.) and hours (e.g., eight
19 to five) that you worked. If your schedule fluctuated, please indicate so but provide as much
20 detail as possible concerning the fluctuation.

21 **ANSWER:**

22

23 **INTERROGATORY NO. 14:** State in detail the factual basis for your allegation that
24 FMG failed to pay "Plaintiffs and Class Members wages earned and owing according to the
25 terms of the Employment Agreements," as alleged in Paragraph 45 of the Class Action
26 Complaint.

1 **ANSWER:**

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3 **INTERROGATORY NO. 15:** State in detail the factual basis for your allegation that
4 FMG's alleged actions constitute knowing, intentional, and willful violations of the applicable
5 wage statutes, as alleged in Paragraphs 22, 23, and 46 of the Class Action Complaint.
6

7 **ANSWER:**

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9 **INTERROGATORY NO. 16:** State specifically which dates FMG allegedly failed to
10 credit you for all hours worked, including, but not limited to, alleged failure to credit you "for
11 time spent on patient charts, for time spent treating patients after official clinic hours, for time
12 spent in training . . . and for time spent in mandatory meetings," as alleged in Paragraph 29 of
13 the Class Action Complaint. For each date, please state the time spent working, and the work
14 performed, for which FMG allegedly failed to credit as hours worked. For each quarter from
15 June 30, 2011 through your termination, please state the number of hours you allegedly
16 worked in excess of 423 hours.
17

18 **ANSWER:**

19
20 **INTERROGATORY NO. 17:** State whether you recorded, or otherwise kept track of,
21 the hours and/or time that you spent on all work-related activities from June 30, 2011 through
22 the date of your termination. If your answer is "Yes," please describe in detail how you
23 recorded, or otherwise kept track of, the hours and/or time you spent on work-related
24 activities, including, but not limited to, time spent on patient charts, time spent treating
25 patients (before, during, or after official clinic hours), time spent in training or continuing
26

1 education, and time spent in mandatory meetings. If your answer is "Yes," please also state
2 whether you submitted any recorded hours and/or time to any representative, employee, or
3 agent of Defendants and, if so, identify the individual(s) to whom you submitted any such
4 records.

5 **ANSWER:**

6
7 **INTERROGATORY NO. 18:** State whether you recorded, or otherwise kept track of,
8 all hours and/or time you worked from June 30, 2011 through the date of your termination
9 during which you had patient contact. If your answer is "Yes," please describe in detail how
10 you recorded, or otherwise kept track of, the hours and/or time during which you had contact
11 with patients. If your answer is "Yes," please also state whether you submitted any recorded
12 hours and/or time to any representative, employee, or agent of Defendants and, if so, identify
13 the individual(s) to whom you submitted any such records.

14 **ANSWER:**

15
16
17 **INTERROGATORY NO. 19:** Regarding your claims for damages in this case,
18 specifically set forth each and every type of damage claimed, the amounts of each type of
19 damage claimed and the formula utilized to determine the amount of each type of damage.

20 **ANSWER:**

21
22
23 **INTERROGATORY NO. 20:** Identify all FMG employees known to you or your
24 representatives who allege that they are not being paid in accordance with the provisions of
25 their Employment Agreements, including, but not limited to, payment for the patient contact
26 hours worked in excess of 423 patient contact hours per quarter.

1 **ANSWER:**

2
3 **REQUESTS FOR PRODUCTION**

4
5 1. Any and all non-privileged documents you identified and/or relied upon in
6 responding to Defendant's First Interrogatories to Plaintiff.

7 **RESPONSE:**

8
9 2. Your State and Federal Income Tax returns for the past five years.

10 **RESPONSE:**

11
12 3. All documents which relate to or support your claim for damages, including
13 any alleged economic and/or liquidated damages.

14 **RESPONSE:**

15
16
17 4. Any and all correspondence, letters, emails or other documents relating to any
18 search for employment you made between May 2012 and the present including, but not
19 limited to, applications, resumes, correspondence or letters received from or provided to any
20 prospective employer.

21 **RESPONSE:**

22
23
24 5. Any and all documents related to any jobs or positions offered to you between
25 May 2012 and the present including, but not limited to, documents containing salary and
26 benefit information for each such job and documents regarding whether you accepted or

denied the job or position.

RESPONSE:

6. Any and all documents and correspondence authored by you, or between you and anyone other than your attorneys, referencing, mentioning or relating to allegations contained in your Class Action Complaint.

RESPONSE:

7. Any and all correspondence between you and any other employee or former employee of any Defendant, including, but not limited to, documents, correspondence, emails, text messages, letters, and/or social networking or other website entries referencing, mentioning or relating to allegations contained in your Class Action Complaint.

RESPONSE:

8. Any and all correspondence between you and any putative class member referencing, mentioning or relating to the allegations contained in your Class Action Complaint.

RESPONSE:

9. Any and all correspondence between you and Dr. Faron Bauer referencing, mentioning or relating to the allegations contained in your Class Action Complaint, your employment with FMG, and/or the termination of your employment with FMG.

RESPONSE:

1 10. Any and all correspondence between you and Dr. Kristen Childress
2 referencing, mentioning or relating to the allegations contained in your Class Action
3 Complaint, your employment with FMG, and/or the termination of your employment with
4 FMG.

5 **RESPONSE:**
6

7 11. Any and all correspondence between you and any person (other than your
8 attorneys) with whom you discussed the termination of your employment from FMG and/or
9 the allegations of this lawsuit including, but not limited to, documents, correspondence,
10 emails, text messages, letters, and/or social networking or other website entries.

11 **RESPONSE:**
12

13 12. All diaries, logs, journals, calendars or notes (other than correspondence
14 between you and your attorneys) created or maintained by you at any time during or after
15 your employment referencing, mentioning or relating to any allegations contained in your
16 Class Action Complaint, including, but not limited to, any logs, notes, or other documents
17 relating to or recording hours worked that you allege you were not compensated for.

18 **RESPONSE:**
19

20
21 13. All diaries, logs, journals, calendars or notes (other than correspondence
22 between you and your attorneys) created or maintained by you at any time during or after
23 your employment referencing, mentioning or relating to any damages you allege you
24 sustained as a result of the allegations in the Class Action Complaint, including, but not
25 limited to, any diaries, logs, journals, calendars, notes, or other documents relating to or
26 reflecting your state of mind as it relates to your claim for emotional distress damages.

RESPONSE:

1
2
3 14. All tapes (audio, video, digital or any other format) and transcripts of any
4 conversations between you and any third party, other than your attorneys, that relate in any
5 way to the termination of your employment from FMG, any alleged complaints you made
6 about wages earned and owing, any alleged complaints you made about violations of RCW
7 49.46 *et seq.*, RCW 49.48 *et seq.*, RCW 49.52 *et seq.*, and established public policies of
8 Washington State, and/or any other allegations contained in your Class Action Complaint.

9 **RESPONSE:**

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11 15. All documents authored by any third party, other than your attorneys, relating
12 in any manner to the claims contained in your Class Action Complaint.

13 **RESPONSE:**

14
15
16 16. The curriculum vitae of every individual identified as an expert in response to
17 Defendant's First Interrogatories to Plaintiff.

18 **RESPONSE:**

19
20
21 17. All reports from any and all experts retained or specially employed by you or
22 on your behalf to provide expert testimony in this matter, including copies of all materials
23 relied upon by each expert in rendering his or her opinions.

24 **RESPONSE:**

25
26 18. All documents provided by you to any expert(s) retained by you to testify at

the trial of this lawsuit.

RESPONSE:

19. All decisions, letters, records, statements, forms, correspondence (other than with your attorneys) or other documents relating to or regarding your contact with any federal, state or local commission or agency (including, but not limited to, any unemployment agencies and the Washington State Department of Health) concerning the allegations in your Class Action Complaint, including, but not limited to, the allegations that you opposed practices “jeopardiz[ing] public health and safety.”

RESPONSE:

20. Any and all documents filed with any federal, state or local commission or agency, including, but not limited to, the Washington State Department of Health, regarding any employee(s) of any Defendant that you believed engaged in practices that “jeopardized public health and safety.”

RESPONSE:

21. All statements, written or oral, signed or unsigned, memorandum of statements, tapes or other recordings of statements which were obtained from Defendant or any of its current or former employees or agents concerning any of the allegations set forth in your Class Action Complaint.

RESPONSE:

22. Any and all documents or correspondence including, but not limited to, letters,

1 emails, memos or notes (other than correspondence between you and your attorneys), dating
2 from January 1, 2009 to present, regarding or relating to any complaints or concerns about
3 other FMG physicians “jeopardize[ing] public health and safety” including, but not limited to,
4 complaints or concerns relating to other FMG physicians’ ability to practice medicine,
5 complaints or concerns relating to other FMG physicians’ health issues potentially affecting
6 patient care, and any other patient safety concerns relating to other FMG physicians.

7 **RESPONSE:**
8

9 23. Produce all documents related to any and all of your online profiles or other
10 social media sites, (including but not limited to Facebook, LinkedIn, Twitter, YouTube and/or
11 blogs), including postings or messages (including, without limitation, tweets, replies, re-
12 tweets, direct or instant messages, status updates, wall comments, groups joined, activity
13 streams, and blog entries), photographs, videos, and online communications that:

14 (a) refer or relate to the allegations contained in your Class Action Complaint,
15 including your claim for damages; and/or

16 (b) consist of or reference communications with current and/or former employees
17 of Defendant regarding your employment (or termination from employment) with FMG;
18 and/or

19 (c) refer or relate to hours worked and wages you claim were earned but not paid
20 between June 30, 2011 and the date of your discharge from FMG; and/or
21

22 (d) refer or relate to any emotion, feeling, or mental state you may have
23 experienced from January 2012 to the present.

24 **RESPONSE:**
25
26

1 24. Any and all documents supporting your contention that you “demand[ed]
2 wages, earned and owing [and] object[ed] to Defendants’ wrongful withholding of wages,” as
3 alleged in Paragraph 3 of the Class Action Complaint.

4 **RESPONSE:**
5

6 25. Any and all documents supporting your contention that you “complained . . .
7 both orally and in writing, about not being paid wages earned and owing,” as alleged in
8 Paragraph 30 of the Class Action Complaint.

9 **RESPONSE:**
10

11 26. Any and all documents supporting your contention that you “report[ed] clinical
12 practices and treatment that [you] reasonably believed jeopardized public health and safety of
13 the citizens of Washington,” as alleged in Paragraph 3 of the Class Action Complaint.

14 **RESPONSE:**
15

16
17 27. Any and all documents supporting your contention that you opposed activity
18 by Defendants that violated RCW 49.46 *et seq.*, RCW 49.48 *et seq.*, RCW 49.52 *et seq.*, and
19 established public policies of Washington State, as alleged in Paragraph 52 of the Class
20 Action Complaint.

21 **RESPONSE:**
22

23
24 28. Any and all documents which relate to or support your claim for non-pecuniary
25 damages, including any alleged emotional distress damages.
26

RESPONSE:

1
2
3 29. All records, invoices, bills or statements for medical services, if any, which
4 resulted from your treatment for injuries including, but not limited to, emotional distress,
5 which you allege you sustained as a result of Defendants' actions.

RESPONSE:

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7
8 30. Any and all documents relating to or reflecting contract negotiations between
9 you and any representative of FMG, including, but not limited to, Cheree Green, regarding
10 your FMG Physician Employment Agreement, dated June 30, 2011, and any amendments.

RESPONSE:

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13
14 31. Any and all documents relating to or reflecting all hours you spent on work-
15 related activities from June 30, 2011 through your termination, including, but not limited to,
16 time spent on patient charts, time spent treating patients after official clinic hours, time spent
17 in training, time spent in continuing medical education, and time spent in mandatory
18 meetings.

RESPONSE:

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22 32. Any and all documents relating to or reflecting all hours you worked from June
23 30, 2011 through your termination during which you had patient contact.

RESPONSE:

1 33. Any and all documents relating to or reflecting all time you spent at any of
2 Defendant's clinics from June 30, 2011 through your termination.

3 **RESPONSE:**
4

5 34. Any and all documents relating to or reflecting all hours you worked per
6 quarter from June 30, 2011 through your termination, including, but not limited to, any and all
7 documents supporting your contention that you worked in excess of 423 hours per quarter, as
8 alleged in Paragraph 30 of the Class Action Complaint.
9

10 **RESPONSE:**
11

12 35. Any and all documents supporting your contention that FMG failed to pay
13 "Plaintiffs and Class Members wages earned and owing according to the terms of the
14 Employment Agreements," as alleged in Paragraph 45 of the Class Action Complaint.
15

16 **RESPONSE:**
17

18 36. Any and all documents supporting your contention that Defendants
19 intentionally harmed your reputation, as alleged in Paragraph 53 of the Class Action
20 Complaint
21

22 **RESPONSE:**
23

24 37. All documents or materials showing the dates and hours you worked as a
25 physician at any of FMG's clinics, including, but not limited to, schedules, calendars, time
26 sheets or any other type of documentation.

1 **RESPONSE:**

2
3 38. Any documents sent by you to Defendants (or any agent or employee of
4 Defendants) or by Defendants to you that concern:

5 (1) any complaint relating to FMG's alleged failure to pay wages due to you under
6 your FMG Physician Employment Agreement, entered into on or about June 30, 2011;
7 and/or

8 (2) any complaint relating to FMG's alleged failure to accurately record time or pay
9 for time worked under your FMG Physician Employment Agreement, entered into on
10 or about June 30, 2011.

11 **RESPONSE:**

12
13 39. Any and all documents supporting your contention that you were employed by
14 FHS and CHI.

15 **RESPONSE:**

16
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18 40. Any and all documents reflecting or relating to any payments made by FHS
19 and/or CHI to you, including all payroll records, timesheets, pay stubs, cancelled checks, and
20 paychecks.

21 **RESPONSE:**

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23
24 41. Any and all documents reflecting or relating to any payments made by FMG to
25 you, including all payroll records, timesheets, pay stubs, cancelled checks, and paychecks
26 from your employment with FMG.

RESPONSE:

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42. All documents that identify any specific or general category of putative class members that you claim are “similarly situated” to yourself.

RESPONSE:

43. All documents that identify the putative group(s) of class members or individual putative class members that Plaintiffs claim are “similarly situated” to themselves.

RESPONSE:

44. All documents or copies of documents submitted by you to FMG requesting “Additional Shift Work” payments for working in excess of 423 hours per quarter, pursuant to the terms of your contract.

RESPONSE:

45. Any and all documents supporting your allegation that FMG’s alleged actions constitute knowing, intentional, and willful violations of the applicable wage statutes, as alleged in Paragraphs 22, 23, and 46 of the Class Action Complaint

RESPONSE:

POLSINELLI PC

1
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17 ATTORNEYS FOR DEFENDANT
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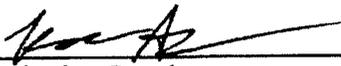
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and at all times material hereto, a resident of the State of Missouri, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein. I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

Scott C.G. Blankenship, WSBA #21431 Paul S. Woods, WSBA #42976 Attorneys for Plaintiffs The Blankenship Law Firm, P.S. 1000 Second Ave, Ste. 3250 Seattle, WA 98104 Fax: (206) 343-2704 email: sblankenship@blankenshiplawfirm.com pwoods@blankenshiplawfirm.com	<input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
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<input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email

Dated this 18th day of December, at Kansas City, Missouri.



Katharine Sangha

2016 OCT -3 PM 4:37
 STATE OF WASHINGTON
 SUPERIOR COURT
 IN AND FOR THE COUNTY OF KING