

Appeal No. 66956-7-I

Cause No. 09-2-46813-3 SEA

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

PPG INDUSTRIES, INC., a Pennsylvania Corporation,
Appellant,

vs.

ANDREW FIORE,
Respondent.

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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Rulings in Which the Trial Court Erred

Error on Merits of Plaintiff/Respondent's Misclassification Claim

1. The Trial Court erred by granting Plaintiff/Respondent Andrew Fiore's motion for summary judgment (and, by implication, denying Defendant/Appellant PPG Industries, Inc.'s motion for summary judgment) on the merits of Fiore's claim that he was misclassified as exempt from the overtime provisions of the Washington Minimum Wage Act (WMWA), by: (a) ruling in its Order entered on January 20, 2011 (CP 1737-39), that "PPG can not sustain its burden that Fiore was an administrative, and thus exempt, employee" under the WMWA; and (b) entering Judgment on March 8, 2011 (CP 2047-57), in favor of Fiore on his misclassification claim.

Errors on Calculation of Damages

2. The Trial Court erred by calculating the value of Fiore's overtime claim pursuant to the "time and a half" method instead of the "half time" method, by: (a) ruling in its summary judgment Order entered on January 20, 2011 (CP 1737-39), that "PPG can not avail itself of the fluctuating work week method of calculating damages"; and (b) entering Judgment on March 8, 2011 (CP 2047-57), calculating the value of Fiore's overtime claim pursuant to the "time and a half" method.

3. The Trial Court erred by awarding double damages to Fiore, by: (a) ruling that PPG willfully violated the WMWA in its Order

entered on February 9, 2011 (CP 2039-42), after improperly shifting the burden of proof on the question of willfulness to PPG, misconstruing the requirements for finding a *bona fide* dispute, and taking an adverse inference against PPG based upon its assertion of the attorney-client privilege; and (b) entering Judgment on March 8, 2011 (CP 2047-57), awarding Fiore double damages as a result of its finding on willfulness.

Errors on Calculation of Attorney Fees

4. The Trial Court committed multiple errors in its Order awarding Fiore attorney fees and costs of \$596,559.47, entered on June 16, 2011 (CP 2507-12):

(a) The Trial Court erred by failing to cap Fiore's fees and costs at \$50,593.80 pursuant to principles of judicial estoppel.

(b) The Trial Court abused its discretion by failing to properly evaluate and address the more than 24:1 ratio between the fees and costs awarded and the amount of Fiore's actual recovery, or PPG's contentions regarding elements of Fiore's fee petition that were excessive or not reasonably expended in the prosecution of Fiore's claims, thereby failing to create a record sufficient for review.

(c) The Trial Court abused its discretion by awarding Fiore a 25% multiplier on his fee award.

B. Standard of Review

1. This Court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the Trial Court. *Hartley v. State*, 103

Wn.2d 768, 774, 698 P.2d 77 (1985).

2. This Court reviews *de novo* the Trial Court's rulings on questions of law. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 172 P.3d 688 (2007).

3. This Court reviews the Trial Court's evaluation of Fiore's petition for an award of attorney fees for abuse of discretion. *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 535, 128 P.3d 128 (2006).

C. Issues Pertaining to Assignments of Error

1. Whether there were no genuine disputes of material fact and Fiore was exempt from the overtime provisions of the WMWA pursuant to the administrative exemption, such that summary judgment should have been rendered in favor of PPG? Or, in the alternative, whether there were genuine disputes of material fact with respect to Fiore's status as an exempt employee, such that summary judgment should not have been rendered in favor of Fiore on his misclassification claim?

2. Whether the value of Fiore's claim for overtime premium compensation damages should be determined utilizing the "half time" method, where PPG already paid Fiore a salary for all hours worked?

3. Whether Fiore bore the burden of proving that PPG willfully violated the WMWA, and, if so, whether it was improper for the Court to make an adverse inference from PPG's invocation of the attorney-client privilege?

4. Whether the Trial Court abused its discretion in awarding

Fiore attorney fees and costs of \$596,559.47 by failing to bind Fiore to his prior representations regarding attorney fees pursuant to judicial estoppel, failing to evaluate the excessive ratio between the fee award and the damages award or PPG's arguments that the requested attorney fees were excessive or not otherwise reasonably expended in the prosecution of Fiore's claim, and awarding Fiore a 25% multiplier?

II. STATEMENT OF THE CASE

Fiore worked for PPG as a Territory Manager from February 19 to November 23, 2009, a period of less than 40 weeks. (CP 931 (Fiore Dep. at 17:20-23).) Fiore's primary duty as a Territory Manager was to promote the sale of PPG's "Olympic" brand paint and stain products at the Lowe's home improvement stores within his territory. PPG paid Fiore a salary for all hours worked and classified him as exempt from the overtime provisions of the WMWA. After PPG terminated Fiore's employment, he filed suit, alleging that he was misclassified as exempt.

The parties arbitrated the case as required by the mandatory arbitration rules of the King County Superior Court. The Arbitrator conducted a two-day evidentiary hearing. (CP 2333-39 (Arbitrator reviewed "stacks of documents"); CP 2082 (arbitration resembled a "mini-trial" in which witnesses testified and were cross-examined extensively, and many exhibits were admitted).) The Arbitrator ruled in favor of PPG, finding that Fiore "plainly and unmistakably" satisfied the requirements of the administrative exemption. (CP 2333-39.)

Fiore requested a trial *de novo* on his claim, and the parties filed cross-motions for summary judgment. Unaware that PPG sustained its burden to prove to the Arbitrator that Fiore was properly classified as exempt, the Trial Court granted Fiore’s motion, holding (without explanation) that PPG “can not sustain its burden” on that very issue. (CP 1737-39.) The Trial Court also held that the value of Fiore’s overtime claim would be calculated pursuant to the “time and a half” method and that PPG’s violation of the WMWA was willful, thus justifying a doubling of the overtime award. The resulting damage award in favor of Fiore was \$24,406.20. (CP 1737-39, 2039-42.) The Trial Court then awarded Fiore attorney fees and costs totaling \$596,559.47, more than 24 times the amount of Fiore’s damages. (CP 2507-12.) PPG appealed.

III. ARGUMENT

A. **PPG Properly Classified Fiore as Exempt from the Overtime Provisions of the WMWA Pursuant to the Administrative Exemption.**

RCW 49.46.130(1) provides the WMWA’s general rule for overtime compensation in the State of Washington. RCW 49.46.130(2) provides numerous exceptions to that rule, including one for “any person exempted pursuant to RCW 49.46.010(5).” RCW 49.46.010(5) includes an exemption for individuals employed in a bona fide “administrative” capacity. RCW 49.46.010(5)(c). This includes any employee:

Who is compensated on a salary ... basis at a rate of not less than \$250 per week ... , and whose primary duty consists of the performance of ... nonmanual work directly related to ...

general business operations of his employer or his employer's customers; which includes work requiring the exercise of discretion and independent judgment.

WAC 296-128-520. The Trial Court did not provide any explanation for its conclusion that PPG "can not sustain its burden" with respect to the administrative exemption, so it is not clear which element of the exemption the Trial Court found could not be established, or why.

PPG submits that upon a *de novo* review, this Court should find that PPG met its burden – based upon Fiore's own admissions and the other undisputed facts presented to the Trial Court – and thus PPG should have been granted summary judgment. Alternatively, this Court should find that PPG *can* meet its burden – and thus PPG should at least be given the opportunity to present its evidence to a jury. Either way, PPG respectfully requests that this Court reverse the Trial Court's order granting Fiore's motion for summary judgment.

1. PPG compensated Fiore on a salary basis.

The undisputed evidence presented to the Trial Court established that Fiore satisfied the first element of the administrative exemption: PPG compensated Fiore on a salary basis at a rate of not less than \$250 per week. An employee is paid on a "salary basis" when he or she "regularly receives for each pay period of one week or longer (but not to exceed one month) a predetermined monetary amount (the salary) consisting of all or part of his or her compensation." WAC 296-128-532. Fiore admits that he was compensated on a salary basis at a rate of \$31,000 per year, paid in predetermined monthly installments of \$2,583.33, the equivalent of

\$596.15 per week (more than double the \$250 requirement), and was not subject to any unauthorized deductions. (CP 932-33, 1003-05 (Fiore Dep. at 18:23-19:20, 171:11-172:16, 174:6-17); CP 1135 (Kovatch Decl. ¶ 3-5).)¹ Fiore satisfied the first element of the administrative exemption.

2. Fiore’s primary duty was the performance of nonmanual work directly related to the general business operations of PPG and Lowe’s.

There are no genuine disputes of fact as to the second element of the administrative exemption: Fiore’s primary duty consisted of the performance of nonmanual work directly related to the general business operations of PPG (his employer) and Lowe’s (his employer’s customer).

a. Fiore’s primary duty was to promote the sale of Olympic paint and stain products by Lowe’s to its customers.

The Arbitrator determined that “PPG has established by a preponderance of the evidence that the ‘primary duty’ of a Territory Manager was and is to promote sales by training Lowe’s associates regarding Olympic products, promoting Olympic products to contractors, obtaining stack-outs and end-caps to promote the products, and educating Lowe’s customers, etc.” (CP 2333-39). Based on the undisputed record evidence presented to the Trial Court, the Arbitrator was correct that Fiore’s primary duty was to promote sales.

¹ See Washington Dep’t of Labor & Indus. Employment Standards Admin. Policy No. ES.A.9.4 (June 24, 2005) at 3, ¶ 4 (salary requirement met if salary is paid monthly and translates into appropriate weekly equivalent).

PPG manufactures paint and stain products under a variety of brands, including the “Olympic” brand. (CP 906 (Calhoun Decl. ¶ 2)). PPG sells Olympic paints and stains to Lowe’s Companies, Inc. Lowe’s, in turn, sells those Olympic products to its customers at its home improvement stores throughout the United States. (*Id.*) As a Territory Manager, Fiore’s primary duty was to promote the sale of Olympic paint and stain products by Lowe’s to its customers. (CP 908 (Calhoun Decl. ¶ 10); CP 1100, 1108 (Calhoun 30(b)(6) Dep. at 120:11-13; 272:15-19 (“primary duty is to promote sales”)).)

Fiore admitted that the “aim” and “whole focus of the job” was to improve the sale of Olympic products by Lowe’s to its customers. (CP 946, 973-74 (Fiore Dep. at 53:18-20, 99:7-21, 98:8-9 (Fiore “promoted their products”)).) Fiore’s admissions, coupled with the other undisputed evidence in the record, established that Fiore’s primary duty was to promote the sale of Olympic products by Lowe’s to its customers.

While a typical Lowe’s store is open for more than one hundred hours per week, Fiore was in each store for an average of only about four hours per week. (CP 982 (Fiore Dep. at 110:5-14); CP 907 (Calhoun Decl. ¶¶ 7-8).) Thus, instead of focusing his efforts on specific sales transactions with individual consumers during his limited time in each store, Fiore was most effective when he pursued strategies to provide what has been called the “gift that keeps on giving” – strategies which resulted in Lowe’s selling more Olympic products to its customers during the more

than one hundred hours each week when Fiore was *not* present. (CP 907 (Calhoun Decl. ¶¶ 7-8); CP 1115-16 (Calhoun Dep. at 236:7-237:6).)

Training Lowe's Personnel. Territory Managers are “vital because they train the Lowe’s associates on the features and benefits” of Olympic products. (CP 1090-91 (Russell Dep. at 140:25-141:2).) When a Lowe’s associate joins the paint department, the Territory Manager trains the associate about Olympic products. (CP 1033 (Mueller Dep. at 118:9-24); CP 1053 (Webb Dep. at 136:4-12).) Territory Managers also provide ongoing “in aisle” training to current Lowe’s paint department employees (as well as more formal training) so that the Lowe’s employees keep informed about the attributes of Olympic products, the proper techniques for using them, and the advantages of those products over other products sold at Lowe’s or elsewhere. (CP 951-55, 960-61 (Fiore Dep. at 66:12-68:10; 68:20-69:11; 70:4-18; 75:25-76:10); CP 1052 (Webb Dep. at 135:21-23 (“in aisle” training should be done on every store visit)).)

PPG wants its Territory Managers to have as much “one on one” time as possible with Lowe’s associates, and Fiore “talked about paint constantly.” (CP 955, 997 (Fiore Dep. at 70:19-22; 150:19-21).) Fiore understood that the “better educated” Lowe’s associates were about Olympic products, “the better they sold” to their customers when Fiore was not present. (CP 982-83 (Fiore Dep. at 110:23-111:5).) As one Territory Manager explained: “[W]e are their source of knowledge in that store. It’s up to us to train them; otherwise they’re not going to know

anything about our product.... [I]t's my job to educate them on our product.” (CP 1033-34 (Mueller Dep. at 118:25-119:10); CP 1047 (Webb Dep. at 79:10-19 (Territory Managers “train Lowe’s associates continually so that they understand the product and how ... to sell it to customers when the Territory Manager is not in the store”)).) Without the training provided by Territory Managers, Lowe’s associates “wouldn’t know about our product” and would not have the expertise needed to sell it. (CP 1041 (Mueller Dep. at 135:18-21); CP 1087 (Russell Dep. at 100:8-18).)

Promoting Sales to Contractors. Fiore engaged in a variety of strategies to promote the sale of Olympic products to contractors who shop at Lowe’s. For example, Fiore attended “Contractor Days” where he would speak with contractors in an effort to promote the Olympic brand. (CP 940, 988 (Fiore Dep. at 43:11-19, 125:4-24 (Fiore hoped that his work at a contractor event would lead to increased promotion of Olympic by Lowe’s contractor employees)).) Fiore also worked to build relationships with the Lowe’s employees who are responsible for selling to contractors. (CP 942 (Fiore Dep. at 45:7-12).) Fiore spoke with Lowe’s employees at the contractor desk in order to raise awareness about Olympic and to identify contractors who might be interested in Olympic products. (CP 962-63, 967-68, 990 (Fiore Dep. at 78:24-79:2, 91:17-92:7, 127:5-6 (Fiore “tried to become friendly with the contractor salespeople so they would think Olympic”)).) He also worked to become the “go-to person” for a Lowe’s district-wide commercial sales employee in an attempt to promote

the sale of Olympic products to large contractors. (CP 987, 1006 (Fiore Dep. at 123:1-17, 190:6-19).) Fiore recognized that building “good rapport” with the Lowe’s contractor sales team provided a competitive advantage. (CP 989 (Fiore Dep. at 126:16-25).) PPG “stressed” to Fiore that he was expected to “build relationships” with the Lowe’s contractor team. (CP 942-43 (Fiore Dep. at 45:18-46:1).)

Securing Promotional Placement. Territory Managers work with Lowe’s managers to obtain promotional space for Olympic products, such as end caps, stack outs, counter displays, and cross-merchandising placements. (CP 934-35 (Fiore Dep. at 37:25-38:4, 38:11-23); CP 1069 (Grube Dep. at 75:5-18).) Promotional placements such as end caps and stack outs provided continuous “exposure to the customer” for Olympic products during the more than one hundred hours per week when Fiore was not in the store. (CP 936 (Fiore Dep. at 39:6-9).)² Fiore understood that it was “important” to PPG that its Territory Managers try to secure additional promotional opportunities. (CP 934-937 (Fiore Dep. at 37:25-40:11).)³ While Fiore was not always successful in his efforts to secure

² Such displays are “lucrative” as they get “a lot of traffic” and “generate quite a bit of profit for [PPG] and for Lowe’s.” (CP 1027-28 (Mueller Dep. at 109:19-110:5); CP 770 (Bishop Decl. ¶ 7 (“result in increased sales”)); CP 1081 (Russell Dep. at 38:16-24 (same)).)

³ See CP 935 (Fiore Dep. at 38:11-23 (PPG “instructed” Territory Managers to “try to secure any end caps that we could”)); CP 936-37 (Fiore Dep. at 39:11-40:11 (attempted to secure stack outs)); CP 938-39 (Fiore Dep. at 41:22-42:2 (same)); CP 946-47 (Fiore Dep. at 53:21-54:2 (store allowed Fiore to put stain display on end cap)); CP 950 (Fiore Dep. at 58:15-22 (spoke with Lowe’s about putting promotional materials on paint desk)); CP 1080 (Russell Dep. at 37:4-15 (PPG “challenged our team

additional promotional space in his territory, he recognized that such efforts were important to PPG. (CP 934-37 (Fiore Dep. at 37:25-40:6).)⁴

Educating Consumers. It is undisputed that Territory Managers promote Olympic products directly to “do it yourself” consumers by educating them about Olympic products, conducting in-store product demonstrations, and promoting Olympic at events. (CP 958-59, 961, 964, 971-72 (Fiore Dep. at 73:18-74:8, 76:12-16, 95:14-96:23, 82:12-17)); CP 1101-1103 (Calhoun 30(b)(6) Dep. at 145:16-147:3 (promote Olympic at trailer events, customer clinics and home shows)); CP 1034 (Mueller Dep. at 119:11-25).) Territory Managers assist customers with the “complete project” by making sure they get the right equipment (including non-Olympic products such as brushes), because such efforts help the customer and are “good for Lowe’s.” (CP 1031-32 (Mueller Dep. at 115:10-116:1); CP 770-71 (Bishop Decl. ¶ 9 (“project” displays promote Olympic and help Lowe’s)); CP 1084-1085 (Russell Dep. at 78:16-79:15).) Even when a Territory Manager is mixing paint for a customer, he or she is expected to utilize that time to discuss the properties of the paint with the Lowe’s associate and to promote Olympic. (CP 1083 (Russell Dep. at 44:14-24).)

Building Relationships. As the “face” of Olympic to Lowe’s, the Territory Manager is the “ambassador” of “good will” for PPG. (CP 1045

[of Territory Managers] to negotiate with the store management to get as many off-shelf spacing or off-shelf promotion that we could get”).

⁴ See *Ho v. Ernst & Young LLP*, No. 05-04867, 2008 U.S. Dist. LEXIS 16713 *10-13 (N.D. Cal. Mar. 4, 2010) (unsuccessful performance of primary exempt duties did not change exempt status of the position).

(Webb Dep. at 77:20-22); CP 1021-1022 (Mueller Dep. at 101:21-102:4).) Thus, while Territory Managers may utilize any number of strategies to promote sales, it is undisputed that building strong relationships with Lowe's managers and associates is "absolutely critical" to a Territory Manager's success. (CP 907 (Calhoun Decl. ¶ 6); CP 1113-14 (Calhoun Dep. at 164:17-24, 235:8-18 ("relationship building" is "most important aspect" of job in promoting sales)); CP 770 (Bishop Decl. ¶ 5 ("Building relationships with Lowe's managers and associates is critical to my ability to be a successful Territory Manager.")).) Fiore admitted that building strong relationships was his "main focus" as a Territory Manager. (CP 945-46, 975-77 (Fiore Dep. at 53:21-24, 49:13-15 (expected to build relationships with Lowe's managers), 100:1-4 (attempted to "improve the relationship PPG had with Lowe's"), 103:2-104:15 ("important" to PPG that he develop good relationships with Lowe's managers))).)

It is undisputed that Territory Managers who develop strong relationships with Lowe's associates in the paint department are more likely to find that during the more than one hundred hours per week when the Territory Manager is not in the store, the Lowe's associates are still recommending Olympic products to their customers. (CP 944-45, 965-66, 981-984 (Fiore Dep. at 48:10-49:3 (developing relationships could increase sales because Lowe's associates "were probably more inclined to sell for people they liked"), 83:18-84:13 (Fiore's approach to promoting sales at one store "must be working" because "they liked me" more than

the representative for another brand), 109:17-110:3, 112:5-17 (as strategy, Fiore attempted to build good relationships with Lowe's zone managers and paint department managers, who had ability to influence sales of Olympic to customers)); CP 772 (Bishop Decl. ¶ 18 (relationships facilitate promotion of Olympic products to customers when Territory Manager is not present)); CP 1026 (Mueller Dep. at 108:6-9 (same)).

Territory Managers who establish strong relationships are also more likely to receive opportunities to employ other strategies designed to improve sales. (CP 1022 (Mueller Dep. at 102:15-23 ("It's all about creating relationships.... Relationship sells your product.")).) For example, a Territory Manager who has established a strong relationship with a Lowe's manager is more likely to receive permission from that manager to set up an end cap or stack out display in his or her store, or to conduct a training session for a group of Lowe's associates. (CP 978-80, (Fiore Dep. at 105:20-106:17, 108:19-24); CP 1048 (Webb Dep. at 81:11-18 (Territory Manager's success at securing permission for end cap displays is "based on how good their relationship is with the store management")); CP 770 (Bishop Decl. ¶ 6 ("I am able to secure additional [promotional display opportunities] because of the relationships that I have developed with Lowe's management")); CP 1080 (Russell Dep. at 37:4-15 (strength of relationships a factor in securing off-shelf promotions)); CP 1023, 1027 (Mueller Dep. at 104:16-25 (built rapport with the stores, so they have confidence in his recommendations to vary

from the plan-o-gram)), 109:13-15 (better relationships result in more frequent approval for promotional displays)).) Likewise, a Territory Manager may increase access to contractors by developing a good relationship with employees at the Lowe’s commercial desk. (CP 771-72 (Bishop Decl. ¶¶ 14-18).) When asked what he did to improve sales at the Lowe’s stores within his territory, Fiore responded that he was “mainly focused on building relationships.” (CP 946 (Fiore Dep. at 53:21-24).)

b. “Promoting sales” is exempt administrative work.

Because Fiore’s primary duty was promoting sales, he satisfied the second element of the administrative exemption. In the seminal case of *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9-10 (1st Cir. 1997), the U.S. Court of Appeals for the First Circuit held that “marketing representatives” who “promote sales” of their employer’s products were exempt administrative employees.⁵ The primary duty of the John Alden marketing representatives was to work with independent insurance agents (who sold John Alden products to *the agents’* customers), keeping them informed about John Alden products and discussing how those products might fit the needs of the agents’ customers. *Id.* at 3-4. The Court of Appeals held that such activities qualified for the administrative exemption because they involved “servicing” the business and were “in

⁵ When construing the WMWA, the Court may consider interpretations of comparable provisions of the FLSA as persuasive authority. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000).

the nature of ‘representing the company’ and ‘promoting sales’ of John Alden products, two examples of administrative work.” *Id.* at 10. The Court of Appeals recognized that the representatives’ contact with the agents involved “something more than routine selling efforts focused simply on particular sales transactions.” *Id.* Rather, their work was “aimed at promoting (*i.e.*, increasing, developing, facilitating, and/or maintaining) customer sales *generally*, activity which is deemed administrative sales promotion work.” *Id.*

The U.S. Department of Labor expressly endorsed the holding of *John Alden*, concluding that “promoting sales ... is exempt administrative work” and that “marketing representatives” who promote the sale of their employer’s products are exempt administrative employees. 69 Fed. Reg. 22140, 22145-46 (Apr. 23, 2004). The Department of Labor reasoned that servicing customers, promoting the employer’s products, and advising customers on the appropriate product to fit their needs are directly related to general business operations and require the exercise of discretion and independent judgment. *Id.* at 22146 (exemption applies “even if they are involved in some selling to consumers”); 29 C.F.R. § 541.203(b) (marketing, servicing and promoting employer’s product is exempt administrative work); *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 626 (11th Cir. 2004) (promoting sales and advising customers are exempt duties).

Pursuant to this line of reasoning, the Washington State Department of Labor & Industries (“L&I”) recognizes that “field

representatives” and “promotion men” qualify for the administrative exemption (*see* L&I Admin. Policy ES.A.9.4 (2005), at 4, ¶ 7.3), as do “marketers” and “promoters” (*id.* at 4-5, ¶ 9), because “representing the company” and “promoting sales” are administrative functions that are “directly related” to “general business operations.” (*Id.* at 4, ¶ 9). As the Arbitrator concluded, Fiore’s primary duty was to promote the sale of Olympic products by Lowe’s to its customers. Thus, Fiore satisfied the second element of the administrative exemption.

c. Fiore’s housekeeping tasks were not his primary duty.

In addition to his primary job duty of promoting the sale of Olympic products, Fiore performed certain collateral “housekeeping” tasks when he was in the Lowe’s stores, such as replenishing the Olympic “chip” rack (the display of Olympic color selections) and occasionally down-stocking some product from storage shelves to display shelves. In an attempt to defeat the second element of the administrative exemption, Fiore argued that his primary duty was the performance of these manual housekeeping tasks. The undisputed evidence (including Fiore’s own admissions) revealed, however, that these tasks were not Fiore’s primary duty. At a minimum, PPG presented substantial evidence to the Trial Court that housekeeping was not Fiore’s primary duty such that this issue could not justify entry of summary judgment in favor of Fiore.

An employee’s “primary duty” is the principal, main, major or

most important duty that the employee performs. 29 C.F.R. § 541.700.⁶ Determination of an employee’s primary duty “must be based on all facts in the particular case” with the major emphasis on the character of the employee’s job as a whole. L&I Admin. Policy ES.A.9.4 at 3, ¶ 5; 29 C.F.R. § 541.700. The conclusion that Fiore’s primary duty was the promotion of Olympic products (and not housekeeping) was reinforced throughout Fiore’s employment, as the following experiences reveal:

Immediately after PPG hired Fiore, it sent him (and more than 150 other Territory Managers from across the United States) to Phoenix for several days to attend a National Sales Meeting. (CP 956, 985 (Fiore Dep. at 71:1-10, 116:16-18).) At the meeting, Sherry Calhoun (PPG’s North America Field Sales Manager for the Lowe’s account) conducted a workshop on “Store Service Expectations.” (CP 906 (Calhoun Decl. ¶¶ 1, 3).) The purpose of Calhoun’s presentation was to emphasize what PPG considered to be the “most important duties of a Territory Manager” – developing and implementing strategies to promote the sale of Olympic products, such as building relationships, securing promotional display opportunities, and training Lowe’s associates. (CP 906-22 (Calhoun Decl. ¶¶ 3-4 & Ex. A).) Throughout the National Sales Meeting, PPG emphasized the importance of building relationships, including a session called “Building Relationships – The Keys to Success.” (CP 985-86

⁶ The “primary duty” provision is nearly identical to the corresponding provision of the administrative exemption under the FLSA. *Compare* WAC 296-128-520 *with* 29 C.F.R. § 541.200(a)(2).

(Fiore Dep. at 116:4-7, 117:3-7); CP 906-22 (Calhoun Decl. ¶ 6 & Ex. B).) The meeting did not include a session on housekeeping tasks. (CP 986 (Fiore Dep. at 117:15-17); CP 907 Calhoun Decl. ¶ 5.) If the most important part of a Territory Manager's job was housekeeping, then it would make no sense for PPG to devote the resources needed to bring Territory Managers to Phoenix for several days of discussions about building relationships and other strategies to promote sales.

PPG expected Fiore to have a solid technical understanding of Olympic products. After the National Sales Meeting, PPG sent Fiore to Louisville for several days of technical training regarding the attributes of Olympic paint and stain products. (CP 957, 969-70 (Fiore Dep. at 72:1-4, 93:22-94:2); CP 789 (Webb Decl. ¶ 3).) PPG also developed a web portal known as *The Torch*, through which PPG was able to keep Fiore current on the technical aspects of Olympic products. (CP 969 (Fiore Dep. at 93:2-17).) In addition to accessing *The Torch* for technical information, Fiore reviewed *The Torch* on a regular basis to learn about the promotional strategies that other Territory Managers implemented in their territories. (CP 948-49, 993-94 (Fiore Dep. at 55:5-56:7, 131:6-132:6 (reviewing *The Torch* to see examples of other Territory Managers who were successfully promoting Olympic)); CP 1014 (Mueller Dep. 25:8-22 (*The Torch* includes an open forum where Territory Managers discuss ideas such as how to run a demonstration or training class)).) If the primary duty of a Territory Manager was manual labor, Territory

Managers would not have any need to understand the technical attributes of Olympic products, nor would they be interested in reviewing promotional strategies developed by other Territory Managers.

Even when Fiore performed housekeeping tasks, he focused on promoting sales. For example, when Fiore replenished the chip rack, he sought opportunities to talk with Lowe's associates and customers, respond to their questions, and otherwise promote the Olympic brand. (CP 958-59 (Fiore Dep. at 73:12-74:8 (admitting that PPG encouraged him to interact with customers and to promote Olympic while he was engaged in activities such as replenishing the chip rack)); CP 970 (Fiore Dep. at 94:15-25) (admitting that when engaged in housekeeping tasks such as replenishing the chip rack, "it was nonstop customers").)

PPG required Territory Managers to submit "monthly letters" to their Regional Manager in which they reported their results for the prior month, and their goals and objectives for the coming months. (CP 930 (Fiore Dep. at 9:4-6).) In Fiore's monthly letters to his Regional Manager Bryan Webb, Fiore reported the following goals and objectives:

- Build relationships with Lowe's commercial sales team;
- Gain stackouts, endcaps and other high visibility displays;
- Train commercial sales associates about the features of Olympic products and how they can sell them to the customers; and
- Gain exposure in the stores for Olympic interior premium paint.

(CP 789-801 (Webb Decl. ¶ 6 & Ex. A); CP 998-999 (Fiore Dep. at 154:25-155:6).) In identifying these objectives, it was Fiore's "intent to

put goals down which reflected what [he] thought the company wanted [him] to be doing.” (CP 999-1000 (Fiore Dep. at 155:15-156:2).) In his own words, Fiore understood that to PPG, his most important duties as a Territory Manager were building relationships, gaining high visibility displays, training associates and improving brand exposure. (*Id.*)

In his first monthly letter, Fiore reported that he was “still making relationships with the contractor sales associates.” (CP 789-801 (Webb Decl. Ex. A).) Fiore noted that one such relationship resulted in a “huge sale” and that another Lowe’s associate with whom he had developed a strong relationship was alerting Fiore to potential sales. (*Id.*) A few months later, Fiore reported that he has “succeeded in building trust in a few stores” and that he was going to participate in an event for realtors to demonstrate how Olympic products could be used to “improve curb appeal” in a difficult real estate market. (*Id.*) Fiore also reported that he was working on developing a relationship with a Lowe’s District Commercial Account Sales employee in an effort to “develop potential customers” and “grow sales” for Lowe’s and Olympic. (*Id.*)

Regional Managers also prepare monthly letters in which they report what is important to them in terms of Territory Manager job duties and performance. (CP 789, 802-864 (Webb Decl. ¶ 8 & Ex. B).) As evidenced by those reports, the most important aspect of the Territory Manager position to Regional Managers is to ensure that the Territory Managers develop and implement strategies to promote the sale of

Olympic paints and stains, not housekeeping tasks. In one of Webb's monthly letters, for example, he reported that Fiore was "working hard to sell more premium through training and relationships he is building." (*Id.*)

The priority that PPG places on sales promotion strategies over housekeeping tasks is also evident in the annual reviews that PPG performs of Territory Managers, which is focused on evaluating the Territory Managers' strategies and initiatives to promote sales. (CP 790, 865-905 (Webb Decl. ¶ 9 & Ex. C).) In addition, Territory Managers are eligible for incentive compensation based upon the success of their efforts to increase sales of Olympic products by Lowe's. (CP 908 (Calhoun Decl. ¶ 12); CP 1088-89 (Russell Dep. at 124:21-125:12).) In contrast, Territory Manager's housekeeping skills are not a factor in determining eligibility for incentive compensation. (CP 908 (Calhoun Decl. ¶ 12).)

Finally, the undisputed record evidence presented to the Trial Court confirmed that if the primary responsibility of a Territory Manager was housekeeping, there would be no need for the position of Territory Manager. (CP 907 (Calhoun Decl. ¶ 9).) As the Arbitrator concluded:

Fiore contends that providing manual labor in Lowe's stores is the primary duty of a TM. But, it makes no business sense for PPG to hire, pay for and provide to Lowe's Territory Managers to perform manual labor in Lowe's stores.... [T]here is no legitimate reason why PPG would essentially give Lowe's such a manual workforce. Why would PPG have Territory Managers if housekeeping tasks constitute the primary duty of that job.

(CP 2335-39). Indeed, it was the Lowe's associates (not Territory

Managers) who were expected to perform manual housekeeping tasks such as down-stocking Olympic product as part of their job duties. (CP 1007 (Fiore Dep. at 202:21-23).)⁷

Fiore argued to the Trial Court that he spent most of his time performing manual tasks. However, when determining what constitutes an employee's primary duty, the amount of time he or she spends performing "exempt" versus "non-exempt" work is not controlling. L&I Admin. Policy ES.A.9.4 at 3, ¶ 5; 29 C.F.R. § 541.103. "A job duty that is of principal importance to the employer, or other duties that are collateral to that job duty, may be considered primary duties even though they occupy less than fifty percent of the employee's time." *Austin v. CUNA Mutual Ins. Soc.*, 240 F.R.D. 420, 429 (W.D. Wisc. 2006). An employee's primary duty "cannot be ascertained by applying a simple 'clock' standard," and even employees who spend 90% or more of their time on manual tasks qualify for the administrative exemption if their primary duty is exempt. *Johnson v. Home Team Prod., Inc.*, 2004 U.S. Dist. LEXIS 13251 *16-17, *28-29 (E.D. La. July 15, 2004) (employee who spent 90% of his time performing physical labor was still exempt).⁸ In any event,

⁷ Fiore testified that down-stocking was "an occasional thing" and conceded that he did not down-stock on a regular basis. (CP 1007 (Fiore Dep. at 202:11-20); CP 1015-16 (Mueller Dep. at 29:14-30:13 (Territory Managers do not stock as part of their duties but will take a "few cans down to fill the open holes")); CP 771 (Bishop Decl. ¶ 12 (same)); CP 1082 (Russell Dep. at 40:3-25 (same)).)

⁸ See also *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1114-15 (9th Cir. 2001) (managers were exempt because their "principal value to Trailer Inns was directing the day-to-day operations of the park even though they

Fiore admitted that his “main focus” was building relationships, that he down-stocked paint only occasionally, and that he “talked about paint constantly.” In light of these admissions and the other evidence presented to the Trial Court described above, Fiore was not entitled to summary judgment based upon his contention that he spent most of his time performing manual tasks.

Fiore admitted that the “main focus” of his job was to promote the sale of Olympic products by Lowe’s to its customers and that he “talked about paint constantly.” Fiore’s attendance at the National Sales Meeting and the technical training in Louisville, his monthly letters (and those of his Regional Manager), his use of *The Torch* to learn about technical matters and sales promotion strategies, and PPG’s performance review and incentive compensation process, all confirm that Fiore’s primary duty as a Territory Manager was to develop and implement strategies designed to promote sales, and belie any suggestion that Fiore’s primary duty was actually the performance of manual housekeeping tasks. In accordance with L&I Admin. Policy ES.A.9.4, parallel authority from the U.S. Department of Labor, as well as *John Alden* and its progeny, Fiore’s primary duty was the performance of nonmanual work directly related to

performed a substantial amount of manual labor”); *Kastor v. Sam’s Wholesale Club*, 131 F. Supp. 2d 862, 866 (N.D. Tex. 2001) (primary duty is “what [the employee] does that is of principal value to the employer, not the collateral tasks he may also perform, even if they consume more than half his time”); *Damberville v. City of Boston*, 945 F. Supp. 384, 392-95 (D. Mass. 1996) (employee was exempt under administrative exemption despite contention that job consisted of merely mundane clerical tasks).

the general business operations of PPG and Lowe's. Fiore satisfied the second element of the administrative exemption.

3. Fiore's primary duty included work requiring the exercise of discretion and judgment.

After hearing two days of testimony, the Arbitrator concluded that "by a preponderance of the evidence, [PPG] has proven that Mr. Fiore's primary duty included work requiring the exercise of discretion and independent judgment." (CP 2335-39). The Arbitrator was correct. The undisputed evidence presented to the Trial Court established that Fiore satisfied the third element of the administrative exemption because his primary duty (promoting the sale of Olympic products) included work requiring the exercise of discretion and independent judgment.

In general, "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." L&I Admin. Policy ES.A.9.4 at 5, ¶ 10.⁹ Territory Managers regularly make independent choices, free from supervision, with respect to how best to promote the sales of Olympic products by Lowe's to its customers. (CP 924 (Grube Decl. ¶ 7).)

Fiore was not "scripted" with respect to how to best promote Olympic products. (CP 908 (Calhoun Decl. ¶ 11).) Rather, it is up to each

⁹ The frequency of the exercise of discretion is not controlling because the analysis considers only whether an employee's primary duty "included" independent judgment and discretion. *Robinson-Smith v. Government Employees Ins. Co.*, 590 F.3d 886 (D.C. Cir. 2010).

Territory Manager to assess the personalities and needs of the stores in his or her territory and to develop a plan on how best to promote the sale of Olympic products at each store. (*Id.*) Territory Managers “decide for themselves which strategies to develop and implement and they make the determinations as to when, where, how and with whom to implement those strategies.” (CP 924 (Grube Decl. ¶ 7).)

PPG expects Territory Managers to develop their own strategies to accomplish their goal of promoting the sale of Olympic products. (CP 908 (Calhoun Decl. ¶ 10); CP 1100 (Calhoun 30(b)(6) Dep. at 120:11-15).) As the face of PPG to Lowe’s within his territory, Fiore regularly exercised independent judgment and discretion in deciding how best to perform his primary duty of promoting the sale of Olympic products. (CP 1098-99 (Calhoun 30(b)(6) Dep. at 52:16-53:6 (“It’s up to the Territory Manager to decide what needs to be done in the store ... to promote the sale” of Olympic products.))

The manner in which any particular Territory Manager might accomplish this primary objective may vary both from one Territory Manager to another, as well as from one store to another. For example, Territory Manager Bishop exercised discretion when he visited contractor job sites away from the stores and consulted Lowe’s district managers. (CP 770-88 (Bishop Decl. ¶ 15 & Ex. A-C).) Fiore exercised his “best judgment” when balancing the need for good rapport with Lowe’s with his goal of promoting Olympic paints and stains to customers. (CP 971-72

(Fiore Dep. at 95:14-96:8).) Similarly, Territory Manager Mueller showed initiative by promoting Olympic on a radio show; he also decided which stores to run product demonstrations in and how to adapt promotion strategies to stores in areas with varying socioeconomic conditions. (CP 1105 (Calhoun 30(b)(6) Dep. at 152:1-3); CP 1035, 1029, 1036-37 (Mueller Dep. at 120:14-16, 112:6-14 (different socioeconomic conditions around each store require different approaches), 121:13-122:17 (providing example of same)); CP 1104 (Calhoun 30(b)(6) Dep. at 148:18-24).)

Territory Managers are expected to develop their own strategies to accomplish the goal of increased sales. (CP 908 (Calhoun Decl. ¶ 10); CP 1046-47 (Webb Dep. at 78:20-79:13 (Territory Managers “establish strategies and objectives” to increase sales)).) As Calhoun explained:

[Territory Managers] determine opportunities and areas they can go after. They analyze their business to determine what they’re going to use to persuade their store manager to allow them the end cap or a stack-out. They determine whether and how they are going to train, what to be trained on, how it’s going to be set up, who they are going to talk to about it. They determine what events they are going to hold, whether it be consumer events or events with Lowe’s associates. They determine what products they are going to drive and promote in the line, what makes sense in each store. All of these decisions can be the same for multiple stores or totally different. They determine training, displays, promotional opportunities, contractor sales, how they’re going to encourage the Lowe’s associates to sell Olympic. It’s a myriad of things.

(CP 1107 (Calhoun 30(b)(6) Dep. at 187:3-23); CP 1117-18 (Calhoun Dep. at 266:1-10, 317:4-9); CP 908 (Calhoun Decl. ¶¶ 10-11); CP 1061-73

(Grube Dep. at 67:19-75:18, 159:13-161:21 (Territory Managers “need to decide what they need to do in each one of those stores to try to promote the sale of Olympic products and understand what’s going on in each of those stores.”)).) Territory Managers “have the flexibility to decide, knowing that store and what works best in that store, which tools ... they should effectively employ to promote the sales of Olympic product in the store.” (CP 1092-93 (Russell Dep. at 144:19-145:6); CP 1046 (Webb Dep. at 78:6-12 (Territory Managers act “creatively and with initiative in the way that they see fit”)).)

Each Lowe’s store has its own “personality” and it is up to each Territory Manager to decide how best to manage the dynamics of each location. (CP 1035-36, 1040 (Mueller Dep. at 120:25-121:12, 129:8-9 (Territory Managers “have to build their own relationships”)).) As Fiore explained, “stores are different” and Territory Managers need to identify the unique opportunities presented by each individual store. (CP 995 (Fiore Dep. at 146:6-25); CP 1109 (Calhoun 30(b)(6) Dep. at 291:2-9 (Territory Manager’s strategy for building relationships “would depend on that Lowe’s manager and the priorities to him and how he works, and it could be different for every store manager in a territory”)).)

Territory Managers have the discretion to decide how best to allocate their time. (CP 1017-18 (Mueller Dep. at 38:10-25 (noting that “[e]verybody’s a little different” with respect to how they allocate their time, and that he is free to spend more time in one store over another if he

wants to provide additional training in that store), 44:19-23 (Mueller decides how much time to spend in a store based upon what is “needed ... to produce the results” he wanted to achieve that day)).) Territory Managers have the “authority to run their territory as needed” and the discretion to decide what strategies will work best in each of the stores in their territory. (CP 1011-12 (Mueller Dep. at 15:13-16:1); CP 1106 (Calhoun 30(b)(6) Dep. at 177:18-20 (Territory Manager is “running his territory and needs to decide how best to promote the sale” of Olympic)).)

Territory Managers “analyze and review sales numbers for individual stores and on individual products” and then use that analysis to develop strategies to promote sales. (CP 1047 (Webb Dep. at 79:3-4, 79:20-25); CP 1065-66 (Grube Dep. at 71:21-72:9 (Territory Managers analyze sales data “so they can build a better action plan”))).) PPG expects Territory Managers to understand their sales numbers and determine what the numbers mean, and to use that information and analysis to develop strategies to promote sales in each of their stores. (CP 1067-68 (Grube Dep. at 73:5-74:19 (providing example of how Territory Manager would analyze sales trend and develop strategy to improve sales))).)

Evidence of the exercise of discretion and independent judgment is found throughout the monthly letters submitted by Fiore and his Regional Manager. For example, in his letters, Fiore analyzed sales volume by product, and based on that analysis he developed specific goals and determined what strategies to utilize. (CP 789-801 (Webb Decl. Ex. A);

CP 774-88 (Bishop Decl. Ex. A-C (analyzing reasons for various sales trends and initiatives undertaken)).) Likewise, Webb’s letters are focused on applying the sales analyses of each Territory Manager to the concrete plans for the region. (CP 789, 802-64 (Webb Decl. ¶ 8 & Ex. B).) In each letter, Webb highlights the ingenuity of his Territory Managers by detailing the unique ideas and strategies they developed and implemented. (*Id.*) Ultimately, the focus of Webb’s monthly letters was on the Territory Managers’ initiatives and strategies to promote the sale of Olympic products throughout their territories, not on housekeeping tasks. (*Id.*)

The choices made by a Territory Manager in how best to promote sales of Olympic within his or her territory are vital to PPG’s success in that territory. As the Court of Appeals recognized in *John Alden*, “the work of the marketing representatives is critically important” to the employer’s business “in that the success of the company in [the representative’s region] depends in large part on the success of the marketing representatives who promote sales of [the company’s] products.” *John Alden*, 126 F.3d at 11; *see also Hines v. Longwood Events, Inc.*, No. 1:08-cv-11653, 2010 U.S. Dist. LEXIS 62259 *7, 24 (D. Mass. June 23, 2010) (work of sales managers affected employer’s business operations to a substantial degree even when they exercised no systemic role in shaping customer service policies or setting prices).

The evidence the parties presented to the Trial Court established that Fiore’s primary duty of promoting sales involved the exercise of

discretion and independent judgment. As the Arbitrator concluded after hearing the witnesses testify and reviewing the relevant documents:

Territory Managers make, or should make, independent decisions, free from immediate supervision, about how to best drive Olympic paint and stain sales in their territory. PPG gives Territory Managers the authority to make such independent choices.

(CP 2335-39.) Thus, PPG established – with undisputed facts presented to the Trial Court – that Fiore satisfied the third and final element of the administrative exemption. PPG respectfully requests that this Court reverse the judgment of the Trial Court and remand with instructions for the Trial Court to enter judgment in favor of PPG. In the alternative, PPG requests that it be given the opportunity to present its evidence to a jury.

B. The Trial Court Erred in the Calculation of the Value of Fiore’s Overtime Claim.

If the Court affirms summary judgment for Fiore or remands for trial, PPG requests that the Court correct two errors of the Trial Court with respect to the calculation of damages. First, the Trial Court adopted the “time and a half” method for computing overtime, instead of the “half time” method. Second, the Trial Court found that PPG willfully violated the WMWA, thus justifying a doubling of Fiore’s overtime award.

1. The measure of Fiore’s overtime damages is limited to the half-time overtime premium.

A finding that Fiore was misclassified as exempt from the overtime requirements of the WMWA would mean that Fiore would have been entitled to receive “compensation for his ... employment in excess of [40

hours per week] at a rate [of] one and one-half times the regular rate at which he [was] employed.” RCW 49.46.130(1). The Trial Court held that Fiore’s overtime claim should be calculated using the so-called “time and a half” method, pursuant to which his weekly salary was divided by 40, and the resulting “regular rate” was multiplied by 1.5 times the number of overtime hours worked. (CP 1737-39.) The Trial Court’s application of the “time and a half” method was in error. Because Fiore was already paid his full salary for all hours worked, the proper measure of his overtime claim is the “half time” approach.

Under Washington law, a salaried employee’s “regular rate” is not determined by dividing an employee’s weekly salary by 40. Rather, it is determined by “dividing the amount of compensation received per week by the total number of hours worked during that week.” WAC 296-128-550. It is undisputed that PPG paid Fiore a fixed salary no matter how many hours he worked each week, even though those hours varied from one week to the next. (CP 1184 (Fiore Dep. at 166:23 – 167:9); CP 1171-72 (Fiore Dep. at 18:23 – 19:1).)¹⁰ Thus, Fiore’s “regular rate” for any individual week was his weekly salary (\$596.15) divided by the number of hours he actually worked that week.

¹⁰ See also CP 1172-73, 1186 (Fiore Dep. at 20:17-21 (hours varied from one week to the next), 19:21-23 (did not receive extra compensation in weeks in which he worked more hours), 20:1-6 (did not receive less compensation in weeks in which he worked fewer hours), 169:18-20 (paid a flat salary no matter how many hours he worked).)

It is undisputed that Fiore was already paid his “regular rate” (weekly salary divided by hours worked) for all hours he worked each week (including hours in excess of forty). Thus, if the final conclusion is that Fiore is entitled to overtime compensation, he would only be entitled to that portion of his compensation which PPG has not already paid (*i.e.*, the additional “one-half times the regular rate at which he [was] employed”). RCW 49.46.130(1). This is the “half time” approach.

As the U.S. Department of Labor confirmed, salaried employees who are found to have been misclassified “received and accepted the salary knowing that it covered whatever hours they worked.” U.S. Dep’t of Labor, Wage & Hour Div., Op. Ltr. FLSA2009-3 (Jan. 14, 2009) (“fixed salary covered whatever hours the employees were called upon to work in a workweek”). Because they already received their regular rate for all hours worked (including the overtime hours), they are only entitled to be paid “an additional one-half their actual regular rate for each overtime hour worked.” *Id.* In addition to being endorsed by the Department of Labor, the “half time” approach has been adopted by the U.S. Supreme Court and every U.S. Circuit Court of Appeals to have considered the issue. *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 580 (1942); *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 354-57 (4th Cir. 2011); *Urnikis-Negro v. American Fam. Prop. Serv.*, 616 F.3d 665, 672-83 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 1484 (2011); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230-31 (10th Cir. 2008);

Valerio v. Putnam Assoc., 173 F.3d 35, 39-40 (1st Cir. 1999); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988).

The Trial Court's error appears to have originated from its mistaken belief that PPG was advocating for use of the "fluctuating work week" method. (CP 1737-39, citing *Monahan v. Emerald Perf. Materials*, 705 F. Supp. 2d 1206 (W.D. Wa. 2010).) The "fluctuating work week" is described in 29 C.F.R. § 778.114(a) as a way to calculate overtime compensation for salaried non-exempt employees, not as a method of computing damages in a misclassification case, and PPG never argued that it applied in this case. Rather, for the reasons set forth above, PPG argued to the Trial Court that the "half time" method should be used. PPG requests that this Court reverse the judgment of the Trial Court and adopt the "half time" method for computing the value of Fiore's overtime claim.

2. Fiore is not entitled to double damages.

The Trial Court awarded Fiore doubles damages, finding that PPG's classification of Fiore as exempt constituted a willful violation of the WMWA. The Trial Court's double damages award was premised on three fundamental legal errors.

First, the Trial Court mistakenly held that PPG had the burden of proving that it did not willfully violate the WMWA. (CP 2039-42 (holding PPG "cannot sustain its burden" on the issue).) In fact, the burden of proof rests with Fiore to establish that PPG acted "willfully and with intent to deprive" him of his wages. RCW 49.52.050(2). In order to

meet this burden, Fiore had to prove that PPG did not have a genuine belief that it properly classified Fiore as exempt. See *McAnulty v. Snohomish School Dist.*, 9 Wn. App. 834, 838, 515 P.2d 523 (1973) (affirming rejection of double damages where “[t]here is no testimony in the record to indicate that [the employer] did not have a genuine belief that [the employee’s] wages could properly be discontinued”). In *Chelan County Deputy Sheriffs’ Ass’n v. County of Chelan*, 109 Wn.2d 282, 302, 745 P.2d 1 (1987), for example, the Supreme Court of Washington reversed an award of double damages because there was “no evidence in the record whatsoever that while [plaintiff] was employed, the [employer] reached a consensus that he had not been paid all the compensation to which he was legally entitled.” Similarly, in *Champagne v. Thurston County*, 163 Wn.2d 69, 82, 178 P.3d 936 (2008), the Supreme Court held that double damages could not be awarded where the employer paid the employee in accordance with the parties’ agreement and the plaintiff could not show bad faith or animus. Fiore did not present any evidence to the Trial Court that PPG lacked a genuine belief that he was properly classified as exempt under Washington law.

Second, double damages should not be awarded where there was a “*bona fide* dispute” as to the obligation. *Wingert v. Yellow Freight Sys. Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002). The Trial Court mistakenly held that a *bona fide* dispute sufficient to negate a finding of willfulness requires proof of the employer’s state of mind. (CP 2039-42

(evaluating *bona fide* dispute based on “PPG’s state of mind on the issue”).) But the existence of a *bona fide* dispute does not turn on the employer’s state of mind. Rather, a *bona fide* dispute is simply a “fairly debatable” dispute. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161-62, 961 P.2d 371 (1998); *Cannon v. Moses Lake*, 35 Wn. App. 120, 125, 663 P.2d 865 (1983); *Moran v. Stowell*, 45 Wn. App. 70, 81, 724 P.2d 396, *rev. denied*, 107 Wn.2d 1014 (1986). Even if it is determined that Fiore should prevail on his overtime claim, the record demonstrates a “fairly debatable” dispute regarding this issue such that it would be not be appropriate to punish PPG by awarding double damages. *See Champagne*, 163 Wn.2d 69 at 81. Indeed, the Arbitrator’s determination that PPG proved that Fiore was properly classified confirms that there is at least a “fairly debatable” dispute on the issue. (CP 2335-39.)

Third, the Trial Court took an adverse inference against PPG based upon its assertion of the attorney-client privilege with respect to a confidential exemption analysis performed by PPG’s in-house counsel in 2004. (CP 2039-42 (taking into account that “PPG has declined to put forward what facts it considered when consulting on the issue with counsel”).) As a matter of established law and sound public policy, the Trial Court should not have considered PPG’s exercise of its fundamental right to assert the attorney-client privilege with respect to the exemption analysis. *Sumpter v. National Grocery Co.*, 194 Wash. 598, 602-04, 78 P.2d 1087 (1938) (no adverse inference from assertion of privilege).

PPG requests that the Court reverse the Trial Court's finding that PPG willfully violated the WMWA and its award of double damages.

C. The Trial Court Erred in the Calculation of Fiore's Award of Attorney Fees and Costs.

The Trial Court erred in its Order awarding Fiore attorney fees and costs of \$596,559.47. First, the Trial Court failed to cap Fiore's fees and costs at \$50,593.80 pursuant to principles of judicial estoppel. Second, the Trial Court failed to properly consider the more than 24:1 ratio between the award and the amount of Fiore's actual recovery, or to evaluate PPG's contentions regarding excessive and unreasonable elements of Fiore's fee petition, thereby failing to create a record sufficient for review by this Court. Finally, the Trial Court abused its discretion in awarding Fiore a 25% multiplier on his fee award.

1. Fiore's Attorney Fee Award Should Be Limited by Principles of Judicial Estoppel.

After PPG removed this action to the U.S. District Court for the Western District of Washington based on diversity jurisdiction, Fiore successfully persuaded the District Court to remand the case to the Trial Court by assuring the District Court that the total amount in controversy, *including attorney fees*, would be less than \$75,000. (CP 2238-53.) Fiore explained, "[t]his is a typical wage claim case and it falls within the class of cases Fiore's counsel usually litigates in 100 hours or less" and that "[t]he maximum amount of attorneys fees would [be] around \$30,000." (CP 2251.) Fiore assured the District Court that it could rely on these

figures, noting that his counsel was “knowledgeable about the issues involved and the effort required to prosecute such claims.” (*Id.*) Fiore concluded that the amount in controversy in this action, “including future attorneys’ fees,” would be “significantly below” \$75,000. (CP 2246, 2254-57.) Fiore should be bound by his assurances to the District Court.

Judicial estoppel is an equitable remedy aimed at preventing “a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Baldwin v. Silver*, 147 Wn. App. 531, 535, 196 P.3d 170 (2008). Judicial estoppel applies when: (1) a party asserts a position that is clearly inconsistent with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. *Id.*; see *Skinner v. Holgate*, 141 Wn. App. 840, 847-48, 173 P.3d 300 (2007). Judicial estoppel is particularly appropriate in this case, where Fiore secured remand to his desired forum based on his assertion that the amount in controversy, including attorney fees, would not exceed \$75,000.

In an attempt to justify his fee request to the Trial Court, Fiore asserted that this case was exceptionally “complex” and implicated “difficult and uncertain questions of state and federal law.” (CP 2072, 2077-90.) When Fiore sought remand, however, he assured the District

Court that this case was a “typical” wage case that would be litigated in “100 hours or less” with fees of “around \$30,000.” In fact, this was a typical wage case. There were only eight depositions; limited discovery disputes (which PPG won); a two-day mandatory arbitration (which PPG won); cross-motions for summary judgment; cross-motions *in limine*; and no trial – nothing remarkable or out of the ordinary. (CP 2238-41.)

In his successful effort to secure remand of his case to the Trial Court, Fiore argued to the District Court that his award plus attorney fees would be less than \$75,000. Fiore’s argument persuaded the District Court to remand this action, giving Fiore the forum of his choice. Fiore should now be held to the assurances he made in support of that effort. Fiore should have been estopped from recovering any fees beyond the representations he made to the District Court, and should be limited in his fee recovery to \$50,593.80, which when combined with Fiore’s damages award would bring Fiore’s total recovery to \$75,000, the amount he assured the District Court he would not exceed.

The disingenuous nature of Fiore’s prior representations to the District Court became readily apparent almost immediately after Fiore secured remand. At that time, Fiore demanded fees of \$19,725 – just for his work on the motion to remand. (CP 2238-41, 2258-2272.) The requested fee was almost two-thirds of what Fiore had represented to the District Court just a few weeks earlier as the “maximum” fee he expected to seek for the entire litigation. Then, in May 2010, Fiore purported to

offer to settle the case in May 2010 for an amount that included nearly \$40,000 in attorney fees. (CP 2081.) Documents had not even been exchanged and depositions were still months away, yet Fiore's fee demand already exceeded the \$30,000 he represented to the District Court would be expended throughout the entire case.

Fiore's recovery of \$596,559.47 in fees and costs, despite his assurances to the District Court that this was a "typical" case that would not require more \$30,000 in fees to litigate, reflects precisely the type of "bad faith" that makes the doctrine of judicial estoppel a relevant and necessary tool. *See, e.g., Morgan v. Gay*, 471 F.3d 469, 477 n.8 (3rd Cir. 2006) (manipulation of amount in controversy to evade federal jurisdiction is bad faith); *Adoff v. Protus IP Solutions, Inc.*, 2009 U.S. Dist. LEXIS 97831, *11, n.1 (D. Md. Oct. 16, 2009) (judicial estoppel may be applied to bar fee recovery beyond representations made in remand motion).

The Trial Court did not even address PPG's judicial estoppel argument. (CP 2507-12.) This Court should bind Fiore to his representations to the District Court, and should limit him to a maximum attorney fee recovery of no more than \$50,593.80.

2. The Trial Court Failed to Properly Evaluate Fiore's Fee Petition.

When evaluating the reasonableness of an attorney fee petition, the Trial Court is required to make a record of its evaluation sufficient to allow review by the Court of Appeals. *McConnell*, 131 Wn. App. 525 at 535. In this case, however, the Trial Court's order adopted Fiore's

proposed order nearly verbatim, approving fees and costs of more than 24 times Fiore's actual award without conducting any review of several components of Fiore's petition which were identified by PPG as unreasonable or excessive. (*Compare* Order, CP 2507-12, with PPG Response to Fiore's Motion for Attorneys Fees, CP 2225-2419.) The Trial Court's failure to evaluate PPG's arguments prevented this Court from having a meaningful record to review on appeal. Where the Trial Court did explain its reasoning, it further abused its discretion by taking into account impermissible factors.

a. Disproportionate fee award

"While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993). The Trial Court's Order approving Fiore's fee petition erroneously "rejects" proportionality considerations. (CP 2512.) The Trial Court should be required to evaluate the relationship between the fee award and the damages award and to explain why it concluded that a more than 24:1 ratio was reasonable.

b. Fees incurred on motion to remand

The Trial Court awarded Fiore fees totaling \$17,710 for work related to the motion to remand. (CP 2275-77 (billing entries for motion to remand).) This portion of Fiore's fee petition should have been denied. Fiore twice asked the District Court to award fees relating to his motion to

remand, but the Court denied his request. (CP 2252, 2258-63, 2274.) The Trial Court should have rejected Fiore's third attempt to recover these fees and should have reduced Fiore's proposed lodestar amount by \$17,710. At a minimum, the Trial Court should have considered PPG's argument and created a record sufficient for review.

c. Fees incurred on unsuccessful work

PPG requested that the Trial Court reduce Fiore's proposed lodestar amount by \$71,566 to account for his counsel's unproductive, unsuccessful efforts: (a) \$10,856 in fees related to Fiore's motion to compel and opposition to PPG's motion for protective order (where the Trial Court denied Fiore's motion to compel and granted PPG's motion for protective order, CP 2281-84); and (b) \$60,710 in fees for work on the arbitration (which PPG won, CP 2335-39.) Fiore should not have recovered fees for attorney time spent on these two matters in which he did not prevail. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538-40, 151 P.3d 976 (2007) (affirming reduction of attorney fees due to fees related to unsuccessful and unproductive components of the litigation, including motion practice). Unfortunately, the Trial Court did not even address this portion of PPG's argument.

d. Fees for duplicative effort

Fees for work that reflects duplicative efforts are not recoverable. In his billing entries, Fiore's counsel sought \$9,675 for work performed by two or more attorneys, including attendance by multiple attorneys at

various proceedings at which only one attorney actively participated. (CP 2292-93.) The Trial Court should have reduced Fiore's proposed lodestar amount by \$9,675. *Morgan v. Kingen*, 141 Wn. App. 143, 162, 169 P.3d 487 (2007) (affirming deduction for duplicative effort), *aff'd*, 166 Wn.2d 526, 210 P.3d 995 (2009). The Trial Court, again, should have at least considered PPG's argument and created a record sufficient for review.

e. Fees for document review and legal research performed at partner rates

Despite the availability of an associate and paralegals, Fiore's lead counsel (McGuigan) performed about 60% of the total work hours on this matter. This work included 140.5 hours for document review, for which Fiore requested fees totaling \$49,175. (CP 2294-98.) Putting aside for the moment that according to Fiore, document review alone accounted for 40.5 hours more than the 100 hours that Fiore previously told the District Court would be his counsel's *total* time on this case, an associate and/or paralegal should have performed the document review. Working together, an associate (at \$275/hour) and paralegal (at \$95/hour) would have incurred only \$25,992.50 in fees for a 140.5 hour document review (at their blended rate of \$185/hour). While PPG submits that 140.5 hours for document review is plainly excessive no matter who did the work, the Trial Court should have at least reduced Fiore's proposed lodestar amount by \$23,182.50 to account for his counsel's improper staffing on the document review. *Morgan*, 141 Wn. App. 143 at 162.

In addition, McGuigan and his partner Kalish expended a combined 77.2 hours on legal research, representing fees totaling \$27,020. (CP 2299-2302.) If staffed appropriately by an associate (at \$275/hour), such legal research fees would have been reduced to \$21,230. While PPG submits that 77.2 hours for legal research on what Fiore called a “typical” wage claim is excessive under any circumstances, the Trial Court should have at least reduced Fiore’s proposed lodestar amount by at least \$5,790 to account for improper staffing.

f. Excessive fees on summary judgment

At the outset, Fiore portrayed this as a “typical wage claim” expected to require no more than “100 hours” of attorney time and a “maximum amount” of attorney fees of \$30,000. (CP 2243-53.) Despite the straightforward nature of this dispute, Fiore’s counsel billed an astounding 531.24 hours on the cross-motions for summary judgment, generating \$158,487.80 in fees. (CP 2305-2319.) There simply is no way that a “typical” wage and hour case such as this should have required 531.24 hours on summary judgment. Because Fiore asserted that the entire case could be litigated “in 100 hours or less,” Fiore should at least have been able to complete summary judgment motion practice in 100 hours or less. If Fiore’s counsel spent 100 hours on summary judgment motion practice, the total fees would be \$29,834 (taking into account that the average rate for the attorney time allegedly spent on the cross motions for summary judgment was \$298.34 per hour), fully \$128,653.80 less than

Fiore's submission. (CP 2319.) The Trial Court should have reduced Fiore's proposed lodestar amount on summary judgment motion practice by at least \$128,653.80. *Morgan*, 141 Wn. App. 143 at 163 (affirming reduction of excessive fees by two-thirds for summary judgment because the case was straightforward). Again, the Trial Court simply ignored PPG's arguments, leaving this Court with no basis to evaluate the reasonableness of this component of the fee award.

g. Impermissible factors taken into account

While the Trial Court adopted Fiore's proposed order almost verbatim, the handwritten language added by the Court reveals that it considered impermissible factors in assessing the reasonableness of the fee award, thereby furthering its abuse of discretion.

First, the Trial Court held that PPG undertook "aggressive litigation tactics" – but the only such "tactic" identified by the Trial Court was that PPG used attorneys "from three different states." (CP 2508.) That PPG's attorneys came from Houston (where its trial counsel is located), Pittsburgh (where PPG is headquartered) and Seattle (where the case was filed) is hardly an "aggressive litigation tactic" and in no way justifies an award of fees and costs more than 24 times Fiore's actual damages recovery. The Court failed to identify any other "aggressive litigation tactics" undertaken by PPG sufficient to justify an award more than 24 times Fiore's damages.

Second, the Trial Court found it “noteworthy” that PPG did not submit a record of its own fees expended in its defense. (CP 2510.) The Trial Court wrote that it “can only assume” that PPG’s fees were “not substantially lower (if lower at all) than Plaintiff’s hours and fees.” (*Id.*) This was an abuse of the Trial Court’s discretion. An opposing party’s attorney fees are not relevant to the determination of whether the other party’s fees are reasonable. *Mirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir. 1978). As the Court of Appeals explained:

Petitioner wants us to ... award him a fee based on what the *opposing side* spent in time and money. This ignores the fact that a given case may have greater precedential value for one side than the other. Also, a plaintiff’s attorney, by pressing questionable claims and refusing to settle except on outrageous terms, could force a defendant to incur substantial fees which he later uses as a basis for his own fee claim. Moreover, the amount of fees which one side is paid by its client is a matter involving various motivations in an on-going attorney-client relationship and may, therefore, have little relevance to the value which petitioner has provided to his clients in a given case.

Id.; see also *Canlas v. Eskanos & Adler, P.C.*, No. C05-00375, 2006 U.S. Dist. LEXIS 83111, at *3-4 (N.D. Cal. Nov. 7, 2006) (denying motion to compel production of defendant’s billing records and holding that time defendant’s lawyers spent is not a “useful measure of the appropriateness of the time plaintiff’s attorney spent”). Not even Fiore argued that PPG’s fees would be a useful measure of Fiore’s fees. (CP 2426-31.) There was no justifiable reason for the Trial Court to *sua sponte* take an adverse inference against PPG based upon its speculation about PPG’s fees.

h. Summary

“Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.” *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998). As detailed above, however, the Trial Court failed to evaluate the proportionality and reasonableness of Fiore’s fee petition, or to create a record of its assessment sufficient for appellate review. Where the Trial Court did undertake to explain the justification for the fee award, it did so by reference to factors that should not have been taken into account. This Court should reverse the Trial Court’s award of attorney fees.

3. The Trial Court Abused its Discretion in Awarding Fiore a Multiplier of 25%.

The Trial Court also adjusted Fiore’s fee award upward by 25%. “Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed.” *Morgan*, 141 Wn. App. 143 at 165. Upward adjustments to the lodestar occur only “in rare instances.” *Mahler*, 135 Wn.2d 398 at 434.

In this case, the Trial Court justified the 25% multiplier by noting the contingent fee nature of the representation and the associated risk of non-payment. (CP 2512). However, Fiore did not provide any admissible “best evidence” to substantiate his claim regarding his alleged contingent fee agreement (or whether such a signed, written agreement even existed).

See ER 1002; RPC 1.5(c). The Trial Court erred by considering the alleged contingent fee nature of the representation in the absence of such evidence. In addition, the alleged contingency risk in this case was minimal given Fiore's assertion that this was a "typical" wage case. See *Morgan*, 141 Wn. App. 143 at 165 (noting inappropriateness of multipliers in wage cases), *aff'd*, 166 Wn.2d at 539-40. Further, when the hourly rate used to determine the lodestar is significant, the lodestar is presumed to have adequately accounted for any contingency risk. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 80, 101-02, 231 P.3d 1211 (2010). Here, the hourly rates of Fiore's attorneys (ranging from \$275 to \$400 per hour) were more than sufficient to account for any contingency in a case that was a straightforward, "typical" wage claim case.

The Trial Court also justified the multiplier by noting that this was a "test case" and that PPG retained "national counsel from a large firm from three different states." (CP 2512.) The Trial Court's reference to this as a "test case" relates to the fact that three other lawsuits had been filed against PPG challenging the exempt status of Territory Managers, and this was the first to be decided.¹¹ The fact that other cases were filed

¹¹ In the second case, the District Court recognized that the plaintiff's "exempt classification under the administrative exception will entail resolving significant and numerous factual issues, and is inappropriate for the summary judgment stage." *Stage v. PPG Industries, Inc.*, 1:10-cv-5, 2011 U.S. Dist. LEXIS 68316, at *29-31 & n.16 (E.D. Tenn. June 24,

against PPG did not impact the work performed by Fiore's counsel in his individual case, and there is no evidence that it impacted the contingent risk associated with this case or otherwise justified an enhancement to the lodestar amount. Further, PPG's selection of counsel is not an appropriate factor to consider when deciding whether to adjust the lodestar amount.

In cases where the lodestar figure grossly exceeds the value of the claims, a downward multiplier may be appropriate. *Scott Fetzer Co.* 122 Wn.2d 141 at 150. This is just such a case. The lodestar amount grossly exceeded the value of Fiore's claim. Thus, to the extent any adjustment to the lodestar was warranted, it was a downward adjustment. The Trial Court did not even take this possibility into account, and this was error.

IV. CONCLUSION

PPG respectfully requests that this Court reverse the judgment of the Trial Court on the merits of Fiore's misclassification claim, with instructions to the Trial Court to enter judgment in favor of PPG. In the alternative, PPG requests that this Court remand this matter to the Trial Court so that the merits of PPG's defenses may be tested at trial.

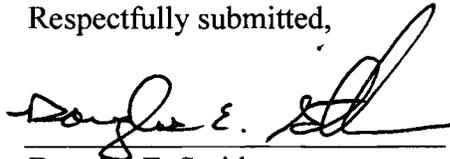
PPG also requests that this Court reverse the judgment of the Trial Court on the calculation of Fiore's alleged damages, holding that the "half

2011) (noting that the Trial Court's decision in this case "sets forth no reasoning"). The remaining two cases are still pending.

time” method applies to this case and that Fiore did not meet his burden to establish willfulness sufficient to justify an award of double damages.

Finally, PPG requests that this Court reverse the Trial Court’s award of attorney fees and costs, limiting Fiore’s recovery pursuant to principles of judicial estoppel, or at least directing the Trial Court to give proper consideration to PPG’s arguments regarding the excessive and unreasonable nature of Fiore’s fee request.

Respectfully submitted,



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Dated: August 12, 2011

Attorneys for Appellant

CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Ste. 3200, Seattle, WA 98101. On August 12, 2011, I served a copy of the foregoing document:

- by facsimile transmission to the person(s) and facsimile number(s) set forth below.
- by placing a true copy of the documents(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Seattle, Washington addressed as set forth below.

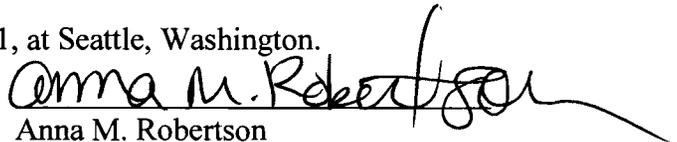
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- by causing a copy of the document(s) listed above to be personally served to the person(s) at the address(es) set forth below.

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

Executed on August 12, 2011, at Seattle, Washington.


Anna M. Robertson

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