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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 95556-5  
NO. 95246-9  
NO. 95442-9

**SUPREME COURT OF THE STATE OF WASHINGTON**

GULICK TRUCKING, INC., a  
Washington corporation,

Petitioner,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

SWANSON HAY COMPANY,  
a Washington corporation,  
HATFIELD ENTERPRIZES, INC.  
a Washington corporation,  
SYSTEM-TWT TRANSPORT,  
a Washington corporation,

Petitioners,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

MACMILLAN-PIPER, INC.,  
a Washington corporation,

Petitioner,

v.

STATE OF WASHINGTON

RESPONDENT'S  
RESPONSE TO  
MOTION TO  
CONSOLIDATE

EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

## I. INTRODUCTION

The Court is scheduled to rule on June 5, 2018, on the petitions for review filed in these matters and the consolidation motions filed by four of the five petitioners. The Court should independently consider the petitions on their merits, and if it grants review in all of the cases, it can consider whether to consolidate them for hearing.

In any event, the cases are not worthy of the Court's review, consolidated or not. The motions to consolidate—filed before the Court has even considered the petitions for review—is an unfounded attempt to call attention to the cases. The Court can take note that the issues raised are largely related. If the Court grants review of the cases—which it should not do—the Respondent would not oppose consolidation, though it would present some challenges in evaluating the different arguments, evidence, and scope and standards of review in each case.

## II. STATEMENT OF FACTS

The Employment Security Department audited hundreds of trucking companies (“carriers”) to determine whether they had adequately reported and paid all unemployment insurance premiums on their workers’ wages

under the Employment Security Act, Title 50 RCW. The Department concluded that “owner-operators”—truck drivers who use their own trucking equipment to transport goods for the carriers under a “lease agreement,” and whom the carriers deem to be independent contractors exempt from coverage—performed services for the carriers that is covered as “employment” under the Act.<sup>1</sup> Accordingly, the Department issued tax assessments for unpaid unemployment insurance premiums on those wages.

Some of the carriers appealed the assessments. In all but one case, administrative law judges upheld the tax assessments, but modified their amounts. The unsuccessful carriers then filed petitions for review with the Department’s Commissioner, who upheld the modified assessments. Ten of the carriers then filed petitions for judicial review of the Department’s final orders in superior court in seven different counties across the state, which all upheld the final orders.<sup>2</sup> The carriers appealed to all divisions of the Court of Appeals.

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<sup>1</sup> In some cases, the Department determined that drivers who had their own motor carrier authority were excepted from unemployment insurance coverage. And in other cases, the Department by stipulation removed from its assessments the owner-operators who were themselves employers, or who formed corporate entities, or who performed no work in Washington.

<sup>2</sup> Three carriers voluntarily dismissed their superior court appeals, and superior courts upheld the Commissioner’s orders upon seven carriers’ appeals. Those seven carriers each appealed to the Courts of Appeals, and two of them have since voluntarily dismissed their appeals.

All three divisions of the Court of Appeals have now issued opinions involving five of the carriers, and all have upheld the Commissioner's decisions. *Swanson Hay Co., et al. v. Emp't Sec. Dep't*, 1 Wn. App. 2d 174, 404 P.3d 517 (2017) (involving the consolidated appeals of three carriers); *MacMillan-Piper Inc. v. Emp't Sec. Dep't*, No. 75534-0-I, 2017 WL 6594805 (Wash. Ct. App. Dec. 26, 2017) (unpublished); *Gulick Trucking, Inc. v. Emp't Sec. Dep't*, No. 49646-1-II, 2018 WL 509096 (Wash. Ct. App. Jan. 23, 2018) (unpublished). The five carriers each petitioned this Court for review. Four of the carriers bring this motion (System-TWT Transport and Hatfield Enterprises, Inc. of the *Swanson Hay Co.* case, MacMillan-Piper, Inc. of the *MacMillan-Piper, Inc.* case, and Gulick Trucking, Inc., of the *Gulick Trucking, Inc.* case). There are some differences among the issues in the cases, but they are largely related.<sup>3</sup>

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<sup>3</sup> Each case has its own administrative record, and the evidence and testimony differs. In certain cases, the parties stipulated to an evidentiary record for the tribunals' consideration. The question of whether work performed by owner-operators is exempt under the independent contractor exception in RCW 50.04.140 is based on the relationship of each carrier with its owner-operators. Each carrier's contract with owner-operators has terms that are required by federal law, but each also has different, company-specific terms that are not federally required. The administrative law judges and Commissioner referred extensively to the unique terms in making factual findings and applying the law to the facts.

In addition, the procedural posture of the cases differs, which affects the scope and standard of review. Each carrier argued that it established the independent contractor exception in RCW 50.04.140(1), which requires an employer's proof of three elements. In two cases pending before this Court, Hatfield and MacMillan, the Commissioner granted the Department's partial summary judgment motion with respect to the first element without reaching the other two elements. No other case resolved the independent contractor inquiry on summary judgment; they were instead decided upon evidence presented and/or stipulated by the parties. In some cases—e.g., Gulick—the Commissioner found that the carriers failed all three elements of RCW 50.04.140(1). And in the other cases—e.g.,

### III. ARGUMENT

Petitioners' consolidation request is an attempt to blur the differences among the cases and draw undue attention to them to influence the Court's decision on whether to grant review. These cases each have their own evidentiary records; some were decided on only one element of the three-element independent contractor exception test, RCW 50.04.140(1), while others were decided on two elements or all three; some were decided on summary judgment as to the independent contractor issue, while others were not; and some carriers argue the audit conduct was arbitrary or capricious or violated their constitutional rights, while others do not. Whether substantial evidence supports the administrative orders' findings, and whether those findings support the unique conclusions, would be based on the individual records of the cases.

The fact that the Department audited hundreds of carriers for compliance with Title 50 RCW, and now there are only a handful of carriers who continue to raise some similar issues disputing their tax obligations, demonstrates that these cases are not worthy of this Court's review. But if the Court does grant review in the cases, the Department does not object to consolidating them—despite the time and care in applying the differences

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Swanson and System—the Commissioner found that the carrier failed the first and third elements. Some of the carriers raised arguments based on the auditors' conduct (e.g., Hatfield, System, and MacMillan), while others do not (e.g., Swanson and Gulick).

in the arguments, evidence, findings and conclusions, and procedural histories.

#### IV. CONCLUSION

The Department respectfully asks the Court to deny review, but if review is granted, the Department does not oppose consolidation.

RESPECTFULLY SUBMITTED this 3rd day of April, 2018.

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**PROOF OF SERVICE**

I, Roxanne Immel, certify that I caused to be served a copy of **Respondent's Response to Motion to Consolidate**, on all parties or their counsel of record on the date below as follows:

Email per agreement

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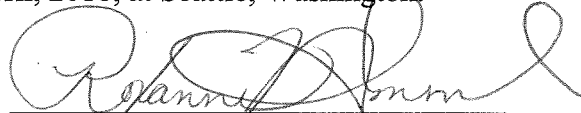
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 3<sup>rd</sup> day of April, 2018, at Seattle, Washington.

  
ROXANNE IMMEL, Legal Assistant



**AGO/LICENSING AND ADMINISTRATIVE LAW DIV**

**April 03, 2018 - 1:57 PM**

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