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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID COOPER and JERRY SCOTT,
individually and on behalf of all those similarly situated,

Respondents/Plaintiffs,

v.

ALSCO, INC., a foreign corporation,

Appellant/Defendant.

APPELLANT ALSCO INC.'S REPLY BRIEF

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I. INTRODUCTION

Despite Respondents' extensive briefing and argument from public policy and supposedly analogous federal regulations, this is a simple case. The Washington Minimum Wage Act ("MWA") under RCW 49.46.130(3), provides an overtime exemption for employees of a "retail or service establishment" if they are paid a commission that represents at least half of their pay and that provides at least one and one half times the state minimum wage. For AlSCO's RSRs, those conditions are met. Accordingly, this Court should reverse the trial court's grant of summary judgment and hold that the RSRs were properly classified as exempt.

As AlSCO demonstrated in its opening brief, the trial court erred by disregarding the language of RCW 49.46.130(3); this Court's decision in *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 64 P.3d 10 (2003), which construed the exemption for a retail or service establishment under the MWA; and the federal cases interpreting the analogous exemption under Section 207(i) of the Fair Labor Standards Act. All of these authorities support the conclusion that AlSCO is a "retail or service establishment," and the RSRs were properly classified as exempt.

Respondents fail to distinguish *Stahl* in any meaningful way. There is no valid reason for treating AlSCO differently from the employer in that case: here, as in *Stahl*, the employer primarily sells its products and

services under contracts with other businesses, and individual customers and employees of those businesses use the products and services. Like the employer in *Stahl*, AlSCO is a “retail or service” establishment, and its RSRs are properly classified as exempt.

Respondents also rely on outdated case law and long-ago repealed statutory authority. The language of many of the federal cases on which the Respondents rely is based upon Section 213(a)(2) of FLSA which was repealed in 1989 and which did not ever address the exemption for employees paid on a commission basis in any event.

If the Court reaches the damages issue (it should not) then the Court should reverse the trial court and hold that the proper method for calculating the regular rate of pay in this case is the method expressly provided for in Washington law: dividing the employee’s total compensation received for a week by the total number of hours worked in that week. WAC 296-128-550. Under Washington law, if an employee paid on a commission basis is entitled to overtime compensation, he or she is entitled to an additional half time pay, on top of that regular rate, as a premium for each hour worked over 40 hours. RCW 49.46.130(1). Respondents would have the Court create a new and improper method of calculating the regular rate so that if an employee is misclassified and sues, he or she recovers substantially more overtime pay than the

employee would have been owed if initially treated as non-exempt. Creating and imposing such a penalty on AlSCO is contrary to the express provisions of the MWA. Under the MWA, the remedy in the event of a misclassification is to make the employee whole. RCW 49.46.090. The only time a penalty is authorized by the MWA is when the failure to pay overtime is the result of a willful violation by the employer. RCW 49.52.070. Here there is no question that the failure to pay overtime was not a willful violation. It is undisputed that AlSCO paid employees pursuant to the terms of its collective bargaining agreement with their union, and the employees paid with commissions chose this method of compensation. Moreover, Respondents have conceded that the alleged violation was not “willful” for purposes of the penalty provision of the Minimum Wage Act. CP 773. Because there is no basis for imposing the double damages penalty under the MWA here, if the RSRs prove they were wrongly classified as exempt, they are entitled to be made whole but nothing more. The trial court should be reversed.

II. ALSCO'S RSRS ARE EXEMPT FROM THE OVERTIME REQUIREMENTS OF THE WASHINGTON MINIMUM WAGE ACT UNDER THE EXEMPTION FOR EMPLOYEES OF "RETAIL OR SERVICE" ESTABLISHMENTS

A. The Exemption's Requirements Are Plain, And Alco's RSR Satisfies Them

Alco meets both parts of the definition of a "retail or service establishment." First, it is *undisputed* that none of Alco's goods or services are for resale. Alco's sales are end of the line transactions to the final consumers of its goods and services. *See*, Alco's Opening Brief ("Op. Br.") 12.

Second, Alco's sales of goods and services are "recognized as retail in the particular industry." The only case in Washington to address this phrase is *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 64 P.3d 10 (2003). In that case, this Court held that sales of goods and services are "recognized as retail" when the sales are (a) subject to retail sales tax and (b) an end of the line transaction between the customer and the employer.¹ *Id.* at 13. It is *undisputed* that Alco meets both of these requirements. There is no question Alco's sales are subject to retail sales tax, *see* RCW 82.08.0202 (linen supply is a retail sale subject to retail

¹ The determination of whether a business is regarded as a "retail or service establishment" is a matter of law to be determined by the courts. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 204-205 (1996); *LaParne v. Monex Deposit Co.*, 714 F. Supp. 2d 1035, 1043 (C.D. Cal. 2010). Competing opinions about whether a business is "retail" do not preclude summary judgment. *LaParne*, 714 F. Supp. 2d at 1043; *Schultz v. Nalle Clinic*, 444 F.2d 17, 20 (4th Cir. 1971).

sales tax), and its sales of goods and services are an end of the line transaction. Those goods and services are consumed and used by AlSCO's customers. In addition to *Stahl*, Washington courts have held that business to business sales are "retail" in other contexts. *See, e.g., Brittingham Leasing Corp. v. Szymanski*, 53 Wn. App. 251, 256 (1989) (defining "retail purchaser" under motor vehicle dealer law as "the buyer who is the final user of the goods"); *Amazon.com v. Szabadi*, No. 14-2-18167-1SEA, J.Ramsdell 10/20/14 Order, Docket No. 75 (2014) ("retail market sector" includes business to business sales). Respondents fail to address these cases.

B. Respondents' Attempts To Distinguish *Stahl* Fail.

The similarities between the employer's business in *Stahl* and AlSCO's business are significant. Like AlSCO, the vending machine company in *Stahl* "contract[ed] *with companies* to place vending machines in their cafeterias, lunchrooms, and snack areas." 148 Wn.2d at 879 (emphasis added). The company provided its goods and services—vending machines and their contents—to businesses for use by individual employees and customers. AlSCO's business is similar. AlSCO contracts to provide its goods and services—napkins, towels, mats, uniforms, etc.—to businesses for *use by individual* employees and customers.

Second, both Alsco and Delicor (the employer in *Stahl*) pay their route drivers a commission based on the volume of sales of goods and services, in accordance with the terms of a collective bargaining agreement between the employer and Teamsters. Respondents admit that it takes more time and effort for an RSR to upsell Alsco's goods and services than to simply drop off products. CP 396-397; 422-425; 662-663. RCW 49.46.130(3) allows employers to offer incentive compensation to employees for the extra time and effort that goes into making a sale by allowing employees to be paid a commission in lieu of overtime premiums, so long as they receive a regular rate of pay in excess of one and one-half times the minimum hourly wage and more than half of the employee's compensation represents commissions. RCW 49.46.130(3).

As the text of the statute reveals, the exemption is concerned with the amount and manner in which the employee is paid, not the nature of the employer's business. *See Gieg v. DDR, Inc.*, 407 F.3d 1038, 1046 (9th Cir. 2005) ("The policy justification for the exemption thus appears to have more to do with the employee's compensation than with the exact nature of the goods or services sold."). As the superior court properly held, Alsco compensates RSRs in accordance with the statute's

requirements.² Applying the exemption to Alsco's RSRs is wholly consistent with the policy behind the exemption for employees paid on a commission basis.³

Alsco's compensation system—consistent with the policy behind the exemption—rewards the RSRs for additional time and effort by paying commissions on the items they deliver and sell. There is no valid distinction between the situation of the employees in *Stahl* and the RSRs' situation here, and no public policy is served by allowing the exemption to apply in *Stahl* and refusing to apply it here.

Finally, Respondents argue that this Court should *overturn* the express holding in *Stahl* that whether a sale is subject to retail sales tax *is* a determinative factor for purposes of the MWA. 148 Wn.2d at 882. Respondents offer no compelling reason to abandon this existing precedent.

² As discussed in Section II.F., RSRs are paid a bona fide commission.

³ Respondents offer no evidence to support their claim that Alsco “took advantage of its misclassification of the commissioned RSRs to increase their workloads without any increase in compensation.” Resp. Br. 14. The method of payment was negotiated by the RSRs and their union in their collective bargaining agreement with Alsco, and individual class members themselves testified that they chose to be paid on a commission basis (without overtime pay) because they could earn more money for the hours they worked than if they were paid hourly and worked a 40-hour workweek. CP 659-661, 675-677. Alsco adjusted the schedules of RSRs who chose to remain compensated on an hourly basis to minimize overtime. This is completely lawful and while Respondents now complain about the process, they do not make any arguments that it is improper.

C. Respondents Rely On A Test That Congress Abolished In 1949

Respondents agree that, in general, sales of linens and uniforms have a retail concept and are recognized as retail. Resp. Br. 13. They argue, however, that AlSCO's sales should not be recognized as retail relying on the old federal "consumer use" test. ***Congress abolished this test more than 65 years ago*** when it amended the Fair Labor Standards Act in 1949 to allow employers who sell goods and provide services to other business and industrial customers to rely on the exemption for retail or service establishments. *Aetna Finance Co. v. Mitchell*, 247 F.2d 190, 193 (1st Cir. 1957) (legislative history "materials ***unmistakably*** disclose that the ***primary purpose*** of the 1949 amendment to § 13(a)(2) was to ***abolish*** the so-called 'consumer use' test which the [DOL] Administrator had been applying in determining whether the sale of goods or services was retail....") (emphasis added); *see also Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 203 (1966) (under FLSA, sales of goods and services can be retail "whether made to private householders ***or to business users.***") (emphasis added). Sales to businesses qualify as retail sales, even when they are made in larger quantities than an individual consumer might use. *English v. Ecolab, Inc.*, 2008 U.S. Dist. LEXIS 25862, *50-51 (S.D.N.Y. Mar. 28, 2008) ("The § 7(i) exemption was

intended to apply even to those large enterprises comprised of multiple establishments. The success of these enterprises is partly explained by their ability to realize certain economies of scale. ... It makes little sense that an exemption designed to cover large enterprises would be inapplicable to a particular employer based on its realization of the scale benefits of larger corporations.”).

D. Respondents Rely On Outdated Case Law And Regulations That Have No Application To The Current Exemption For “Retail Or Service” Establishments

Respondents also rely heavily on case law and regulations that use an outdated definition of retail or service establishment from the long-ago repealed exemption under section 213(a)(2) of the FLSA. This exemption was derived in a different context, served a different purpose, and has since been repealed.

The purpose of section 213(a)(2), relied on by Respondents, was to exempt *intrastate* businesses—true mom and pop stores—from the *entirety of the FLSA*, not just the overtime requirements. *Alvarado v. Corporate Cleaning Services, Inc.*, 782 F.3d 365, 371 (7th Cir. 2015). To ensure that only those small stores whose output remained within the state were exempted from the FLSA, courts and the Department of Labor defined “retail or service establishment” to include only those employers who operated on a small scale in the local community. *Id.* “This definition

made sense in that context: if Congress’s purpose was to exempt local mom and pop stores from wide-sweeping federal labor legislation (and not just from the overtime requirement), courts would want to ensure that most of the local stores’ output would remain within the state — in other words that they are operating on a small scale in the community.” *Id.* Section 213(a)(2) did not require that employees be paid on a commission basis because, unlike the exemption at issue here, that section was not concerned with the exempt status of employees paid on a commission. Moreover, ***Congress repealed section 213(a)(2) in 1989.***

Notably, all four of the cases primarily relied upon by Respondents in support of their argument that AlSCO’s sales should not be recognized as retail rely on the definition of retail or service establishment ***under this old section 213(a)(2) of the FLSA.*** See *Idaho Sheet Metal Works, Inc.*, 383 U.S. at 206; *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946); *Schultz v. Instant Handling, Inc.*, 418 F.2d 1019 (5th Cir. 1969); *Acme Car & Truck Rentals, Inc. v. Hooper* 331 F.2d 442, 447-48 (5th Cir. 1964). Respondents fail to explain how or why the definition of a retail or service establishment under the now repealed blanket exemption for intrastate businesses under section 213(a)(2) should control the interpretation of “retail or service establishment” under Washington’s

MWA or the analogous exemption under section 207(i) of the FLSA.⁴ The two provisions serve “very different purpose[s].” *See Alvarado*, 782 F.3d at 371; *English*, 2008 U.S. Dist. LEXIS 25862, *26 (criticizing reliance on regulations that “interpret a statute which has been repealed”).

In addition, even if the definition of “retail or service establishment” from section 213(a)(2) of the FLSA were applicable to the exemption provided by section 207(i) or by the MWA, the cases cited by Respondents do not support their claim that AlSCO’s sales do not qualify as retail. First, Respondents rely on *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946), which held that the sale of window washing services to “industrial customers” is not a retail sale. But that 1946 decision is no longer good law after Congress’ amendment of the FLSA in 1949 to recognize sales of goods and services to other business and industrial customers as retail.

⁴ Respondents also argue that AlSCO’s business lacks a retail concept based on the inclusion of “laundries” on the list of business that lack a “retail concept” under L&I Administrative Policy ES.A.10.3. This is a red herring. AlSCO is a textile rental services company that supplies (i.e. rents) garments, uniforms, linens, floor mats, towels, and other necessary products to consumers. It is not a “laundry” and Respondents concede as much. CP 243. Moreover, at least one court has invalidated those regulations that suggest laundries lack a retail concept. In *Reich v. Delcorp, Inc.*, the Eighth Circuit found that the inclusion of laundries in the category of businesses that lack a retail concept for purposes of the retail or service exemption was not supported by law and that “there is no ironclad barrier” to a laundry qualifying as a retail or service establishment for purposes of the exemption. 3 F.3d 1181, 1185-86 (8th Cir. 1993). The DOL has accepted the reasoning of the *Delcorp* decision. DOL Op. Letter, FLSA 2005-44 (Oct. 24, 2005).

Second, in *Idaho Sheet Metal Works*, the Court held that the sale of industrial potato processing equipment and tires for commercial vehicles and other heavy industrial machinery such as earth-moving equipment was not a “retail sale” because, unlike AlSCO’s goods and services (napkins, towels, soap, linens, etc.), the goods lacked a “private and non-commercial utility.” 383 U.S. at 207-209. Similarly, in *Schultz v. Instant Handling, Inc.*, the sale of waste removal services using “specially designed containers” that were 40 times larger than a residential trash can was not a retail sale because again, unlike AlSCO’s services, it was not something a private individual would ever need. 418 F.2d 1019 (5th Cir. 1969). These decisions are not based on the quantity of goods sold. Rather, these were goods and services that a private individual would *never* use, regardless of quantity. By contrast, individuals (both employees and the customers) use the goods and services sold by AlSCO—toilet paper, soap, towels, rags, linens, uniforms, etc.—on a daily basis.

In the last case cited by Respondents, *Acme Car & Truck Rentals, Inc. v. Hooper*, the Fifth Circuit held that fleet sales of vehicles were not recognized as retail because a member of the “general public” would have to buy in volume and *lease five or more vehicles* in order to take advantage of discount rates. 331 F.2d 442, 447-48 (5th Cir. 1964). AlSCO does not require that its customers buy in such volume: it requires only a modest

“stop minimum” charge of \$25 per week to justify the expenses that go into servicing a customer. CP 99-100; 453. Many retailers impose a minimum purchase to justify free delivery, and doing so does not change the character of a sale from retail to wholesale. AlSCO’s practice of requiring a weekly stop minimum of just \$25 per week is not remotely similar to a requirement that a customer *lease a small fleet of vehicles* in order to take advantage of volume discounts.

Recent cases interpreting the definition of “retail or service establishment” under section 207(i) of the FLSA (as opposed to the now repealed section 213(a)(2) relied on by Respondents) support applying the exemption to AlSCO. As detailed in AlSCO’s Opening Brief, both *Alvarado v. Corporate Cleaning Servs., Inc.*, 782 F.3d 365 (7th Cir. 2015) and *English v. Ecolab, Inc.*, 2008 U.S. Dist. LEXIS 25862 (S.D.N.Y. Mar. 31, 2008), hold that employers with business practices almost identical to AlSCO’s were entitled to rely on the exemption even when their sales of goods and services were made to industrial customers, pursuant to long term contracts, and in quantities that an individual consumer might not necessarily use, so long as the FLSA’s requirements for payment of adequate commissions were met. Respondents’ efforts to distinguish these recent cases fail.

The employer in *Alvarado* did not sell its cleaning services directly to individual apartment dwellers. While tenants of large residential apartment buildings benefitted from CSS's window washing services when building owners contracted for the service for the entire building, no individual tenants paid for CSS's services. CSS's sales, nonetheless, were retail. Here, like the individual tenants in *Alvarado*, individuals use Alasco's products—its napkins, towels, uniforms—even though they do not directly pay for them. Alasco's sales of its goods and services, just like CSS's sales of its window washing services, do not lose their retail character simply because a business purchases them for individual use by customers and employees.

Similarly, Respondents fail to distinguish *English* in any meaningful way. Respondents cannot dispute that the business model of Ecolab, the employer in *English*, is nearly identical to Alasco's model. Both companies sell goods and services predominantly to businesses pursuant to long term contracts. *English* held that such sales were retail. Respondents argue that such sales should not be characterized as retail because the businesses that purchase the goods and services, as opposed to the individuals who use them, "primarily benefit" from the purchases. Respondents' Opening Brief, p. 25. There is no authority to support Respondents' argument that the retail determination turns on who receives

the benefit, and their theory would mean that a business to business sales can never be “retail,” which is contrary to both Washington and federal law.⁵

E. Also Is A Service Establishment

The term “service establishment” is “much broader” than a “retail establishment”. *See Alvarado*, 782 F.3d at 369. As a “service” establishment, AlSCO is entitled to rely on the exemption regardless of whether its sales are “retail,” because it is a “service” establishment. Respondents want this Court to rewrite the language of the statute to delete the words “or service.” This is something the legislature can do, but not this Court.

F. RSRs Are Paid A Bona Fide Commission

Respondents did not appeal from or assign error to the superior court’s holding that RSRs “are paid more than 1.5 times the state minimum wage with more than half their pay being calculated by a commission formula.” *See* Notice of Appeal; Resp. Br. 2 (“Statement of Issues”). They cannot now be heard to argue that the superior court was wrong. RAP 10.3(b) (“If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to

⁵ Respondents further try to distinguish *English* because the case settled after appeal and there are additional unresolved lawsuits against Ecolab. These factors have no bearing on the validity of the holding.

those assignments of error presented for review by respondent and include argument of those issues.”); *In re Disciplinary Proceeding Against Abele*, 184 Wn.2d 1, 13, 358 P.3d 371 (2015) (appellate court reviews only a claimed error included in an assignment of error); *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 191 n.4, 332 P.3d 415 (2015) (declining to consider challenges to parts of decision where party “did not assign error to the trial court’s decision not to exclude it or designate it as an issue for review”).

Moreover, the undisputed facts in the record show that RSRs’ compensation is based on a bona fide commission rate. An employee is paid a commission for purposes of the retail or service establishment exemption (i.e., a “bona fide” commission) when there is proportionality between the employee’s compensation and the employer’s sales. *See Stahl*, 148 Wn.2d at 886. Also’s RSRs are paid a percentage of the amount charged to the customer for service and direct sales products delivered to the customer. CP 664.

RSRs have the opportunity and the ability to increase their income by making more sales. As Respondent Scott testified:

Q. And you could make more money if customers buy more things or buy the allied products, right.

A. Yes.

Q. Because the majority of your compensation is commission?

A. Yes.

CP 678. Respondent Cooper similarly testified that he has the opportunity to sell additional items to customers, and when he does, he gains the benefit of “extra volume” on his route, thereby increasing his commissions. CP 662-663. Indeed, both Respondents chose to be paid on a commission basis because they *felt they could make more money* by doing so as opposed to when they were paid on an hourly basis and limited to 40-hours per week. CP 659-661, 676-677.

The fact that RSRs do not control their customer lists or schedules is irrelevant. As the Court held in *Stahl*, an employee’s job duties do not affect whether he is paid a bona fide commission for purposes of the retail or service establishment exemption. 148 Wn.2d at 887. Even an employee who has no involvement in sales, and therefore no direct ability to increase his or her earnings, is exempt from overtime provided the employee’s compensation is tied to the amount charged to the customer and the remaining requirements of the exemption are met. *See Stahl*, 148 Wn.2d at 886. The holding in *Stahl* is dispositive and consistent with federal decisions holding that commissions based on a percentage of the amount charged to the customers are bona fide commissions for the purposes of the retail or service establishment exemption. *See, e.g.,*

Klinedinst v. Swift Investments, Inc., 260 F.3d 1251, 1256 (11th Cir. 2001); *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 508 (7th Cir. 2007); *Parker v. NutriSystem, Inc.*, 620 F.3d 274 (3rd Cir. 2010); *McAninch v. Monro Muffler Brake, Inc.*, 799 F. Supp. 2d 807, 813 (S.D. Ohio, 2011); citing *Wilks v. Pep Boys*, 278 Fed. Appx. 488, 489 (6th Cir. 2008).

Respondents rely entirely on *Cancilla v. Ecolab, Inc.*, No. C 12-03001 CRB, 2013 WL 1365939, *3 (N.D. Cal. Apr. 3, 2013). But *Stahl*, not *Cancilla* states Washington law. And unlike the service technicians in *Cancilla*, AlSCO's RSRs *do* have an avenue to increase their compensation: they can sell more product or services and thereby increase their commissions. CP 662-663.

III. THE REGULAR RATE OF PAY OF AN EMPLOYEE PAID ON A COMMISSION BASIS MUST BE CALCULATED BY DIVIDING AN EMPLOYEE'S TOTAL WEEKLY COMPENSATION BY THE TOTAL NUMBER OF HOURS ACTUALLY WORKED

Washington and federal law are both very clear about how to calculate the "regular rate" and overtime due for employees paid on a commission basis. L&I Administrative Policy ES.A.8.1 states:

When a commission is paid on a workweek basis, it is added to the employee's other earnings for that workweek and the total is divided by the number of hours worked in the workweek to obtain the employee's

regular rate for the particular workweek.
The employee must then be paid extra compensation at the one-half rate for each overtime hour worked. See WAC 296-126-021.

See Q/A #6 at pages 4-6 (emphasis added); *see also* 29 C.F.R. § 778.118

(“When the commission is paid on a weekly basis, it is added to the employee’s other earnings for that workweek ... and the total is divided by the ***total number of hours worked*** in the workweek to obtain the employee’s ***regular hourly rate*** for the particular workweek.”) (emphasis added).

A. The Fluctuating Workweek Theory Does Not Apply Here

Respondents spend fifteen pages of their brief discussing the fluctuating workweek theory and explaining why it does not apply to this case. But AlSCO does not claim, and has never contended, that the fluctuating workweek theory applies here. To be clear, again: ***AlSCO does not need and does not rely on the fluctuating workweek method in its calculation of overtime allegedly due the RSRs.***

The calculation of the regular rate of pay and the overtime due to employees paid on a commission basis, like the RSRs, is controlled by WAC 296-128-550, WAC 296-126-021, and the related L&I guidance. These regulations and L&I interpretations repeatedly and unequivocally direct that the regular rate of pay for an employee paid on a commission

basis is calculated by dividing the employee's total compensation by the total hours he or she worked. WAC-296-128-550; L&I Administrative Policy ES.A.8.1; *see also* 29 C.F.R. § 778.118. They also provide that for hours worked over 40, the premium due is an extra one-half of that rate. WAC-296-128-550; *see also* L&I Administrative Policy ES.A.8.1 ("The employee must then be paid extra compensation at the one-half rate for each overtime hour worked."). There is no question that if the RSRs had been classified as non-exempt and had been paid overtime by AlSCO, this method for calculating the regular rate would control how much they should have been paid.

Nonetheless, Respondents argue that the RSRs are entitled to recover *substantially more back pay than they would have earned if they had been treated as non-exempt and paid overtime to begin with*. This windfall theory of recovery is directly counter to the remedy provisions of the MWA.

B. The MWA Does Not Entitle Respondents To Recover A Penalty Absent A Willful Violation.

The remedy for a violation of the MWA is to make an employee whole by proving the employee what he or she should have earned (plus attorneys' fees). *See McConnell v. Mothers Work, Inc.*, 131 Wn.App. 525, 536, 128 P.3d 128 (2006) ("The sole available remedy for such violations

is found in RCW 49.46.090.”). Under RCW 49.46.090, “Any employer who pays any employee less than wages to which such employee is entitled under or by virtue of this chapter, *shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid to such employee by the employer*, and for costs and such reasonable attorney’s fees as may be allowed by the court.” (Emphasis added); *see also* RCW 4.56.110 (providing interest on judgments). Nothing in these provisions authorizes a court to impose an additional penalty against an employer or to award a misclassified employee a windfall.

Using the method required by WAC sections 296-128-550 and 296-126-021 and the L&I Guidance, the unpaid overtime allegedly due in this case would be \$278,469.91. Under the superior court’s erroneous approach it would be \$1,011,046.20.

Absent a finding of willfulness, there is no basis under the MWA for awarding a misclassified employee anything other than the amount he or she should have been paid if properly compensated as nonexempt to begin with.⁶ Under WAC-296-128-550, the regular rate for an employee paid on a commission basis must be calculated by dividing by the amount

⁶ In this case, there is no question Alscos failure to pay overtime allegedly due the RSRs was not a willful violation. The trial court so held and Respondents did not appeal that judgment. Alscos paid its RSRs pursuant to the terms of a collective bargaining agreement negotiated between Alscos and the RSR’s union, and Respondents have already conceded that the failure to pay overtime was not willful. CP 773. Thus, there is no basis to punish Alscos or to grant Respondents more than make-whole relief.

of compensation received per week by *total number of hours worked* in the workweek. The amount of additional pay, as an overtime premium, due such an employee is an extra one-half of that rate. WAC-296-128-550; *see also* L&I Administrative Policy ES.A.8.1. The trial court's decision that the regular rate of pay must be calculated by dividing the amount of compensation by the number 40 was in error and should be reversed.

IV. CONCLUSION

For the reasons set forth above and in AlSCO's opening brief, AlSCO respectfully requests that this Court reverse the summary judgments granted in favor of Respondents. This Court should direct the trial court to enter judgment in favor of AlSCO that AlSCO's RSRs are exempt from the payment of overtime under the Washington Minimum Wage Act as employees of a "retail or service establishment." In the event that the Court reaches the damages issue, the Court should hold that the regular rate of pay for an employee paid on a commission basis is calculated by dividing the employee's total compensation by the total hours he or she actually worked in the week.

RESPECTFULLY SUBMITTED this 25th day of November, 2015.

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served in the manner noted below, a copy of the APPELLANT'S REPLY BRIEF on the following:

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Executed this 25th day of November, 2015, in Seattle,
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s/ Lynn Nydam
Lynn Nydam

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Dear Clerk:

Attached for filing please find Appellant AlSCO Inc.'s Reply Brief. Hard copies will follow as identified in the certificate of service. Please advise if you are unable to open the attachment.

Thank you

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