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I. INTRODUCTION

Respondent Interstate Distributor Co. (“IDC”) is a Washington-based trucking company. CP 1, 94. IDC pays its line haul truck drivers in an alternative method (a mileage based system) as permitted by the Washington Minimum Wage Act (“MWA”), Ch. 49.46 RCW. CP 237. IDC’s alternative compensation system is, and always has been, in full compliance with the requirements of the MWA.

The Washington Department of Labor and Industries (“DLI”) determined IDC’s compensation system to be reasonably equivalent to what employees otherwise receive under the MWA’s general overtime requirements. DLI made its determination in accordance with a properly enacted regulation implementing the MWA. IDC has demonstrated with unrebutted testimony that drivers paid according to this alternative method actually receive more than drivers paid according to the MWA’s general overtime guidelines. CP 236-40. IDC’s compensation system is legal and fair.

Appellant Larry Westberry (“Westberry”) filed the instant lawsuit against IDC on or about May 29, 2008. Westberry incorrectly contended IDC’s compensation system violated the MWA. He also alleged he would prosecute his lawsuit on behalf of a similarly situated class of individuals.

CP 1-3. However, in the two-plus years since Westberry commenced this case, he has never filed a motion for class certification (or undertaken any other discernible efforts to obtain class certification).¹

IDC brought a motion to dismiss this case under CR 12(b)(6) and/or CR 56. CP 220. IDC argued that Westberry's claim failed as a matter of law because he was paid under a reasonably equivalent compensation system as permitted by the MWA *and* because he could not prevail on an MWA claim as a Georgia-based employee. CP 227-35. Westberry did not request a continuance under CR 56(f) to conduct additional discovery in order to prepare his response to IDC's motion. The Pierce County Superior Court granted IDC's Motion for Summary Judgment based on IDC's reasonably equivalent compensation system. CP 315-16. This Court should affirm the Superior Court's decision to grant IDC's Motion for Summary Judgment.

II. ASSIGNMENT OF ERROR

Error Assigned by Appellant

Westberry assigns error to the Superior Court's dismissal of this case on summary judgment. Westberry argues that summary judgment was

¹ Westberry's Brief uses the term "appellants," suggesting there is more than one person. This is not so. Because Westberry is the only appellant, IDC will use the singular rather than the plural.

based on an *ex parte* application from IDC to DLI and a subsequent determination of disputed facts and law by DLI.

Issue Pertaining to Appellant's Assignment of Error

Did the Superior Court err in granting summary judgment to IDC?

III. STATEMENT OF THE CASE

A. Relevant Facts.

IDC employed Westberry as a line haul truck driver from 2003 to 2007. Westberry was a Georgia-based employee during the entire time he was employed by IDC. Westberry admitted in his Complaint that he “resides in Jesup, Wayne County, Georgia.” CP 1-2; 221-22. His admission is consistent with all relevant documentation in his personnel file maintained by IDC (e.g., license issued by the State of Georgia, Employment Eligibility Verification form lists mailing and residential addresses in Georgia, and his employment application lists a Georgia address and declares he resided at that address for nine years). CP 237.

IDC utilized an alternative method of compensation to pay Westberry and other line haul truck drivers. CP 237-40. The use of alternative compensation systems by trucking industry employers is expressly authorized under the MWA. The MWA, at RCW 49.46.130(2)(f), provides that the MWA’s general overtime requirements do not apply to:

An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et. seq. and 49 U.S.C. Sec. 10101 et. seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

Washington's legislature adopted this exception to the MWA's overtime requirements over two decades ago. Specifically, since 1989, the MWA has expressly provided that standard overtime computations do not apply if the trucking employer's compensation system paid the reasonable equivalent of overtime (as does IDC's compensation system). Washington Laws, 1989 c. 104 Sec. 1; RCW 49.46.130(2)(f). IDC's alternative compensation system complies with the MWA by paying affected employees the reasonable equivalent of overtime (IDC actually pays more than the equivalent of overtime under its MWA-compliant alternative compensation system). IDC demonstrated the reasonable equivalence of its alternative compensation system to the Superior Court with detailed evidence that was not rebutted by Westberry.

Regulations were also adopted in 1989 to implement the reasonable equivalent exception to the MWA's general overtime requirements. *See e.g.*, WAC 296-128-012 (overtime for truck and bus drivers). DLI formally approved IDC's compensation system for its line haul truck drivers as

reasonably equivalent under the MWA in accordance with legally adopted regulations. CP 232-35; 238-40; 255-56; 275-76. In doing so, DLI acknowledged that IDC's line haul truck drivers typically received *greater* compensation under its alternative compensation system vis-à-vis IDC's local drivers who are simply paid time-and-a-half for overtime per the MWA's general overtime requirements. CP 236-39; 256.

B. Procedural History.

Westberry commenced this case in Pierce County Superior Court on May 29, 2008. CP 1-3. IDC appeared through the undersigned law firm. CP 36-37.

On or about June 25, 2008, IDC removed the case to the United States District Court for the Western District of Washington. CP 93-99. IDC asserted that a diversity of citizenship existed based on the amount in controversy and Westberry's admission that he was a Georgia resident. CP 94-95. IDC calculated the alleged amount in controversy using the allegations specifically made by Westberry in his own Complaint. CP 95.

On July 24, 2008, Westberry moved to remand the case to Pierce County Superior Court. CP 103-116. To support his motion, Westberry asserted the amount in controversy did not exceed the jurisdictional requirement of \$75,000. CP 108-116. In making this assertion, Westberry

conceded he had not reviewed his logbooks prior to filing his Complaint and instead based his allegations “upon his admittedly imperfect memory”. CP 109. IDC contended that it was entitled to rely upon the allegations made by Westberry in his Complaint. CP 12.

The District Court determined “the amount in controversy in this matter does not exceed \$75,000” (CP 14) and remanded the case to the Pierce County Superior Court on August 22, 2008. CP 16.

Westberry subsequently took no apparent action to prosecute this case for approximately a year and a half – when he served discovery requests upon IDC in December 2009. CP 224.

C. Superior Court’s Decision.

On February 1, 2010, IDC moved for dismissal of the case under CR 12(b)(6) and/or CR 56. The motions for dismissal were made in the alternative, with the same two grounds provided in support of dismissal under both CR 12(b)(6) and CR 56. First, IDC argued that Westberry could not prevail on a claim under the MWA because he was a Georgia resident and the MWA only applies to Washington-based employees. Second, IDC argued that Westberry could not prevail on a claim against IDC under the MWA because the compensation structure employed by IDC was reasonably equivalent in accordance with the MWA and WAC 296-128-012. CP 220-

35. On April 2, 2010, Judge Kathryn J. Nelson granted IDC's Motion for Summary Judgment based on IDC's compliance with the MWA's reasonable equivalency standard. CP 315-16.

IV. ARGUMENT

IDC respectfully requests that this Court affirm the Superior Court's Order granting IDC summary judgment. CP 315-16. This Court should apply the *de novo* standard of review and engage in the same inquiry as the Superior Court in reviewing that court's summary judgment order. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (internal citation omitted).

A. Westberry's Case was Properly Dismissed as a Matter of Law Because IDC's Compensation System is Reasonably Equivalent to the General Overtime Requirements of the MWA

The MWA, subject to certain exceptions, requires employers to pay employees one and one-half their regular rate of compensation for hours worked over 40 per designated workweek. RCW 49.46.130(1). One exception to this rule applies to interstate truck drivers like Westberry. The exception applicable to Westberry, which is set forth at RCW 49.46.130(2)(f), provides that the MWA's overtime requirements do not apply to:

An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act

(49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, *reasonably equivalent* to that required by this subsection, for working longer than forty hours per week.

(Emphasis added). Westberry's case was properly dismissed because IDC complied with the statute by compensating him an amount reasonably equivalent to that otherwise required by the MWA.

The statutorily provided reasonable equivalence exception to Washington's general overtime requirements is a legislative acknowledgment of the unique nature of the trucking industry. Alternative mileage based compensation systems are necessary to ensure that drivers operate safely and efficiently when on the road away from immediate supervision.

Since 1989, the MWA has expressly provided that regular overtime requirements do not apply to individuals employed as truck drivers if the compensation system under which the drivers are paid is reasonably equivalent to the MWA's general overtime requirements. RCW 49.46.130(2)(f); Washington Laws, 1989 c. 104 Sec. 1. Regulations (WAC 296-128-011 and 296-128-012) allowing an employer to submit its

compensation system to DLI for a reasonably equivalent analysis and approval were also adopted in 1989.²

IDC proved, through unrebutted declaration testimony, that line haul truck drivers like Westberry were paid more under IDC's statutorily-allowed alternative compensation system. Consequently, IDC demonstrated its alternative compensation system complied with the MWA by paying at least a reasonably equivalent amount. The record in this case also proves DLI formally approved IDC's compensation system for its line haul truck drivers as reasonably equivalent under RCW 49.46.130(2)(f) and WAC 296-128-012. CP 238-40, 255-56, 275-76, 278-79, 280. Thus, the Superior Court properly dismissed Westberry's claims as a matter of law.

1. IDC's Compensation System Complied with the MWA and its Implementing Regulations Before and After *Bostain v. Food Express*.
 - a. *IDC presented unrebutted evidence proving its line haul truck driver employees are paid a reasonably equivalent sum in compliance with the MWA.*

² WAC 296-128-012(1)(c) expressly empowers DLI to "evaluate alternative pay and formulas used by employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked in excess of forty hours per week."

The reasonably equivalent standard under the MWA was enacted in 1989. For over two decades, employers like IDC have had the legal right to make use of alternative compensation systems for truck driver employees. An alternative compensation system is permitted under the MWA if it compensates drivers in an amount that is reasonably equivalent to the amount the drivers would otherwise receive under the MWA's general overtime requirement. The alternative compensation system used by IDC pays its drivers an amount reasonably equivalent to the amount the drivers would receive under the MWA's general overtime requirement. IDC's alternative compensation system is statutorily compliant.

IDC presented detailed evidence to the Superior Court demonstrating compliance with the MWA's reasonably equivalent standard. The evidence proved that IDC's line haul truck drivers are actually paid more than what IDC's local Washington drivers receive under the general overtime requirements of the MWA (local drivers are paid hourly, plus overtime at time and one-half). CP 239, 257-73. Westberry did not rebut this evidence. CP 295-304. The evidence unequivocally demonstrates IDC's alternative compensation system is compliant with the statute's twenty-plus year old reasonably equivalent standard.

- b. *IDC's alternative compensation system complied with the statute and DLI's legally adopted interpretive regulations before and after Bostain v. Food Express.*

Since enactment of the reasonably equivalent standard under the MWA in 1989, trucking companies in Washington have relied upon DLI's interpretive regulations. One such regulation, WAC 296-128-012, was amended following the March 1, 2007 decision of the Washington Supreme Court in Bostain v. Food Express, Inc., 159 Wn.2d 700, 153 P.3d 846 (2007). The Bostain court held that “[t]he overtime provisions of RCW 49.46.130 apply to all hours worked by a Washington-based truck driver engaged in interstate transportation, whether worked within Washington State or outside the state.” Id. at 724. The Bostain decision did not, however, abolish the reasonably equivalent exception to the overtime requirements of the MWA found at RCW 49.46.130(2)(f). That exception was unaffected by Bostain and remains the law in Washington. *See, e.g., Bostain*, 159 Wn.2d at 715 (“a worker must be paid an amount equal to one and one-half times the hourly rate *or be provided reasonably equivalent compensation.*”)(Emphasis added).

Prior to the Bostain decision, DLI interpreted the relevant regulations related to the MWA (former versions of WAC 296-128-011, 012) to apply only to hours an employee worked within Washington. Trucking companies

relied upon this interpretation. CP 239. Recognizing the unfairness of denying employers who relied on these regulations the benefit of the MWA's reasonably equivalent exception, DLI amended WAC 296-128-012(3) to contain a safe harbor allowing employers 90 days after the regulation's amendment to prove that their pre-Bostain compensation plan paid employees the reasonable equivalency of overtime. The record does not contain any evidence indicating DLI failed to comply with Washington's Administrative Procedure Act ("APA"), Ch. 34.05 RCW, in amending WAC 296-128-012. Amended WAC 296-128-012(3), which was adopted on October 21, 2008 (with an effective date of November 21, 2008), provides:

Compensation plans before March 1, 2007. An employer who employed drivers who worked over forty hours a week consisting of both in-state and out-of-state hours anytime before March 1, 2007, may, within ninety days of the adoption of this subsection, submit a proposal consistent with subsection (1) of this section to the department for approval of a reasonably equivalent compensation system. The employer shall submit information to substantiate its proposal consisting of at least twenty-six consecutive weeks over a representative period between July 1, 2005 and March 1, 2007. The department shall then determine if the compensation system includes overtime that was at least reasonably equivalent to that required by RCW 49.46.130.

Amended WAC 296-128-012(3) did not create a new right for trucking employers to pay their employees the reasonable equivalent of

overtime under the MWA. That right had been in existence since 1989 pursuant to RCW 49.46.130. The amendment to WAC 296-128-012 simply allowed employers who previously believed that it was unnecessary to obtain a reasonably equivalent determination from DLI (because of the employers' reliance upon DLI's prior interpretation that the overtime requirements of the MWA only applied to hours worked in Washington) a window to submit their respective compensation plans which had been in existence prior to the March 1, 2007 Bostain decision to DLI for approval.

IDC submitted its *present* reasonably equivalent compensation system to DLI for approval on December 13, 2007, months prior to adoption of amended WAC 296-128-012(3). CP 240; 258-73. On July 18, 2008, DLI determined IDC's present compensation system to be reasonably equivalent in compliance with the MWA. CP 239, 255-56. This is the same compensation system under which IDC paid Westberry during his employment with IDC from 2003 to 2007. CP 239.

On January 15, 2009, following the adoption of amended WAC 296-128-012, IDC submitted its pre-Bostain compensation system (which was the same as its present compensation system) to DLI for approval in conformance with the safe harbor portion of amended WAC 296-128-012(3). CP 240. On February 4, 2009, DLI wrote to IDC and

acknowledged IDC's January 15, 2009 request that DLI approve its compensation plan for the period of July 1, 2005 to March 1, 2007 as reasonably equivalent under the MWA. CP 240, 275-76. In its February 4, 2009 letter, DLI requested that IDC submit a "certification of accuracy and validity" pursuant to DLI administrative policy ES.A.8.3(3). CP 275. DLI further stated "Upon receipt of your certification of accuracy and validity, L&I will approve your current compensation on [sic] reasonably equivalent on a retroactive basis from July 1, 2005 to March 1, 2007 and from March 2, 2007 to July 1, 2007." CP 240, 275-76.

On April 30, 2009, IDC provided the requested certification to DLI in response to DLI's February 4, 2009 letter. CP 240, 278. DLI then approved IDC's pre-Bostain reasonably equivalent compensation system in accordance with its authority under the amended regulation. CP 240, 280. DLI's approval is further evidence of IDC's compliance with the statutory reasonably equivalent standard. As detailed above, IDC proved with un rebutted evidence that its alternative compensation system complies with the statute. IDC's compliance with the MWA, both before and after Bostain, has been affirmed by DLI.

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In summary, the record in this case proves IDC's present and pre-Bostain compensation systems, which are identical, provide reasonably equivalent compensation to IDC's line haul truck drivers (like Westberry) in compliance with the MWA. This forecloses Westberry's claims in this matter. The Superior Court properly dismissed Westberry's case as a matter of law.

2. Westberry's Analysis Regarding the MWA's Reasonably Equivalent Exception is Wrong and his Related *Ex Parte* Criticisms are Inapposite.

Westberry's Brief repeatedly suggests DLI's approval of IDC's compensation system occurred in the context of an unfair *ex parte* proceeding in which he should have been allowed to participate. This argument is a red herring premised on Westberry's misunderstanding of the state of the law and its application.

First, Westberry misconstrues the nature of the reasonably equivalent exception under RCW 49.46.130(2)(f) and ignores the fact that this is a 20-plus year old statutory exception to the MWA's general overtime requirements. Unlike the agency opinion scrutinized in Bostain, *supra*, the reasonably equivalent standard underlying this case has been legislatively sanctioned in the MWA for over two decades; it is not a regulatory creation,

an agency opinion, or an isolated tool of construction formed by DLI through *ex parte* channels. The *ex parte* concept is not applicable.

DLI's approval of IDC's reasonably equivalent compensation system was based upon the MWA and its legally adopted implementing regulations. The MWA does not provide an employee the "right" to contest his/her employer's decision to pay him/her the reasonable equivalent of overtime. The MWA only requires that "the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week". As detailed above, IDC put forth un rebutted evidence proving its line haul truck drivers are actually paid more under IDC's reasonably equivalent alternative compensation system.

Any perceived right to participate in DLI's reasonably equivalent determination process Westberry may harbor is imagined. Westberry was not entitled to participate in what he has inaccurately described as *ex parte* reasonable equivalency determination proceedings. DLI has the authority to adopt implementing regulations. Here, DLI adopted and subsequently amended regulations implementing the MWA in compliance with the APA. Westberry's suggestion that DLI approved IDC's alternative compensation system through improper *ex parte* channels is tantamount to suggesting that

every time an agency evaluates compliance with a statute or regulation, it is engaging in an *ex parte* process. That argument does not accord with the APA. For example, if DLI audits a business for compliance with worker compensation laws, the employees of that business receive no more notice of DLI's determination than Westberry received in this case.

This case is not the proper place for Westberry to attack what he subjectively perceives to be the unfairness of the MWA and/or DLI's related statutorily compliant processes. This Court should reject Westberry's attempt to weave imaginary rights into the MWA. The plain language of the reasonably equivalent overtime exception in RCW 49.46.130(2)(f) governs this case and compels affirmance of the Superior Court's Order.

Second, Westberry's Brief demonstrates a misunderstanding of how the reasonably equivalent exception works. Westberry argues "A truly 'reasonably equivalent' pay scheme would in some way provide a pay premium to a driver while working in excess of 40 hours in a week." (Appellant's Brief, p. 9). Westberry's argument is legally incorrect and has already been rejected by the Court of Appeals. In Scheider v. Snyder's Foods, Inc., 116 Wn. App. 706, 715, 66 P.3d 640 (2003) the Court held, in regard to RCW 49.46.130(2)(f):

The Salespersons complain that the compensation system is not an enhanced system as promised, and adds nothing more

than a slight base increase. While this contention may be true, this fact is unrelated to whether the compensation system pays the reasonable equivalent of overtime. The statute does not require an enhanced pay system, nor is the Bakery obliged to pay an enhanced salary. Rather, the statute simply requires that the Bakery pay the Salesperson the reasonable equivalent of time and one-half.

Westberry's argument misses another crucial point. The reasonably equivalent rate paid to IDC's line haul truck drivers already includes an embedded reasonable equivalent for overtime. In fact, IDC's line haul truck drivers typically make more money than its local drivers paid on an hourly basis. CP 239, 257-73. As referenced above, IDC proved this point before the Superior Court without rebuttal. IDC's compensation is not only "reasonably equivalent", but it operates to the undeniable advantage of the line haul employee.

In addition, Westberry overlooks the fact that IDC did not unilaterally determine whether its compensation system met the reasonably equivalent standard set forth in the MWA. Instead, IDC exercised rights that have been available to trucking employers for over 20 years under the MWA and submitted information to DLI requesting a reasonably equivalent determination. This process included a thorough inspection and review by DLI of IDC's reasonably equivalent compensation system at issue. Additionally, as part of this process, IDC responded to subsequent follow-up

inquiries from DLI. The entire process occurred in accordance with WAC 296-128-012. IDC followed the regulatory scheme in place to effectuate the MWA; it did not engage in a secretive *ex parte* proceeding with DLI.

Third, Westberry's argument that DLI's approval of IDC's compensation system came "without any notice...." (Appellant's Brief, p. 2) is more than a red herring; it is factually inaccurate. In truth, before DLI approved IDC's pre-Bostain compensation system, Westberry had actual notice that IDC was seeking a reasonably equivalent determination from DLI. In the following excerpt from Westberry's Motion to Remand (filed with the United States District Court for the Western District of Washington), Westberry acknowledged the validity of IDC's reasonably equivalent defense and acknowledged having notice of IDC's application to DLI for a reasonably equivalent determination:

This case falls squarely within *Burford*. Indeed, this entire case arises from the Washington State Supreme Court's rejection of DLI rules purporting to relieve Washington-based trucking companies from paying overtime wages to Washington-based truck drivers for overtime hours driven out of state. And the state administrative process is ongoing; in an effort to retroactively overcome *Bostain*, DLI is presently in the process of rulemaking regarding overtime wages for truck drivers. IDC is an active participant in that rulemaking procedure.

In connection with this rulemaking, IDC is currently seeking DLI's approval of a so-called "reasonably equivalent" overtime pay plan pursuant to WAC 296-128-011 / -012

which, if approved, would arguably provide a retroactive defense to IDC for its overtime-payment practices. On December 13, 2007, IDC filed a letter with DLI

CP 114-15 (internal citations and footnotes omitted). In this one excerpt, Westberry admitted that (a) he was aware of an ongoing state administrative rulemaking process applicable to the MWA's reasonably equivalent exception, (b) he was aware of and possessed a copy of IDC's request to DLI seeking approval of its compensation plan, and (c) the rulemaking process could create a defense for IDC. In spite of the foregoing, Westberry would have this Court believe he was "without any notice" of IDC's reasonably equivalent application to DLI or the rulemaking process.

Westberry admittedly had actual knowledge of *both* DLI's rulemaking process and IDC's reasonable equivalency approval request. In fact, Westberry's counsel averred to the federal court, in his July 24, 2008 Declaration in support of Westberry's Motion to Remand, that, among other things:

3. Earlier this year I filed a public disclosure request with the state Department of Labor and Industries seeking, *inter alia*, material concerning DLI's proposed rulemaking concerning the issues raised by *Bostain v. Food Express*, 159 Wash.2d 700 (decided on March 1, 2007).

4. Among the materials I received are the following, which are attached to this declaration as Exhibits 3 through 7.

5. Ex. 3: The Preproposal Statement of Inquiry published by DLI on May 6, 2008 on the subject of ‘Chapter 296-128 WAC, Minimum wages.’

....

7. Ex. 5: A letter dated Dec. 13, 2007 from Interstate Distributor Co. (“IDC”), to DLI seeking a determination that its ‘mileage based pay structure for interstate truck drivers is reasonably equivalent to the hourly rate, including overtime, paid to IDC’s local drivers.’

....

9. Ex. 7: A copy of the proposed WAC 296-128-012(3).

CP 135-36. Further, Westberry’s counsel’s July 24, 2008 Declaration even attached a copy of proposed WAC 296.128-012(3) and expressly referenced the proposed adoption date (October 21, 2008) of the rule. CP 115.

Westberry’s knowledge of the subject rulemaking process in 2008 is indisputable. Westberry’s failure to become engaged in the rulemaking process in 2008 was his own choice; not the result of circumstances beyond his knowledge.

Westberry’s apparent decision to forego any attempt to intervene in the rulemaking process regarding proposed WAC 296-128-012(3) prior to its adoption accords with the laissez-faire approach he has taken throughout this case. For example, Westberry took no action for approximately one and one-half years following the remand from federal to state court, he

conducted no depositions, he chose not to move for a continuance of IDC's summary judgment motion under CR 56(f) to conduct discovery, and he never moved for class certification. The level of Westberry's involvement in the subject rulemaking process was the result of his own volition about which he cannot justifiably complain to this Court.

Fourth, the regulations at issue here were adopted in the same manner as all regulations - with notice and an opportunity for public comment as provided for by the APA. *See* RCW 34.05 *et seq.* Westberry's Brief does not contend that the subject regulations were improperly adopted under the APA. Nor could Westberry reasonably make such a claim given his assertion to the federal court as part of his Motion to Remand, wherein he stated "Ex. 3 to Ellsworth Dec. is a copy of the 'Preproposal Statement of Inquiry' regarding the proposed rule, published by DLI on May 6, 2008 *in accordance with the state Administrative Procedure Act, RCW 34.05.*" CP 115 (emphasis added). Further, and as established above, Westberry had actual knowledge in 2008 of the rulemaking process regarding proposed WAC 296-128-012(3). CP 114-15.

Finally, Westberry's attempt to color this case as unfair is misplaced. It is apparent that his real issue lies with his subjective distaste for the MWA and its implementing regulations. With respect to the MWA, Westberry will

need to make his appeal directly to the legislature or pursue recourse through an independent action. With respect to the regulations implementing the MWA, Westberry can file a petition for amendment or repeal as permitted by the APA, Ch. 34.05 RCW. Any such action by Westberry, however, cannot change the outcome of this case. Amended WAC 296-128-012 took effect two years ago. The MWA's reasonably equivalent overtime exception has existed for over 20 years. The Superior Court in this case properly applied the existing law in Washington to determine Westberry's lawsuit must be dismissed. This case is not the appropriate avenue for Westberry to initiate a challenge of the MWA or its implementing regulations.

In summary, Westberry's lawsuit is barred by the MWA and WAC 296-128-012. The Superior Court properly agreed and granted IDC's Motion for Summary Judgment based upon DLI's reasonably equivalent determination under the foregoing authority. The fact that Westberry does not like the statutorily provided reasonably equivalent model is irrelevant. This Court should affirm the Superior Court's dismissal of Westberry's lawsuit.

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B. The Superior Court’s Order Granting IDC Summary Judgment Should Also be Affirmed on the Additional and Independent Grounds that Westberry was Not a Washington Employee When He Worked for IDC³

IDC respectfully submits that this Court should affirm the Superior Court’s Order granting it summary judgment for the reasons set forth above in Section IV.A. of this Brief. IDC also respectfully submits that this Court should affirm the Superior Court’s order based upon the additional and independent grounds set forth in this Section IV.B.

1. Westberry, as a Former Georgia Employee, Cannot State a Claim Under *Bostain v. Food Express*.

Westberry asserts “this entire case arises from the Washington Supreme Court’s rejection [in *Bostain v. Food Express*, 159 Wn.2d 700, 153 P.3d 846 (2007)] of DLI rules purporting to relieve Washington-based trucking companies from paying overtime wages to *Washington-based truck drivers* for overtime hours driven out of state.” CP 114 (emphasis added).

³ Westberry’s Appellant Brief mischaracterizes the CR 56 Motion IDC put before the Superior Court in an apparent attempt to foreclose IDC from raising this argument. In that Motion, IDC asserted two primary grounds for dismissal, arguing that both justified dismissal under CR 56 (the same arguments were made as to IDC’s CR 12(b)(6) Motion). CP 220-35. IDC may now argue any grounds in support of the summary judgment order that are supported by the record. See *McGowan v. State*, 148 Wn.2d. 278, 287-88, 60 P.3d 67 (2002)(“Because the State prevailed, it was not required to cross-appeal the court’s ruling as to section 2(1)(a); it seeks no further affirmative relief from this court. RAP 2.4(a); RAP 5.1(d); *State v. Bobic*, 140 Wash.2d 250, 257-58, 996 P.2d 610. The State is entitled to argue any grounds in support of the superior court’s order that are supported by the record. *Id.* at 258, 996 P.2d 610.”); *In re Doyle*, 93 Wn.App. 120, 127, 966 P.2d 1279 (1998)(“Under the Rules of Appellate Procedure 5.1(d), a notice of cross appeal is essential if the respondent seeks affirmative relief *as distinguished from urging additional grounds for affirmance.*”)(Emphasis added).

As Westberry accurately stated, Bostain only applies to Washington employees. Westberry was not a Washington employee when he worked for IDC – he was a Georgia employee. CP 237. Bostain, therefore, is inapplicable to Westberry and his lawsuit fails as a matter of law.

The Supreme Court’s opinion in Bostain makes it clear that the MWA, upon which Westberry is suing IDC and basing his entire case, applies only to *Washington employees/drivers*. The Bostain court unequivocally held:

The overtime provisions of RCW 49.46.130 apply to all hours worked by a *Washington-based truck driver* engaged in interstate transportation, whether within Washington State or outside the state.

Bostain, 159 Wn.2d at 724.

In addition to the express language of this holding, Justice Madsen’s Bostain opinion refers to “Washington-based” drivers or employees, “Washington employees”, and/or “Washington’s work force” no less than 14 additional times.⁴ Each such reference is excerpted below:

⁴ The Bostain court did not provide a specific definition for a “Washington-based employee”. Presumably, the court did not define the term because it believed the definition of a “Washington-based employee” to be self-evident. However, rational indicators of a “Washington-based employee” could include residence, location of dispatch, and to what state taxes are paid regarding the employee. Regardless, there are no facts in the record that would indicate Westberry was a Washington-based employee.

1. Rather, the legislature's policy declaration in RCW 49.46.005 describes the purpose of the MWA and speaks to the importance of minimum wage protections for *Washington employees* in order to encourage Washington employment opportunities. Bostain, 159 Wn.2d at 711.

2. Here, the purposes of the MWA would be contravened if RCW 49.46.005 is construed to exempt *Washington-based employees* who work out of state. Id. at 712.

3. A restrictive reading of the declaration section and overtime provisions of the MWA would be inconsistent with protecting workers and, specifically, would be inconsistent with the protections afforded *Washington employees* under the MWA. Id. at 712.

4. Interpreting the word 'hours' in RCW 49.46.130(1) and (2)(f) to mean 'hours worked in Washington State' is neither plainly nor unmistakably consistent with the language in RCW 49.46.130(1) or the spirit of the MWA's minimum wage levels for *Washington employees*. Id. at 712.

5. and 6. Considering the plain language of RCW 49.46.130(1), RCW 49.46.130(2)(f), and RCW 49.46.005, we conclude that the trial court correctly determined that all hours of work must be considered, whether worked within this state or not, when determining overtime due a *Washington employee*. Here, Mr. Bostain was a *Washington employee*. Under RCW 49.46.130(1) he is entitled to overtime for the hours he worked in excess of 40 per week. Id. at 712-13.

7. Whether overtime under RCW 49.46.130(1) must be paid for an employee as a *Washington-based employee* will depend on factors that courts routinely use for deciding choice of laws issues. Id. at 713 n.5.

8. Neither case controls or precludes our holding here that the WMA [sic] unambiguously requires that overtime be

paid to a *Washington employee* based on all hours worked. Id. at 717.

9. Assuring proper compensation for *Washington employees* is an important legitimate local interest served by the overtime provisions of the MWA. Id. at 719.

10. (noting State's long history of protecting employees' rights and the legislature's concern for the welfare of *Washington's work force*). Id. at 719.

11. In relevant part, the MWA regulates only employers who are doing business in Washington and who have hired *Washington-based employees*. Id. at 719.

12. and 13. Here, the Bostains point out, overtime under the MWA applies to *Washington-based employees*, and it is difficult to conceive of circumstances where one who does not qualify as the employer of a *Washington-based employee* would be subject to the MWA's overtime pay regulations. Id. at 720.

14. As the Bostains maintain, if the employee is a *Washington-based employee* subject to Washington's MWA, the employer is not likely to be subject to the wage and hour statutes of another jurisdiction with respect to that employee. Id. at 721.

(Emphasis added).

Even assuming every fact alleged in his Complaint to be true, Westberry can prove no set of facts that would entitle him to relief because he was not a Washington employee when he worked for IDC. As a matter of law, Westberry's lawsuit fails because Bostain is inapplicable to Westberry as a former Georgia employee of IDC.

2. Westberry Would Not be a Proper Class Representative under CR 23.

Westberry's Complaint seeks to bring this lawsuit as a class action on behalf of "all other similarly situated individuals pursuant to Civil Rule 23(b)(3)." CP 2. As noted above, Westberry's Appellant Brief makes repeated reference to "plaintiff truck drivers", the class, and appellants (plural). The fact is there is no class and it is incorrect to suggest otherwise; there is only Larry Westberry. Westberry filed this case on May 29, 2008. CP 1. In the two-plus years since, Westberry has made no effort to obtain class certification. Westberry cannot benefit from his lack of diligence and this Court should not consider the residency of potential parties not properly before the Court.

Presumably, Westberry did not move for class certification because any such motion would fail under the plain language of CR 23(a), which provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Westberry would not be a proper class representative under CR 23(a). His admitted theory of the case is based on Bostain. As established above, Bostain applies to Washington employees, not Georgia employees like Westberry. Washington law cannot provide any relief to Westberry. He thus fails to satisfy the requirements of CR 23(a)(2), (3), and (4).

CR 23(b)(3) contains additional requirements Westberry cannot satisfy to maintain a class action in Washington against IDC. Among other things, CR 23(b)(3) requires that the Court find “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” How can Westberry possibly satisfy this requirement when his very theory of the case relies upon the Washington common law articulated in Bostain which has no applicability to Westberry, a Georgia employee?

Westberry contends that “[t]he prospective class action would not be dismissed, however, even if Westberry’s personal claims were not governed by Washington law because there are Washington residents in the class and they are available to represent the class.” Appellant’s Brief, p. 3. In making this argument, Westberry attempts to equate this case to

O'Brien v. Shearson Hayden Stone, 90 Wn.2d 680, 586 P.2d 830 (1978).

O'Brien is easily distinguishable. In O'Brien, the court undertook a choice of law analysis and directed the trial court to create subclasses for the division of class members. The O'Brien court would not have been able to divide the class based upon applicable law if there was no class. Here, there is no class, only Westberry. Westberry brought his action under the MWA. As detailed above, the MWA is only applicable to Washington-based employees. Westberry's case fails as a matter of law (individually and as a class representative) because he is not a Washington-based employee.

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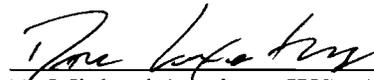
V. CONCLUSION

The Superior Court's Order granting IDC summary judgment should be affirmed because the record in this case proves IDC's alternative compensation system is reasonably equivalent as required by the MWA. The Superior Court's Order should also be affirmed on the independent basis that Westberry cannot prevail on a MWA claim as a Georgia-based employee.

DATED this 10th day of November 2010

MCGAVICK GRAVES, P.S.

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