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DIVISION II

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STATE OF WASHINGTON

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No. 34234-1-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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EMERALD CITY PIZZA, LLC, Appellant,

v.

DAVID WESTON, Respondent.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION.

Plaintiff-Respondent David Weston (“Weston”) is one of many former and current employees of Defendant-Appellant Emerald City Pizza, LLC (“ECP”). ECP owns and operates approximately 60 Pizza Hut restaurants in Western Washington. CP 55. Weston and approximately 100 other individuals were employed by ECP as “Restaurant General Managers” or “RGMs” during the time period covered by Weston’s complaint. RGMs are classified by ECP as exempt executive employees and denied overtime compensation for work over forty hours per week. Weston’s complaint alleges that, despite the title of “manager,” RGMs’ primary duties are not management, but rather production-related, customer-service oriented job duties, along with some low-level supervisory tasks regulated and directed by an “Area Coach.” CP 1-6. Low pay, long hours, limited discretion, and substantial production-related tasks turn what might be considered an exempt position (*Compare Palazollo-Robinson v. Shari’s Mgmt. Corp.*, 68 F. Supp. 2d 1186 (W.D. Wash. 1999)) into nothing more than a non-exempt “lead person” position for ECP. Weston seeks overtime compensation required by Washington’s Minimum Wage Act, RCW Ch. 49.46, and seeks to represent a class of similarly situated RGMs.

On July 8, 2005, ECP moved for summary judgment on Weston's individual claims, arguing that its RGMs fall within the bona fide executive exemption to the Washington Minimum Wage Act. On August 5, 2005, the trial court denied ECP's motion. After ECP sought discretionary review of the denial of summary judgment, the Commissioner of this Court upheld the trial court's order at summary judgment. On December 9, 2005, the trial court granted Weston's Motion for Class Certification and certified a class of all individuals who were employed as Restaurant General Managers and who were not compensated at time-and-one-half their regular rate of pay for overtime hours worked for ECP. CP 193-194. ECP now seeks review of that decision.

It should be noted at the outset that no class-wide discovery has occurred in this case. Judge Fleming's order granting class certification was based on Plaintiff's evidence, offered in the form of Weston's declaration, that RGMs' collective duties do not amount to "management," thereby disqualifying ECP from applying the executive exemption. Weston's declaration asserts that he, as well as all RGMs employed by ECP, regularly perform the following non-managerial tasks:

- 80-90% of Weston's duties consisted of taking telephone orders, making pizzas, working the cash register, stocking supplies, setting up the tables, delivering pizzas, and cleaning the facilities.
- Weston reported to an Area Coach and the Area Coach required Weston to work between 40 and 50 hours per week and at least 5 full days per week.
- Weston was required to work 8 to 9 "peak revenue periods" per week.
- During "peak revenue periods" (lunch and dinner three-hour periods), Weston's duties consisted almost entirely of making pizzas, taking phone orders, operating the cash register, and assisting customers.
- Weston had little or no authority to hire anyone without an authorization from the Area Coach.
- Weston had little or no authority to terminate anyone without the approval of the Area Coach.
- ECP directed Weston to update sales forecasts based on the direction of the Area Coach.
- Weston was not allowed to schedule restaurant employees to work overtime.
- The Area Coach inspected the restaurant in person at least once per week.

- The Area Coach called Weston daily to check on the status of the restaurant and to determine whether the restaurant was staffed and the employees were scheduled pursuant to his direction.
- During visits, the Area Coach inspected the inventory, reviewed shift schedules, and gave Weston direction and/or corrections regarding inventory and scheduling.
- Except questions about their pizzas, any questions from customers must be directed to the Area Coach. CP 25-26.

Without the benefit of class-wide discovery, questions remain as to the extent the proposed class members performed substantially the same tasks and held substantially the same supervisory authority in relation to that of ECP's Area Coaches. If class discovery substantiates Weston's claims on behalf of the absent class members, clearly this case would be appropriate for class litigation. *See, e.g., Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002). Certification of a class permits just the sort of class-wide discovery necessary in order to define the contours of the class.

All that is required at the outset of the case, is a showing that the requirements of CR 23 have been met. Weston has established the prerequisites of numerosity, commonality, typicality, and adequate representation, as well as a basis for concluding that questions of law or

fact common to the class predominate over individual questions and class treatment constitutes a superior method of adjudication. The basis for such conclusions is the fact that all RGMs employed by ECP during the relevant time period worked within the same organizational structure as the lead plaintiff, Weston, together with the common legal question of whether ECP has a uniform policy of unlawfully treating certain classifications of employees as “exempt.”

Should further discovery reveal a basis for creating subclasses or further defining the contours of the class, the trial court has the discretion under CR 23 to do so. *See* CR 23(c)(4); CR 23(d). For that reason, Washington courts have held that courts should “err in favor of certifying a class, since the class is always subject to later modification or decertification by the trial court.” *Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8 (2002) (citing *Brown v. Brown*, 6 Wn. App. 249, 253, 492 P.2d 581 (1971)).

The evidence before the trial court was sufficient to satisfy the requirements for class certification. The trial court’s order should be affirmed and the trial court allowed the discretion to manage this action as provided for in CR 23.

## II. COUNTER-STATEMENT OF THE CASE.

The class certified by the trial court is comprised of “Restaurant General Managers,” or “RGMs” employed by Emerald City Pizza since January 28, 2002. CP 193-194. During the applicable time period, ECP operated approximately 60 Pizza Hut franchise restaurants throughout Washington CP 55. Each restaurant operates with the same basic organizational structure: Each restaurant employs a number of “Team Members,” “Shift Managers,” and “hourly Assistant Managers”; one RGM is assigned to each restaurant; and each restaurant, in turn, is managed by an “Area Coach.” CP 55.

The named plaintiff in this case, David Weston, was employed as an RGM for ECP from December, 2000 through May, 2002. CP 24. The large portion of Weston’s day-to-day job duties, his “primary duties,” consisted of work such as taking telephone orders, making pizzas, working cash registers, stocking supplies, setting up tables, making deliveries, and cleaning the facilities. CP 25. Weston alleges that the class members perform similar tasks as a result of ECP’s formal and informal policies, practices, and procedures. CP 26. The trial court concluded that Weston could prove the claims of the class to the extent he can show at trial that the class members perform similar tasks as a result of ECP’s formal and informal policies, practices, and procedures.

Weston, like the class members, worked under the direction of an “Area Coach.” CP 25. The Area Coach was responsible for specifying work schedule, staffing levels, and directing what the forecasted revenues should be. CP 25. The Area Coach was the individual who had the discretion to increase staffing levels, approve employee terminations, and, except for general questions from customers regarding their pizzas, the person who received questions from customers and/or suppliers. CP 25. RGMs generally had little or no authority to make decisions regarding product, pricing, hours of operation, or to give bonuses to crew members. Weston alleges that the class members are subject to similar restrictions and limitations on their discretion in relation to Area Coaches as a result of ECP’s formal and informal policies, practices, and procedures. CP 25. The trial court concluded that Weston could prove the claims of the class at trial to the extent he can show that the class members were subject to similar restrictions and limitations on their discretion in relation to Area Coaches as a result of ECP’s formal and informal policies, practices, and procedures.

It is not in contention that all RGMs employed by ECP during the relevant time period worked within the same organizational structure as the lead plaintiff, Weston. In its opening brief, ECP seeks to single out Weston as an outlier, someone who can only “prove[] a class of one –

himself.” However, Weston did not create the organizational structure at ECP, he simply worked within that structure. Weston did not determine what supervisory role his Area Coaches were going to have over him; that was ECP doing. Weston did not dictate his working conditions, his hours, or his mandatory overtime; ECP was responsible for creating the position at issue in this case. Through its formal and informal practices, policies, and procedures, ECP established the “working foreman” or “lead person”-type position that Weston filled. As a result, Weston asserts that all RGMs performed substantially the same job duties, worked substantially similar hours, were subject to substantially the same policies and practices, and held substantially the same supervisory authority in relation to that of ECP’s Area Coaches.

Based on those allegations, the trial court correctly concluded that class treatment of Weston’s claims for overtime compensation is appropriate under CR 23. It is ECP’s organizational structure that lends itself to class-wide litigation because the issue for trial is whether ECP has created and cultivated a position it deems to be “exempt,” when, in fact, employees holding that position regularly and invariably work long hours for low pay with limited discretion and substantial production-related tasks.

### III. ARGUMENT

#### A. Standard of Review.

Class actions in Washington are governed by CR 23. “Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, ‘saves members of the class the cost and trouble of filing individual suits, and . . . also frees the defendant from the harassment of identical future litigation.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002). In addition, “a primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group.” *Brown v. Brown*, 6 Wn. App. 249, 253, 492 P.2d 581 (1971)

Based on these considerations, the trial court has broad discretion in deciding whether to certify a class. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 426, 54 P.3d 687 (2002). “A trial court’s decision regarding whether to certify a class is a discretionary one that will not be overturned unless it is manifestly unreasonable or based on untenable grounds. *Id.* (citing *Lacey Nursing Ctr., Inc. v. Department of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995)).

**B. Class Certification Is Appropriate To Determine Whether “RGMs” Were Properly Classified As Exempt Employees Under the Minimum Wage Act.**

Class certification is appropriate in those circumstances where a common legal question is presented, *Johnson v. Moore*, 80 Wn.2d 531, 535, 496 P.2d 334 (1972), which is based on a particular course of conduct by the employer that gives rise to claims of other class members. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665 (2002). Standardized policies, practices, or behaviors that affect all class members similarly give rise to circumstances allowing for class treatment. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978).

As ECP notes in its opening brief, Weston’s claims are based on two factual contentions: that he and all other RGMs spend most of their time performing production work; and that his and all other RGMs’ discretion is limited by the supervision exacted by an Area Coach. If either or both of those factual issues are resolved in favor of the class, the class members would be entitled to overtime compensation under the Minimum Wage Act. *See Palazollo-Robinson v. Shari’s Mgmt. Corp.*, 68 F. Supp. 2d 1186, 1190 (W.D. Wash. 1999) (outlining factors for determining exempt status, which include, *inter alia*, the frequency with which the employee exercises discretionary powers and his relative freedom from supervision).

The common question of law that links all class members is whether the class members were improperly denied overtime compensation as a result of ECP's characterization of the position of "Restaurant General Manager" as exempt from earning overtime under the Washington Minimum Wage Act. The resolution of whether RGMs were improperly classified as exempt turns on whether their collective duties were in fact "management" of the restaurants. A conclusion as to whether class members' duties were or were not "management" need not be based on any particulars of Weston's employment, such as individual conversations *he* had with an Area Coach or the precise amount of non-exempt work *he* performed in his role as RGM, but the class' claims may be evidenced by the representative nature of Weston's duties as an RGM.

All that is required for class treatment is a "common nucleus of operative facts." *Rosario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992). To that end, Weston set forth sufficient facts from which to conclude that common facts pervade and the uniform interpretation and application of the Minimum Wage Act as to him could establish a right to recover in other class members. It is precisely because no two employees will have worked under *identical* circumstances that courts generally recognize that "[t]he actions of the defendant need not affect each member of the class in the same manner." *Smith v. Univ. of Wash. Law School*, 2 F.

Supp. 2d 1324 (W.D. Wash. 1998); *see also Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194 (Cal. 2004) (“Neither variations in the mix of actual work activities undertaken by the class . . . nor differences in the total unpaid overtime compensation owed each class member, bars certification as a matter of law.”).

As evidence by Weston’s employment with ECP, the proposed class members share common duties, and responsibilities, despite which particular restaurant they might be employed in, or who their particular Area Coach may be. Weston, as one employee within ECPs’ chain of restaurants, was subject to standardized practices that applied not only to him, but to the class as well. Rather than being an outlier, Weston is simply one example of the type of work class members generally perform in their role as RGM. *Accord Sav-on Drug Store, Inc. v. Superior Court*, 34 Cal.4th 319, 96 P.3d 194 (Cal. 2004) (certifying class of 600-1400 drug store managers with varying duties who sought overtime under California state law, where employer claimed executive exemption).

Surely, no two RGMs are likely to have spent the *precise* amount of time performing any given task (e.g., making pizzas), nor is each and every RGM going to be found to have *exactly* the same working relationship with his or her Area Coach. However, it is *not* a requirement for class certification that the class members’ underlying work conditions

be identical. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 824, 64 P.3d 49 (2003). “The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs.” 1 Alba Conte & Herbert Newberg, 1 *Newberg on Class Actions* § 3:12, at 315 (4th ed. 2002).

Rather, the Court must look to the essential characteristics of the class’ claims. The essential characteristics at issue here include the fact that *all* RGMs are or were employed by ECP at an average rate of less than \$37,000; *all* RGMs were mandated to work in excess of 40 hours per week, often spending substantial amounts of time performing production-related tasks; *all* RGMs were exempted from overtime compensation; and *all* RGMs worked within the confines of an organizational structure that required substantial oversight by an Area Coach. It is on the basis of these essential facts that class treatment is appropriate as to the underlying question: Whether Weston and the class members were improperly classified as exempt employees and denied overtime compensation? The characteristics of Weston’s claims are, in fact, indistinguishable from any other RGM employed by ECP because each employee was subject to substantially *similar* (albeit not identical) conditions of employment.

Under the circumstances, similarity is all that is required and, as such, class treatment is appropriate under CR 23.

The particular course of conduct that makes class treatment appropriate here is ECP's practice of having RGMs perform labor such as making pizzas, taking telephone orders, working cash registers, stocking supplies, and cleaning the facilities a significant portion of the time they worked. Though the RGMs worked for different restaurants owned by ECP, they allegedly performed the same type of work for the same employer, working under ECP's policy of dictating that RGMs perform manual labor such as making pizzas, taking telephone orders, working cash registers, stocking supplies, and cleaning the facilities a majority of the time they worked. *See* CP 25-26. Perhaps even more importantly, all RGMs worked within the confines of an organizational structure that required substantial oversight and control by an Area Coach. ECP established a system in which RGMs reported to an Area Coach. By employing this system, and giving Area Coaches the ultimate discretion and decision-making authority over the restaurants and the actions of its RGMs, ECP deprived itself of the ability to treat RGMs as exempt employees.

### **C. The Trial Court Correctly Rejected ECP's Argument As To "Superiority."**

ECP argues against certification, asserting that a class action is not a superior method of resolving the claims at issue because common issues do not predominate this litigation. ECP argues that, on the basis of a survey it conducted of some of its current RGM's, and the declarations of six RGM's, Weston's duties were different than the run-of-the-mill RGM.

ECP's survey of and declarations from some of its current RGM's provides no basis for concluding that the trial court abused its discretion in granting class certification. The problem with ECP's survey is its inherent subjectivity and flaws with regard to methodology and administration. The obvious flaw is that the survey is a collection of information from RGMs who were then current RGMs – and who must face the consequences of “wrong” responses. It must be borne in mind that current employees are often fearful to assert their rights out of concern of direct or indirect retaliation. The class action device is properly applied to address just such circumstances. *E.g., Sav-On*, 34 Cal.4th 319, 96 P.3d 194 (defendant offered 51 declarations of managers stating that they spent more than 50 percent of their time on managerial activities. Notwithstanding this evidence, the court found that common questions predominated and approved of certifying the class).

Additionally, ECP's survey fails to capture any information relevant to the RGMs' "management" role in relation to that of the Area Coach, which is a substantial factor in considering whether RGMs should be considered exempt employees. *Accord Cowan v. Treetop Enterprises, Inc.*, 120 F. Supp. 2d 672, 691 (M.D. Tenn. 1999) (under circumstances similar to those at issue, the court granted summary judgment for employees finding that the role of the district manager in relation to the unit manager undermined the frequency of the unit managers' exercise of managerial functions).

Further, while it may very well be that some of ECP's declarants may not wish to benefit by the relief sought in this action, such a view by some members of the class "does not impair the legitimacy of a class action." *Zimmer v. City of Seattle*, 19 Wn. App. 864, 870, 578 P.2d 548 (1978).

ECP cites to *Miller* for the proposition that "if the class members differ from the named plaintiff in critical respects, any advantages of class certification 'all but disappear.'" Def.'s Brief, at 2. An analysis of the facts in *Miller*, though, shows that the case does not avail ECP. In *Miller*, the court was concerned with the varying tasks of outside salesmen. The plaintiffs claimed that they spent so much of their time delivering and stocking supplies for existing customers that they had insufficient time to

develop new clients. The *Miller* court noted that class treatment may be inappropriate in circumstances where “the resolution of a common legal issue is dependent upon highly specific factual and legal determinations that will be different for each class member.” 115 Wn. App. at 824. In the case of salesmen, their entitlement to overtime turned on whether each employee customarily and regularly engaged in sales activities. *See id.*

In contrast to the issue in *Miller*, Weston’s claims turn largely on the discretion (or lack thereof) given to RGMs in relation to ECP’s Area Coaches. This discretion is dictated by ECP’s organization structure and organizational policies alone, policies that both Weston and ECP believe apply equally to all RGM’s. Absent the sort of factual issues present in *Miller*, questions regarding employees’ entitlements to overtime where the employer claims an exempt status are precisely the sort of legal determinations calling for resolution on a class wide basis. *See, e.g., Perez v. RadioShack Corp.*, 386 F. Supp. 2d 979 (N.D. Ill. 2005); *Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194 (Cal. 2004).

In *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 607-08 (C.D. Cal. 2005), for example, the employer put forth the same argument as ECP has in this case. It argued that the “overriding” issue was whether reporters and account executives were exempt or non-exempt from overtime requirements and that the court has to engage in an

individualized inquiry into each reporter's and account executive's job duties, hours, and/or income in order to determine whether or not that individual should be classified as "exempt." The court rejected this argument as "unpersuasive" because "Defendant itself classifies all reporters and account executives as exempt. Defendant cannot, on the one hand, argue that all reporters and account executives are exempt from overtime wages and, on the other hand, argue that the Court must inquire into the job duties of each reporter and account executive in order to determine whether that individual is 'exempt.' Moreover, Defendant's argument ignores the fact that Plaintiffs are challenging Defendant's policy of classifying all reporters and account executives as 'exempt.'" *Id.* at 613.

The *Wang* court concluded that "questions of law and fact predominate in this case. These questions include: whether Defendant has a uniform policy of unlawfully treating certain classifications of employees as 'exempt' . . . ." The legal basis for certifying this action as a class is indistinguishable the reasoning set forth in *Wang*.

**D. The Trial Court Has the Discretion to Manage This Class Action.**

ECP's arguments against class certification ignore the fact that (1) this case is still in its infancy; and (2) should information come to light

through the class-wide discovery process that necessitates the creation of subclasses or decertification, the trial court has the discretion to manage the class action as it deems fit.

CR 23 gives the trial court the discretion to limit a class action to particular issues or to otherwise divide the action into subclasses should the evidence support such treatment. *See* CR 23(c)(4). If, after class discovery relevant to the class' claims, Weston discovers that a portion of ECP's restaurants treated RGMs differently than others (and perhaps differently than ECP's six declarants), the trial court has the discretion to define how the class' claims should proceed. The class' claims have not been fully explored through the discovery process in order to allow such a division to be made. Reversing the trial court's order would have the effect of inappropriately preventing Weston from developing and defining the contours of the class.

Additionally, should discovery come to light that supports ECP's argument that common issues do not predominate this litigation, the trial court maintains the discretion to decertify the class action at a later date. *See* CR 23(d). However, before a decision to decertify – or refuse to certify in the first place – is made, Weston must be given the opportunity to develop the information underlying the class' claims. To find otherwise

would be to deny class members' any relief for potentially meritorious claims.

#### IV. CONCLUSION

It is time for this litigation to finally fully develop in the trial court. The trial court properly concluded that class certification was appropriate in this case. That decision should not be upset absent a showing that it was manifestly unreasonable or based on untenable grounds. Based on the foregoing, this Court should affirm the trial court's order and permit this case to proceed.

Dated this 27<sup>th</sup> day of July, 2006

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 27th day of July, 2006, I caused to be served a copy of the document to which this certificate is attached, on the following:

Paul L. Dayton  
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- via electronic mail
- via U.S. Mail
- via legal messenger
- via overnight mail
- via facsimile

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 BY \_\_\_\_\_  
 OFFICER

I declare under penalty of perjury under the laws of the State of Washington this 27th day of July, 2006, at Portland, Oregon.

By: Carol Green  
Carol Green