

NO. 94229-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

DEFENDANT DOVEX FRUIT COMPANY'S ANSWERING BRIEF

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I. INTRODUCTION

Plaintiffs Mariano Carranza and Eliseo Martinez have worked over the years for Defendant Dovex Fruit Company (“Dovex”) as piece rate employees picking fruit in Dovex’s orchards. During this time, Mr. Carranza and Mr. Martinez would return each year to Dovex to harvest cherries, apples, and pears in the orchards that Dovex maintains in north central Washington. For these efforts, Dovex compensated Mr. Carranza and Mr. Martinez at the greater of the agreed upon rate for each piece produced or Dovex’s hourly base rate. To ensure that Mr. Carranza and Mr. Martinez always enjoyed a wage higher than the state minimum wage, and to attract and retain skilled piece rate employees, Dovex sets its hourly base rate higher than Washington’s minimum wage. If a piece rate employee’s piece rate pay for any given week falls below the state minimum wage Dovex “grosses up” the employees wage to its base rate. This is done automatically for every piece rate employee that works for Dovex and is calculated against every hour that the piece rate employee works for Dovex.

Despite this, Mr. Carranza and Mr. Martinez now bring claims against Dovex on behalf of themselves and as putative class representatives alleging, *inter alia*, violations of Washington’s Minimum Wage Act. There are no allegations, however, by Mr. Carranza or Mr.

Martinez that Dovex has ever actually failed to pay them – or any other putative class member they seek to represent – less than Washington’s minimum wage calculated on a weekly basis from the time they clock in each morning to the time they clocked out each night. Whether these wages were Dovex’s base rate, or whether the wages were the piece rate, it is uncontested that the wages paid always exceeded Washington’s hourly minimum rate calculated on a per week average for every hour worked for Dovex.

What is in contest is whether Dovex must now separately track and pay for time spent by piece rate employees on non-picking tasks that piece rate employees regularly undertake in the course of picking the fruit that makes up each piece. According to Plaintiffs theory, this category of non-picking activities includes “...but is not limited to, carrying ladders to a company trailer so that the ladders can be transported to another orchard block, waiting for the company trailer so that ladders can be transported to the next orchard block, waiting for equipment and materials necessary for the work, traveling between orchard blocks during the workday, attending required work meetings, storing equipment and materials, waiting to move to another orchard block after work in on orchard block is complete, and moving equipment and materials to different orchard blocks.” Dkt. 39 at 5. Plaintiffs describe this non-exhaustive list of activities as “non-

productive” tasks. *See e.g., Plaintiffs’ Opening Brief* at 5 (citing to Dkt. 39 at 5). However, this category of tasks are more accurately referred to simply as “non-picking” tasks because that is what they are: non-picking tasks that piece rate employees regularly perform when they are not actually picking the fruit the piece rate is paid upon.

Regardless of how these tasks are defined, Plaintiffs’ claims all hinge precariously upon an entrepreneurial interpretation of this Court’s important ruling addressing rest breaks in *Lopez Demetrio v. Sakuma Brothers Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015) and a strained application of Washington’s Minimum Wage Act codified at RCW 49.46.020 (the “MWA”). Plaintiffs’ claims posit the theory that the *Lopez Demetrio* decision created a third category of compensable time for non-picking activities that occur between the piece rate employees’ paid rest breaks and the actual picking of each piece of fruit that the piece rate is paid on. However, the question of whether non-picking time is a separate category of compensable time for piece rate employees was never presented in *Lopez Demetrio*. Rather, the Court analyzed a specific administrative code relating exclusively to rest breaks and held that employers must separately pay for piece rate employees’ rest breaks. The *Lopez Demetrio* decision did not address nor create a new category of time for non-picking tasks.

Perhaps recognizing the frailty of their *Lopez Demetrio* based argument, Plaintiffs next ask this Court to read a new category of time for non-picking tasks into the MWA itself. They also argue that the *method* Dovex uses to calculate compliance with the MWA rate somehow results in a failure to pay piece rate employees for *each hour worked*. But Plaintiffs' argument belies the undisputed factual record. Dovex and its piece rate employees agree to compensate all non-picking time via the piece rate. From the time the employee clocks in until the time the employee clocks out each day not a second of work goes uncounted or uncompensated. Dovex *does* compensate its employees at a rate *above* minimum wage for each discrete, individual hour worked. It uses workweek averaging to ensure that the wages paid to piece rate employees comply with the MWA. If those wages fall short of the minimum wage Dovex has a "gross-up" policy that automatically increases the employees wage to Dovex's base hourly rate, which rate is set above the minimum wage rate.

Recognizing at the outset of the case that Plaintiffs' theory was novel and sought to create a new category of compensable time under Washington wage and hour law, the United States District Court for the Eastern District of Washington (the "district court") certified the following questions to this Court:

- A. Does Washington law require agricultural employers to pay their pieceworkers for time spent performing activities outside of piece-rate picking work (e.g., “Piece Rate Down Time” and similar work)?
- B. If the answer to the above question is “yes”, how must agricultural employers calculate the rate of pay for time spent performing activities outside of piece-rate picking work (e.g., “Piece Rate Down Time” and similar work)?

Dkt. 41 at 2.

II. ARGUMENT

A. Summary of Argument

As to the first certified question, Plaintiffs contend that “Piece Rate Down Time” for non-picking tasks is only compensated if it is separately tracked and paid in addition to the piece rate. Plaintiffs’ contentions are wrong.

First, this Court’s well-reasoned decision in *Lopez Demetrio* addressing separate and additional pay for *rest breaks* does not preclude a piece rate employer from including compensation for regular non-picking tasks within the piece rate compensation paid outside of rest breaks.

Second, the MWA provides flexibility in negotiating the methods and amount of compensation in an employment relationship as long as the employer pays at least the established minimum wage rate. The only

relevant limitation is that whatever agreement the employer and employee reach, the wage must result in at least the minimum hourly wage. Here, there is no factual dispute that Dovex's piece rate compensation system has always included non-picking tasks within the piece rate compensation and the Plaintiffs accepted employment on those terms. And there is no factual dispute that Dovex's piece rate compensation system contains a "gross-up" policy that ensures that piece rate employees are paid above the minimum wage if their piece rate earnings do not meet the minimum wage. The piece rate compensation system Dovex provides to its workers meets or exceeds the requirements of the MWA in every instance.

Third, Plaintiffs' contention that piece rate employees are not paid for every hour worked is demonstrably false. The certified record demonstrates that Dovex tracks and accounts for every second that each piece rate employee is on the clock. At the end of every workweek, Dovex ensures that each and every hour worked is compensated, irrespective of any other time worked or any other wages earned, using its gross-up method. Dovex's gross-up system ensures that Dovex pays its piece rate employees compensation for every hour they work.

Fourth, Plaintiffs' argument that workweek averaging and gross-up calculations somehow render piece rate employees categorically underpaid conflates the two separate, but equally important, variables that each

employer must meet under the MWA. Each employer must pay each employee (1) at a rate that meets or exceeds minimum wage, (2) for each hour worked. Workweek averaging is a necessary and universally adopted methodology to compute the rate at which each employee is paid. This rate computation—which is necessary in the non-hourly compensation context—does not render piece rate employees unpaid for each hour worked.

Finally, public policy considerations support Dovex's piece rate compensation structure and system. Piece rate employment promotes employment opportunities as mandated by the MWA. Piece rate employment provides high levels of compensation for skilled employees. Piece rate employment facilitates the efficient harvest of fruit for the benefit of the employer and the State's economy. And perhaps most importantly to the individual worker, piece rate employment provides a level of control over their time and earnings that non-production based compensation does not. All of these benefits provided by piece rate employment are on the line in this case. Were Plaintiffs' arguments to be accepted, it would mean a practical end to employers offering piece rate work to the skilled, hardworking, and industrious employees who most seek it.

B. *Lopez Demetrio* Did Not Determine as a Matter of Law Whether Piece Rate Compensation is Allowed to Include Compensation for Non-Picking Activities.

1. *Lopez Demetrio* Recognized Two Categories of Compensable Time, Not the Three Categories of Time Sought by Plaintiffs.

Plaintiffs’ theory tethers itself to this Court’s decision in *Lopez Demetrio v. Sakuma Brothers Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015) and is best summed up by a single sentence in Plaintiffs’ opening brief: “If employers must separately pay pieceworkers for ‘hours worked’ in the form of rest breaks, then they must separately pay pieceworkers for active ‘hours worked’ outside of piecework.” *Pltfs.’ Opening Brief*, p. 19. As with rest breaks in *Lopez Demetrio*, the story goes, so too must go non-picking time in *Carranza Martinez*. But Plaintiffs are mistaken.

The question of whether non-picking tasks can be included within the piece rate was never addressed by this Court in *Lopez Demetrio*. The parties had settled all claims other than whether to separately pay rest breaks on a going forward basis. Thus this Court did not determine as a matter of law whether certain tasks – such as regular non-picking activities – could or could not be included within the piece rate. The Court’s decision that employers could not deduct rest breaks from the piece rate paid to workers presumed an already defined piece rate that necessarily

included the non-picking activities Plaintiffs now complain of. The decision did not determine what defined the piece rate in the first instance.

The Court was clear that the basis for its decision in *Lopez Demetrio* was based on the plain language of WAC 296-131-020(2) and the public policy in favor of rest breaks for employees:

“[f]ollowing from the plain language of WAC 296-131-020(2), and consistent with case law interpreting Washington’s long standing labor policy, employers must pay a wage separate from the piece rate for time spent on rest breaks.” *Lopez Demetrio* at 659.

In reaching this holding, the Court expressly recognized that “a pieceworker’s right to separate pay for rest breaks springs not from the MWA, but rather from WAC 296-131-020(2)’s mandate that rest breaks be paid ‘on the employer’s time.’” *Lopez Demetrio*, 183 Wn.2d at 661.

Recognizing that neither the plain language of WAC 296-131-020(2) nor rest break public policy apply outside of rest breaks to non-picking tasks, Plaintiffs seize on a single dicta statement from *Lopez Demetrio* for their theory that piece rate employees must be “paid separately for all time spent performing non-piecework activities....” *Pltfs.’ Opening Brief*, at p. 11. Specifically, Plaintiffs contend that the Court’s statement that the piece rate is earned only “when the employee is actively producing” creates a requirement for employers to somehow separately track and pay for “all time” spent outside of actually picking

each piece of fruit. *Lopez Demetrio* at 649. But when considered in context, it is clear that the Court's statement regarding time an employee spends "actively producing" was juxtaposed against periods of inactivity provided for by the rest breaks at issue in *Lopez Demetrio*. The *Lopez Demetrio* decision simply did not create the new third category of compensable time necessary for Plaintiffs theory because this category of time was never considered by the Court in *Lopez Demetrio*.

The Court analyzed two distinct categories of compensable time in *Lopez Demetrio*: rest breaks and all other time spent working for the employer. "Since the piece rate is earned only while the employee is *working* (i.e., no pay accrues during *rest breaks*) the Workers' rest breaks cannot reasonably said to be "on the employer's time" if paid by the piece." *Lopez Demetrio* at 656 (emphasis added); ("[t]ime spent on rest breaks and time spent in active work are *both* hours worked for the employer...." *Id.* at 662 (emphasis added). The Court's consistent recognition of two categories of compensable time for piece rate employees is further highlighted by its example of how rest break wages for piece rate employees are to be calculated:

Suppose an employee is paid 50 cents per pound of fruit picked (the piece rate). The employee works five eight-hour days and takes 20 minutes of rest breaks each day, as provided for by WAC 296-131-0202(2). The employee has

spent 38.6 producing and 1.4 hours on breaks, for 40 hours of *total work*.” *Id.* at 660 footnote 3. (emphasis added).

The above demonstrate that when a piece rate employee is clocked in, he or she is engaged in either “producing” or on “breaks”, which two components constitute the employee’s “total work” for the employer. This illustration of the two categories of compensable time recognized in *Lopez Demetrio* directly counters Plaintiffs’ entrepreneurial theory that “[i]f employers must separately pay pieceworkers for ‘hours worked’ in the form of rest breaks, then they must separately pay pieceworkers for active ‘hours worked’ outside of piecework.” *Pltfs.’ Opening Brief, p. 19.*

Simply put, the *Lopez Demetrio* decision did not create a third category of time “outside” of piecework for non-picking tasks. The Court correctly recognized two categories of compensable time applicable to piece rate employees and incorporated these two categories in its holding that “employers must pay employees for rest breaks separate and apart from the piece rate.” *Lopez Demetrio* at 653.

2. The recuperative purpose of rest breaks and the public policy considerations in *Lopez Demetrio* do not support Plaintiffs’ claims.

The important public policy considerations in *Lopez Demetrio* that support separate pay for rest breaks for piece rate employees are not a bridge to Plaintiffs’ claims for a third category of compensable time for

regular non-picking tasks. In *Lopez Demetrio* the Court expressly recognized that rest breaks further a “recuperative purpose” critical to the health and effectiveness of employees working in a dangerous industry like agriculture. “Rest breaks mitigate these dangers by allowing employees to sit, cool down, and rehydrate, and we interpret rest breaks to further that recuperative purpose.” *Lopez Demetrio*, 183 Wn.2d at 658; *see also Pellino v. Brinks Inc.*, 164 Wash.App. 668, 692, 267 P.3d 383 (2011) (holding that missed rest breaks failed to provide employee with “relief from work or exertion.” (citing to *White v. Salvation Army*, 118 Wash. App. 272, 277–78, 75 P.3d 990, 992 (2003)).

“[C]arrying ladders to a company trailer so that the ladders can be transported to another orchard block, waiting for the company trailer so that ladders can be transported to the next orchard block, waiting for equipment and materials necessary for the work, traveling between orchard blocks during the workday, attending required work meetings, storing equipment and materials, waiting to move to another orchard block after work in on orchard block is complete, and moving equipment and materials....” do not serve a recuperative purpose or provide the employee relief from work or exertion. Dkt. 39 at 5.

Plaintiffs’ contention that it would be an “anomalous result if rest break ‘hours worked’ warranted separate pay but ‘hours worked’ in non-

piece rate activities did not....” conflates the *recuperative purpose* of paid rest breaks with an Plaintiffs *economic interest* in receiving pay beyond the payment for rest breaks and the piece rate that they agreed to when they accepted employment with Dovex.

As such, the important public policy considerations that relate to rest breaks do not bridge the gap between this Court’s holding in *Lopez Demetrio* and Plaintiffs claims for a new category of compensable time for the non-picking tasks that piece workers regularly engage in.

C. Dovex Is Permitted to Include Non-Picking Activities Within Its Piece Rate Compensation System.

Plaintiffs opening brief seeks to pull back from the unlimited list of non-picking activities complained of in Plaintiffs’ Complaint and focus instead on a more narrow list of activities that include traveling between orchards and blocks, attending required meetings, storing equipment and materials, and transporting ladders. *Compare* Dkt. 39 at 5; *Pltfs.’ Opening Brief*, at p. 5. But even this revised list arbitrarily prohibits some non-picking activities from inclusion in the piece rate (moving ladders, moving between orchard rows, attending safety meetings) while allowing others to remain (climbing up and down ladders, waiting out rain delays, donning picking bags). This arbitrary bifurcation is Plaintiffs’ own entrepreneurial invention. And it fails as follows:

First, Plaintiffs claims fail for the simple reason that they assume (in error) that when a piece rate employee is performing regular non-picking tasks he or she is engaged in “non-production” activities “outside” of the piece rate structure. This assumption is categorically false because non-picking tasks are anticipated for and necessary to the production of each piece the employee is compensated for. Rather than being outside of the production of each piece, non-picking tasks are just one component of all of the various activities that are required to produce each piece safely, timely, and in accordance with the terms of employment.

Second, Plaintiffs incorrectly argue that piece rate employees cannot agree with their employers *as a matter of law* to include non-picking tasks within the piece rate. This position is unsupported by Washington law and conflicts with existing regulations that allow employers flexibility to structure piece rate pay to compensate for all tasks regularly required of the piece rate employee.

Third, Plaintiffs’ contention that Dovex does not pay its piece rate employees at or above the minimum wage for all hours worked is demonstrably false. The uncontested record shows that Dovex pays its piece rate employees *above* the minimum wage for each hour worked. Because each hour worked is separately compensated, and an employee is entitled to pay for each hour worked *regardless* of whether or not she

works any additional time, Dovex satisfies the MWA's requirement that employers pay for "each hour worked."

And finally, Plaintiffs conflate the MWA's requirement that employees be paid at a *rate* of at least minimum wage per hour with the requirement that an employer must pay for all hours worked. Plaintiffs argue that the *methodology* adopted by piece rate employers to ensure it pays at or above the minimum wage rate, somehow renders work hours uncompensated. Plaintiffs' argument is illogical, and does not comport with this Court's precedent or other persuasive authority addressing piece rate work. Work week averaging is a lawful—and indeed the only realistic—means of calculating the MWA rate of pay owed to non-hourly employees when their earnings do not otherwise meet the minimum wage.

D. Plaintiffs are Wrong to Assume That the So-Called "Non-Piecework Activities" Falls Outside of the Piece Rate Compensation System.

There is no factual dispute that Dovex's piece rate employment system incorporates regular non-picking tasks within the piece rate. *See* Dkt. 39 at 3. Dovex's piece rate has always been calculated to include regular non-picking tasks associated with the actual picking of the piece because that is the very nature of a piece rate. If the piece rate pay were to only include only the actual time spent picking, as Plaintiffs argue, there would be no need to vary the piece rate. But Dovex does vary the piece

rate, regularly. *See* Dkt. 39, Ex. 7 DOV002015-002020; Dkt. 39, Ex. 11 DOV001270-001276). The reason Dovex must vary its piece rate is for the obvious purpose of taking into account all of the various non-picking tasks that affect the number of pieces a piece rate employee can pick per day. As time required to perform these non-picking tasks goes up, so too does the piece rate to attract and maintain the piece rate employee. As the time required for non-picking tasks goes down, the piece rate is lowered so that the employer is not paying over the market for the pieces.

And there is no factual dispute that Plaintiffs knew the piece rate included non-picking activities within the piece rate and agreed to employment on that basis: Plaintiffs admit that they returned year after year to work for Dovex and Dovex never offered to separately track and pay Plaintiffs for the non-picking tasks they now complain of. *See e.g.*, Complaint at 3, ¶¶3.4; 3.11 (“Plaintiff Carranza has traveled from his permanent residence to pick apples, pears, and cherries each year for Dovex since 1999. Between 2012 and 2014, Plaintiff Martinez picked apples, pears, and cherries for Dovex during the summer harvest until approximately October or November each year.”; *see also* Dkt. 39 at 3, ¶ 2 (“[Dovex] did not pay both a piece rate of no less than minimum wage for all piece time worked plus a separate rate of at least minimum wage all

non-piece-rate performed, but denies it was required to do so.”) (quoting Dkt. 21 at 10, ¶ 5.3).

Accordingly, Plaintiffs’ claims rise and fail from the false assumption that when a piece rate employee is performing regular non-picking tasks he or she is engaged in “non-production” activities “outside” of the piece rate structure. This assumption is false because non-picking tasks are anticipated for and necessary to the production of each piece the employee is compensated for. Non-picking tasks are not outside of the production of each piece. They are simply one component of the various activities that are necessary to produce each piece in a safe and timely manner.

E. Washington Law Grants Flexibility to Employers to Provide Piece Rate Employment and Include All Work Tasks Within the Agreed Upon Piece Rate as Long as the Employee is Paid at Least Minimum Wage.

Washington’s Minimum Wage Act provides as follows:

Every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [minimum wage] per hour.

RCW 49.46.020.

The plain and unambiguous language of RCW 49.46.020 does not prohibit an employer from paying its employees via a piece rate compensation system. Nor does it prohibit an employer from choosing to

calculate within the piece rate regular activities it requires of its employees to produce each piece. *See Innis v. Tandy Corp.*, 141 Wn.2d 517, 531 (2000) (upholding employer’s choice not to “calculate the regular rate as ‘hourly rate’ but as a ratio of weekly base salary to total hours worked in a work week. The Washington Minimum Wage Act permits this choice.”). Accordingly, the plain language of RCW 49.46.020 unambiguously allows Dovex the flexibility to offer piece rate employment that includes regular non-picking activities within the piece rate.

Plaintiffs argument that “where an employer pays an employee for *some* hours worked on a piece-rate basis, the MWA does not permit the employer to refuse to pay for *other* hours worked outside of piecework.” (*Pltfs.’ Opening Brief*, at p.18) (emphasis original) contradicts the plain language of RCW 49.46.020 and seeks to insert an ambiguity where none exists. The Court should decline this strained interpretation of RCW 49.46.020. *See HomeStreet, Inc. v. State*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (When a statutory provision is unambiguous, the Court derives the statute’s meaning (and thus the legislature’s intent) from its express language; *see also Agrilink Foods, Inc. v. State*, 153 Wn.2d 392, 398, 103 P.3d 1226 (2005) (“Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent

from the words of the statute itself, regardless of contrary interpretation by an administrative agency.”).

Further guidance on the flexibility of piece rate employment under Washington law is also found by looking at Washington regulations that directly address piece rate employment. Outside of the agricultural context, piece rate regulation in Washington directly contemplates that an employer has the flexibility to structure piece rate pay to compensate for all regular tasks in a workweek by piece rate if the employer so desires.

Where employees are paid on a commission or piece work basis, wholly or partially, (1) The amount earned on such basis in each work-week period may be credited as part of the total wage for that period; and (2) The total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

WAC 296-126-021

If the law required certain regular tasks to fall outside the piece rate, the piece rate could never be paid “wholly” by piece rate, and “wholly” would have no meaning within WAC 296-126-021.

And not even Plaintiffs’ invented hypotheticals outside the record for this case can demonstrate a violation of the MWA by way of the inclusion of non-picking tasks within the piece rate. For example, Plaintiffs posit the hypothetical that “...an employer could require an employee to perform five hours of piece-rate work and 35 hours of other

work activities in a week and refuse to pay the employee for the 35 hours of non-piece-rate work so long as the employee receives at least minimum wage when averaging out the five hours of piece-rate compensation over the entire 40-hour week. This is not the law.” *Pltfs.’ Opening Brief*, at p.31. (citing to the MWA).

Under Plaintiffs hypothetical, however, the piece rate employee would not have claims under the MWA because the employee *did* receive minimum wage for all 40 hours worked. Rather, this hypothetical piece rate employee would have claims under the Wage Rebate Act (RCW 49.52.050) against the employer for failing to satisfy the obligations it assumed through contract with the piece rate employee to provide a meaningful opportunity to earn compensation from production of pieces for the piece rate. This hypothetical piece rate employee would have a breach of contract claim against the employer as well, which claim is also independent of the MWA.

Plaintiffs do assert Wage Rebate Act claims elsewhere in this litigation (*Pltfs.’ Opening Brief*, p. at 8) and can pursue those claims if there are facts outside this record that exist to support those claims. Plaintiffs could also pursue breach of contract claims as well, but these contract claims likely implicate individualized inquiries inconsistent with the class-wide claims Plaintiffs are attempting to pursue.

Plaintiffs’ argument regarding self-styled “non-piecework activities” fails because it is premised on the incorrect assumption that non-picking activities are “non-production” activities outside of the piece rate structure. This assumption is false and not supported by the record before this Court. Moreover, Plaintiffs’ claims as a matter of law non-picking tasks cannot be included within the piece rate paid to the employee belie the plain language of the MWA. The application of the plain and unambiguous language of the MWA controls the analysis of Plaintiffs’ claims and allows employers the flexibility to provide piece rate employment and include all work tasks within the agreed upon piece rate as long as the employee is paid at least minimum wage. Here, the certified record evidences Dovex’s compliance with Washington law by paying its piece rate employees the greater of either the piece rate or Dovex’s base rate – both of which always *exceed* Washington’s minimum hourly wage.

F. The MWA Requires Employers Pay Each Employee at (1) a Rate of Not Less Than the Minimum Wage, (2) for Each Hour Worked.

Washington’s MWA requires employers pay each employee “at a *rate* of not less than [minimum wage] *per hour*.” RCW 49.46.020 (emphasis added). In order to comply with the MWA, each employer must satisfy two distinct, but equally important variables: (1) the employee must be paid at a **rate** of not less than the minimum wage, *and* (2) the

employee must be paid for **each hour worked**. Stated another way, RCW 49.46.020 requires every employer to calculate wages as follows:

$$\text{MWA Pay} = \text{Rate at or above minimum wage} \times (\text{each hour worked})$$

These two variables (rate and each hour worked) are mutually exclusive. Even if an employer pays its employees at a rate that meets or exceeds minimum wage, it does not comply with the MWA if it does not compensate its employees for each hour worked. See e.g. *Seattle Professional Engineering Employees Association v. Boeing Co.*, 139 Wn.2d 824, 991 P.2d 1126 (2000), *opinion corrected on denial of reconsideration* at 1 P.3d 578 (“SPEEA”); *Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003). The same holds true in the inverse: even if the employer pays for each hour worked, if it is not paying an adequate rate, it is not complying with the MWA. See generally *Martini v. State Employment Security Department*, 98 Wn. App. 791, 793, n.2, 990 P.2d 981 (2000).

The undisputed factual record in this case demonstrates that Dovex satisfies both variables required under the MWA. The parties acknowledge that Dovex tracks and records all time that a piece rate employee works each day—be it rest break or productive time. See e.g., Dkt 39, Ex. 3. It

thereby identifies each hour worked, and it then accounts for each hour worked in its payment calculations.

Dovex also compensates its employees at a rate that meets or exceeds minimum wage. Dovex *always* pays its employees at or above its base rate—a rate that exceeds the statutory minimum wage. Dkt 39, Ex. 3 & Ex. 4. Dovex, “like every employer of piece rate workers,” uses workweek averaging to ensure that the rate it pays meets or exceeds minimum wage. *Lopez Demetrio*, 183 Wn.2d at 661. It uses workweek averaging to ensure that the “quotient of an employee’s piece rate earnings by the number of hours he or she worked, inclusive of time spent on rest breaks, is at least the minimum wage.” *Lopez Demetrio*, 183 Wn.2d at 661. If the workweek-averaged rate “falls below minimum wage,” Dovex “grosses-up” that employee’s wage: it “bring[s] up the employee’s pay” to its base rate in order to remain in compliance with the MWA. *Lopez Demetrio*, 183 Wn.2d at 661.

The undisputed record demonstrates that Dovex *always* pays each pieceworker employee (1) at a rate that exceeds the statutory minimum wage, and (2) for each hour worked. Dovex’s piece rate compensation system thus satisfies both variables required under the MWA.

There is no factual dispute between the parties regarding the mechanics of Dovex’s compensation system. And Plaintiffs have never

alleged that their pay ever averaged out to less than Washington’s applicable minimum wage for each hour they worked. But Dovex’s system, they argue, is not good enough. Plaintiffs contend that, because it uses workweek averaging and “gross-up” as a *methodology* to ensure it pays at the proper rate, Dovex does not pay its employees “**at all**” for production-related time. *Pltfs.’ Opening Brief*, at p. 16 (emphasis added). This argument necessarily fails: it conflates the requirement that employers pay the proper rate with the requirement that they pay for each hour worked. It blurs the line between these two independent variables, and argues that the methodology used to ensure each employee is paid an adequate rate somehow affects whether or not each employee is paid for each hour worked. Plaintiffs’ theory is logically unsound and misapplies prior caselaw in an attempt to read piece rate compensation out of the MWA.

1. Dovex pays its piece rate employees for each and every hour worked.

Although the three foundational cases cited by Plaintiffs consider only *hourly* compensation structures, Dovex does not dispute that Washington employers must pay their workers—even piece rate workers—for each and every hour they work. *See e.g. Stevens*, 162 Wn.2d at 47. Compensable time begins the second an employee begins working,

and does not stop until that employee's work has ended. *See e.g. SPEEA*, 139 Wn.2d 824.

A careful review of *SPEEA*, *Stevens*, and *Alvarez* reveals the following test: an employer fails to pay for "each hour worked" as required by the MWA if payment for *any* hour worked is contingent on working *any other hour*. Stated another way, the Court must be able to isolate any single hour worked out of an employee's pay period; and, in order to comply with the MWA, the employer's compensation structure must ensure that, if that discrete hour were the *only* hour worked by the employee, the employee would still receive compensation.

Dovex satisfies this requirement: via its "gross-up" procedure, Dovex ensures that every second spent on the clock is compensated, irrespective of whether or not the employee worked any other hour. For example, if Mr. Carranza worked for just one hour in one week for Dovex and was unable to pick a single piece of fruit (perhaps due to rain) he would still be paid for that one hour of work at Dovex's base rate even if he never returned again and never had future earnings with Dovex. The same is not true of the compensation systems examined by this Court in *SPEEA*, *Stevens*, and *Alvarez*.

2. Boeing began compensating its employees only after they had spent hours working at the "pre-employment" orientation.

In *SPEEA*, Boeing required all new hourly employees to attend its “pre-employment” orientation session. *SPEEA*, 139 Wn.2d at 834. Although the orientations often took hours, Boeing did not pay its employees for any time spent attending. *Id.* Employees did not begin accruing pay at their hourly rate until they commenced their first shift. *See Id.* The employees sued, arguing that Boeing failed to compensate them for all hours worked during their “pre-employment” orientation. *Id.* at 828. By the time the case reached this Court, Boeing conceded that the “pre-employment” orientation was “work” compensable under the MWA, and that its employees were not compensated for that time spent working. *Id.* at 829. This Court held that Boeing’s compensation policy did not pay for each hour worked and thus violated the MWA. *Id.* at 834.

Boeing’s compensation structure plainly failed to pay for each hour worked. Imagine that Plaintiff Mariano Carranza is hired by Boeing on Friday as a new hourly employee. That next Monday, he spends one hour at Boeing’s “pre-employment orientation.” On Tuesday, Mr. Carranza shows up for his first scheduled shift, but before he can start work, he is terminated. Mr. Carranza the Boeing employee goes home without a paycheck because he did not work any of his scheduled shift, despite the fact that he worked for one hour at the orientation. Boeing’s compensation formula violates the MWA:

Boeing Pay = Rate x each hour worked – each hour spent at orientation

If the Court isolates the hour Mr. Carranza spent at orientation, it becomes clear that Boeing's compensation system precludes him from taking home *any* pay unless he works *additional* time in the future. Boeing thus failed to compensate Mr. Carranza for each hour spent at orientation. It failed to pay for each hour worked.

Because Boeing did not pay for each hour worked, this Court did not—and had no need to—consider whether or not Boeing paid its employees at an adequate *rate* via workweek averaging.¹ Even if Boeing paid its employees at a rate higher than minimum wage per hour, because it did not pay for each hour worked, it failed to comply with the MWA. The employees' rate of pay was irrelevant. The same is true of *Stevens*, 162 Wn.2d 42.

3. Similarly, Brink's failed to pay its hourly employees for work time spent driving.

In *Stevens*, Brink's Home Security allowed its technicians to drive company vehicles directly from their homes to worksite locations. *Id.* at

¹ At the trial court level, Boeing argued that, because its employees' pay averaged out to at least minimum wage per hour worked, it had complied with the MWA. *See Seattle Professional Engineering Employees Association v. Boeing Co.*, 1995 WL 17873923, *9 (Sup. Ct. Wash. Oct. 17, 1995). However, the Court of Appeals expressly refused to consider whether the proper rate under the MWA should be evaluated on an hourly or workweek basis. *Seattle Professional Engineering Employees Association v. Boeing Co.*, 92 Wn. App. 214, 225, 963 P.2d 204 (1998). And in line with the distinction between rate of pay and hours worked, this Court's opinion is devoid of any mention to workweek averaging—or any argument regarding Boeing's rate of pay. *SPEEA*, 139 Wn.2d 834.

42, 45. During these drives, Brink’s employees were “on duty” and thus at “work.” *Id.* at 48. However, Brink’s did not often compensate its employees for their drive time. *Id.* at 48. By failing to pay for “on duty” drive time, this Court held that Brink’s failed to pay for each hour worked, and violated the MWA. *Id.* at 48. As was the case in *SPEEA*, this Court’s opinion did not consider the adequacy of Brink’s rate of pay: because Brink’s failed to pay for drive time, it failed to comply with the MWA. *Id.*

And the Court was correct. Mr. Carranza the Brink’s employee is in the same boat as Mr. Carranza the Boeing employee. Imagine Mr. Carranza the Brink’s employee receives his very first job order while at home. He plans his route and drives the company vehicle to the jobsite, which takes about an hour. But as soon as Mr. Carranza arrives, he is immediately fired. Mr. Carranza, again, goes home without a paycheck, despite the fact that he spent an hour at work driving from his home to the job. Like Boeing, Brink’s compensation policy adopts a formula that is impermissible under the MWA:

$$\textit{Brink's Pay} = \textit{Rate} \times \textit{each hour worked} - \textit{each hour spent driving}$$

4. Like Boeing and Brink’s, IBP, Inc. failed to pay its employees for time spent working outside of their scheduled shift.

Alvarez v. IBP, Inc.—the third case upon which Plaintiffs’ theory is based—is no different than *SPEEA* and *Stevens*. 339 F.3d 894. In

Alvarez, IBP required its hourly employees retrieve, don, doff, and stow protective gear before and after their scheduled shifts. *Id.* at 900. IBP did not compensate its employees for this time worked outside of their hourly shifts. *Id.* Because time spent retrieving, donning, doffing, and stowing protective gear was compensable time under the MWA, IBP's compensation system failed to pay for each hour worked:

Alvarez Pay = Rate x each hour worked – each hour spent donning and doffing

If Mr. Carranza the IBP employee had spent time retrieving and donning his protective gear, but then been fired before his hourly shift began, he would, just like Mr. Carranza the Boeing and Brink's employee, again go home without a paycheck. By requiring their employees to work before and after scheduled hourly shifts without compensation, Boeing, Brink's, and IBP all failed to pay for each hour worked and thus violated the MWA.

5. Unlike *SPEEA*, *Stevens*, and *Alvarez*, Dovex pays its piece rate employees for each and every distinct hour worked.

The same is not true of Dovex. As discussed above, the MWA requires employers compute each employee's pay as follows:

Pay = Rate x each hour worked

The defendants in *SPEEA*, *Stevens*, and *Alvarez* computed their employees' pay using formulas that are plainly unlawful under the MWA

because they deducted *time spent working* from the formula's essential second variable of "each hour worked."

But Dovex's formula mirrors the MWA. Dovex pays *at least* its base rate for every hour each employee spends "on the clock." Dkt. 39, Ex. 3 & Ex. 4. Dovex tracks and records every second that a piece rate worker spends working. *See e.g.*, Dkt. 39, Ex. 8. It also tracks and records every piece each worker picks, and the pay they earn for each piece picked. *Id.* At the end of each workweek, Dovex totals up all wages earned by each worker. It then divides those total wages by the total hours each employee worked. If any employee's defacto average rate is less than Dovex's base rate (which always exceeds the minimum wage), Dovex "grosses-up" that employee's pay. It converts that employee to hourly compensation, and pays its base rate for each hour worked. But if the employee's defacto rate is *above* Dovex's base rate (which is nearly always the case), Dovex does not "gross-down" their pay—it pays them the total wages they earned. Dovex uses its "gross-up" procedure to ensure that its piece rate employees receive adequate compensation for each hour worked, while still providing them with the opportunity to make much more than its hourly base rate.

In order for Dovex to *not* pay for each hour worked as required by the MWA, Dovex would have to consciously exclude time spent on non-

picking tasks from its pay calculation. It would have to calculate each worker's pay as follows:

$$\text{Pay} = \text{Rate} \times \text{each hour worked} - \text{each hour spent on non-picking tasks}$$

Nothing in the undisputed record remotely suggests that Dovex excludes time spent on non-picking tasks its compensation calculations. Instead, the parties agree that Dovex includes *every single hour* an employee spends on rest breaks, non-picking tasks, and actual picking, when it analyzes and “grosses-up” a worker's pay. Unlike the defendants in *SPEEA*, *Stevens*, and *Alvarez*, Dovex pays its employees for each hour worked.

6. *Martini* does not stand for the proposition that Dovex's piece rate system does not pay for each hour worked.

Plaintiffs analogize Dovex's compensation system to that at issue in *Martini v. State, Employment Security Department*, 98 Wn. App. 791, 990 P.2d 981 (2000). Implying that Dovex similarly fails to compensate its piece rate workers for all hours worked, Plaintiffs characterize *Martini* as follows:

The employer “did not compensate [the driver] for time spent cleaning, fueling, inspecting, and maintaining the vehicle.” *Id.* In addition, the driver “was unpaid for at least 30 minutes of wait time on over 90 percent of his trips.” *Id.* at 798. The court stated that these facts “present a clear violation of the Washington Minimum Wage Act. . . .” *Id.*

Pltfs.' Opening Brief, at p. 20.

Dovex does not dispute that it must pay piece rate workers for each hour worked. But its piece rate compensation system looks *nothing* like that examined by the Court of Appeals in *Martini*. In fact, *Martini* looks much like the hourly cases cited above: Mr. Martini’s employer admitted that it refused to pay its employees for the first thirty minutes of “wait time” spent on each trip. *Martini*, 98 Wn. App. at 793. Unlike Dovex, Martini’s employer *did* fail to pay for each hour worked:

$$\textit{Martini Pay} = \textit{Rate} \times (\textit{each hour worked} - \textit{wait time})$$

And Plaintiffs fail to inform the Court that, unlike the workers in this case, Mr. Martini was *never* guaranteed a minimum or base wage, nor did his employer utilize a “gross-up” procedure to ensure payment for each hour worked.² *Id.* at 793. Unlike *Martini*, Dovex *does not* refuse to compensate its employees for any portion of time spent waiting (or on any other non-picking task). And unlike *Martini*, Dovex *does* guarantee a minimum hourly rate of pay that exceeds the statutory minimum wage.

² The portion of the opinion to which Plaintiffs cite reads in its entirety:

In this case, the Commissioner found that Martini was unpaid for at least 30 minutes of wait time on over 90 percent of his trips, and the hearing testimony established that Martini was not compensated in any way for time spent cleaning, fueling, inspecting, and maintaining the vehicle. CSS admitted that Martini was not guaranteed a minimum hourly wage. The facts of this case thus present a clear violation of the Washington Minimum Wage Act and an employer’s knowledge of factual circumstances that gave rise to the violation.

Martini, 98 Wn. App. at 798.

7. Workweek averaging is the appropriate methodology to ensure compliance with the MWA.

The next step in the analysis of Dovex’s compliance with the MWA looks to the rate that is paid to piece rate employees. For Dovex’s *hourly* employees, that “rate” is easily identified: because hourly pay is logically tied to each unit of time that an hourly employee works, the rate requires no calculation—it is merely the rate at which the employee is paid per hour.

Not so with piece rate pay employees. Because piece rate pay is necessarily untethered from discrete units of time, the rate of pay must be *calculated*. For piece rate employees, Dovex calculates its rate using the piece rate industry standard of workweek averaging. When an employee is paid exclusively by the piece, her rate for purposes of ensuring compliance with the minimum wage requirement of the MWA is calculated by dividing the total amount earned by the total number of hours worked that week. And when an employee earns piece rate in addition to other forms of compensation, the total wages in that pay period are again added together and then averaged over the total number of hours worked that week.

Workweek averaging is not a means to “force workers to finance their own unpaid work time” or to “deduct piece-rate pay earned during

fruit-picking time to offset its payment obligations.” *Pltfs.’ Opening Brief*, at p. 1. It is simply a *methodology* to ensure that employees working under non-hourly compensation systems are paid at a rate that meets or exceeds the minimum wage once the total value of the worker’s pieces are known at the end of the week. Plaintiffs’ “per-hour approach to minimum wage compliance” invents a requirement that each employee be paid *each hour on the hour* for their work. But this is not what the MWA requires and not how non-hourly employment – such as piece rate work – compensates. Just as a car salesman paid on a commission basis does not receive a paycheck *each hour on the hour* for time spent working the car lot, a piece rate worker does not received a pay check each hour on the hour for time spent working in the orchard. Rather, at the end of each week the total commissions or pieces are added up and divided by the total number of hours worked to determine whether the employee’s wages meet the minimum wage requirements. If not, the wages are increased under the work week averaging methodology. Counter to Plaintiffs’ claims, the workweek averaging methodology has no ability to decrease or take away wages owed to piece rate employees. The only thing workweek averaging can do to a piece rate employee is increase his or her paycheck.

Of Plaintiffs’ three foundational cases, only *Alvarez* examines the rate at which the plaintiff employees were compensated. 339 F.3d 894.

The Ninth Circuit held that the employer could not, under Washington law, use workweek averaging to determine the appropriate rate at which an *hourly* employee must be paid. *Alvarez*, at 913. An *hourly* employee's rate, the Court explained, requires no computation: an hourly employee's rate of pay is her hourly rate. *See Alvarez*, at 913. But the Ninth Circuit took great pains to distinguish workweek averaging in the *hourly* context from workweek averaging as it applies to *non-hourly* compensation systems:

Regulations interpreting the MWA are similarly telling in this regard. Repeatedly listing 'hourly' employment as a separate employment type, these regulations permit use of the work-week measure only for particular employment categories. Were the Washington legislature disposed to apply the workweek measure to hourly employees, it could have done so as expressly as it did vis-à-vis other employment types. And were the workweek measure to be generally and necessarily applicable, the Washington legislature's specification of the workweek standard for, e.g., commissioned employees would be both extraneous and redundant. Given this statutory and regulatory background, the district court quite reasonably predicted that the Washington Supreme Court would construe the MWA as using a per-hour standard for hourly employees.

Alvarez at 912–13 (citations omitted) (emphasis added).

This distinction makes a difference. The rate at which an hourly employee must be paid requires no calculation because the right to hourly pay naturally accrues as each unit of time passes. But non-hourly pay—such as piece rate and commission work—does not correlate to any one

specific unit of time. Rarely, if ever, will two pieces correlate with the exact same unit of time. Each piece may, and nearly often does, take more or less than one hour to accumulate. A non-hourly employee's pay does not accrue linearly. Thus, in order to convert non-hourly pay to a rate and thus ensure compliance with the MWA, employers must necessarily use some form of averaging.

Administrative guidance from Washington's Department of Labor and Industries ("DLI") acknowledges the need for averaging in the non-hourly context. DLI instructs employers to use workweek averaging (and a Dovex-like "gross-up" procedure) to ensure each employee is paid at a rate that meet or exceeds minimum wage for each hour worked:

Determining whether an employee has been paid the minimum wage

In order to determine whether an employee has been paid the statutory minimum hourly wage when the employee is compensated on other than an hourly basis, the following standards should be used:

- If the pay period is weekly, the employee's total weekly earnings are divided by the total weekly hours worked (including hours over 40). Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
- If the regular pay period is not weekly, the employee's total earnings in the pay period are divided by the total number of hours worked in that pay period. The result is the employee's hourly rate of pay. Earnings must equal minimum wage for

each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.

- For employees paid on commission or piecework basis, wholly or in part, other than those employed in bona fide outside sales positions, the commission or piecework earnings earned in each workweek are credited toward the total wage for the pay period. The total wage for that period is determined by dividing the total earnings by the total hours worked; the result must be at least the applicable minimum wage for each hour worked. See WAC 296-126-021.

Wash. DLI Admin. Policy ES.A.3, at 2 (2014) (emphasis added).

A regulation concerning workweek averaging in the non-agricultural piece rate context is persuasive authority that workweek averaging is the appropriate method of ensuring an adequate rate of pay under the MWA in non-hourly compensation contexts:

Where employees are paid on a commission or piecework basis, wholly or partially,

(1) The amount earned on such basis in each work-week period may be credited as a part of the total wage for that period; and

(2) The total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

WAC 296-126-021.

Plaintiffs argue that WAC 296-126-021 actually prohibits employers from paying their workers wholly on a piece rate basis. *Pltfs.’ Opening Brief*, at pp. 30–31. According to Plaintiffs, because WAC 296-

126-021(1) provides that piece rate wages *may* be credited as *part* of the total wages in a work period, WAC 296-126-021(1) *requires* that employers pay piece rate workers under some additional compensation system in addition to their non-hourly rate. Plaintiffs ignore, however, the fact that WAC 296-126-021(1) expressly contemplates that employees may be paid wholly on a piecework or commission basis. Plaintiffs' tortured reading of WAC 296-126-021 ignores the word "wholly" and itself fails to give "effect to all [the] language without rendering any part superfluous." *Bravern Residential, II, LLC v. Dep't of Revenue*, 183, Wn. App. 769, 778, 334 P.3d 1182 (2014); *see also Whatcom Cnty v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

But even setting aside the plain language of WAC 296-126-021, allowing workweek averaging in the non-agricultural commission or piecework basis would not render WAC 296-126-021(1) superfluous. WAC 296-136-021(1) is *permissive*. In situations wherein an employee is compensated on both hourly *and* non-hourly bases, WAC 296-136-021(1) provides that employers *may* combine the total amount earned under all compensation systems together in order to determine the total wage for that work period. WAC 296-136-021(1) does not *require* that they do so, and it surely does not require payment via both hourly and non-hourly systems. In contrast, WAC 296-136-021(2) provides that the total wages

paid in a work period *shall* be divided by the number of hours worked and must result in no less than the applicable minimum wage. Employers *must* calculate non-hourly workers' rate of pay via the workweek averaging approach set forth WAC 296-136-021(2), regardless of whether or not they chose to combine the worker's non-hourly pay with any other hourly pay they may have received in that time period. WAC 296-126-021 expressly provides for the workweek averaging and "gross-up" compliance methodology Dovex has adopted in the agricultural piece rate context.

8. This Court's precedent endorses workweek averaging as the appropriate methodology to ensure non-hourly workers are paid at a rate that meets or exceeds minimum wage.

DLI administrative policy and regulations highlight the critical distinction between calculating the rate of pay for an hourly employee, and calculating an employee's rate of pay under a non-hourly compensation system. DLI accepts and embraces the need for the workweek average to ensure each non-hourly employee is paid at a rate that meets or exceeds minimum wage. But most importantly, the use of workweek averaging to compute a piece rate worker's pay *in the agricultural context* is directly in line with this Court's precedent. In *Lopez Demetrio*, this Court cited with approval agricultural employers' use of workweek averaging to ensure piece rate payments comply with the MWA:

The second sentence of [the rest break regulation] references the MWA's floor by ensuring the quotient of an employee's piece rate earnings by the number of hours he or she worked, inclusive of the time spent on rest breaks is at least the minimum wage. If this *de facto* hourly rate falls below the minimum wage, the employer must bring up the employee's pay to the minimum. Like every employer of piece rate workers, Sakuma already performs this minimum wage calculation.

Lopez Demetrio, 183 Wn.2d at 660–61.

Like every employer of piece rate workers, Dovex performs this minimum wage calculation. Like every employer of piece rate workers, its workweek averaging and gross-up procedure ensures that all piece rate employers are paid at a rate above the statutory minimum. This Court even used a workweek averaging and gross-up system *identical* to Dovex's in its explanatory hypothetical:

An example demonstrates this calculation in practice. Suppose an employee is paid 50 cents per pound of fruit picked (the piece rate). The employee works five eight-hour days and takes 20 minutes of rest breaks each day, as provided by WAC 296-131-020(2). The employee has spent 38.6 hours producing and 1.4 hour son breaks, for 40 hours of total work. If the employee produces 750 pounds of fruit, he or she earns \$375.00 that week. Thus, the employer divides the employee's total piece rate earnings (\$375.00) by 40 hours, which equals only \$9.38 per hour. The employer must increase the worker's total piece rate earnings to meet the \$9.47 state minimum wage, if that is the highest applicable minimum wage in the locality.

Lopez Demetrio, 183 Wn.2d at n.3.

Lopez Demetrio expressly endorses workweek average and Dovex’s “gross-up” procedure as a methodology to ensure that the rate paid to non-hourly workers meets or exceeds the statutory minimum wage. The Court should reiterate its analysis in *Lopez Demetrio* and solidify workweek averaging in the agricultural piece rate context.

9. If the Court finds its precedent and DLI guidance to be ambiguous, the Court should not rely on antithetical California law. It should instead look to the Federal Fair Labor Standards Act for guidance.

Perhaps recognizing that Washington’s MWA does not prohibit workweek averaging, Plaintiffs ask this Court to disregard its established precedent and DLI guidance, and instead rely upon California law. But California law is inapposite. RCW 49.46.020 provides that “every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [minimum wage] *per hour*.” (Emphasis added). California’s Wage Order Number Four, however, expressly requires separate payment for *all hours worked*: “Every employer shall pay to each employee wages not less than . . . [minimum wage] per hour for all hours worked.” California’s and Washington’s governing authorities are simply not identical; they are not “essentially the same.” *Pltfs.’ Opening Brief*, at p. 23.

But most importantly, California’s minimum wage order and RCW 49.46.020 have both been examined in the context of per-mile, piece compensation systems in the trucking industry. While Wage Order Number Four prohibits workweek averaging in piece rate trucking compensation schemes, *Ridgeway v. Wal-Mart Stores, Inc.*, 107 F.Supp.3d 1044 (N.D. Cal. 2015); *Quezada v. Con-Way Freight, Inc.*, No. C 09-03670 JW, 2012 WL 2847609 (N.D. Cal. July 11, 2012); *Carrillo v. Schneider Logistics, Inc.*, 823 F.Supp.2d 1040 (C.D. Cal. 2011); *Cardenas v. McLane Foodservices, Inc.*, 796 F.Supp.2d 1246 (C.D. Cal. 2011), Washington regulations expressly endorse workweek averaging as applied to piece-rate truck drivers. WAC 296-126-021; *See also Helde v. Knight Transportation, Inc.*, 2016 WL 1687961 (W.D. Wash. Apr. 26, 2016); *Mendis v. Schneider Nat’l Carriers Inc.*, 2016 WL 6650992 (W.D. Wash. Nov. 10, 2016). Not only are California and Washington laws not “essentially the same,” in some cases they are diametrically opposed.³

Instead of relying on California’s antipodal state law, to the extent this Court seeks additional guidance, it should turn to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (“FLSA”). Washington’s MWA

³ California is clearly an outlier in its approach to this area of the law. Oregon’s MWA, like California’s wage and hour law, expressly requires payment for “each hour of work.” O.R.S. 653.025. But Oregon, unlike California, permits workweek averaging. *See Loebach v. Oregon Student Public Interest Group*, 200 Or. App. 100, 112 P.3d 461 (2005).

(unlike California’s wage and hour law) is based on the FLSA. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (“We have repeatedly recognized that the ‘MWA is based on the Fair Labor Standards Act of 1938.’”) (citing *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 885, 64 P.3d 10 (2003)); *Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn. App. 401, 422, 54 P.3d 687 (2002); *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 323, 37 Cal.Rptr.3d 460 (“[T]he minimum wage provisions of the FLSA differ significantly from California’s minimum wage law.”). Cases and regulations interpreting the FLSA are thus persuasive and helpful when examining the MWA. *See Chelan County Deputy Sheriffs’ Ass’n v. Chelan County*, 109 Wn.2d 282, 291–92, 745 P.2d 1 (1987); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000).

The FLSA, like the MWA, requires employers compensate their employees for all “hours worked.” *Alvarez*, 339 F.3d at 902 (“It is axiomatic, under the FLSA, that employers must pay employees for all ‘hours worked.’”); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004). And the FLSA, like Washington law, requires employers compensate their workers at a rate that meets or exceeds the minimum wage. *Alvarez*, at 912. While the MWA and the FLSA may diverge when it comes to workweek averaging for hourly employees, *see Alvarez*, at

912, the agencies tasked with interpreting these statutes have both adopted workweek averaging in the non-hourly compensation context. 29 C.F.R. § 778.318; WAC 296-136-021. This Court should look to the FLSA for guidance.

The FLSA expressly allows *agricultural employers* to utilize workweek averaging to ensure their piece rate employers are paid at a rate at or above the minimum wage. 29 C.F.R. § 778.318. And it allows employees and their employers to agree to compensate *all* time spent working via the piece rate:

[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.

Further, the Second Circuit Court of Appeals has already considered—and rejected—arguments under the FLSA that are very similar to Plaintiffs’ “non-productive time” theory in this case. *See e.g. Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106 (2d Cir. 2013); *Davis v. Abington Memorial Hosp.*, 765 F.3d 236, 244 (3d Cir.

2014); *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192 (2nd Cir. 2013).

10. Plaintiffs' theories take aim at piece rate employment itself, not Dovex's compliance with Washington law.

Taken to their logical conclusions all of Plaintiffs theories would result in agricultural employers ceasing to offer piece rate employment to workers. Under any iteration of Plaintiffs theories, the result would be the same. It is not possible for employers to separately track and pay for every second of time that an employee is not actually picking each piece of fruit, so they will be forced to abandon piece rate pay altogether. Similarly, if piece rate employers cannot use averaging to determine if they have meet the minimum wage requirement under the MWA, they have no practical way to ensure their compliance with the MWA and will forced to switch to offering only hourly employment to workers.

Maybe this is what Plaintiffs really want as a result of their claims, but it is not what the thousands of skilled pickers that return each year to Washington's harvest necessarily want. These skilled pickers enjoy wages that greatly exceed minimum wage⁴ and the piece rate allows them to control their earnings and time spent working in a way that straight hourly work does not afford.

⁴ See Dkt. 39, Ex. 7; see also *Federal Reg.*, Vol. 81, No. 247 (Dec. 23, 2016).

The employers lose the ability to attract and retain skilled pickers without the production incentive inherent in the piece rate system. Without the ability to reward efficient and skilled pickers, the time-sensitive harvest becomes less efficient and the employers' costs go up. These impacts will have a ripple effect and a negative impact on an important industry that in 2015 contributed nearly \$3.0 billion dollars to the State's economy⁵ and created employment for approximately 250,000 workers⁶.

Public policy does not support Plaintiffs' invitation to get rid of piece rate employment for agricultural workers. Doing so takes away opportunities for employment for skilled pickers contravene to the mandate of the MWA. Public policy also militates against re-writing the terms of employment that the employer and employee agreed to. And public policy favors the high wages and efficient production that piece rate based compensation promotes. Accordingly, the Court should decline Plaintiffs' invitation to dismantle piece rate employment for agricultural workers and answer the first certified question in the negative.

11. If Dovex must pay separately for non-picking time the rate of pay should Dovex's base rate.

⁵https://www.nass.usda.gov/Statistics_by_State/Washington/Publications/Fruit/2016/FR07_01.pdf

⁶ U. S. Dep't of Agriculture, Nat'l Agricultural Statistical Serv., *2012 Census of Agriculture*, available at <http://tinyurl.com/kszh4wl> (page last modified 5/18/2017).

If the Court answers the first certified question in the negative, it need not reach the second certified question. However, if the Court does reach the second certified question it should hold that Dovex must pay its base rate to piece rate employees for time spent on non-picking tasks.

Even if the Court determines that non-picking tasks cannot be included within the agreed upon piece rate as a matter of law, this still does not mean the employer and the employee had any meeting of the minds regarding what the rate for time spent on non-picking tasks would be. Certainly, if Dovex and its employees never agreed to separate payment for non-picking tasks in the first place they did not agree that those non-picking tasks would be paid at the same rate as the piece rate itself.

Absent any agreement otherwise, the default rate that Dovex offers for work performed by employees exclusive of the piece rate compensation should apply. This would be Dovex's base rate, which exceeds minimum wage, and Plaintiffs acknowledge is the "General/Misc." category that Dovex pays Dovex employees for work "outside" of the piece rate. *See* Pltfs.' *Opening Brief*, p. 5. Accordingly, if the Court does address the second certified issue it should require that Dovex pay its base rate to employees for time spent on non-picking tasks.

III. CONCLUSION

What is at stake in this case is whether skilled workers will any longer have the opportunity to earn high wages through piece rate work while enjoying the guaranteed protection of making no less than the minimum wage for every hour they work. And while the Plaintiffs may take issue with piece rate work itself, their claims and arguments against the piece rate are not consistent with the terms of employment they accepted, nor do they demonstrate any violation of Washington law. Ultimately, when fully considered, all that Plaintiffs can show is that they were always paid by Dovex at rates *above* the minimum wage for every single hour they worked for Dovex. Accordingly, the Court should reject Plaintiffs' claims and answer the first certified question in the negative.

RESPECTFULLY SUBMITTED AND DATED this 22nd day of May, 2017.

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CERTIFICATE OF SERVICE

I, Clay M. Gatens certify that on May 22, 2017, I caused a true and correct and copy of the foregoing to be filed with the Washington Supreme Court and copies were served to the following counsel of record via email (per agreement of parties):

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