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NO. 91801-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents/Plaintiffs,

v.

ALSCO, INC., a foreign corporation,

Appellant/Defendant.

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**APPELLANT ALSCO INC.'S STATEMENT OF ADDITIONAL  
AUTHORITY**

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AlSCO, Inc.

## STATEMENT OF ADDITIONAL AUTHORITY

Pursuant to RAP 10.8, Appellant AlSCO, Inc. submits the following additional authority relevant to the issue of whether 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:"

1. *Charlot v. Ecolab, Inc.*, Case No. 12 Civ. 4543 (KAM) (VMS), 2015 U.S. Dist. LEXIS 132790, \*89-98 (E.D.N.Y., Sep. 30, 2015) (sales of cleaning products, etc. to restaurants, hotels, and institutional customers were retail even though the customers were businesses and sales were in quantities larger than used by individual households).

Pursuant to RAP 10.8, Appellant AlSCO, Inc. submits the following additional authority relevant to the issue of whether the "regular rate" of pay of a misclassified employee paid on a salary-plus-commission basis should be calculated by dividing an employee's total weekly compensation by the total number of hours worked in a week:

1. *Yang v. Shanghai Gourmet, LLC*, 471 Fed. Appx. 784, 786 (9th Cir. 2012) (absent agreed hourly rate, regular rate for a salaried employee is obtained by dividing the employee's weekly wage by the number of hours worked each week).

2. *Desmond v. PNGI Charles Town Gaming*, 630 F.3d 351, 354-57 (4th Cir. 2011) (if employee was improperly classified as exempt and paid a weekly salary, appropriate remedy calculates regular rate by dividing salary by all hours worked in a week and paying the missing 50% premium for the hours over 40).

3. *Urnikis-Negro v. American Family Property Servs.*, 616 F.3d 665, 677-78, 681 (7th Cir. 2010); *cert. denied* 562 U.S. 1218 (2011) (FWW “does not provide the proper analytical framework” in misclassification cases; proper damage calculation determines “regular rate” by dividing salary by total hours worked in a week and adding “an overtime premium of one-half that rate” for hours over 40).

4. *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 110 (9th Cir. 1975) (approving calculation of regular rate based on the amount of compensation divided by the amount of hours that the compensation was designed to cover).

5. *Tumulty v. FedEx Ground Package Sys.*, 2005 U.S. Dist. LEXIS 25997, \*17, 2005 WL 1979104 (W.D. Wash. Aug. 16, 2005) (overtime due is calculated by dividing weekly salary by the total hours worked each week and then multiplying half that “regular rate” by the number of hours worked in excess of 40).

RESPECTFULLY SUBMITTED this 1st day of June, 2016.

Davis Wright Tremaine LLP  
Attorneys for Alisco, Inc.

By *s/ Harry Korrell* \_\_\_\_\_

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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 STATEMENT OF ADDITIONAL AUTHORITY on the following:

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Geoffrey D. Swindler, WSBA # 20176  
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Executed this 1st day of June, 2016, in Seattle, Washington.

*s/ Donna Alexander* \_\_\_\_\_  
Donna Alexander

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Dear Clerk:

Attached for filing please find Appellant AlSCO Inc.'s Statement of Additional Authority. Please advise if you are unable to open the attachment.

Thank you

*Donna L. Alexander*

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A little encouragement can spark a great accomplishment

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