

No. 74806-8-I

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

Cindius Romney as Personal Representative of the Estate of Dr. Michael Romney, Dr. Faron Bauer, and Dr. Kristen Childress, individually and on behalf of all others similarly situated,

Petitioners,

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,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. Identity of Respondents	1
II. Introduction.....	1
III. Issues presented for review.....	3
A. Did the Superior Court act within its authority when it issued an order compelling individual arbitration, instead of leaving the decision to an arbitrator?.....	3
B. Did Franciscan waive, or is Franciscan estopped from raising, the class arbitration issue?	3
IV. Statement Of The Case	3
V. Argument	6
A. The “who decides” question is for courts, not arbitrators.	6
1. Arbitrators decide preliminary procedural questions, while courts decide preliminary questions of arbitrability.	6
2. The “who decides” question is a preliminary question of arbitrability.....	7
i. Case law under the Federal Arbitration Act supports the position that courts answer the “who decides” question.....	8
ii. Washington law supports Franciscan’s position that courts should answer the “who decides” question.....	12
iii. The “who decides” question is not procedural because it does not grow out of the parties’ underlying dispute and does not bear on the final disposition of their claims.....	14
iv. How the “who decides” question affects the arbitration makes it an arbitrability question for the court.	16
v. The presumption in favor of arbitration does not apply to the “who decides” question.	17
3. The parties did not “clearly and unmistakably” agree that arbitrators decide questions of arbitrability, in the Agreements or otherwise.	19

B. Franciscan did not waive its right to request individual arbitrations	20
1. Waiver requires the intentional relinquishment of a right.....	20
2. Petitioners have a “heavy burden of proof” with respect to waiver.	21
3. Petitioners fail to show an express or implied agreement to participate in class arbitration.....	21
i. Franciscan did not admit that the Agreements permit class arbitration during the discovery dispute between the parties.	23
ii. Franciscan did not admit that the Agreements permit class arbitration during settlement discussions with Petitioners’ counsel.	28
iii. Franciscan’s focus has always been on the three individual Petitioners, not the class.	29
4. Franciscan’s “delay” is not evidence of waiver.....	30
C. Franciscan is not equitably estopped from demanding individual arbitration.	34
1. Estoppel requires proof by “clear, cogent and convincing evidence.	34
2. Franciscan did not act inconsistently.	34
3. Petitioners did not reasonably rely on Franciscan’s alleged representations.....	36
4. Petitioners have not been harmed or suffered any prejudice.	37
D. The Superior Court correctly ordered the parties to arbitrate individually.	39
1. The absence of any reference to class arbitration in an arbitration agreement weighs in favor of the conclusion that the parties have not agreed to it.	39
2. The Agreements are silent on the issue of class arbitration.....	41
3. The reference to the AAA Rules in the Agreements does not change the analysis.....	45
VI. Conclusion	47

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alixpartners, LLP v. Brewington</i> , No. 14-CV-14942, 2015 WL 8538089 (E.D. Mich. Dec. 10, 2015).....	11, 41, 42, 43
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333, 131 S. Ct. 1740 (2011).....	15, 16
<i>AT&T Techs., Inc. v. Commc'ns Workers of Am.</i> , 475 U.S. 643, 106 S. Ct. 1415 (1986).....	13, 18
<i>Balfour, Guthrie & Co. v. Commercial Metals Co.</i> , 93 Wn. 2d 199, 202-03, 607 P.2d 856 (1980).....	40
<i>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	34
<i>Bird v. Turner</i> , No. 5:14CV97, 2015 WL 5168575 (N.D. W. Va. Sept. 1, 2015).....	41
<i>Cent. Wash. Bank v. Mendelson-Zeller, Inc.</i> , 113 Wn. 2d 346, 779 P.2d 697 (1989).....	20, 21
<i>Chassen v. Fid. Nat'l Fin., Inc.</i> , No. 09-291, 2014 WL 202763 (D.N.J. Jan. 17, 2014).....	11
<i>Chem. Bank v. Wash. Public Power Supply Sys.</i> , 102 Wn.2d 874, 691 P.2d 524 (1984).....	37, 38
<i>Chesapeake Appalachia, LLC v. Suppa</i> , 91 F. Supp. 3d 853, 861 (N.D. W. Va. 2015).....	11
<i>Chico v. Hilton Worldwide, Inc.</i> , No. CV 14-5750, 2014 WL 5088240 (C.D. Cal. Oct. 7, 2014).....	43
<i>Cobarruviaz v. Maplebear, Inc.</i> , 143 F. Supp. 3d 930, 944 (N.D. Cal. 2015).....	11

<i>Dell Webb Cmtys., Inc. v. Carlson</i> , 817 F.3d 867 (4th Cir. 2016)	9, 10
<i>Dominium Austin Partners, LLC v. Emerson</i> , 248 F.3d 720 (8th Cir. 2001)	40
<i>Eshagh v. Terminix Int’l Co., L.P.</i> , 588 F. App’x 703 (9th Cir. 2014)	10, 40
<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938, 115 S. Ct. 1920 (1995).....	8, 14, 17, 18, 19
<i>George V. Nolte & Co. v. Pieler Constr. Co.</i> , 54 Wn. 2d 30, 34–35, 337 P.2d 710 (1959).....	33
<i>Green Tree Financial Corporation v. Bazzle</i> , 539 U.S. 444, 123 S. Ct. 2402 (2003).....	8, 9, 11, 15
<i>Guida v. Home Savs. of Am., Inc.</i> , 793 F. Supp. 2d 611 (E.D.N.Y. 2011)	11
<i>Henderson v. U.S. Patent Comm’n, Ltd.</i> , --- F. Supp. 3d ---, 2016 WL 3027895 (N.D. Ill. May 27, 2016).....	10
<i>Herzfeld v. 1416 Chancellor, Inc.</i> , No. 14–4966, 2015 WL 4480829 (E.D. Pa. July 22, 2015).....	44
<i>Hill v. Garda CL Nw., Inc.</i> , 169 Wn. App. 685, 281 P.3d 334 (2012).....	31, 32, 40
<i>Hill v. Garda CL Nw., Inc.</i> , 179 Wn. 2d 47, 308 P.3d 635 (2013).....	7, 8
<i>Howsam v. Dean Witter Reynolds, Inc.</i> , 537 U.S. 79, 123 S. Ct. 588 (2002).....	6, 7, 13, 14, 17, 18
<i>Huffman v. Hilltop Cos., LLC</i> , 747 F.3d 391 (6th Cir. 2014)	9
<i>Ives v. Ramsden</i> , 142 Wn. App. 369, 174 P.3d 1231 (2008).....	20
<i>John Wiley & Sons, Inc. v. Livingston</i> , 376 U.S. 543, 84 S. Ct. 909 (1964).....	7

<i>JP Morgan Chase Bank, N.A. v. Jones</i> , Case No. C15-117RAJ, 2016 WL 1182153 (W.D. Wash. Mar. 28, 2016)	10, 43
<i>JPay, Inc. v. Kobel</i> , No. 16-20121-CIV, 2016 WL 2853537 (S.D. Fla. May 16, 2016).....	11
<i>Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.</i> , 28 Wn. App. 59, 621 P.2d 791 (1980).....	30, 33, 38
<i>Lee v. JPMorgan Chase & Co.</i> , 982 F. Supp. 2d 1109 (C.D. Cal. 2013).....	11
<i>Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.</i> , 192 Wn. App. 465, 369 P.3d 503 (2016).....	12, 13
<i>Opalinski v. Robert Half Int'l Inc.</i> , 761 F.3d 326 (3d Cir. 2014)	9, 17
<i>Opalinski v. Robert Half Int'l Inc.</i> , No. 10–2069, 2015 WL 7306420 (D.N.J. Nov. 18, 2015).....	41, 43, 44
<i>Oxford Health Plans LLC v. Sutter</i> , 133 S. Ct. 2064 (2013).....	7, 8, 9, 31
<i>Quilloin v. Tenet Health Sys. Philadelphia, Inc.</i> , 673 F.3d 221 (3d Cir. 2012)	40
<i>Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett</i> , 734 F.3d 594 (6th Cir. 2013)	9, 40, 43
<i>Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.</i> , 4 Wn. App. 695, 483 P.2d 880 (1971).....	31
<i>River House Dev. Inc. v. Integrus Architecture, P.S.</i> , 167 Wn. App. 221, 272 P.3d 289 (2012).....	21, 22, 46
<i>Rossi v. SCI Funeral Servs. of N.Y., Inc.</i> , 15 CV 473, 2016 WL 524253 (E.D.N.Y. Jan. 28, 2016)	11
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn. 2d 781, 225 P.3d 213 (2009).....	8, 17, 18, 19

<i>Shoreline Sch. Dist. No. 412 v. Shoreline Ass'n of Educ. Office Emps.</i> , 29 Wn. App. 956, 958, 631 P.2d 996 (1981).....	20
<i>Steele v. Lundgren</i> , 85 Wn. App. 845, 852, 935 P.2d 671 (1997).....	21
<i>Stein v. Geonerco, Inc.</i> , 105 Wn. App. 41, 17 P.3d 1266 (2001).....	40
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 559 U.S. 662, 130 S. Ct. 1758 (2010)..	7, 8, 9, 15, 16, 17, 22, 31, 39, 45
<i>Tajonar v. Echosphere, L.L.C.</i> , No. 14cv2732, 2015 WL 4743912 (S.D. Cal. Aug. 10, 2015).....	11
<i>Tiffany v. KO Huts, Inc.</i> , --- F. Supp. 3d ---, 2016 WL 1453056 (W.D. Okla. Apr. 13, 2016).....	11
<i>Townsend v. Quadrant Corp.</i> , 153 Wn. App. 870, 224 P.3d 818 (2009).....	14, 35
<i>Verbeek Props., LLC v. GreenCo Envtl., Inc.</i> , 150 Wn. App. 82, 246 P.3d 205 (2010).....	20
<i>Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.</i> , 489 U.S. 468, 109 S. Ct. 1248 (1989).....	7

Statutes

Federal Arbitration Act.....	8
Uniform Arbitration Act.....	13, 14
RCW 7.04A.901	13
RCW 7.04A.060	14

I. IDENTITY OF RESPONDENTS

Respondents are Franciscan Medical Group (“FMG”) and the related entities identified in the caption. For purposes of this brief, Respondents will be referred to as “Franciscan.”

II. INTRODUCTION

The first question presented in this appeal is whether a court or an arbitrator should decide if the arbitration agreements between the parties permit class arbitration.¹ There is no Washington decision directly addressing this issue, and the U.S. Supreme Court has not yet resolved it, but the majority of federal courts hold that courts, not arbitrators, should answer the “who decides” question when the arbitration agreement at issue is silent on the subject.

Here, the arbitration agreements between the parties are silent with respect to the “who decides” question, and the parties have not expressly or impliedly agreed otherwise, so the Superior Court was the proper authority to answer the “who decides” question.

The second question on appeal is whether Franciscan waived its right to seek individual arbitration. Viewed correctly, the record shows that Franciscan never indicated, expressly or by its conduct, that the

¹ For purposes of this brief, this will be referred to as the “who decides” question.

arbitration agreements permit class arbitration, or that it had any intention of arbitrating on a class basis, despite Petitioners' assertions to the contrary. The statements on which Petitioners rely to show waiver are insufficient to carry the heavy burden required to establish waiver under Washington law, and cannot reasonably be construed as consent by Franciscan to engage in class arbitration. It is apparent, after considering all the facts and circumstances of this case, that Franciscan sought individual arbitration at the appropriate time, in the proper venue, and in the correct way.

The third and final question on appeal is whether Franciscan is equitably estopped from demanding individual arbitration. The answer is undoubtedly no. Estoppel, like waiver, is not favored in Washington, and its applicability must be proven by clear, cogent and convincing evidence. Petitioners come nowhere close to establishing any of the elements of equitable estoppel under this standard: (1) Franciscan did not act inconsistently; (2) Petitioners have not shown that they reasonably relied on Franciscan's alleged representations related to class arbitration; and (3) Petitioners were not harmed or prejudiced by Franciscan's alleged representations.

Therefore, because Petitioners have not proven that the Superior Court erred when it ordered the parties to individual arbitration,

Franciscan respectfully requests that this Court affirm the Superior Court and require Petitioners to arbitrate in accordance with their agreements.

III. ISSUES PRESENTED FOR REVIEW

A. Did the Superior Court act within its authority when it issued an order compelling individual arbitration, instead of leaving the decision to an arbitrator?

B. Did Franciscan waive, or is Franciscan estopped from raising, the class arbitration issue?

IV. STATEMENT OF THE CASE

Petitioners initiated this litigation against Franciscan on November 13, 2013. CP 1–11. For two years, the parties were engaged in a dispute regarding the proper forum for their claims—court or arbitration. This Court ultimately ruled that the case belongs in arbitration,² and directed the Superior Court to issue an order compelling arbitration. CP 1167–82. The Superior Court did so in accordance with the arbitration agreements signed by each of the named Petitioners (“Agreements”), which authorize individual, not class, arbitration. CP 1503–04.

Under their Agreements with Franciscan, Petitioners must arbitrate, individually, any “disputes arising out of or related to the

² The Washington Supreme Court denied review. CP 1165.

Employment Agreement, [their] employment by FMG, and/or [their] separation from employment with FMG.” CP 63 (Romney), CP 99 (Bauer), CP 135 (Childress).³ The Agreements do not indicate who decides issues concerning the scope of the arbitration or other preliminary questions of arbitrability. The Agreements are also silent on the issue of class arbitration; they make no reference whatsoever to employee groups or other employees’ claims or disputes. Instead, the Agreements consistently refer to Petitioners in the singular:

- “This Arbitration Addendum . . . is . . . between Physician (“**You**”) and FMG” CP 63, pmb1. (emphasis added).
- “This Addendum requires **You** and FMG to arbitrate all Claims . . . between **You** and FMG.” *Id.* (emphasis added).
- “This Addendum affects **your** rights to a trial by jury.” *Id.* (emphasis added).
- “**YOU MAY WISH TO SEEK LEGAL ADVICE BEFORE SIGNING THIS ADDENDUM.**” *Id.* (bold and all caps in original, italics added).
- “[**Y**]our employment” and “**your** separation of employment.” CP 63, § 1 (emphasis added).
- “**You** and FMG each agree that all Claims between **You** and FMG . . . shall be exclusively decided by arbitration” CP 63, § 2 (emphasis added).

³ The Agreements are substantively identical for each of the three Petitioners; as such, only Dr. Romney’s will be cited in this brief from this point forward.

- “By signing this Addendum, **You** are waiving your right to a trial by jury.” *Id.* (emphasis added)
- “**You** and FMG shall equally share all costs of arbitration . . . unless **you** prove . . . that the costs of the arbitration would effectively prevent **you** from pursuing **your** claim” CP 63, § 3 (emphasis added).
- “**The terms of this Addendum have control over any prior agreement that *You* may have with FMG and any prior discussion *You* may have had with an FMG representative about arbitration.**” CP 64, § 4 (bold in original, italics added).
- “**Any amendment to this Addendum must be in writing, signed by *You* and FMG.**” *Id.* (bold in original, italics added).

Once the Superior Court correctly ordered individual and separate arbitrations,⁴ Franciscan prepared to arbitrate with each of the three named Petitioners. But, before any proceedings could commence, Petitioners sought review in this Court, arguing that the Superior Court erred and that they should be permitted to arbitrate their claims on a classwide basis. CP

⁴ Petitioners take issue with the fact that Franciscan’s proposed order asked the Superior Court to order “separate” arbitrations for each of the named Petitioners, and that Franciscan’s “briefing was completely devoid of any [such] arguments.” *See* Petitioners’ Brief at 11–12. But it is clear that this is precisely the relief sought by Franciscan in its motion to compel individual arbitration. *See, e.g.*, CP 1184 (“Defendants are prepared to arbitrate, *individually, with each of the Plaintiffs*—Romney, Bauer, and Childress—pursuant to their arbitration agreements and in compliance with the WCOA Ruling.” (emphasis added)); CP 1187 (“[T]his Court should issue an order compelling *individual* arbitration between Defendants and *each of the three named Plaintiffs*.” (emphasis added)); CP 1187 (“Defendants move this Court for an order compelling Romney, Bauer, and Childress to submit, *individually*, to binding arbitration” (emphasis added)). Indeed, Franciscan’s “Statement of the Issue” when it moved to compel individual arbitration asked: “Should the Court issue an order compelling arbitration *on an individual basis*? Answer: Yes.” CP 1185 (emphasis added).

1629–32. This Court granted discretionary review under RAP 2.3(b)(2) on two issues: (1) who should decide what type of arbitration the parties agreed to—a court or an arbitrator; and (2) “whether Franciscan waived or is equitably estopped from demanding individual arbitration.”⁵ See **Appendix 1** at pp. 4–5.

V. ARGUMENT

A. The “who decides” question is for courts, not arbitrators.

1. *Arbitrators decide preliminary procedural questions, while courts decide preliminary questions of arbitrability.*

There are two categories of threshold questions when dealing with arbitration agreements—procedural questions for the arbitrator, and questions of arbitrability for the court. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85, 123 S. Ct. 588 (2002). Procedural questions arise once the obligation to arbitrate a matter is established, and may include

⁵ Petitioners claim a third assignment of error: that the Superior Court exceeded this Court’s mandate “by failing to compel Plaintiffs’ entire consolidated complaint with class claims to arbitration” Petitioners’ Brief at 4–5, 42–43. Commissioner Neal did not grant review on this issue and the Court need not consider it. Further, Petitioners’ argument on this point is tenuous and unconvincing. The mandate clearly allows the Superior Court to order individual arbitration as it instructed the Superior Court only to proceed in accordance with this Court’s prior ruling, which found that the Agreements are enforceable and that arbitration is the proper forum. See CP 1165–66 (mandate); CP 1167–82 (WCOA decision). For a detailed discussion on why this is the case, see CP 1452–53 and **Appendix 2** at pp. 6–8.

such issues as the application of statutes of limitation, notice requirements, laches, waiver, delay, and estoppel. *See id.* at 84–85, 123 S. Ct. 588; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909 (1964).

Questions of arbitrability, on the other hand, include whether the parties entered into a valid arbitration agreement, whether the parties agreed to submit a particular dispute to arbitration, and what issues the parties must arbitrate. *Livingston*, 376 U.S. at 547, 84 S. Ct. 909. In the absence of a “clear[] and unmistakabl[e]” agreement to the contrary, it is presumed the parties to an arbitration agreement intended the court, rather than the arbitrator, to decide questions of arbitrability. *Howsam*, 537 U.S. at 83, 123 S. Ct. 588; *Hill v. Garda CL Nw., Inc.*, 179 Wn. 2d 47, 53, 308 P.3d 635 (2013) (“*Hill II*”). In these circumstances, it is beyond dispute that questions of arbitrability “are presumptively for the courts to decide.” *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013).

2. *The “who decides” question is a preliminary question of arbitrability.*

With respect to the “who decides” question, the analytical starting point is the premise that arbitrators have authority to decide disputes only because the parties agreed in advance to submit their disputes to arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682–83, 130 S. Ct. 1758 (2010); *see also Volt Info. Sciences, Inc. v. Bd. of*

Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479, 109 S. Ct. 1248 (1989) (“[A]rbitration . . . is a matter of consent, not coercion.”). Arbitration’s consensual nature means “a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S. Ct. 1920 (1995); see also *Hill II*, 179 Wn. 2d at 53, 308 P.3d 635; *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn. 2d 781, 810, 225 P.3d 213 (2009).

i. Case law under the Federal Arbitration Act supports the position that courts answer the “who decides” question.

Contrary to Petitioners’ representation,⁶ the U.S. Supreme Court has not answered the “who decides” question. In *Green Tree Financial Corporation v. Bazzle*, 539 U.S. 444, 452–53, 123 S. Ct. 2402 (2003), four justices concluded that whether the parties’ agreement prohibited class arbitration was a procedural question for arbitrators. In two subsequent decisions, however, the Court emphasized that it “has not yet decided whether the availability of class arbitration is a question of arbitrability.” *Oxford Health*, 133 S. Ct. at 2068 n.2; see also *Stolt–Nielsen*, 559 U.S. at 680, 130 S. Ct. 1758.

⁶ Petitioners’ Brief at 39–40.

Although they unmistakably declared that *Bazzle* is not binding precedent, neither *Oxford Health* nor *Stolt–Nielsen* answered the “who decides” question because the parties in both cases agreed to have the arbitrator decide whether class arbitration was permitted, and therefore the “who decides” question was not before the Court. *Id.* However, it is important to note that Justice Alito, in his concurrence in *Oxford Health*, warned that courts should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent. *See Oxford Health*, 133 S. Ct. at 2071–72 (Alito, J., concurring).

Three federal circuits have confronted the “who decides” question, and all three rejected the plurality position in *Bazzle* and instead concluded that the “who decides” question is an arbitrability question for courts to decide. These circuits reached this conclusion because arbitration is poorly suited to class litigation where the rights of absent members are determined, thereby fundamentally affecting both the nature and scope of the parties’ arbitration. *See Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 873 (4th Cir. 2016); *Opalinski v. Robert Half Int’l Inc.*, 761 F.3d 326, 332–35 (3d Cir. 2014) (“*Opalinski I*”); *Huffman v. Hilltop Cos., LLC*, 747 F.3d 391, 398–99 (6th Cir. 2014); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 597–99 (6th Cir. 2013).

In the most recent circuit court decision on this issue, the Fourth Circuit stated: “The evolution of the Court’s cases are but a short step away from the conclusion that whether an arbitration agreement authorizes class arbitration presents a question as to the arbitrator’s inherent power, which requires judicial review.” *Dell Webb*, 817 F.3d at 875.

The Ninth Circuit has similarly concluded that the “who decides” question is a “gateway question of arbitrability”:

Issues that contracting parties would likely have expected a court to have decided are considered gateway questions of arbitrability for courts, and not arbitrators, to decide. The Supreme Court has made it clear that class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

Eshagh v. Terminix Int’l Co., L.P., 588 F. App’x 703, 704 (9th Cir. 2014) (internal quotations and citations omitted).

Many district courts, including the Western District of Washington, have also held that a court is the proper body to answer the “who decides” question. *See JP Morgan Chase Bank, N.A. v. Jones*, Case No. C15-117RAJ, 2016 WL 1182153, at *9 (W.D. Wash. Mar. 28, 2016) (“The availability of class arbitration is a gateway question of arbitrability for the court to decide.”); *Henderson v. U.S. Patent Comm’n, Ltd.*, --- F. Supp. 3d ---, 2016 WL 3027895, at *6 (N.D. Ill. May 27, 2016) (“[T]he Court has given every indication, short of outright holding, that classwide

arbitrability is a gateway question presumptively for the court rather than for the arbitrator.”); *JPay, Inc. v. Kobel*, No. 16-20121-CIV, 2016 WL 2853537, at *3 (S.D. Fla. May 16, 2016) (“The differences between class and bilateral arbitration are of enough consequence that the determination of whether class arbitration is available is a substantive question for the Court to decide.”); *Chesapeake Appalachia, LLC v. Suppa*, 91 F. Supp. 3d 853, 861 (N.D. W. Va. 2015) (“[C]lass arbitration . . . concerns are too acute to be labeled merely ‘procedural.’ Rather, the law protects parties by presuming that a decision implicating such consequential matters should be litigated through the judicial process instead of through arbitration.”).⁷

A minority of district courts have found *Bazzle* persuasive and concluded that the “who decides” question is for arbitrators to answer,⁸ but the recent federal trend is clearly that courts, not arbitrators, should answer the “who decides” question.

⁷ See also *Tiffany v. KO Huts, Inc.*, --- F. Supp. 3d ---, 2016 WL 1453056, at *5 (W.D. Okla. Apr. 13, 2016); *Alixpartners, LLP v. Brewington*, No. 14-CV-14942, 2015 WL 8538089, at *3–*5 (E.D. Mich. Dec. 10, 2015); *Cobarruviaz v. Maplebear, Inc.*, 143 F. Supp. 3d 930, 944 (N.D. Cal. 2015); *Tajonar v. Echosphere, L.L.C.*, No. 14cv2732, 2015 WL 4743912, at *1 (S.D. Cal. Aug. 10, 2015); *Chassen v. Fid. Nat’l Fin., Inc.*, No. 09-291, 2014 WL 202763, at *6 (D.N.J. Jan. 17, 2014).

⁸ See, e.g., *Rossi v. SCI Funeral Servs. of N.Y., Inc.*, 15 CV 473, 2016 WL 524253, at *11 (E.D.N.Y. Jan. 28, 2016); *Lee v. JPMorgan Chase & Co.*, 982 F. Supp. 2d 1109, 1112–14 (C.D. Cal. 2013); *Guida v. Home Savs. of Am., Inc.*, 793 F. Supp. 2d 611, 615–19 (E.D.N.Y. 2011).

This Court should thus follow the Third, Fourth, Sixth, and Ninth Circuits and conclude that the “who decides” question is for courts to answer.

ii. *Washington law supports Franciscan’s position that courts should answer the “who decides” question.*

Washington courts have not yet weighed in on the “who decides” issue. Yet in the order granting discretionary review, Commissioner Neal seemed to express the view that Washington decisions favor Petitioners. *See Appendix 1* at p. 4 (citing *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 369 P.3d 503 (2016)).⁹ In fact, they do not.

Marcus & Millichap did not consider the specific matter at issue here: whether a court or arbitrator should determine if the parties agreed to class arbitration (class arbitration is nowhere mentioned in the opinion). Rather, the court had been called upon to determine whether a valid agreement to arbitrate existed between two commercial brokers in light of

⁹ Petitioners rely on *Marcus & Millichap* to support their baseless assertion that “Washington law requires that the issue of class arbitration be decided by the arbitrator.” Petitioners’ Brief at 38. That is not the law in Washington, as more fully explained in this **Section V.A.2.ii**.

the enactment of the Uniform Arbitration Act (“UAA”) in Washington. *Marcus & Millichap*, 192 Wn. App. at 469–71, 369 P.3d 503.

Moreover, while Commissioner Neal’s statement is correct that “all issues covered by the *substantive scope* of the arbitration clause must go to arbitration,” *id.* at 480, 369 P.3d 503 (emphasis added), it is equally true and well-established that gateway issues—i.e., questions of arbitrability—must be decided by a court. Courts that have specifically considered the matter at issue here have held that the “who decides” question is a gateway issue. Such decisions, many of which are cited above, while not binding on this Court, are certainly instructive, as noted in *Marcus & Millichap*: “Because the UAA instructs courts to consider ‘the need to promote uniformity of the law’ when applying and construing the UAA, authority from other jurisdictions is instructive.” *Id.* at 472 n.5, 369 P.3d 503 (quoting RCW 7.04A.901).

Commissioner Neal also conflated the “who decides” question with the “class arbitration” question: the threshold question of “who decides,” as explained above, runs in favor of courts. Indeed, absent a clear and unmistakable agreement to the contrary, it is presumed the parties intended courts, not arbitrators, to answer the “who decides” question. *See Howsam*, 537 U.S. at 83, 123 S. Ct. 588; *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415 (1986).

Further, this Court has specifically noted that the UAA “provides circumscribed decision-making authority for both the courts and arbitrators, and that *courts* must ““decide whether . . . a controversy is subject to an agreement to arbitrate””—or, in other words, ““whether a dispute is encompassed by an agreement to arbitrate.”” *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 879, 224 P.3d 818 (2009) (quoting RCW 7.04A.060 and UNIF. ARB. ACT § 6 cmt. 2, 7 U.L.A. 24). Here, the parties have a dispute about whether class arbitration is encompassed by the Agreements, which falls within the court’s decision-making authority under Washington law.

iii. The “who decides” question is not procedural because it does not grow out of the parties’ underlying dispute and does not bear on the final disposition of their claims.

The proper standard for identifying procedural questions for the arbitrator, according to the Supreme Court, is whether they grow out of the parties’ dispute and bear on its final disposition. *Howsam*, 537 U.S. at 83–84, 123 S. Ct. 588; *First Options of Chicago*, 514 U.S. at 944–45, 115 S. Ct. 1920. The “who decides” question is *not* procedural under the above standard because it does not grow out of the parties’ underlying dispute and does not bear on the final disposition of their claims. Indeed, here, the “who decides” question arises in the absence of an express agreement on

the issue, rather than as a consequence of Petitioners' wage claims against Franciscan. Similarly, the "who decides" question does not bear on the final disposition of Petitioners' wage claims; they are entitled to continue pursuing those claims regardless of how the "who decides" question is resolved. Neither *Bazzle* nor any of the cases adopting its rationale provides an explanation or analysis of how the "who decides" question grows out of the parties' underlying dispute or bears on the dispute's final disposition.¹⁰

Moreover, in *Stolt-Nielsen*, the Supreme Court explained that the shift from individual to class arbitration fundamentally changes the nature of the arbitration and significantly expands its scope. *Stolt-Nielsen*, 559 U.S. at 687, 130 S. Ct. 1758; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347–351, 131 S. Ct. 1740 (2011).¹¹ Thus, class arbitration is

¹⁰ The *Bazzle* plurality concluded that arbitrators must decide the class arbitration question because it is a procedural inquiry that asks, "what *kind of arbitration proceeding* the parties agreed to." *Bazzle*, 539 U.S. at 452–53, 123 S. Ct. 2402 (emphasis in original). That question, according to the plurality in *Bazzle*, "concerns contract interpretation and arbitration procedures," which arbitrators are well suited to answer. *Id.* This reasoning is unpersuasive, however, because the proper standard for identifying procedural questions does not consider the kind of arbitration procedures the parties agreed to or whether the question is a matter of contract interpretation.

¹¹ The fundamental differences between class and individual arbitration the *Stolt-Nielsen* and *Concepcion* courts identified include the following: (1) class arbitration requires the arbitrator to resolve not a single dispute between the parties to a single agreement, but rather many disputes involving potentially hundreds or thousands of parties; (2) a class arbitration award adjudicates not only the rights of the parties to the arbitration agreement, but also the rights of

a fundamentally different proceeding involving the rights of unrepresented parties. At a minimum, the law requires an express agreement between the parties authorizing a private arbitrator to decide whether classwide relief is available. Otherwise, that question is for a court to decide. *See Stolt-Nielsen*, 559 U.S. at 685–87, 130 S. Ct. 1758.

The fundamental differences between class and individual arbitration are highly relevant because they show that the “who decides” question does not grow out of the parties’ dispute itself and does not bear on the dispute’s final resolution. Indeed, the differences highlighted in *Stolt-Nielsen* and *Concepcion* are not merely procedural because the issue of whose claims the parties agreed to arbitrate is essentially a question of what the parties agreed to, a gateway issue.

Therefore, because the “who decides” question does not grow out of the parties’ underlying dispute and does not bear on the final disposition of their claims, it is a question of arbitrability for the Court to decide.

iv. How the “who decides” question affects the arbitration makes it an arbitrability question for the court.

absent parties; (3) class arbitration involves commercial stakes comparable to class action litigation, but the scope of judicial review is much narrower; (4) class arbitration proceedings are much more formal and do not provide the time and costs savings that typically prompt parties to agree to arbitration; and (5) the presumption of privacy and confidentiality applicable in individual arbitrations does not apply in class arbitration. *Stolt-Nielsen*, 559 U.S. at 686–87, 130 S. Ct. 1758; *Concepcion*, 563 U.S. at 347–51, 131 S. Ct. 1740.

As explained above, questions of arbitrability concern whether the contracting parties agreed to arbitrate their disputes and the issues they agreed to arbitrate. *Howsam*, 537 U.S. at 83–84, 123 S. Ct. 588; *First Options of Chicago*, 514 U.S. at 944–45, 115 S. Ct. 1920. Applying this standard, it is clear that the “who decides” question involves these issues because it requires the decision maker to determine whose claims the parties agreed to arbitrate—only the named plaintiff’s claims against the defendant, or the claims of numerous other absent, but similarly-situated claimants against the defendant. *See Stolt–Nielsen*, 559 U.S. at 686, 130 S. Ct. 1758; *Opalinski I*, 761 F.3d at 332 (“The Supreme Court has long recognized that a district court must determine whose claims an arbitrator is authorized to decide.”). As the Washington Supreme Court has previously noted, “whether an arbitration agreement binds a nonsignator is a ‘gateway dispute’ that is ‘an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.’” *Satomi*, 167 Wn. 2d at 809, 225 P.3d 213 (citing *Howsam*, 537 U.S. at 83, 84, 123 S. Ct. 588).

*v. The presumption in favor of
 arbitration does not apply to the
 “who decides” question.*

Seeking to reverse the presumption favoring judicial resolution, Petitioners contend that courts must resolve all doubts about arbitrability

in favor of arbitration, and therefore any question concerning whether they and Franciscan agreed to class arbitration must be submitted to the arbitrator for resolution. *See* Petitioners' Brief at 39. This contention is unpersuasive because Petitioners conflate the "who decides" question with the class arbitration question. The strong policy in favor of enforcing arbitration agreements according to their terms generally requires any doubt concerning the arbitrability of a dispute to be resolved in favor of arbitration, but that presumption only applies to whether a particular dispute is covered by an arbitration agreement. *Howsam*, 537 U.S. at 83, 123 S. Ct. 588; *First Options of Chicago*, 514 U.S. at 944–45, 115 S. Ct. 1920. That presumption does not apply to the threshold question of "who decides" whether a particular dispute is covered by an arbitration agreement. *First Options of Chicago*, 514 U.S. at 944–45, 115 S. Ct. 1920.

In sum, the "who decides" question is a question of arbitrability for a court to decide; that is, "[u]nless the parties clearly and unmistakably provide otherwise." *AT&T Techs.*, 475 U.S. at 649, 106 S. Ct. 1415; *see also* *Howsam*, 537 U.S. at 83, 123 S. Ct. 588; *Satomi*, 167 Wn. 2d at 809, 225 P.3d 213.

3. *The parties did not “clearly and unmistakably” agree that arbitrators decide questions of arbitrability, in the Agreements or otherwise.*

The Agreements at issue here do not “clearly and unmistakably” circumscribe decision-making authority to courts or arbitrators under any circumstances, and they nowhere refer to questions of arbitrability generally or the “who decides” question specifically. The parties have also not “clearly and unmistakably” agreed, expressly or impliedly, that an arbitrator should answer the “who decides” question. Thus, the “who decides” question in this situation should be answered by the courts, not by an arbitrator. *See Satomi*, 167 Wn. 2d at 809, 225 P.3d 213; *First Options of Chicago*, 514 U.S. at 944–45, 115 S. Ct. 1920 (holding that a court should decide whether the arbitration contract binds parties who do not sign the agreement). This is because the “who decides” question here requires the Court to determine whether Petitioners’ and Franciscan’s agreement to submit all claims and disputes to binding arbitration covers not only Petitioners’ claims against Franciscan, but also the claims of all similarly situated individuals against Franciscan.

Thus, the answer to the first question on appeal—whether the Superior Court acted within its authority when it issued an order compelling individual, as opposed to class, arbitration—is yes. The

Superior Court, as the proper entity to decide the issue, acted correctly by issuing an order compelling individual arbitration.

B. Franciscan did not waive its right to request individual arbitrations

Petitioners contend that Franciscan waived the ability to challenge class arbitration “by (1) not asserting it timely, and (2) affirmatively stating the opposite to the trial and appellate courts multiple times.” Petitioners’ Brief at 17. In addition to being factually incorrect—Franciscan sought individual arbitration at the appropriate time and never stated that the Agreements allowed for arbitration as a class—Petitioners misunderstand the doctrine of waiver and misapply it here.

1. *Waiver requires the intentional relinquishment of a right.*

“Waiver is the voluntary and intentional relinquishment of a known right.” *Verbeek Props., LLC v. GreenCo Env'tl., Inc.*, 150 Wn. App. 82, 87, 246 P.3d 205 (2010) (citing *Ives v. Ramsden*, 142 Wn. App. 369, 383, 174 P.3d 1231 (2008)). “It will not be found ‘absent conduct inconsistent with any other intention but to forego that right.’” *Ives*, 142 Wn. App. at 383, 174 P.3d 1231 (quoting *Shoreline Sch. Dist. No. 412 v. Shoreline Ass’n of Educ. Office Emps.*, 29 Wn. App. 956, 958, 631 P.2d 996 (1981)); see also *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn. 2d 346, 353, 779 P.2d 697 (1989) (“It is necessary that the person

against whom waiver is claimed have *intended* to relinquish the right, advantage, or benefit and his action must be inconsistent with any other *intent* than to waive it.” (emphasis added)).

2. ***Petitioners have a “heavy burden of proof” with respect to waiver.***

Waiver ““is disfavored, and a party seeking to prove waiver has ‘a heavy burden of proof.’” *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 237, 272 P.3d 289 (2012) (quoting *Steele v. Lundgren*, 85 Wn. App. 845, 852, 935 P.2d 671 (1997)). “The determination of whether waiver has occurred ‘necessarily depends upon the facts of the particular case and is not susceptible to bright line rules.’” *Id.* (quoting *Steele*, 85 Wn. App. at 853, 935 P.2d 671).

Petitioners have not met their “heavy burden” of showing that Franciscan waived its right to arbitrate individually rather than as a class. Indeed, Petitioners have not shown that Franciscan agreed to class arbitration—expressly, by its conduct, or otherwise.

3. ***Petitioners fail to show an express or implied agreement to participate in class arbitration.***

Petitioners argue that Franciscan expressly and implicitly agreed to classwide arbitration. To prevail on this argument, Petitioners must show that Franciscan’s “conduct reached a point where it was inconsistent with

any other intention but to forego the right to arbitrate” individually rather than as a class. *River House Dev.*, 167 Wn. App. at 238, 272 P.3d 289. Petitioners have not presented such evidence. At no point in time did Franciscan’s words or conduct indicate that it had agreed to class arbitration, which is what Petitioners are required to show under clear Supreme Court precedent. *See Stolt-Nielsen*, 559 U.S. at 684 (“[A] party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” (emphasis in original)).

Try as they might, Petitioners fall far short of showing an express or implied agreement to arbitrate as a class. As support for their untenable position, Petitioners cite to certain misleading excerpts of Franciscan’s filings throughout the litigation of this case to establish that Franciscan has represented that class claims could and should be arbitrated under the Agreements. *See* Petitioners’ Brief at 2, 6–12. But Petitioners’ citations fail to show any agreement by Franciscan to arbitrate the class claims at issue here. In fact, the opposite is true: Franciscan’s filings clearly show that it never, at any time, anticipated or agreed to participate in class arbitration.

- i. *Franciscan did not admit that the Agreements permit class arbitration during the discovery dispute between the parties.*

According to Petitioners, Franciscan admitted, during the discovery dispute between the parties, that “the arbitrator had the power to certify a class, thereby admitting that the Arbitration Agreements permit class claims in arbitration.” Petitioners’ Brief at 7–8. Petitioners are confused. While it is true that Franciscan acknowledged that an arbitrator has the power to *certify* a class, that in no way implies an admission by Franciscan that the Agreements permit class arbitration. Rather, it means that an arbitrator, faced with a motion to certify a class, has the authority to make the class certification determination. But the proposed class first must get to the arbitrator, and that only happens once a court makes the determination that the parties have agreed to class arbitration.

Petitioners also disingenuously allege that, during the discovery dispute, Franciscan “never disputed” that class discovery must occur. *See* Petitioners’ Brief at 7. Nothing could be further from the truth. Franciscan repeatedly and explicitly argued that “only limited discovery related to Dr. Romney’s *individual claims* [should] be allowed,” and that classwide discovery was unnecessary and improper. CP 612 (emphasis added); *see also* CP 600–14; CP 666–79.

Petitioners cite to a number of statements made by Franciscan in two pleadings during the discovery dispute to support their argument that Franciscan agreed to class arbitration. *See* Petitioners' Brief at 8–9.¹² But all of the supposed “admissions” Franciscan made are taken out of context and do nothing to advance Petitioners' position. The notion that Franciscan waived its right to seek individual arbitration through statements made during a discovery dispute while the case was on appeal is absurd. At that time, the Agreements had been invalidated and Franciscan was facing the very real possibility of the case being litigated in court. It makes no sense to use Franciscan's statements made in such circumstances as proof that it agreed to arbitrate as a class.

Regardless, the statements offered by Petitioners do not show that Franciscan admitted that the Agreements permit class claims in arbitration. To emphasize this point, Franciscan responds below to each of the quotations included by Petitioners on pages 8 and 9 of their brief (reprinted for ease of reference):

- Plaintiffs, however, have failed to demonstrate that putative class members would be harmed in any way should class-related discovery occur after these issues have been determined by either a court or an arbitrator. CP 676 [*should be 675–76*].

¹² The two pleadings are found at CP 600–14 and CP 666–79. In the two pleadings, Franciscan stated its intent to engage in discovery relating to Dr. Romney's *individual claims* more than 30 times.

RESPONSE: The referenced issues that could be determined by either a court or an arbitrator are whether a class exists (class certification), and whether to allow class discovery, not whether to allow class arbitration, which the parties were not considering at that time. *See* CP 675-76. Therefore, this statement cannot possibly be construed as an admission that the Agreements permit class arbitration.

- Should a class be certified, those class members would have access to all discovery related to Dr. Romney's¹³ claims under the wage statutes, as well as the opportunity to conduct class discovery in the forum which ultimately presides over this matter. CP 676.

RESPONSE: In the very next sentence, Franciscan asked the court to “enter a Protective Order, preventing Plaintiffs from seeking unduly burdensome and expensive class-related discovery at this time.” CP 676. Franciscan was explicitly opposing Petitioners’ attempt to obtain class discovery, which clearly shows that Franciscan was not anticipating or agreeing to participate in class arbitration. And again, an acknowledgment that a class *could* be certified, or that an arbitrator *could* conduct class discovery, is not the same as an admission that the Agreements permit class arbitration.

- Additionally, if this Court orders full discovery and then compels the parties to arbitration, FMG may be forced to participate in discovery that is unnecessary for the arbitration, as an arbitrator could decline to certify the putative class or narrow other issues in the case. CP 611.

RESPONSE: It is, of course true, that an arbitrator, if called upon, can make a determination with respect to the certification of a class, but only if the parties agree to or a court orders class arbitration. Franciscan’s statements do not indicate that it agreed to engage in class arbitration at some future date. It is also significant that, in the next section of the brief cited by Petitioners, Franciscan requested that the court “order that only

¹³ In their brief, Petitioners misquote the cited language, removing “Dr. Romney’s” and replacing it with “all” without including brackets to indicate that they made a substantive change to the quote.

limited discovery relating to Dr. Romney's *individual claims* be allowed and deny Plaintiffs' request to engage in full discovery relating to Plaintiffs' class claims and the individual claims of the other Plaintiffs." CP 612 (emphasis added).

- [T]here is no indication that Dr. Bauer will be unable to pursue his individual claims or proceed as a class representative once the forum is determined and a decision is made as to class certification . . . [T]his court should consider all facts, including whether it is appropriate to allow class discovery when it is still uncertain whether a court or an arbitrator will preside over this matter and whether a class will even be certified . . . [I]t is unclear as to who will preside over this matter and whether a class will be certified. CP 667.

RESPONSE: These statements by Franciscan acknowledge only that, at the time of the briefing at issue, no decisions had been made regarding the proper forum for this dispute (Petitioners insisted on court proceedings, while Franciscan argued for arbitration) or regarding class certification. There is no indication in these statements that Franciscan agreed or intended to arbitrate as a class, or even that class arbitration was potentially available. Franciscan understood then, as it does now, that the decision regarding the proper forum had to be made before any other decisions could be rendered, including the availability of class arbitration or the viability of the class.

- It is undisputed, however, that Dr. Bauer is healthy and will be available to assist in the prosecution of his individual claims, and those of any class he may ultimately be allowed to represent, once the proper forum for this matter is determined. CP 669–70.

RESPONSE: If arbitration is the proper forum (which is what this Court decided), that does not mean that the class is viable or that Petitioners and the absent class members get to proceed to class arbitration. Rather, it means that the trial court should determine whether to *allow* class arbitration, and, if so, then the arbitrator would be called upon to decide the certification question.

- [T]he discovery Plaintiffs seek is unduly burdensome and potentially unnecessary, as the putative class is not certified, it is

unlikely that Dr. Romney will proceed as a class representative if a class is certified, and Drs. Bauer and Childress remain adequate class representatives. CP 673.

RESPONSE: This quoted language comes from Franciscan’s “Statement of Issues,” in which it asked the trial court to enter a protective order preventing Petitioners from obtaining discovery on class claims for the reason stated above and because Franciscan was “in the process of responding to discovery on Dr. Romney’s *individual claims*.” CP 673 (emphasis added). Franciscan believed it was improper to engage in class discovery at that time, and asked the trial court to intervene. Now Petitioners are attempting to misconstrue those proceedings and mislead this Court into believing that Franciscan somehow agreed to class arbitration. That is absurd.

- Plaintiffs cannot establish that justice requires this Court to permit discovery regarding class claims when it is uncertain whether this Court or an arbitrator will determine whether a class exists, when no class has been certified, and when Dr. Bauer will be able to pursue his individual claims, as well as those of the putative class, once the question of forum is decided. CP 674.

RESPONSE: It is true that a court or arbitrator can make the determination “whether a class exists,” but that does not mean an arbitrator decides the class arbitration question, or that Franciscan consented to class arbitration. If a court were to decide to allow class arbitration, the arbitrator would then be called upon to decide the certification question—i.e., whether a class exists. Nothing in Franciscan’s statement here indicates that it was agreeing to participate in class arbitration, or that it consented that the Agreements allow for or demand class arbitration.

- Here, good cause exists to enter a Protective Order because allowing discovery on class claims when it is still uncertain whether this matter will proceed in this Court or in arbitration, where it is uncertain whether a class will be certified (and even if one is, it is unlikely that Dr. Romney will be a class representative given his medical condition) and where Dr. Bauer will be able to pursue his individual claims and any class claims once the arbitration issue has been decided, would be unduly burdensome,

expensive, and unnecessary—especially if it is ultimately decided that this matter should proceed in arbitration and/or that no class should be certified.” CP 675.

RESPONSE: These statements by Franciscan acknowledge only that, at the time of the briefing at issue, no decisions had been made regarding the proper forum for this case or regarding class certification. Further, Franciscan understood then, as it does now, that the decision regarding the proper forum had to be made before any other decisions could be rendered, including the viability of the class, Dr. Bauer’s ability to serve as a class representative, or the availability of class arbitration.

None of the above statements can be construed as an acknowledgment by Franciscan that the Agreements authorize class arbitration or as an agreement to engage in class arbitration. In fact, Franciscan’s belief that it was improper to engage in classwide discovery goes against Petitioners’ position that Franciscan impliedly agreed to participate in class arbitration.

ii. *Franciscan did not admit that the Agreements permit class arbitration during settlement discussions with Petitioners’ counsel.*

As further support for their assertion that Franciscan has admitted that the Agreements permit class arbitration, Petitioners cite to an e-mail exchange between counsel for the parties regarding possible *settlement* of Petitioners’ claims. *See* Petitioners’ Brief at 10 n.1. This privileged e-mail communication has no bearing on these proceedings and should be disregarded in its entirety. Its inclusion is improper, inappropriate, and

disingenuous. Moreover, it provides absolutely no support for Petitioners' assertion; the attempt by Franciscan to settle the class claims at a discount in advance of arbitration or court proceedings (at that time the enforceability of the Agreements was in question while the appeal was pending) was meant to mitigate risk should the case proceed in court. Once the Washington Supreme Court denied review and the parties knew the case would be proceeding in arbitration, the settlement talks between the parties immediately broke down as the parties attempted to agree on arbitrators.

iii. Franciscan's focus has always been on the three individual Petitioners, not the class.

From the inception of this case nearly three years ago until now, Franciscan has focused its briefing in the Superior Court and in this Court on the three individual Petitioners, not the class. *See, e.g.*, CP 174 (the “**three individuals**” agreed to arbitrate their disputes); CP 174 (the “Court should compel the **three Petitioners** to honor the language of the Addendums”); CP 176, 180, 182, 184, 237, 241–42, 1424, 1431, 1470, 1484, 1492 (emphasizing the language in the Agreements referring to Petitioners in the singular—i.e., “you,” “your,” “**a** plaintiff,” “**the** employee”); CP 180, 261 (“all **three Plaintiffs**”); CP 180 (the Agreements require “both the employer and **the** employee [singular] to bring their

claims in arbitration”); CP 181, 183, 1424, 1428 (“either party,” meaning either Franciscan or one of the individual Petitioners); CP 182 (“each of the *three* Employment Agreements”); CP 235 (the Agreements “agreed to by Drs. Romney, Bauer and Childress . . . allow Plaintiffs to pursue *their* claims”); CP 261–62, 1479–80 (emphasizing the Agreements of Drs. Romney, Bauer, and Childress); CP 600–14 (emphasizing that only discovery related to Dr. Romney’s “individual claims” be allowed and that class claims should not); CP 666–79 (same); CP 1466 (“individual employment contracts”).

4. *Franciscan’s “delay” is not evidence of waiver.*

It is clear that Franciscan did not expressly waive its right to arbitrate individually. Petitioners must prove, then, that Franciscan implicitly waived the right to arbitrate individually. *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 62, 621 P.2d 791 (1980) (“Waiver of an arbitration clause may be accomplished expressly or by implication.”). Petitioners attempt to do so by pointing to Franciscan’s delay in seeking individual arbitrations. *See* Petitioners’ Brief at 21–23. Once again, Petitioners’ argument misses the mark.

This is because implied waiver must be proved by a party’s “undisputed acts or language so inconsistent with his purpose to stand

upon his rights as to leave no opportunity for a reasonable inference to the contrary.” *Reynolds Metals Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971). “Negligence, oversight, or thoughtlessness does not create it.” *Id.*

Here, Franciscan did not have an affirmative duty to raise the class arbitration issue earlier than it did because the Agreements are silent on the issue of class arbitration, and the prevailing legal theory under *Stolt-Nielsen* and its progeny is that silence does not equal an agreement to arbitrate as a class.¹⁴ Therefore, it was reasonable for Franciscan to first engage in a dispute over the enforceability of the Agreements without raising the issue of class arbitration. Once Petitioners’ obligation to arbitrate their claims was decided, Franciscan requested individual, rather than class, arbitration. That was the appropriate time and method of doing so. Franciscan’s position is bolstered by numerous cases in which the class arbitration issue was raised at varying times and under a variety of circumstances, including post-discovery. *See, e.g., Oxford Health* 133 S. Ct. at 2067 (the parties agreed that an arbitrator should decide whether their contract authorized class arbitration *after* the state trial court had granted Oxford’s motion to compel); *Hill v. Garda CL Nw., Inc.*, 169 Wn.

¹⁴ This point is discussed in depth below in **Section V.D.**

App. 685, 690–91, 281 P.3d 334 (2012) (“*Hill I*”), *rev’d on other grounds by Hill II* (holding that the employer did not waive its right to arbitrate even though the parties discussed settlement and engaged in mediation and discovery for over a year before the issue of class arbitration was raised).

Still, according to Petitioners, Franciscan “would have said class arbitration was precluded if that were true.” Petitioners’ Brief at 20. That is absurd. Petitioners, like Franciscan, filed hundreds of pages of briefing in multiple venues without once claiming or arguing that they could pursue class claims in arbitration, or that the Agreements explicitly allow for arbitration as a class. If Franciscan was required to raise the class arbitration issue, it was equally incumbent upon Petitioners to make the argument that class arbitration was appropriate at some point during the proceedings.¹⁵

Further, the time that has elapsed due to Petitioners’ insistence on disputing the enforceability of the Agreements, and in pursuing class discovery while that dispute was pending, should not be considered in assessing waiver. Indeed, a court should consider “only those time periods ‘reasonably chargeable’ to the party allegedly waiving its arbitration

¹⁵ Petitioners support their assertion by pointing out that Franciscan is “one of the largest healthcare providers in the nation with experienced counsel.” Petitioners’ Brief at 20. Of course, the same can be said of counsel for Petitioners, who is one of the most experienced litigators in Washington with respect to claims like the ones at issue here.

rights.” *Lake Wash.*, 28 Wn. App. at 63, 621 P.2d 791 (quoting *George V. Nolte & Co. v. Pieler Constr. Co.*, 54 Wn. 2d 30, 34–35, 337 P.2d 710 (1959)). “Time which ha[s] elapsed due to the conduct of one party [is] not [] evidence of waiver by the other party.” *Id.* Petitioners were responsible for the long delay here because they moved to invalidate the Agreements in the first instance, and they sought class discovery. The delay is not evidence of waiver by Franciscan.

Petitioners assert that Franciscan “never raised any issue with respect to class arbitrability or severance” from the time the Washington Supreme Court denied review on September 30, 2015 until this Court issued the mandate on November 20, 2015. *See* Petitioners’ Brief at 11.¹⁶ That is false. On October 5, 2015, just five days after the Supreme Court denied review, Franciscan, through counsel, invited Petitioners’ counsel “to propose *three different arbitrators for the three individual arbitrations for Dr. Romney, Dr. Bauer, and Ms. Childress.*” Appendix 3 (emphasis added). When Petitioners’ counsel questioned this approach, counsel for Franciscan responded, on October 6, 2015: “Yes, we are taking the position that *there needs to be three individual arbitrations (one per claimant).*” Appendix 4 (emphasis added).

¹⁶ Petitioners also allege that Franciscan “failed to raise issues related to class arbitration until after the COA issued the mandate.” Petitioners’ Brief at 11.

In sum, it is clear that Franciscan has not consented, either explicitly or by implication, to class arbitration.

C. Franciscan is not equitably estopped from demanding individual arbitration.

According to Petitioners, Franciscan has “chang[ed its] position regarding arbitrability of class claims,” and thus Franciscan should be equitably estopped from demanding individual arbitration. Petitioners’ Brief at 24. Petitioners are wrong.

1. *Estoppel requires proof by “clear, cogent and convincing evidence.”*

“Estoppel is not favored and a party asserting estoppel must prove each of its elements by clear, cogent and convincing evidence.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994). Petitioners fall far short of meeting this demanding standard as to any of the elements of equitable estoppel.

2. *Franciscan did not act inconsistently.*

Petitioners argue that Franciscan acted inconsistently with the position it has now taken with respect to class arbitration. Petitioners’ Brief at 25–26. As has previously been explained, Franciscan never took the position that the Agreements permit class arbitration, and never agreed to arbitrate as a class. *See supra* **Section V.B.3**. Petitioners have presented

no evidence that Franciscan led it to believe that it would arbitrate as a class, and certainly not “clear, cogent, and convincing evidence.”

Petitioners also contend that Franciscan has taken inconsistent positions with respect to non-signatory parties being bound by the Agreements. *See* Petitioners’ Brief at 20, 25–26. Petitioners misrepresent and misstate Franciscan’s argument, however. Franciscan’s “non-signatory parties”—affiliated entities Catholic Health Initiatives and Franciscan Health System—are allowed to participate in arbitration because they are “inherently inseparable” from Franciscan. *See* CP 185 (quoting *Townsend*, 153 Wn. App. at 889, 224 P.3d 818). The alleged absent class members are not “inherently inseparable” from Petitioners. Plus, Franciscan’s affiliated entities are expressly included in the Agreements. *See* CP 63, § 1 (defining Franciscan as “Franciscan Medical Group, and its affiliates, subsidiaries, and parent companies”). The alleged absent class members are not. These are precisely the arguments Franciscan made on this issue in the Superior Court and in this Court previously. *See* CP 185–86, 245, 1447–48, 1499–1500. Franciscan is not acting inconsistently on this issue.

3. *Petitioners did not reasonably rely on Franciscan's alleged representations.*

Petitioners have not shown, by “clear, cogent, and convincing evidence,” that they reasonably relied on Franciscan’s alleged representations related to class arbitration. In fact, they do not indicate what representations Franciscan made that led them down the path they pursued. Instead, they blame Franciscan for not raising the class arbitration issue sooner so they could respond to it. Petitioners’ Brief at 26. But that was not Franciscan’s responsibility. Because the Agreements are silent on the issue of class arbitration, and the prevailing legal theory is that silence does not equal an agreement to arbitrate as a class, the onus was on Petitioners to raise the issue.¹⁷ Petitioners acknowledge as much: “Plaintiffs would have incorporated the waiver of class claims issues into their arguments that the Arbitration Agreements were unconscionable.” Petitioners’ Brief at 26. That is precisely what Petitioners should have done when they filed their motion to void the Agreements at the outset of this case: they should have argued that the inability to bring class claims in arbitration under the Agreements rendered them unconscionable.¹⁸ But they did not do so.

¹⁷ Again, this point is discussed in depth below in Section V.D.

¹⁸ While Franciscan believes this argument does not have merit, the time for Petitioners to raise the class arbitration unconscionability argument was when

Therefore, it was reasonable for Franciscan to engage in a dispute over the enforceability of the Agreements without raising the issue of class arbitration. Franciscan justifiably presumed that, should the Agreements be upheld as valid by the Superior Court, arbitration would take place on an individual, not a class, basis. It had no reason to suppose otherwise due to the Agreements' silence on the issue and Petitioners' failure to raise it.

4. *Petitioners have not been harmed or suffered any prejudice.*

According to Petitioners, they have been injured and prejudiced by Franciscan's alleged representations on the class arbitration issue. Petitioners' Brief at 26–29. But, unfortunately for Petitioners, “the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of th[e] facts” at issue. *Chem. Bank v. Wash. Public Power Supply Sys.*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). Indeed, in order to create an estoppel it is necessary that:

The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, *but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are*

they filed their original motion to void the Agreements. Instead, now that Petitioners do not like the outcome of the courts' rulings, they grasp at straws to find new arguments to challenge the Agreements instead of addressing them all together up front in their original motion. Petitioners cannot take multiple bites of the proverbial apple in their quest to dodge arbitration.

known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.”

Id. (italics in original).

Petitioners could and should have raised the class arbitration issue when they initially moved to invalidate the Agreements; they knew then that the Agreements were silent with respect to class arbitration, and that the presumption in such a situation is that the parties have not agreed to class arbitration. Because they did not raise the issue as they were required to do, Petitioners “cannot now complain of the consequences of their neglect in the matter.” *See id.* Moreover, Petitioners cannot plausibly argue that they were “destitute of any convenient and available means of acquiring” the knowledge of the state of facts here as they could have ascertained Franciscan’s position on the class arbitration issue by either asking or raising it in their motion. Thus, there can be no estoppel.

Petitioners also contend that they have suffered injury and prejudice as a result of Franciscan’s delay. Petitioners’ Brief at 26. But any delay has been caused by Petitioners, and cannot be held against Franciscan, as has previously been explained. *See supra* **Section V.B.4** (“[A] court should consider ‘only those time periods reasonably chargeable to the party allegedly waiving its arbitration rights.’” (quoting *Lake Wash.*, 28 Wn. App. at 63, 621 P.2d 791)).

D. The Superior Court correctly ordered the parties to arbitrate individually.

Even though it is not an issue submitted to the Court for review in this appeal, Petitioners seek a determination that “class claims can proceed in arbitration under the language of the Arbitration Agreements.” Petitioners’ Brief at 29–38. They assert that the “Agreements are not ‘silent’ on class claims,” and that the “Agreements evidence an agreement and intent to arbitrate class claims.” *Id.* at 30–34. Petitioners have no right to raise this issue on appeal, and the Court should ignore it, but in the event the Court is inclined to consider it, it is clear that Petitioners are wrong.

1. *The absence of any reference to class arbitration in an arbitration agreement weighs in favor of the conclusion that the parties have not agreed to it.*

It is a well-recognized legal principle that a lack of any mention of class arbitration in an arbitration agreement weighs against finding that such agreement permits class arbitration; merely agreeing to arbitrate is not enough to infer a party’s consent to class arbitration because of the “fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration.” *Stolt-Nielsen*, 559 U.S. at 685–86.

On this issue, “the Washington Supreme Court has ruled that when an arbitration agreement is silent on consolidation, a court may not compel consolidated arbitration.” *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 49, 17 P.3d 1266 (2001) (citing *Balfour, Guthrie & Co. v. Commercial Metals Co.*, 93 Wn. 2d 199, 202–03, 607 P.2d 856 (1980)); *see also Hill I*, 169 Wn. App. at 688, 281 P.3d 334 (holding that because the arbitration agreements were silent with respect to class arbitration, “the trial court erred by ordering the parties to submit their dispute to class arbitration”).

These holdings are in line with authorities across the country, including many of the circuit courts, the Ninth Circuit among them. *See Eshagh*, 588 F. App’x at 704 (compelling bilateral arbitration according to the parties’ agreement, which did not contain terms related to class arbitration); *Reed Elsevier*, 734 F.3d at 599 (“The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it.”); *Quilloin v. Tenet Health Sys. Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) (“Silence regarding class arbitration generally indicates a prohibition against class arbitration.”); *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001) (“[B]ecause the [] agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals.”).

Numerous district courts confronted with this issue have likewise found that silence on the matter of class arbitration indicates that the agreement does not allow for class arbitration. *See, e.g., Opalinski v. Robert Half Int'l Inc.*, No. 10–2069, 2015 WL 7306420, at *4 (D.N.J. Nov. 18, 2015) (“*Opalinski IF*”) (collecting cases and noting that district courts in California, Ohio, Florida, New York, and Alabama have all recently “reject[ed] classwide arbitration where the agreement does not mention class arbitration.”); *Bird v. Turner*, No. 5:14CV97, 2015 WL 5168575, at *9 (N.D. W. Va. Sept. 1, 2015) (finding that “the parties did not consent to class arbitration but only to bilateral arbitration” because the arbitration agreement did “not mention class arbitration”); *Alixpartners*, 2015 WL 8538089, at *6 (“[A]n implicit agreement to authorize class-action arbitration should not be inferred solely from the fact of the parties’ agreement to arbitrate.”).

In short, the weight of authority holds that silence on the issue of classwide arbitration in an arbitration agreement weighs against inferring consent.

2. ***The Agreements are silent on the issue of class arbitration.***

Here, the Agreements’ express terms do not mention class arbitration; instead, the Agreements simply require the parties to arbitrate

all claims and disputes they have with one another, except for a few specialized claims not applicable here. *See* CP 63. This language is not a clear and unmistakable statement that the parties intended the Agreements to provide for class arbitration.

To the contrary, the Agreements demonstrate that the parties only contemplated bilateral arbitration of disputes between Franciscan and individual employees. The Agreements consistently refer to Petitioners in the singular, suggesting that each Petitioner’s Agreement only applies to disputes between that Petitioner and Franciscan:

- “This Arbitration Addendum . . . is . . . between Physician (“**You**”) and FMG” CP 63, pmb1. (emphasis added).
- “This Addendum requires **You** and FMG to arbitrate all Claims . . . between **You** and FMG.” *Id.* (emphasis added).
- “This Addendum affects **your** rights to a trial by jury.” *Id.* (emphasis added).
- “**YOU MAY WISH TO SEEK LEGAL ADVICE BEFORE SIGNING THIS ADDENDUM.**” *Id.* (bold and all caps in original, italics added).
- “[**Y**]our employment” and “**your** separation of employment.” CP 63, § 1 (emphasis added).
- “**You** and FMG each agree that all Claims between **You** and FMG . . . shall be exclusively decided by arbitration” CP 63, § 2 (emphasis added).
- “By signing this Addendum, **You** are waiving your right to a trial by jury.” *Id.* (emphasis added)

- “**You** and FMG shall equally share all costs of arbitration . . . unless **you** prove . . . that the costs of the arbitration would effectively prevent **you** from pursuing **your** claim” CP 63, § 3 (emphasis added).
- “**The terms of this Addendum have control over any prior agreement that *You* may have with FMG and any prior discussion *You* may have had with an FMG representative about arbitration.**” CP 64, § 4 (bold in original, italics added).
- “**Any amendment to this Addendum must be in writing, signed by *You* and FMG.**” *Id.* (bold in original, italics added).

The Agreements make no reference to employee groups or other employees’ claims or disputes, further suggesting that they did not intend to permit class arbitration. *See JP Morgan Chase*, 2016 WL 1182153, at *9; *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750, 2014 WL 5088240, at *12 (C.D. Cal. Oct. 7, 2014). Moreover, merely because the Agreements do “not expressly exclude the possibility of classwide arbitration” is insufficient; they do “not include it either, which is what [they] must do in order for [the Court] to force” class arbitration. *See Reed Elsevier*, 734 F.3d at 600.

Finally, the Agreements’ limitation of arbitrable claims to those “arising out of or related to the Employment Agreement, [Petitioners’] employment by FMG, and/or [Petitioners’] separation from employment with FMG” is inconsistent with class arbitration. *See Opalinski II*, 2015 WL 7306420, at *6. The claims of other employees do not arise out of or relate to Petitioners’ Agreements, employment, or termination. *See id.*

“When arbitration agreements limit claims to those arising out of the relationship between the contracting parties, as is the case here, they generally do not authorize class arbitration of absent parties’ claims.” *Id.* (collecting cases); *see also Herzfeld v. 1416 Chancellor, Inc.*, No. 14–4966, 2015 WL 4480829, at *8 (E.D. Pa. July 22, 2015) (“[T]he Agreement does not expressly or implicitly evidence an agreement for collective or class arbitration. The Agreement refers only to arbitration affecting ‘both parties.’ It does not mention other parties of any type. Under standard contract principles, there is no ‘meeting of the minds’ on this monumental change to the parties’ agreement.”).

Petitioners argue that Franciscan could have chosen to specifically exclude class arbitration in the terms of the Agreements and that, because they did not do so, Franciscan revealed its intent to submit to class arbitration. *See* Petitioners’ Brief at 34–35. This argument is unpersuasive: the “[m]ere absence of explicit exemption, without more, does not evince an intent to permit classwide arbitration.” *See Opalinski II*, 2015 WL 7306420, at *6.

Considering Petitioners’ arguments as a whole, what they essentially ask the Court to do is infer that because the Agreements clearly contemplate bilateral arbitration and are intended to be read broadly, they must also contemplate class arbitration. This the Court should not do, as

such a request flies in the face of binding precedent requiring the Court to do exactly the opposite. *See Stolt–Nielsen*, 559 U.S. at 685, 130 S. Ct. 1758 (“An implicit agreement to authorize class-action arbitration, however, is not a term that . . . may [be] infer[red] solely from the fact of the parties’ agreement to arbitrate.”). Despite the fact that the Agreements are intended to be as broad as legally possible, Petitioners cannot escape the fact that the Agreements are limited to disputes arising out of Petitioners’, and only Petitioners’, employment with Franciscan.

3. ***The reference to the AAA Rules in the Agreements does not change the analysis.***

According to Petitioners, the Agreements call for class arbitration by incorporating the American Arbitration Association’s (“AAA”) Rules for the Resolution of Employment Disputes, including the AAA Supplementary Rules for Class Arbitrations” (“Supplementary Rules”). Petitioners’ Brief at 13–14, 28 n.6, 34 n.8, 40–41.

However, as Petitioners’ acknowledge, the AAA administers demands for class arbitration under the Supplementary Rules *only if* “the agreement is silent with respect to class claims.” *See* Petitioners’ Brief at 40–41 (quoting the above language in CP 1364). This means that in order for Petitioners to prevail on this theory—that the AAA rules “mandate that the arbitrator decide whether class claims exist in arbitration”—they have

to take the position that the Agreements are silent with respect to class claims. They cannot and should not be permitted to do so when they have argued repeatedly in their brief, and in their pleadings leading up to this appeal, that the Agreements are not silent on the issue of class arbitration. *See* Petitioners' Brief at 3, 29–36; CP 1335–36 (“The Agreements are not ‘silent’ regarding arbitration of class claims”); CP 1513–16 (“The Arbitration contracts at issue in this case are not ‘silent’ regarding the arbitrability of class claims”). Petitioners' have thus waived their right to assert now that the Agreements are silent with respect to class claims. *See River House Dev.*, 167 Wn. App. at 236, 272 P.3d 289.

Petitioners also cannot prevail on their AAA theory because the Supplementary Rules themselves state: “Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, ***the arbitrator shall follow the order of the court.***” CP 1357, § 1(c) (emphasis added). That is precisely what happened here: the Superior Court, by order, resolved the class arbitration question and ruled that Petitioners must proceed to arbitration individually. Whenever arbitrators are selected for the individual Petitioners, they must, according to the Supplementary Rules, follow that order.

Therefore, because the Agreements are silent on the issue of class arbitration, and because silence weighs against inferring consent to arbitrate as a class, the Superior Court correctly ordered Petitioners to arbitrate their claims individually and separately.

VI. CONCLUSION

Courts answer preliminary questions of arbitrability, including the “who decides” question, unless the parties have clearly and unmistakably provided otherwise. There is no evidence here that the parties designated decision-making authority to an arbitrator to decide questions of arbitrability generally or the “who decides” question specifically, so the courts must decide.

Here, the Superior Court reasonably interpreted the language of the Agreements, considered the conduct of the parties in litigation, and ordered individual arbitrations. Thus, the Superior Court did not err by ordering Petitioners to arbitrate individually.

The Superior Court also did not err when it determined that Franciscan did not waive the right to request, and is not equitably estopped from demanding, individual arbitration. Franciscan sought to compel individual arbitration at the appropriate time, in the proper venue, and in the correct way.

Therefore, because the Superior Court correctly ordered the parties to individual arbitration, this Court should affirm the Superior Court's ruling.

Respectfully submitted this 31st day of August, 2016

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By: _____


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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 Washington, 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 document to be served this date, in the manner indicated, to the parties listed below:

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Dated this 31st day of August, 2016 at Seattle, Washington.


Legal Assistant

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2016 AUG 31 PM 2:26
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Appendix 1

The Court of Appeals
of the
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CASE #: 74806-8-1

Estate of Dr. Michael Romney, et al., Appellants v. Franciscan Medical Group, et al.,
Respondents

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on May 3, 2016, regarding Petitioner's motion for discretionary review:

In this matter plaintiffs/petitioners Dr. Kristen Childress, Dr. Faron Bauer, and the estate of Dr. Michael Romney seek review of a January 6, 2016 trial court order granting defendant/respondent Franciscan Medical Group's motion to stay judicial proceedings and to compel individual arbitration, and a January 29, 2016 order denying reconsideration. For the reasons stated below, review will go forward.

Childress, Bauer and Romney are former employees of the Franciscan Medical Group. Each entered into an employment contract that included an agreement to arbitrate "all disputes arising out of or related to the employment agreements" between the parties, with a few specified exceptions. Neither the agreement nor the addendum mention class claims or class arbitration.

The employees brought suit against Franciscan for damages, statutory penalties, and equitable relief for alleged wage violations on behalf of themselves and a class of physicians, medical assistants and nurse practitioners. Romney and Bauer also brought individual claims alleging they were improperly fired and lost hospital privileges in retaliation for whistleblowing. The employees moved to invalidate/void the arbitration agreement as unconscionable. Franciscan moved to compel arbitration. The trial court found the arbitration agreement unconscionable, invalidated it, and denied Franciscan's motion to compel arbitration.

Franciscan appealed. In a published opinion, this court concluded that the arbitration agreement was not procedurally unconscionable, reasoning that the employees had a meaningful choice in entering the agreement and the arbitration clause is understandable. Romney v. Franciscan Group, 186 Wn. App. 728, 740, 349 P.3d 32 (2015). The court also concluded that the agreement is not substantively unconscionable. The employees argued that the agreement was overly harsh because it required them to arbitrate all claims but allowed Franciscan to seek limited relief in court. The court held that assuming without deciding that these clauses are unconscionable, they are readily severable from the agreement. The court also rejected challenges based on provisions related to limiting exemplary damages, confidentiality, and fee sharing. Romney, 186 Wn. App. at 743-47. Finally, the court addressed the employee's argument that the arbitration agreement improperly attempted to bind parties who are not signatories. Although the issue had not been addressed by the trial court, for the sake of judicial economy this court addressed it, reasoning that where claims are based on the same set of facts and are inherently inseparable, the court may order arbitration of claims against a "party if even that party is not a party to the arbitration agreement." Romney, 186 Wn. App. at 747. The court "revers[ed] the trial court and remand[ed] for an order compelling arbitration." Romney, 186 Wn. App. at 748.

The Supreme Court denied review, and on November 14, 2015, the mandate issued. Several weeks later Franciscan filed a motion to stay judicial proceedings and to compel individual arbitration of all claims. Appendix Q. The employees opposed the motion, arguing that the trial court has no discretion to alter the scope of the mandate on remand, that Franciscan previously could have but did not raise the issue of individual v. class arbitration, and that it lost the opportunity to do so now through waiver and/or estoppel. The employees also argued that the issue of class arbitration was for the arbitrator, not the court, to decide. Appendix S.

Franciscan argued that the mandate allows the trial court to order individual arbitration that the parties never agreed to class arbitration, that Franciscan never indicated an intent to arbitrate collectively, and there was no waiver. Appendix U. Franciscan also argued that the court, not the arbitrator, must decide the class arbitration issue. Franciscan argued that while the U.S. Supreme Court has not yet resolved whether the availability of class arbitration is for the arbitrator or the court to decide, circuit authority supports that it is a question for the court. Appendix U at 5.

The trial court granted Franciscan's motion, stayed judicial proceedings, and compelled the parties to individually arbitrate all claims. Subsequently, the court denied reconsideration.

The employees seek review by appeal under RAP 2.2(a)(3), or by discretionary review under RAP 2.3(b)(2). Franciscan opposes review.

RAP 2.2(a)(3) provides for appeal as of right of "[a]ny written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action." This court has held that the right to arbitration is a substantial right under RAP 2.2(a)(3) and that a court decision that discontinues an "action" for arbitration falls within RAP 2.2(a)(3) because it involves issues wholly separate from the merits of the dispute and because an effective challenge to the order is not possible without an interlocutory appeal. Stein v. Geonerco, 105 Wn. App. 41, 44-45, 17 P.3d 1266 (2001); Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 440, 783 P.2d 1174 (1989). In Hill v. Garda CL Northwest, Inc., 179 Wn.2d 47, 308 P.3d 635 (2013), the Supreme Court discussed this rule and considered the flip side of the appealability issue:

When the trial court declines to compel arbitration, that decision is immediately appealable, in part because "[i]f a trial court does not compel arbitration and there is no immediate right to appeal, the party seeking arbitration must proceed through costly and lengthy litigation before having the opportunity to appeal, by which time such an appeal is too late to be effective." [quoting Stein]. While we have never addressed whether the opposite is always true, similar considerations are at play. If the court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a potentially costly arbitration before having the opportunity to appeal.

Hill, 179 Wn.2d at 54. The court in Hill went on to address the unconscionability challenge.

Citing Stein, Herzog, and Hill, the employees argue that they should not be forced to abandon their class claims and arbitrate individually before having an opportunity to appeal, at which time an appeal would be too late to be effective. Franciscan argues that there is no right to appeal, citing Wooh v. Home Insurance Co., 84 Wn. App. 782, 783, 930 P.2d 337 (1997), where the court stated in dicta that an order compelling arbitration is not a final order appealable under RAP 2.2(a). Wooh relies on Teufel Constr. Co. v. American Arbitration Ass'n., 3 Wn. App. 24, 25, 472 P.2d 572 (1970).

There are some reasons that support an immediate appeal here. Wooh and Teufel predate Stein and Hill. In Hill the court acknowledged that it has not resolved the issue of appealability of an order compelling arbitration, but signaled it may be open to allowing an immediate appeal of an order compelling arbitration.

And some (but not all) of the policy reasons for an immediate appeal are present here, where the trial court, in compelling arbitration, has in fact denied class arbitration, the procedure the employees argue they are entitled to. I need not resolve this appealability issue, as the employees have demonstrated that review is warranted.

Review is available under RAP 2.3(b)(2) if the moving party demonstrates probable error that substantially alters the status quo or substantially limits the party's freedom to act. Here, denying class arbitration and compelling the employees to individually arbitrate their claims substantially limits the employee's freedom to act. The issue, then, is whether they have shown probable error.

As they did below, the employees argue that the question of class arbitration is for the arbitrator to decide, not the court. Franciscan has cited cases from other jurisdictions that support its view that the issue of class arbitration is a gateway issue for the court to decide. But there is pertinent Washington contrary authority. See Marcus & Millichap Real Estate Inv. Services, Inc. v. Yates, Wood MacDonald, Inc., 192 Wn. App. 465, ___ P.3d ___ (2016), 2016 WL 394007 (if a court finds that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration agreement must go to arbitration), citing Townsend v. Quadrant Corp., 153 Wn. App. 870, 881, 224 P.3d 818 (2009), *aff'd on other grounds*, 173 Wn.2d 451, 268 P.3d 917 (2012). See also Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2002) (the question here – whether the contracts forbid class arbitration – does not fall into the narrow exception of gateway issues to be decided by the court; it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties; the relevant question is what type of arbitration proceeding the parties agreed to; it involves contract interpretation and arbitration procedures, questions well situated for an arbitrator to answer); Stolt-Nielsen v. Animalfeeds Internat'l Corp., 559 U.S. 662, 680, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010) (noting that the decision in Green Tree v. Bazzle, that the question of class arbitration is for the arbitrator, was a plurality decision, but declining to revisit the issue because the parties supplemental agreement specifically assigned the issue to the arbitration panel and no party argued the assignment was impermissible); Oxford Health Plans LLC v. Sutter, ___ U.S. ___, 133 S. Ct. 2064, 2068 n. 2, 186 L. Ed. 2d 4382 (2013) (this court has not yet decided whether the availability of class arbitration is a question for the court or arbitrator).

Under this case law, the issue of what type of arbitration the parties agreed to – individual or class arbitration – appears to be a decision for the arbitrator. The fact that the parties have not yet agreed upon who the arbitrator will be does not change the analysis. To the extent the trial court ordered individual arbitration instead of leaving the issue to the arbitrator, the employees have demonstrated discretionary review is warranted.

The employees also argue that Franciscan waived or is estopped from raising the issue of class arbitration by failing to raise it earlier in the litigation and making statements and/or acting inconsistently with the view that class arbitration is unavailable. See Appendix L, listing instances in which Franciscan referred to class arbitration.

Equitable estoppel is based on the notion that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied on the representation or position. Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (discussing application of equitable estoppel and waiver to the belatedly raised defense of insufficient service of process). Waiver involves similar concepts and can occur where a party's late assertion of a position is inconsistent with its previous behavior or the party has been dilatory in asserting the position. Lybbert, 141 Wn.2d at 38-39. See River House Development, Inc. v. Integrus Architecture, PS, 167 Wn. App. 221, 272 P.3d 289 (2012) (discussing application of equitable estoppel and waiver to questions of whether right to arbitration was waived by litigation conduct). See also Hill, 179 Wn.2d at 54 (noting the court has suggested a party must raise objections to arbitration in the trial court or on first review or risk having waived the issue). Review of the issue whether Franciscan waived or is equitably estopped from demanding individual arbitration is warranted.

Therefore, it is

ORDERED that discretionary review is granted, and the clerk will set a perfection schedule.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

CMR

Appendix 2

No. 71625-5-I

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

Cindius Romney as Personal Representative of the Estate of Dr. Michael
Romney, Dr. Faron Bauer, and Dr. Kristen Childress,
individually and on behalf of all others similarly situated,

Petitioners,

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,

Respondents.

**ANSWER TO PETITIONERS'
MOTION FOR DISCRETIONARY REVIEW**

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TABLE OF CONTENTS

I. Identity of Respondents	1
II. Introduction.....	1
III. Issues presented for review	2
A. Do Petitioners have a right to appeal an order granting a motion to compel arbitration under RAP 2.2(a)?.....	2
B. Is discretionary review appropriate under RAP 2.3?.....	2
IV. Statement Of The Case	2
V. Argument	5
A. Petitioners are not entitled to appeal under RAP 2.2(a); an order compelling arbitration is not appealable as a right.....	5
B. The superior court did not exceed this Court’s mandate or commit error warranting discretionary review by ordering Petitioners to arbitrate individually.....	5
1. This Court’s mandate allowed the superior court to order individual arbitrations.....	6
2. Franciscan did not waive its right to request individual arbitrations.	8
i. Waiver requires the intentional relinquishment of a right; Franciscan did not intentionally relinquish its right to request individual arbitrations.....	9
ii. Waiver only applies to issues that could have been raised on appeal; because the class arbitration issue was not a part of the appeal, Franciscan could not have raised it.	10
iii. By moving to compel arbitration, Franciscan did not waive its ability to seek assistance from the courts in deciding preliminary issues.	11
3. The superior court correctly interpreted the language of the Agreements and enforced the parties’ expectations when it ordered individual arbitrations.....	12
i. Parties cannot be compelled to submit to class arbitration absent agreement.....	13

ii. There was no agreement by the parties to submit to class arbitration, either in the Agreements themselves or by course of conduct.	15
C. Courts, not arbitrators, must make determinations regarding the availability of class arbitration.	19
VI. Conclusion	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Central Wn. Bank v. Mendelson-Zeller, Inc.</i> , 113 Wn. 2d 346, 779 P.2d 697 (1989).....	9
<i>Champ v. Siegel Trading Co.</i> , 55 F.3d 269 (7th Cir. 1995)	14
<i>Dominium Austin Partners, LLC v. Emerson</i> , 248 F.3d 720 (8th Cir. 2001)	14
<i>Hill v. Garda CL Nw. Inc.</i> , 169 Wn. App. 685, 281 P.3d 334 (2012).....	10, 13, 14
<i>Hill v. Garda CL NW., Inc.</i> , 179 Wn. 2d 47, 308 P.3d 635 (2013).....	8, 13, 14
<i>Oxford Health Plans LLC v. Sutter</i> , 133 S. Ct. 2064 (2013).....	9, 13, 19
<i>Perry v. Thomas</i> , 482 U.S. 483, 107 S.Ct. 2520 (1987).....	13
<i>Reed Elsevier, Inc. ex rel. LexisNexis v. Crockett</i> , 734 F.3d 594 (6th Cir. 2013)	20
<i>River House Dev., Inc. v. Integrus Architecture, P.S.</i> , 167 Wn. App. 221, 272 P.3d 289 (2012).....	18
<i>Robert Half Int'l Inc.</i> , 761 F.3d 326 (3d Cir. 2014).....	19
<i>State v. Fort</i> , 190 Wn. App. 202, 360 P.3d 820 (2015).....	9
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 559 U.S. 662, 130 S.Ct. 1758 (2010).....	13, 14, 15, 19
<i>United States v. Husband</i> , 312 F.3d 247 (7th Cir. 2002)	10

United States v. Schroeder,
536 F.3d 746 (7th Cir. 2008)10

Woo v. Home Ins. Co.,
84 Wn. App. 781, 930 P.2d 337 (1997)5

Zuver v. Airtouch Commc'ns, Inc.,
153 Wn. 2d 293, 103 P.3d 753 (2004)8, 13

Statutes

Federal Arbitration Act2, 13, 14, 16

RCW 7.04A.2505

Other Authorities

RAP 2.2(a)2, 5

RAP 2.3(b)(2) and (3)2, 5, 6

I. IDENTITY OF RESPONDENTS

Respondents are Franciscan Medical Group (“FMG”) and the related entities identified in the caption. For purposes of this answer, Respondents will be referred to as “Franciscan” or “FMG.”

II. INTRODUCTION

On November 13, 2015, after two years of litigation related to the arbitrability of this dispute, this Court issued a mandate certifying its ruling that this case is arbitrable (“WCOA Ruling”). Exhibit 1. The WCOA Ruling, issued on February 17, 2015, found that the arbitration agreements at issue here are enforceable, and directed the superior court to issue an order compelling arbitration. Exhibit 2. The superior court then did precisely what this Court’s mandate required it to do—ordered the parties to arbitration. Exhibit 3.

Unhappy with the superior court’s order, Petitioners now seek review in this Court. But there is no reason for this Court to accept review—Petitioners are not entitled to appeal as of right, and the superior court did not exceed this Court’s mandate or err in compelling the Petitioners to individual arbitration.

Therefore, Respondents urge the Court to deny Petitioners’ Motion for Discretionary Review (“Motion”) and refuse to accept review.

III. ISSUES PRESENTED FOR REVIEW

- A. Do Petitioners have a right to appeal an order granting a motion to compel arbitration under RAP 2.2(a)?
- B. Is discretionary review appropriate under RAP 2.3(b)?

IV. STATEMENT OF THE CASE

Each of the three named Petitioners—Michael Romney, Faron Bauer, and Kristen Childress—is a party to an employment contract (“Employment Agreements”) with FMG as a result of his or her employment with Franciscan. Exhibits 4, 5, and 6. The Employment Agreements include arbitration provisions (“Arbitration Addenda”) that mutually obligate Petitioners and FMG to arbitrate employment-related disputes.¹ See Arbitration Addenda, pmb1., § 2. The Agreements also specifically state that any arbitration between FMG and its employees is governed by the Federal Arbitration Act (“FAA”). See *id.* § 2. *The Agreements are silent on the issue of class arbitration.*

This Court settled the parties’ earlier dispute over the arbitrability of Petitioners’ claims in favor of arbitration and issued a mandate requiring the superior court to order the parties to arbitration. After the mandate was issued but before the superior court issued its order,

¹ The Employment Agreements and Arbitration Addenda will collectively be referred to as the “Agreements” in this answer.

Franciscan moved for an order compelling Petitioners to submit to individual arbitration and staying the action pending completion of the arbitration proceedings. Exhibit 7 (“Franciscan’s Motion to Compel”). Franciscan’s Motion to Compel was based on the fundamental precept that parties cannot be compelled to submit to class arbitration absent agreement. *Id.* at 3:21–4:6. Therefore, because the Agreements are silent on the issue of class arbitration, and because the parties never otherwise agreed to submit to class arbitration, Franciscan moved the superior court for an order compelling Petitioners to submit, individually and separately,² to arbitration. *Id.* at 4:7–5:23.

Petitioners opposed Franciscan’s Motion to Compel, arguing that: (1) this Court’s mandate remanded all claims, including class claims, to arbitration; (2) Franciscan had waived its ability to request individual arbitrations; and (3) “the law and the Agreements support the fact that an

² Petitioners take issue with the fact that Franciscan’s proposed order asked the superior court to order “separate” arbitrations for each of the named Petitioners. *See* Motion at 5–6. But it is clear that this is precisely the relief sought by Franciscan all along. *See, e.g.*, Franciscan’s Motion to Compel at 2:3–4 (“Defendants are prepared to arbitrate, individually, with *each of the Plaintiffs*—Romney, Bauer, and Childress” (emphasis added)); 5:18–19 (“[T]his Court should issue an order compelling individual arbitration between Defendants and *each of the three named Plaintiffs*.” (emphasis added)). Moreover, the Agreements themselves require each of the Petitioners to arbitrate his or her claims separately; they are precluded from being joined in a single arbitration proceeding under the express terms of the Agreements. *See* Arbitration Addenda, pmb1., § 2.

arbitrator is the only person who can decide if the parties agreed to arbitrate class claims.” *See* Exhibit 8 at 6:6–8, 7:20–9:9, 9:16–18. These are substantively the exact issues Petitioners contend were erroneously decided by the superior court and that Petitioners raise in their Motion.

In its reply in support of its Motion to Compel, Franciscan dealt with each of Petitioners’ contentions, arguing to the superior court that: (1) this Court’s mandate allowed the superior court to order individual arbitration; (2) the parties never agreed to class arbitration, and Franciscan never indicated an intent to arbitrate collectively; (3) Franciscan had not waived its right to request individual arbitration; and (4) the superior court, not an arbitrator, must decide the class arbitration issue. *See* Exhibit 9 at 1:13–5:20.

After reviewing the parties’ submissions, the superior court ordered individual arbitrations. *See* Ex. 3. Accordingly, Franciscan is prepared to arbitrate, individually and separately, with each of the three named Petitioners. But Petitioners refuse, insisting that they be permitted to arbitrate their claims on a classwide basis. Petitioners’ position lacks merit and is inconsistent with prevailing law. Thus, the superior court correctly ordered the parties to arbitrate on an individual basis, and this Court should not accept review.

V. ARGUMENT

A. Petitioners are not entitled to appeal under RAP 2.2(a); an order compelling arbitration is not appealable as a right.

Petitioners argue that they have a right to appeal under RAP 2.2(a)(1), which allows a party to appeal from a “final judgment,” and under RAP 2.2(a)(3), which provides for an appeal of a “written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.” Motion at 7. The order compelling arbitration does not determine the outcome of the action or prevent entry of a final judgment; to the contrary, entry of a judicial judgment following arbitration is expressly allowed under RCW 7.04A.250. This is why Petitioners are unable to offer any legal authority for their position: there is none. Rather, “an order *compelling* arbitration is not a final order” and, accordingly, is not “appealable of right under RAP 2.2(a).” *Woo v. Home Ins. Co.*, 84 Wn. App. 781, 783, 930 P.2d 337 (1997) (emphasis added). Therefore, Petitioners are not entitled to appeal under RAP 2.2(a).

B. The superior court did not exceed this Court’s mandate or commit error warranting discretionary review by ordering Petitioners to arbitrate individually.

Petitioners contend that this Court should accept discretionary review of this matter under RAP 2.3(b)(2) and (3). Motion at 9–18. RAP

2.3(b)(2) permits discretionary review if “[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.”³ RAP 2.3(b)(3) permits discretionary review if “[t]he superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court.”

Petitioners have failed to establish that either of these subsections applies to the superior court’s order at issue here. Indeed, Petitioners focus solely on the alleged “legal error” committed by the superior court, and do not address the “status quo or freedom to act” prong of RAP 2.3(b)(2) in any meaningful way. And, even though they cite to RAP 2.3(b)(3) twice—*see* Motion at 9, 17⁴—Petitioners do not even allege that the superior court’s decision departed from the accepted and usual course of judicial proceedings. Regardless, it would be impossible for them to argue that an order compelling arbitration constituted such a departure. It is clear that discretionary review is not warranted, as more fully explained below.

1. *This Court’s mandate allowed the superior court to order individual arbitrations.*

³ As can be seen, RAP 2.3(b)(2) has two prongs: a “probable error” prong and a “status quo or freedom to act” prong.

⁴ In the heading to Section V.1.d of their Motion, Petitioners quote the language from RAP 2.3(b)(2) but cite RAP 2.3(b)(3). Motion at 17.

Petitioners argue that the superior court did not follow the mandate from this Court when the superior court ordered individual arbitrations. *See* Motion at 9–11. According to Petitioners, this is because the mandate “unequivocally remanded the entire case,” including the uncertified class claims, to arbitration. *Id.* at 9. This is a clear attempt by Petitioners to mislead the Court and misconstrue the record.⁵ The mandate plainly states only that “[t]his case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.” Ex. 1. It was the superior court’s duty, then, to proceed in accordance with the WCOA Ruling, which found that the Agreements are enforceable. *See* Ex. 2. And that is exactly what the superior court did by ordering the parties to arbitration.

This Court did not consider, and its decision did not address, whether the Agreements authorize class arbitration. The conscionability of the Agreements was the only issue this Court was asked to consider.⁶ If one of the grounds for unconscionability was the unavailability of class

⁵ Petitioners made this exact same argument to the superior court when it opposed Franciscan’s Motion to Compel. *See* Ex. 8 at 1:2–12; 6:2–11. The superior court clearly saw through Petitioners’ attempt to misconstrue the nature of the mandate, exemplified by its granting Franciscan’s Motion to Compel.

⁶ The only mention made by this Court in its ruling that in any way relates to the procedural allegations of a class was when it noted that Petitioners had brought claims on behalf of a class. Ex. 2 at 2.

arbitration (due to the Agreements' silence on the issue), then Petitioners should have raised it when they sought to invalidate the Agreements in the first instance. *See, e.g., Hill v. Garda CL NW., Inc.*, 179 Wn. 2d 47, 54, 308 P.3d 635 (2013) (“*Hill IP*”) (“[A] party must raise objections to arbitration in the trial court or on first review or risk having waived the challenge.”); *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn. 2d 293, 321, 103 P.3d 753 (2004) (declining to hear challenges to arbitration that were not raised below).

Because Petitioners never raised the class arbitration issues as a basis to find the Agreements unconscionable, and because this Court never decided such issues, the Court’s mandate was likewise silent. As a result, the superior court was well within the scope of the mandate to order individual arbitration.

2. *Franciscan did not waive its right to request individual arbitrations.*

Petitioners contend that the superior court erred by ruling on the class arbitration argument that Franciscan “waived by (1) not asserting it timely, and (2) affirmatively stating an opposite opinion to the trial and appellate courts multiple time[s].” Motion at 11–15. In addition to being factually incorrect—Franciscan raised the class arbitration issue at the appropriate time and never stated that the Agreements allowed for

arbitration as a class—Petitioners misunderstand the doctrine of waiver and misapply it to the facts here.

- i. Waiver requires the intentional relinquishment of a right; Franciscan did not intentionally relinquish its right to request individual arbitrations.*

Petitioners contend that intent is not a necessary element of waiver. Motion at 12. They are wrong. The law is clear: “Waiver requires the *intentional* relinquishment or abandonment of a known right or privilege.” *State v. Fort*, 190 Wn. App. 202, 225, 360 P.3d 820 (2015) (emphasis added). “It is necessary that the person against whom waiver is claimed have *intended* to relinquish the right, advantage, or benefit and his action must be inconsistent with any other *intent* than to waive it.” *Central Wn. Bank v. Mendelson-Zeller, Inc.*, 113 Wn. 2d 346, 353, 779 P.2d 697 (1989) (emphasis added).

There is no evidence in this case, and Petitioners have offered none, that Franciscan intended to relinquish its right to request individual arbitrations, or that its action was inconsistent with any other intent than to waive it. Franciscan’s position is bolstered by numerous cases in which the class arbitration issue was raised at varying times and under a variety of circumstances, including post-discovery. *See, e.g., Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013) (the parties agreed that an

arbitrator should decide whether their contract authorized class arbitration *after* the state trial court had granted Oxford’s motion to compel); *Hill v. Garda CL Nw. Inc.*, 169 Wn. App. 685, 690–91, 281 P.3d 334 (2012) (“*Hill I*”) (holding that the employer did not waive its right to arbitrate even though the parties discussed settlement and engaged in mediation and discovery for over a year before the issue of class arbitration was raised).

- ii. *Waiver only applies to issues that could have been raised on appeal; because the class arbitration issue was not a part of the appeal, Franciscan could not have raised it.*

Petitioners contend that because Franciscan did not raise the class arbitration issue during the prior appellate proceedings, they cannot do so now that the case has been remanded. Motion at 13–14. Petitioners are mistaken. Franciscan could not have raised the individual arbitration issue during the prior proceedings because there had been no determination by the superior court or this Court on that issue. *See, e.g., United States v. Schroeder*, 536 F.3d 746, 751 (7th Cir. 2008) (any issue that *could* have been raised on appeal is waived and thus not remanded); *United States v. Husband*, 312 F.3d 247, 250–51 (7th Cir. 2002) (same). Moreover, Franciscan was not seeking an order contrary to this Court’s ruling, asking the superior court to revisit any issues it had previously resolved, or asking the superior court to reevaluate the disputes that had already been settled

by this Court. Rather, Franciscan was seeking a determination on an entirely separate issue—whether the parties have Agreements that require individual arbitration.

Still, according to Petitioners, Franciscan “would have said class arbitration was precluded if that were true.” Motion at 5.⁷ That is absurd. Petitioners, like Franciscan, filed “hundreds of pages of briefing” in multiple venues without once claiming or arguing that they could pursue class claims in arbitration, or that the Agreements explicitly allow for arbitration as a class. *See id.* at 3, 5. If Franciscan was required to raise the class arbitration issue, it was equally incumbent upon Petitioners to make the argument that class arbitration was appropriate at some point during the proceedings.

iii. By moving to compel arbitration, Franciscan did not waive its ability to seek assistance from the courts in deciding preliminary issues.

Petitioners also disingenuously argue that Franciscan “stated that the [superior court] had no authority over this case because the whole dispute was subject to arbitration.” Motion at 13. That is inaccurate.

⁷ Petitioners support their assertion by pointing out that Franciscan is “one of the largest healthcare providers in the nation with experienced counsel.” Motion at 5. Of course, the same can be said of counsel for Petitioners, who is one of the most experienced litigators in Washington in claims like the ones at issue here.

Franciscan has never argued that the superior court—or this Court—has no authority to decide issues related to arbitration. In fact, Franciscan acknowledged that courts have the authority to decide such issues when it moved the superior court to compel arbitration at the outset of this litigation and engaged in a prolonged judicial dispute to fully resolve the issue of the enforceability of the Agreements. Contrary to what Petitioners argue, Franciscan did not change course when it asked the superior court to decide yet another preliminary issue related to arbitration.

3. *The superior court correctly interpreted the language of the Agreements and enforced the parties' expectations when it ordered individual arbitrations.*

Petitioners contend that the superior court erred by ignoring or misinterpreting the Agreements which, according to Petitioners, require arbitration of class claims. Motion at 15–17. Petitioners' suggestion that the superior court ignored the language of the Agreements lacks merit. The parties fully briefed the language of the Agreements and their interpretations of such language. It is apparent that the superior court considered such arguments and did not misinterpret the Agreements, which are clearly silent on the issue of class arbitration. It would have been legally unsound for the superior court to order class arbitration under the circumstances at issue here for the reasons that follow.

- i. *Parties cannot be compelled to submit to class arbitration absent agreement.*

According to the U.S. Supreme Court, “the FAA⁸ imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681, 130 S.Ct. 1758 (2010) (quotation omitted). Therefore, courts must give effect to the contractual rights, expectations, and intent of the parties. *Id.* at 682. “From these principles, it follows that **a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.**” *Id.* at 684 (emphasis added).

Therefore, the key issue is whether the parties have *agreed* to submit to class arbitration, or, stated another way, whether the arbitration agreements at issue “authorize” class arbitration. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013); *see also Hill I*, 169 Wn. App. at 688 (“A court may not require a party to submit to class arbitration unless the party agreed to do so.” (citing *Stolt-Nielsen*, 559 U.S. at 684)).⁹

⁸ The federal statutory framework for the enforcement of private parties’ agreements to arbitrate is embodied in the FAA, which creates a body of substantive law that federal *and* state courts must apply to arbitration agreements that fall under the FAA’s coverage. *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520 (1987); *Zuver*, 153 Wn. 2d at 301.

⁹ *Hill I* was reversed by the Washington Supreme Court in *Hill II*, but on grounds unrelated to the class arbitration issue. Therefore, it is instructive here.

Where the parties have reached no agreement on the issue—i.e., where the arbitration agreement is silent as to class arbitration—they cannot be compelled under the FAA to submit to class arbitration. *See, e.g., Stolt-Nielsen*, 559 U.S. at 687 (“[T]he FAA requires [that] . . . where the parties stipulated that there was ‘no agreement’ [to authorize class arbitration], it follows that the parties cannot be compelled to submit their dispute to class arbitration.”); *Hill I*, 169 Wn. App. at 688 (because the arbitration agreements were silent on the issue of class arbitration, “the trial court erred by ordering the parties to submit their dispute to class arbitration”).¹⁰ This is because “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” *Stolt-Nielsen*, 559 U.S. at 685–87 (identifying “just some of the fundamental changes

In *Hill I*, the WCOA held that the employees must arbitrate individually, notwithstanding that the class had already been certified. *Hill I*, 169 Wn. App. at 688. Here, where no class has been certified, it is even more appropriate that the superior court would order individual arbitration.

¹⁰ *See also Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001) (“[B]ecause the [] agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals.”); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (a court lacks authority to order classwide arbitration under § 4 of the FAA where the parties’ arbitration agreement is silent on the matter).

brought about by the shift from bilateral arbitration to class-action arbitration”).

- ii. *There was no agreement by the parties to submit to class arbitration, either in the Agreements themselves or by course of conduct.*

In this case, the parties did not agree to submit to class arbitration. The Agreements are silent on the issue,¹¹ and the parties have never, either before or during this litigation, agreed to arbitrate on a classwide basis. These factors alone are sufficient to preclude Franciscan from being required to submit to class arbitration based on the authorities cited above. In addition, the language of the Arbitration Addenda themselves lends further support to Franciscan’s position that its intent was to arbitrate on an *individual* basis and based on the *individual* nature of any dispute. For example:

- The Arbitration Addenda Require “*You* and FMG to arbitrate all Claims . . . between *You* and FMG.” Arbitration Addenda pmb1. (emphasis added).
- The term “Claims,” according to the Arbitration Addenda, encompasses “all disputes arising out of or related to the Employment Agreement, *your* employment by FMG, and/or *your* separation of employment with FMG.” *Id.* § 1 (emphasis added).

¹¹ In their Motion, Petitioners allege that the Agreements are not silent on the issue of class arbitration, that they “include an agreement to arbitrate class claims and for Petitioners to consolidate their related claims in a single arbitration.” Motion at 6. That is patently false.

- Section 2 of the Arbitration Addenda states that “*You* and FMG each agree that all Claims between *You* and FMG” shall be decided by FAA arbitration. *Id.* § 2 (emphasis added).

See Exs. 4, 5, and 6. It is clear, based on this language, that the parties did not intend to arbitrate employment claims collectively.

Despite this clear language, Petitioners assert that Franciscan has conceded that the Agreements show an intent and agreement to arbitrate class claims, and as support cite to seven of Franciscan’s filings to establish that it (1) “admitted that class arbitration *could* occur,” and (2) “admitted class claims *could* exist in arbitration.” Motion at 4–5 (emphasis added). These are not admissions by Franciscan that the Agreements show an intent to arbitrate collectively; rather, they are unremarkable propositions that provide no support for Petitioners’ position. Petitioners’ citations only indicate that Franciscan understood that, under certain circumstances, arbitration as a class was a possibility.

As further support for their assertion that Franciscan has acknowledged that Petitioners’ class claims should be arbitrated, Petitioners cite to certain “correspondence” between the parties that occurred during discussions about a possible mediation between the

parties while the last appeal was pending. *See* Motion at 3.¹² But the only “correspondence” Petitioners specifically cite is an e-mail exchange between counsel for the parties regarding possible *settlement* of Petitioners’ claims. *See* Motion at 3 n.3. This privileged e-mail communication has no bearing on these proceedings and should be disregarded in its entirety. Its inclusion in the Motion is improper, inappropriate, and disingenuous. Moreover, it provides absolutely no support for Petitioners’ assertion; the fact that the parties were engaged in settlement discussions is not a concession by Franciscan that class claims should be arbitrated.

According to Petitioners, yet another indication that the Agreements allow for class arbitration is the fact that the Arbitration Addenda incorporate the AAA Rules, “which exclusively delegate to the arbitrator the job of determining if class arbitration is available.” Motion at 6. Petitioners’ position is that any “dispute regarding severing the claims and arbitration of class claims . . . must be resolved in arbitration.” *Id.* at 6–7. This is an absurd argument for Petitioners to make in light of their

¹² Specifically, Petitioners allege that, “after winning at the COA, Defendants represented that class claims should be arbitrated in correspondence while the parties attempted to mediate.” Motion at 3. n.3. This is not true. Unsurprisingly, Petitioners offer no evidence of any such communications—because none exists. This is yet another example of Petitioners’ overreaching and misrepresenting the facts.

stance at the inception of this litigation that the Agreements were void and that the superior court must make that determination. Petitioners have waived their right to assert this argument now. *See River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 272 P.3d 289 (2012) (“[A] party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” (internal quotation omitted)).

Moreover, the AAA Rules do not “exclusively delegate to the arbitrator the job of determining if class arbitration is available,” as Petitioners allege. Motion at 6. The arbitrator’s ability to decide the class arbitration issue depends first upon his or her “*appointment*.” *Id.* In other words, an arbitrator can decide whether class arbitration is appropriate, but only if the parties have already agreed to an arbitrator and he or she has been appointed. Otherwise, courts decide gateway issues such as class arbitrability.¹³ *See discussion infra* Part V.C. The parties have never appointed an arbitrator in this case, leaving the superior court as the only available forum to decide these issues.

¹³ In this instance, the parties cannot agree on an arbitrator (or multiple arbitrators) or even how to arbitrate (individually or as a class), which means that these issues are clearly gateway issues for the superior court to decide.

It is also important to note that Franciscan’s focus, in their briefing to this Court and in the superior court, was on the three individual Petitioners, not the class. *See, e.g.*, Franciscan’s Motion to Compel at 1:4–11 (noting that the “*three individuals*” entered into Agreements in which they agreed to arbitrate *their* disputes, and that the “Court should compel the *three Petitioners* to honor the language of the Addendums” (emphasis added)). It is clear that Franciscan has not consented, either explicitly or by implication, to class arbitration.

Therefore, because it is a court’s responsibility to give effect to the intent and expectations of the parties, *see Stolt-Nielsen*, 559 U.S. at 682, the superior court did not err by issuing an order compelling individual arbitration between Franciscan and each of the three named Petitioners.

C. Courts, not arbitrators, must make determinations regarding the availability of class arbitration.

It is beyond dispute that “questions of arbitrability”—“which include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy—are presumptively for the courts to decide.” *Oxford*, 133 S. Ct. at 2068 n.2. While the U.S. Supreme Court has not yet ruled on the issue of whether the availability of class arbitration is a question of arbitrability, *see id.*, there is ample case law in

the circuits holding that it is. *See, e.g., Robert Half Int'l Inc.*, 761 F.3d 326, 332 (3d Cir. 2014) (“We now hold that whether an agreement provides for classwide arbitration is a ‘question of arbitrability’ to be decided by the District Court.”); *Reed Elsevier, Inc. ex rel. LexisNexis v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (same).

Therefore, because the issue of whether an agreement provides for classwide arbitration is a question of arbitrability, and because courts decide questions of arbitrability, the superior court did not err when it determined that the Agreements do not permit class arbitration. As explained previously, there has been no agreement by the parties to submit to class arbitration or to let an arbitrator decide the issue, and the Court should thus deny review of the superior court’s order compelling individual arbitration.

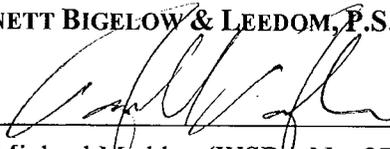
VI. CONCLUSION

Petitioners’ Motion is not reviewable as of right under RAP 2.2(a) or under the discretion of this Court under RAP 2.3(b). Thus, the superior court did not commit legal error when it granted Franciscan’s Motion to Compel and ordered Petitioners to arbitrate, individually and separately, their claims. Under these circumstances, this Court should not accept review of the superior court’s order. Petitioners’ Motion should be rejected.

Respectfully submitted this 31st day of March, 2016

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ATTORNEYS FOR FRANCISCAN

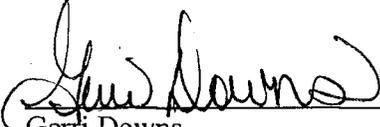
CERTIFICATE OF SERVICE

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 Washington, 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 document to be served this date, in the manner indicated, to the parties listed below:

Scott C.G. Blankenship, WSBA No. 21431	<input checked="" type="checkbox"/>	Hand Delivered
Richard E. Goldsworthy, WSBA No. 40684	<input type="checkbox"/>	Facsimile
The Blankenship Law Firm, P.S.	<input type="checkbox"/>	U.S. Mail
1000 Second Ave, Ste. 3250	<input type="checkbox"/>	Email
Seattle, WA 98104		
Fax: (206) 343-2704		
Email: sblankenship@blankenshiplawfirm.com		
rgoldsworthy@blankenshiplawfirm.com		

Attorneys for Petitioners

Dated this 31st day of March, 2016 at Seattle, Washington.


Gerri Downs
Legal Assistant

Appendix 3

From: Michele Haydel Gehrke
Sent: Monday, October 05, 2015 5:28 PM
To: 'Scott Blankenship'
Cc: Erica Brunette; Aletha Smith; Adam Merrill
Subject: RE: Romney et. al. v. Franciscan et. al.: Conference for Arbitration [FIRM-ACTIVE.FID3813280]

Scott,

I am in receipt of your email about commencing arbitration now that the Washington Supreme Court has denied your petition for review. While we are waiting for the Court to issue its mandate, we can discuss with you how the arbitrations will proceed. While the parties previously discussed the possibility of using John Aslin as an arbitrator and attempted to schedule a conference call to explore that possibility, the communications in the file indicate that such a call never occurred given your change in litigation strategy and there was never an actual agreement to use him in any of the cases.

We invite you to propose three different arbitrators for the three individual arbitrations for Dr. Romney, Dr. Bauer, and Ms. Childress and we would be happy to consider them.

Best regards,
Michele

From: Scott Blankenship [<mailto:sblankenship@blankenshiplawfirm.com>]
Sent: Friday, October 02, 2015 3:04 PM
To: John F. Aslin (jaslin@perkinscoie.com); 'bbuckley@perkinscoie.com'
Cc: Michele Haydel Gehrke; Adam Merrill; Rick Goldsworthy; Erica Brunette; Aletha Smith
Subject: Romney et. al. v. Franciscan et. al.: Conference for Arbitration

Dear Mr. Aslin:

I am writing to get this case back on track for arbitration, and wanted to know your availability for scheduling a pre-arbitration hearing. As I am sure you recall, the parties had previously selected you to serve as the arbitrator on this matter. We learned this week that review was denied by the Washington Supreme Court. We now have clarity on some of the issues from the Court of Appeals, including the need to arbitrate this matter.

Ms. Glickstein is no longer counsel for Defendants, so I also wanted to introduce you to her partner, Michele Gehrke who is now defense counsel along with Adam Merrill.

What is your availability?

We look forward to hearing from you.

Best regards,
Scott Blankenship

The Blankenship Law Firm, P.S.
By: Scott C. G. Blankenship
1000 Second Ave., 3250

Seattle, Washington 98104
Phone: 206-343-2700
Facsimile: 206-343-2704
Email: sblankenship@blankenshiplawfirm.com
<http://www.blankenshiplawfirm.com>

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From: Karen Glickstein [<mailto:KGlickstein@Polsinelli.com>]
Sent: Tuesday, September 17, 2013 6:20 AM
To: Aslin, John (Perkins Coie); Scott Blankenship
Cc: Stump, Arlene (Perkins Coie); Paul Woods; Carlie Elledge
Subject: RE: Conference call-September 17, 2013.

I am also generally available the dates referenced below with the exception of the following times:

Sept. 24 (not available after 2 pm pst)
Sept. 26 (not available between 11:30 and 1:30 pst)

I look forward to hearing from Mr. Blankenship re his availability for this call, as well as a call before the call with Mr. Aslin to discuss the information requested by Mr. Aslin.

Appendix 4

From: Michele Haydel Gehrke
Sent: Tuesday, October 06, 2015 6:01 PM
To: 'Scott Blankenship'
Cc: Erica Brunette; Aletha Smith; Adam Merrill; Rick Goldsworthy
Subject: RE: Romney et. al. v. Franciscan et. al.: Conference for Arbitration [FIRM-ACTIVE.FID3813280]
Attachments: 0805_001-c.pdf

Scott,

Yes, we are taking the position that there needs to be three individual arbitrations (one per claimant). Your clients signed individual arbitration agreements that have no provisions for a class arbitration. Under *Stolt-Nielsen*, there is no basis to have a class arbitration. *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 684 (2010) (“**a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed to do so.*”**) (emphasis added)

Second, you had your chance to raise any and all unconscionability arguments and those issues have already been thoroughly litigated. The Washington Supreme Court denied your petition for review and the agreements are enforceable so any further arguments regarding unconscionability are futile.

Third, we have gone through the correspondence and it is clear there was no agreement to designate Aslin as the arbitrator. While there were emails about scheduling a conference call to discuss retaining him as an arbitrator, you cancelled that call and then decided to litigate the arbitration issues. Aslin’s own emails state that after the scheduled call he would need an agreement in writing to move forward assuming that is what the parties wanted to do. (“Assuming that we are still comfortable after that call, I’ll want a stipulation from the parties designating me the Arbitrator of your clients’ dispute.”) See attached emails reflecting the above discussions. That call never occurred, nor did any designation. Further, if the call had occurred with Aslin, presumably one of the issues the parties would have discussed is that these are individuals claims and not a class arbitration.

Again, we invite you to propose three different individual arbitrators for the three different individual cases for our consideration. We look forward to hearing from you.

Michele

From: Scott Blankenship [mailto:sblankenship@blankenshiplawfirm.com]
Sent: Monday, October 05, 2015 5:41 PM
To: Michele Haydel Gehrke
Cc: Erica Brunette; Aletha Smith; Adam Merrill; Rick Goldsworthy
Subject: RE: Romney et. al. v. Franciscan et. al.: Conference for Arbitration [FIRM-ACTIVE.FID3813280]

Michele,

Are you now taking the position, post-appeal that there needs to be three separate arbitrations one per claimant? You are also ignoring the class. This approach would certainly have been an additional basis for finding the arbitration agreement unconscionable.

You are also wrong about the posture of arbitration. The Defendants did agree to John Aslin for arbitration for all three plaintiffs and the class. At no point was there ever a discussion about separating the claims, and you are not seriously claiming this now are you?

Also, denial of review did not in any way eliminate the class claims.

Please get back to me on this, and clarify it, without delay. Also, please include Rick Goldsworthy on your response.

The Blankenship Law Firm, P.S.
By: Scott C. G. Blankenship
1000 Second Ave., 3250
Seattle, Washington 98104
Phone: 206-343-2700
Facsimile: 206-343-2704
Email: sblankenship@blankenshiplawfirm.com
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From: Michele Haydel Gehrke [<mailto:mgehrke@polsinelli.com>]
Sent: Monday, October 05, 2015 5:28 PM
To: Scott Blankenship
Cc: Erica Brunette; Aletha Smith; Adam Merrill
Subject: RE: Romney et. al. v. Franciscan et. al.: Conference for Arbitration [FIRM-ACTIVE.FID3813280]

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Subject: Romney et. al. v. Franciscan et. al.: Conference for Arbitration

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Best regards,
Scott Blankenship

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