

No. 94229-3

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CERTIFICATION FROM UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on  
behalf of others similarly situated,

Petitioners/Plaintiffs,

v.

DOVEX FRUIT COMPANY,

Respondent/Defendant.

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**AMICUS BRIEF**

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## I. BACKGROUND

Washington employs more than a quarter of a million farmworkers, more than any other state except California.<sup>1</sup> As of 2015, nearly half of the Washington's agricultural employees work year round, up from 25% just ten years prior.<sup>2</sup> Farmworkers are partners in Washington's \$10.7 billion agricultural economy,<sup>3</sup> but they are also neighbors, friends, and vital members of our communities.

While Washington's agricultural production has increased, costs of production have increased as well, including increases in "interest, taxes, wage rates, machinery, and services."<sup>4</sup> Prices which have not risen at the same rate as costs, exchange rates, and export policies have put pressure on farmers to become more and more efficient.<sup>5</sup> Meanwhile, labor costs and shortages have put pressure on farmers to find ways to attract and retain a reliable and productive workforce.

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<sup>1</sup> United States Department of Agriculture ("USDA") National Agricultural Statistical Service, 2012 Census of Agriculture, [https://www.agcensus.usda.gov/Publications/2012/#full\\_report](https://www.agcensus.usda.gov/Publications/2012/#full_report).

<sup>2</sup> Washington Employment Security Department 2015 Agricultural Workforce Report <https://fortress.wa.gov/esd/employmentdata/docs/industry-reports/2015-agriculture-workforce-report.pdf>.

<sup>3</sup> USDA National Agricultural Statistics Service Press Release, October 12, 2016, [https://www.nass.usda.gov/Statistics\\_by\\_State/Washington/Publications/Current\\_News\\_Release/2016/Top10\\_WA\\_2015.pdf](https://www.nass.usda.gov/Statistics_by_State/Washington/Publications/Current_News_Release/2016/Top10_WA_2015.pdf).

<sup>4</sup> Desmond O'Rourke, "Apple prices will force efficiencies," Good Fruit Grower (March 23, 2015), <http://www.goodfruit.com/orourke-apple-prices-will-force-efficiencies/>.

<sup>5</sup> *Id.*

Piece rate compensation, compensation tied to the production of a unit rather than by the hour, is a way for farmers to increase efficiency and production while directly rewarding and compensating their skilled and valued employees. While once used primarily for harvest, piece rate is now being used for a host of other activities. For example, in a cherry orchard, a worker could be paid per lug for harvest, per row for thinning or tying, or per tree for planting.

Both farmers and farmworkers benefit under a piece rate system as compared to a straight hourly rate of pay. For farmers, piece rates establish the unit labor cost for a particular task, thus enabling a more accurate prediction of the cost of production. Workers directly receive the benefit of their productivity. In addition, less direct supervision is needed under a piece a price rate system, a benefit to farmer and worker.

Perhaps the biggest benefit of a piece rate system is productivity. When workers are paid hourly, “the fastest crew worker performs at the same speed of the slowest one.”<sup>6</sup> When paying by the piece productivity is rewarded and that reward attracts a more skilled and able workforce.

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<sup>6</sup> Gregorio Billikopf, “Designing an Effective Piece Rate,” (Univ. of Cal. Jan. 30, 2008) <https://nature.berkeley.edu/ucce50/ag-labor/7research/7calag06.htm>.

A study of more than 3,000 workers showed that switching from hourly to piece rate pay increased productivity by 44%.<sup>7</sup> One of WSTFA's member farmers noted not only increased productivity of 25% when it switched from an hourly to a pieced based system of compensation, but also a 30% increase in the average employee's wages.

Piece rate works in agriculture in particular because tasks, such as picking, must be completed in a very short period of time. All harvests are short and labor intensive, but perhaps none more so than the cherry harvest. Cherries become soft as the weather warms, farmers may only harvest during the cooler periods of the day.<sup>8</sup> Work usually begins at dawn, but must stop as the day heats up. Typically workers can only work 6 hours a day before it gets too hot to continue. Unlike apples, cherries will not continue to ripen once removed from the tree.<sup>9</sup> Timing is critical:

Harvesting too early results in small size, poor color and poor flavor. Delaying harvest a few days can darken the color, increase the size, and boost the flavor. Fruit can increase in size 40% from the earliest they might be picked to full maturity. However, leaving unpicked cherries too long on the tree may result in soft fruit prone to injury,

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<sup>7</sup> Edward P. Lazear, "Performance Pay & Productivity," *Am. Econ. Rev.*, Vol. 90, No. 5, 1346-1361 (Dec. 2000) <http://www.econ.yale.edu/~dirkb/teach/pdf/lazear/2000-performancepay.pdf>.

<sup>8</sup> WSU Tree Fruit Research & Extension Center, "An Introduction to Cherry Quality and Handling," <http://postharvest.tfrec.wsu.edu/pages/N411B> (last visited July 27, 2017).

<sup>9</sup> WSU Tree Fruit Research & Extension Center, "Sweet Cherry Maturity and Harvest," <http://treefruit.wsu.edu/orchard-management/harvest/> (last visited July 30, 2017).

increased decay susceptibility, more shrivel, stem browning, and pitting.<sup>10</sup>

Farmers aim to pick at the cherry's optimum size and flavor. It is a small window of opportunity. It is skilled and fast-paced work, but productive workers are well rewarded, making anywhere from \$20 to \$50 an hour.<sup>11</sup>

An orchard is not like a factory floor. Although farmers have increased efficiencies with mechanization and horticultural practices (rolling picking platforms, shorter, closer, and trellised trees, etc.), the trees do not move down an assembly line to the workers. Workers still must move from tree to tree and block to block often carrying their ladders with them as they go. They must get their bin or lug ticket marked so that their production is counted. Many small non-picking activities are necessary to produce each piece. For example, it is estimated that as little as 30% of an apple picker's time is spent picking apples.<sup>12</sup>

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<sup>10</sup> Cindy Kahn, "Sweet Cherry Harvest" (WSU Tree Fruit June 12, 2015), <http://treefruit.wsu.edu/web-article/sweet-cherry-harvest/>.

<sup>11</sup> "The top cherry pickers can earn well over \$375 a day." Mike Richards, "Washington State Sweet Cherry Growers Expecting 'Heavy Set' Harvest," *The Lens* (July 3, 2017) <http://thelens.news/2017/07/03/washington-state-sweet-cherry-growers-expecting-heavy-set-harvest/>; Wash. State Employment Security Dep't, 2013 Survey of Washington Fruit Growers, (May 27, 2014) <https://fortress.wa.gov/esd/employmentdata/docs/industry-reports/fruit-growers-wage-survey-results-2013.pdf>.

<sup>12</sup> Linda Calvin & Phillip Martin, "The U.S. Produce Industry and Labor" USDA Econ. Research Report No. 106 at 18 (Nov. 2010). [https://www.ers.usda.gov/webdocs/publications/44764/8069\\_err106.pdf?v=41056](https://www.ers.usda.gov/webdocs/publications/44764/8069_err106.pdf?v=41056).

The term “non-productive time” is not commonly used in the farming industry. It appears to be a term chosen by plaintiffs’ counsel for undefined segments of the workday for which they are seeking extra compensation and fees. The reality is that virtually every move a worker makes once the work day starts is geared towards generating and receiving credit for the wage-producing unit/piece. Climbing a ladder or a platform, walking tree to tree or row to row, dumping the lug or bag into the bin, having a ticked marked or scanned are all inextricably related to the production of and compensation for the unit. Calling them “non-productive” is like calling legal research a “non-productive” component to writing a legal brief. Each activity is a necessary element of the process.

These so-called “non-productive” activities are provided for in the piece rate and rates are adjusted accordingly. For example, it may be harder to pick one block of Gala apples than another due to variations in fruit size, crop load, planting density, tree size, slope of the terrain, as well as a host of so-called “non-productive” variables. How far does the worker have to walk between trees? Between rows? How many times do they have to move a ladder on one tree? How tall is the tree and therefore, how many rungs does a worker climb? As the time to pick increases, typically so does the piece rate. Often a grower will test pick a small section in order to set a fair and all-inclusive piece rate. Farmworkers and farmers

have a long-standing common understanding and practice that non-productive activities are paid through the piece rate.

Many farmers further document this understanding through the notice of terms and conditions of employment required under Washington's Farm Labor Contractor Act (see RCW 19.30.110(7)) and the federal Migrant and Seasonal Agricultural Worker Protection Act (see 29 CFR § 500.75(b)) as follows:

When work is to be performed at piece rates, the specific piece rate for the work to be performed will be announced before the specific piece rate task begins. . . Piece rates fluctuate throughout the crop year and harvest periods.  
**Piece rate pay compensates the employee for all hours of work recorded during a day in which piece rate work was performed.**

Even so, it has become common practice among WSTFA's members to compensate workers at a separate hourly rate for activities such as safety and sexual harassment training, significant weather delays where the crew is asked to remain on-site or on-call, or significant travel time after the work day has commenced. While the weather and travel hypotheticals are logical stretches - most employers will simply send crews home when faced with weather so severe that it prevents work, and most employers are able to plan their work/picking schedules so that mid-day travel is not necessary - the truth is that all of these events can be tracked and recorded on a crew-wide basis with relative ease.

On the other hand, it is not feasible to track and separately record individualized micro-units of so-called nonproductive time. For example, one person may spend 20 minutes moving ladders from tree to tree in a day, while another quicker employee takes half that time. Or for example, Sally is a fast picker and is one of the first ones to fill and have her lug ticket marked. She spends 90 seconds in this task. Bob is an average picker and he fills his lug at about the same time as six other workers. He must then wait four minutes to have his lug ticket marked. It would be difficult for even the most sophisticated of farms to record this time, but nearly impossible for the small farmer with only a few acres and a handful of employees.

A hybrid approach of hourly pay with a piece rate bonus offers less incentive for productive workers because it “end[s] up rewarding workers in an inverse order to their performance level. . . the greater the worker productivity, the less the pay received per effort (i.e., per vine pruned, fruit tree thinned, box picked or pound processed). The faster workers, then, subsidize the slow ones.”<sup>13</sup> The purpose of the piece rate and the reason why it works is that it directly rewards productivity. A system that offers *less* to the most productive workers is not a substitute for straight piece rate.

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<sup>13</sup> Billikopf, <https://nature.berkeley.edu/ucce50/ag-labor/7research/7calag06.htm>.

Plaintiffs cite the average income for a farmworker in 2006 as \$17,596. In 2016, the annual mean wage for farmworkers in Washington was \$27,430<sup>14</sup> - a 55 % increase. Rewards for productivity are a net gain for both farmer and farmworker. The current piece rate system as implemented by the majority of farmers ensures minimum wage for all work performed. Workers rely on piece rate; it allows them to maximize their earning capacity and rewards them directly for their skill and hard work. Farmers are competing for labor on a national scale. Piece rate allows farmers to attract and keep workers. If piece rate is no longer available, many workers have indicated that they will move to other states that offer it. Plaintiffs' per-hour approach to piece rate compensation is short-sighted. A per-hour approach to piece rate would harm the industry and the very workers they are seeking to protect.

## II. ARGUMENT

### A. **The Minimum Wage Act does not require non-hourly employees be paid for all time worked.**

Washington law requires that all workers receive payment of wages due at a rate of at least minimum wage. RCW 49.52.050. An employer must pay for work performed. However, the parties conflate

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<sup>14</sup> Bureau of Labor Statistics, Occupational Employment and Wages, 45-2092 Farmworkers and Laborers, Crop, Nursery & Greenhouse (May 2016) <https://www.bls.gov/oes/current/oes452092.htm>.

being paid for work and being paid for *worktime*.<sup>15</sup> The distinction is important. Work is typically paid based upon units of time such as an hourly rate. When work is performed on an hourly basis, of course each hour of work must be paid. *See Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 48, 169 P.3d 473 (2007).

Although wages are commonly earned based upon the passage of time, about 5% of America's workforce is compensated based upon production.<sup>16</sup> The term "wage" is broadly defined by the Minimum Wage Act ("MWA"), as "compensation due to an employee by reason of employment." RCW 49.46.010(7). The Act's flexibility allows employers to compensate employees through non-hourly means. When work is performed on a non-hourly basis the employee need not be paid for each hour worked. *See Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.*, 139 Wn.2d 824, 834, 991 P.2d 1126, 1 P.3d 578 (2000) ("*SPEEA*") (MWA does not "provide any remedy for an employer's failure to pay an employee for all time worked").

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<sup>15</sup> Both named parties assert that the MWA requires that the employer pay for **each** hour worked and that each hour must be compensated at a rate no less than the minimum wage. Their characterizations do not accurately reflect the nature of piecework nor the law governing it.

<sup>16</sup> William J. Wiatrowski, "The Effect of Incentive Pay on Rates of Change in Wages and Salaries" (U.S. Bureau of Labor Statistics, Nov. 24, 2009), <https://www.bls.gov/opub/mlr/cwc/the-effect-of-incentive-pay-on-rates-of-change-in-wages-and-salaries.pdf>.

Employees working piece rate are not paid for each hour worked; they are paid based upon production. A per hour analysis may be feasible under some kinds of production. For example, if an employee was paid for each bicycle and she completed one bicycle before beginning the next, assuming she completed at least one bicycle an hour, the employer could record the production each hour and determine whether she met minimum wage on a per hour basis. However, for other methods of production a per hour analysis is not workable. For example, rather than working on one bicycle at a time to completion, what if the employee made 20 bicycles, completing each step of construction on the twenty bicycles before moving on to the next step? She will produce twenty bicycles only upon the completion of her final step. She would earn a large piece rate in her final hour, but the hours leading up to the completion of the final step on each of the twenty bicycles would have no production and no compensation earned and therefore would not meet minimum wage under the “per hour/each hour” test. A per hour/each hour test would stifle efficiencies, require a great deal of monitoring, and be unnecessarily complicated. A per hour approach is inconsistent with the very nature of piece rate.

**B. The Minimum Wage Act allows averaging to determine a piece rate hourly minimum wage equivalent.**

The MWA requires every employer to “pay. . . wages at a rate of not less than eleven dollars per hour.” RCW 49.46.020. The MWA is patterned after the Federal Fair Labor Standards Act (“FLSA”), which states that employees shall be paid at wages at a rate of “\$7.25 an hour.” 29 U.S.C. § 206(a). An hourly increment is a simple and practical measuring rod for testing compliance with the minimum wage requirements even for those employers who do not pay their employees on an hourly basis. *See United States v. Rosenwasser*, 323 U.S. 360, 364, 65 S. Ct. 295, 89 L. Ed. 301 (1945). Translating a piece-rate worker's wages into an average hourly rate is a simple and workable method for determining minimum wage compliance. *See* 29 C.F.R. § 776.5 (“[W]hatever the basis on which the workers are paid, whether it be monthly, weekly or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate.”).

Plaintiffs state that the MWA requires payment of “minimum wage ‘per hour,’” for all ‘hours worked,’”<sup>17</sup> and then concludes that **each** hour

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<sup>17</sup> Plaintiffs ask the Court to adopt the California’s approach to piece rate. California’s minimum wage law states, “Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage **for all hours worked** in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” Cal. Code Regs., tit. 8, § 11040 (4)(B). Plaintiffs add the phrase “for all hours worked” even though the Washington MWA contains no such language.

must equal or exceed minimum wage. As our bicycle builder illustrates above, this is not the case for those working under a piece rate or other production based compensation system. When calculating a non-hourly wage an average is used to determine minimum wage compliance.

Plaintiffs argue that averaging is improper. They claim “[t]he per hour approach to minimum wage has long been the standard in Washington and the policy of the Department of Labor and Industries.” *Pltfs.’ Opening Brief*, at p. 17. To support this assertion, Plaintiffs cite the 1994 declaration of Greg Mowat, Department of Labor and Industries Program Manager, stating, “The requirements of the Washington Minimum Wage Act are not satisfied if any hours of work are not compensated, even if the total wages paid for a workweek divided by the total number of hours worked yields an average wage greater than the minimum.” *Id.* citing Dkt. 34-2.

Notably, Mr. Mowat’s declaration was offered in the *SPEEA* case, where pursuant to contract, *hourly* employees were working off the clock. The use of the declaration as to the Department’s long standing position on determining piece rate minimum wage is misleading. The per-hour/each hour approach may be the policy of the Department in cases where employees are paid hourly, but the Department takes a different approach when the employee is paid on a piece rate basis. Since at least

1974, the Department used an averaging framework for piece rate employees. Under WAC 296-126-021, if an employee is paid solely by the piece or a combination of piece and hourly, the wages earned in a week are divided by the total number of hours worked during that week: the resulting wage must be no less than the established minimum wage rate.

Although WAC 296-126-021 does not apply to agricultural employment, see WAC 296-126-001(2)(c), the Department did not adopt a different minimum wage compliance approach for agricultural workers. To the contrary, the Department has adopted the same averaging framework for *agricultural* workers earning piece rate. The Department created guidance for agricultural employees entitled “When paid by the piece, are you earning minimum wage?”<sup>18</sup> The guidance, provided in English and Spanish, walks through a hypothetical minimum wage

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<sup>18</sup> Agricultural Workers: “When paid by piece rate, are you earning minimum wage?”, Publication F700-171-000 (01-2014) (English) F00-171-999 (Spanish), <https://www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/49647AE1-AFF8-4862-A21A-748430023EA4/f700-171-000-how-to-calculate-your-salary-in-agriculture-english-web.pdf>.

computation for a strawberry picker named José:

Example	<b>José's workweek</b>							
	José picks strawberries. His employer promised to pay 50 cents for every pound (unit) of strawberries. Every day, José records how many <b>hours</b> he worked and how many <b>pounds</b> of strawberries he picks.							
		Sun. July 14	Mon. July 15	Tues. July 16	Wed. July 17	Thurs. July 18	Fri. July 19	Sat. July 20
Units (bins/trees/pounds/etc.)	92	125	175	149	183	105	98	927 Total units
Hours (subtract your meal period)	5	8	10	9	10	7	6	55 Total hours

*For the workweek above, José was paid \$463.50 (gross wages) for picking 927 pounds (units) of strawberries at 50 cents per pound. His own records show that he worked 55 hours for the week.*

The Department divided his gross wages for the week by the number of total hours worked (\$463.50/55) and determined that he did not meet minimum wage for the week. Under the Department's hypothetical the employer was required to gross up the employee's weekly wages (not his hourly wage) so that the average wage for the week met minimum wage. This Court used the same weekly averaging framework to determine the minimum wage rate for agricultural piece rate workers in *Demetrio v. Sakuma Bros. Farms*, 183 Wn.2d 649, 661 fn. 3, 355 P.3d 258 (2015).

Under the "per hour" test suggested by Plaintiffs, farmers would be required to look at each hour's production and gross up **each hour** so that it met minimum wage. This suggested approach is inconsistent with the nature of piece rate and is not required under the MWA nor Department's regulations or policies. As long as an employee is paid the

equivalent of the established minimum wage under the averaging methodology set forth in the regulations, the MWA is satisfied.

**C. “Non-productive” activities may be included in piecework.**

A great deal of briefing has been devoted to cases where hourly employees were not compensated for “all hours worked.” *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 48, 169 P.3d 473 (2007), *Alvarez v. IBP, Inc.*, 339 F.3d 894, 900 (9th Cir. 2003), *aff'd*, 546 U.S. 21, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005), and *SPEEA*, 139 Wn.2d 824, 834, 991 P.2d 1126, 1 P.3d 578 (2000), were cases in which employees who were paid by the hour, typically by punching a time clock, allege that their employer required them to work “off-the-clock.” When work is paid by the hour, each hour of work requires payment. The challenged compensation system here is distinct from those cases in which employees are paid by the hour.

When applying these hourly cases to a piece rate compensation system, the takeaway is not “each hour must be paid,” but rather “all work must be paid.” Whether all work has been paid depends upon the method of compensation and the terms of employment. The method of compensation and terms of employment are largely a matter of agreement between employee and employer. *See Helde v. Knight Transp., Inc.*, 2016 WL 1687961, at \*2 (W.D. Wash. Apr. 26, 2016). Whether non-productive

work is covered by piece rate compensation is dependent upon the parties' agreement.

Plaintiffs assert that an allocation of piece rate compensation for both productive and nonproductive time is impermissible, citing *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 903 (9th Cir. 2004). In *Ballaris*, hourly employees were paid for lunch (non-work time), but not for donning and doffing of uniforms. The employer argued that the money received for the paid lunch time should be used to offset its obligation for overtime. The court found "it would undermine the purpose of the FLSA if an employer could use agreed-upon compensation for non-work time (or work time) as a credit so as to avoid paying compensation required by the FLSA." *Id.* at 914. Because the employer agreed to pay for lunches, it could not then credit that money toward wages.

This is consistent with the FLSA's approach to piece rate. Washington courts recognize the "persuasive authority" of the federal Fair Labor Standards Act and regulations promulgated pursuant to it when construing MWA provisions that are similar to those of the FLSA. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524-25, 7 P.3d 807 (2000). The Code of Federal Regulations provides:

[W]hile it is not proper for an employer to agree with his pieceworkers that the hours spent in down-time (waiting for work) will not be paid for or will be neither paid for nor

counted, it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours. If this is the agreement of the parties, the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek.

29 C.F.R. § 778.318 (c).

There is no Washington precedent on the issue. Plaintiffs cite *Martini v. State, Emp't Security Dep't*, 98 Wn. App. 791, 793, 990 P.2d 981 (2000), for the proposition that non-productive time must be compensated at a separate hourly rate outside of the piece rate. This is an incorrect reading of *Martini*. *Martini* was a truck driver who was paid \$.16 a mile and also \$.10 a minute for waiting time, but was not paid for his first 30 minutes of wait time. *Id.* Contrary to Plaintiffs' assertion, the court did not find that non-productive time must be paid hourly. Rather, the parties' *agreed* compensation provided that there would be a piece rate component (driving) and an hourly component as compensation (waiting). *Id.* at 793-94. In *Martini*, both components often failed to meet minimum wage.

Employees and employers are free to agree as to the nature of their employment relationship and the method of compensation so long as employees receive wages owed and the wages meet or exceed minimum

wage. In Washington, there is a long-standing practice and tradition of paying workers an agreed piece rate that compensates them for all of the work they perform in the day that is directly or indirectly related to the production of the piece. Washington's farmworkers have enthusiastically accepted the benefit of this bargain and the industry as a whole has flourished.

### III. CONCLUSION

A piece rate compensation system that includes so-called "non-productive" time, particularly "non-productive" time that is closely interwoven with piece producing activities, is consistent with Washington's laws and policies ensuring payment of wages due. WSTFA respectfully requests that this Court find that a per hour/each hour analysis of piece rate compensation is not required and that, if agreed, "non-productive" time may be compensated through a straight piece rate system.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 31st day of July, 2017, I caused a true and correct copy of the foregoing document, to be filed with the Washington Supreme Court and copies were served to the following counsel of record via email (per agreement of the parties):

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**July 31, 2017 - 3:58 PM**

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