

In the Matter of
BLACHANA, LLC, dba Penner's Portsmouth Club
Case No. 06-08

Final Order of Commissioner Brad Avakian

Issued August 26, 2009

SYNOPSIS

NW Sportsbar, LLC, a bar and restaurant, went out of business on May 9, 2006. Subsequently, four employees who were owed wages for work performed in the prior 60 days filed wage claims. The commissioner made a determination that the claims were valid and caused \$7,047.62 to be paid to the four claimants from the Wage Security Fund. On June 26, 2006, Respondent opened for business as a bar and restaurant at the same location at which NW had conducted business. The commissioner determined that Respondent was a "successor" employer under ORS 652.310(1) and ordered Respondent to repay the Wage Security Fund \$7,047.62, as well as a 25 percent penalty of \$1,761.91. ORS 652.140, ORS 652.310(1), ORS 652.414.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 16-17, 2009, W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimants Gye Alexander, Jerry Peterson, and Jerri Smith were present and not represented by counsel. Wage claimant Katharine Cleary made an appearance and testified by telephone. Steven C. Burke, attorney at law, was present and represented Respondent Blachana, LLC. Chris Penner, a member of the Respondent LLC, was present

throughout the hearing as the person designated by Respondent to assist in the presentation of its case.

The Agency called the following witnesses: Claimants Jerri Smith, Jerry Peterson, and Gye Alexander; Claimant Katharine Cleary (telephonic); Bernadette Yap-Sam, BOLI Wage and Hour Division compliance specialist (telephonic); and Chris Penner and Janet Penner, members of Blachana, LLC.

Respondent called the following witnesses: Chris Penner and Janet Penner.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-23 (submitted or generated prior to hearing);
- b) Agency exhibits A-1, A-3 through A-23 and A-25 through A-30 (submitted prior to hearing), portions of A-24 (submitted prior to hearing), and A-31 (submitted at hearing);
- c) Respondent exhibits R-1 through R-4 and R-7 (submitted prior to hearing), and R-10 (submitted at hearing). Exhibits R-8 and R-9 were not offered.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

- 1) On May 18, 2006, Claimant Jerry Ann Smith (“Smith”) filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned between April 15 and May 7, 2006, and due to her. At the time she filed her wage claim, Smith assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent.

2) On July 6, 2006, Claimant Gye Alexander (“Alexander”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned between January 1 to May 1, 2006, and due to him. At the time he filed his wage claim, Alexander assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

3) On July 14, 2006, Claimant Jerry L. Peterson (“Peterson”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned between “09/01/05 to 04/31/06” and due to him. At the time he filed his wage claim, Alexander assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

4) On September 15, 2006, Claimant Katharine O. Cleary (“Cleary”) filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned between March 1 and April 2006 and due to her. At the time she filed her wage claim, Cleary assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent.

5) Claimants filed their wage claims within the statute of limitations.

6) On January 17, 2007, the Agency issued Order of Determination No. 06-4470 based upon the wage claims filed by Claimants. The Order of Determination alleged:

(a) Claimant Cleary was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner’s Portsmouth Club, successor to the business of NW Sportbars Inc., from 3/10/06 through 4/29/06; that she worked 124.933 hours at the wage rate of \$7.50 per hour; that she earned \$937.00 and was paid nothing; and that she is owed \$937.00 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(b) Claimant Smith was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner’s Portsmouth Club, successor to the business of NW Sportbars Inc., from 4/15/06 through 5/7/06; that she worked 64 hours at the wage rate of \$7.50 per hour; that

she earned \$480.00 and was paid nothing; and that she is owed \$480.00 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(c) Claimant Alexander was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner's Portsmouth Club, successor to the business of NW Sportbars Inc., from 3/10/06 through 5/9/06; that he worked 344 hours at the wage rate of \$7.50 per hour; that he earned \$2,580.00 and was paid only \$400.00; and that he is owed \$2,180.00 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(d) Claimant Peterson was employed in Oregon by NW Sportbars Inc. dba Portsmouth Club and Blachana, LLC dba Penner's Portsmouth Club, successor to the business of NW Sportbars Inc., from 3/10/06 through 4/30/06; that he worked one month, three weeks, and one day at the salary of \$2,000.00 per month; that he earned \$3,450.62 and was paid nothing; and that he is owed \$3,450.62 in unpaid wages, plus interest at the legal rate per annum from June 1, 2006, until paid.

(e) Respondent NW Sportbars Inc. dba Portsmouth Club willfully failed to pay those wages, more than 30 days have elapsed since the wages became due and owing, and Respondent NW Sportbars Inc. dba Portsmouth Club owes Claimants Cleary, Smith, and Alexander each \$1,800.00 in penalty wages, plus interest from July 1, 2006, until paid, and owes Peterson \$3,691.20 in penalty wages, plus interest at the legal rate per annum from July 1, 2006, until paid.

(f) Respondent paid Claimants Cleary, Smith, and Alexander less than the wages to which they were entitled under ORS 653.010 to 653.261 and is liable to each for \$1,800.00 in civil penalties, pursuant to the provisions of ORS 653.055(1)(b), plus interest at the legal rate per annum from July 1, 2006, until paid.

(g) BOLI has paid Claimants \$7,047.62 from the Wage Security Fund ("WSF") and is entitled to recover from Respondents that amount as wages paid from the WSF, plus a penalty of 25% of the sum paid from the WSF, equaling \$1,841.91, plus interest at the legal rate per annum.

The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

7) On February 5, 2007, Chris Penner and Janet Penner filed an answer and request for hearing on behalf of Blachana, LLC ("Respondent"). In their answer, they

stated that they were Respondent's only members and authorized themselves to be authorized representatives for Respondent.

8) On March 27, 2007, the Agency issued a Final Order on Default against NW Sportbars Inc. dba Portsmouth Club based on its failure to file an answer and request a hearing.

9) On March 31, 2009, the Agency filed a "BOLI Request for Hearing" with the forum.

10) On April 1, 2009, the Hearings Unit issued a Notice of Hearing to Respondent,ⁱ the Agency, and Claimants stating the time and place of the hearing as May 12, 2009, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon April 28, 2009. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

11) On April 17, 2006, Steven C. Burke, attorney at law, filed a notice of appearance on behalf of Respondent. Burke also filed an amended request for hearing, an amended answer, and a motion for postponement so that he could "obtain further discovery to adequately prepare and serve the interests of my clients."

12) On April 21, 2009, the Agency filed objections to Respondent's request for a postponement. On April 23, 2009, the ALJ issued an interim order denying Respondent's request for postponement on the grounds that inability to complete discovery is not good cause for a postponement and Respondent had not demonstrated

that its need for additional preparation was due to circumstances beyond Respondent's control.

13) On April 22, 2009, the Agency filed a motion for a discovery order requiring Respondent to provide documents related to the interrelationship between C.P. Underhill LLC, Blachana, LLC, and Northwest Sportsbar Inc. and Dustin Drago. The Agency provided documentation showing that it had made a written request for this information on April 2, 2009, and represented that Respondent had not responded to the request.

14) On April 23, 2009, the ALJ granted the Agency's motion for a discovery order, noting that if Respondent filed objections before April 29, 2009, she would construe those objections as a motion for reconsideration of the order and "give them the same consideration [she] would have given them had they been filed before this order issued."

15) On April 25, 2009, Respondent renewed its motion for a postponement.

16) On April 28, 2009, the ALJ conducted a telephonic prehearing conference to address Respondent's renewed motion for postponement. On May 5, 2009, the ALJ reconsidered her ruling and granted Respondent's motion for a postponement. The ALJ reset the hearing to begin on June 16, 2009.

17) On June 1, 2009, the ALJ in the case was changed from ALJ Linda Lohr to ALJ Alan McCullough.

18) Respondent submitted its case summary on June 2, 2009, and the Agency submitted its case summary on June 4, 2009.

19) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

20) After opening statements, and before any witnesses were called, Respondent moved to dismiss the case on the grounds that the Agency had submitted an “inadequate” case summary, in that the Agency’s case summary failed to detail all the elements of the specific successor in interest test the Agency intended to apply to the case. The ALJ’s case summary order had required, among other things, that the Agency submit “a brief statement of the elements of the claim.” The Agency’s case summary stated that “Respondent, as successor in interest, is liable to the Wage Security Fund for reimbursement of \$7,047.62 in wages paid to Claimants and for a penalty of 25% of those wages in the amount of \$1,841.91 plus interest until paid.” The ALJ ruled that the Agency’s case summary met the requirements of OAR 839-050-0210 and overruled Respondent’s objection.

21) During the hearing, Respondent moved to amend its answer to add the affirmative defense that the claimants were independent contractors. The ALJ ruled that affirmative defenses must be raised in the pleadings and denied Respondent’s motion.

22) The ALJ allowed Respondent’s counsel to make an oral offer of proof as to what the testimony of Gye Alexander and Bernadette Yap-Sam would have been, had Respondent been allowed to question them regarding whether or not claimants were independent contractors. (Statements of ALJ, Burke)

23) The Agency provided an unsigned declaration of Katharine Cleary with its case summary. After opening statements, and before any witnesses were called, the Agency offered the same declaration, signed by Cleary, as Exhibit A-31. Respondent requested cross examination of Cleary and objected to the introduction of Cleary’s declaration without the opportunity to cross examine her. The ALJ conditionally admitted Cleary’s signed declaration, contingent on the Agency making Cleary available

for cross examination by June 30, 2009. The ALJ based his ruling on the grounds that the signature on Cleary's declaration made it a different document than the unsigned declaration submitted with the Agency case summary and Respondent had had no prior opportunity to request cross examination based on that particular document. The Agency called Cleary as a telephone witness on the second day of hearing, and Respondent had an opportunity to cross examine her. During cross examination, Cleary testified that Burgess had drafted the affidavit and that she had reviewed drafts of the affidavit before signing the final version. She did not testify that she reviewed those drafts in preparation for hearing. During Cleary's cross examination, Respondent requested the production of the drafts the purpose of cross examining Cleary on their contents. The ALJ reserved ruling on Respondent's request until after the hearing. Under the circumstances, the forum concludes that Respondent is not entitled to production of the drafts prepared by the Agency's case presenter and Respondent's request is denied.ⁱⁱ

24) During the hearing, the Agency offered Exhibit A-24, two one-page print-outs from Willamette Week's internet site describing local entertainment in Portland in May and December 2006. The May printout contained information about the Portsmouth Club's closure and anticipated reopening. The December printout described upcoming musical events at the Portsmouth Club. Respondent objected to the admission of A-24 on the basis that it was unreliable, that its prejudice outweighed its probative value, and that there was no foundational testimony showing how the information was gathered. At the time the objection was made, the ALJ reserved ruling until the proposed order. C. Penner subsequently testified that a woman from Willamette Week had talked with him in May 2006 and that he provided some of the information printed in A-24. He also verified the accuracy of some of the other

information contained in A-24. The forum receives into evidence the printed information on A-24 that C. Penner either acknowledged providing to Willamette Week or that C. Penner admitted was accurate information.

25) At the conclusion of the hearing, and prior to closing argument, Respondent moved for a directed verdict. The ALJ denied the motion.

26) The ALJ issued a proposed order on August 6, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) Since 1940, five different businesses have operated a bar and restaurant in the same building at 5264 N Lombard, Portland, Oregon. The building at that location is designed to house a restaurant/lounge. Since a bar and restaurant first began operating in that location, customers have referred to the business as “Portsmouth Club,” even when one of the previous owners changed the name.

2) Janet Penner (“J. Penner”) is a manager of C. P. Underhill (“CPU”), an Oregon limited liability company. On February 28, 2005, Penner, in her capacity as “manager” of CPU, Christopher Penner (“C. Penner”), as an individual, and NW Sportsbar, Inc. (“NW”) executed a lease agreement that included among its terms the following language:

“By this Lease, dated as of 2/28/2005, CP Underhill, LLC, and Christopher Penner, (hereinafter called ‘Landlord’) and NW Sportsbar, Inc, a Washington corporation, (hereinafter called ‘Tenant’) agree as follows:

“1. **Lease of Premises.** Landlord does hereby lease to Tenant and Tenant hereby leases from Landlord the real property (hereinafter called ‘Premises’) located at 5264 N Lombard, in the City of Portland, County of Multnomah and State of Oregon, more particularly, that property comprising The Portsmouth Club, Mama’s BBQ and the attached parking designated for said business.

2. **Term.**

- a. **Original Term.** The lease shall commence 2/28/2005 and terminate on 2/27/2010.”

Dustin Drago signed the lease agreement on behalf of NW in his capacity as president.

(Testimony of J. Penner; Exhibit A-27)

3) On the same day that CPU, C. Penner, and NW executed the lease, they also executed an “Agreement for Sale of Business” that included among its terms the following language:

“BY THIS AGREEMENT dated as of 2/28/2005, C.P. Underhill, LLC, and Christopher Penner, hereinafter called Sellers, and NW Sportsbar, Inc, hereinafter called Buyer, agree as follows:

“* * * * *

“1. Sale of Business. Sellers agree to sell to Buyer all of the listed assets of C.P. Underhill, LLC and Buyer agrees to purchase from Sellers the Sellers’ listed assets of C.P. Underhill and Sellers’ interest in said assets consists of the following assets:

“A. Inventory of the Portsmouth Club - \$50,000.00

“B. Good Will - \$285,000.00

“This transaction includes only those assets specifically described above and included in Schedule A., and excludes all cash on hand and in bank accounts.”

Again, Dustin Drago signed the sale agreement on behalf of NW in his capacity as president.

4) Schedule A in the sale agreement listed the following physical inventory under the page heading of “C.P. UNDERHILL LLC”:

- 1 beer tap system
- 1 glass cooler
- 1 under counter cooler
- 2 ice wells
- 4 bar cabinets
- 1 parking lot awning
- 1 store front awning
- 1 tall outside sign
- 1 square outside sign
- 1 outside sign with/readerboard

lighting
11 booths
10 hard wood table tops
77 wooden chairs
17 bar stools, black
16 bar stools, red
1 BBQ room stereo with 8 speakers
1 bar stereo with 9 speakers
1 espresso maker
1 espresso grinder
3 cash registers
1 sm. Deep freezer
1 lg. prep cooler
1 sm. Prep cooler
1 4 slot steam table
1 broiler
2 deep fryers
1 grill
1 range
3 microwaves
1 under counter freezer
175 dishes
100 sets table ware
275 glassware
1 Sears upright freezer
1 Holbart slicer
1 Kitchen Aid mixer
1 Triumph mixer
Stephan vertical mixer
1 sm. stainless prep table
1 lg. stainless prep table
1 maple prep table
? pots, pans, heat lamps & kitchen stuff
3 rolling carts
1 stainless prep sink
1 stainless dish station
2 lg. store room shelves

- 1 security camera system
- 1 alarm system
- 1 new ice maker
- 1 used ice maker
- 1 lg. chest freezer
- 1 set kitchen cooler shelves
- 1 set keg cooler shelves
- 5 TV's
- 1 cigarette machine
- 1 ATM
- 2 ceiling fans
- 2 10 seater round tables
- 12-15 various table tops
- table bases
- 1 2 door upright freezer
- 4 ladders
- 1 hand truck
- 2 high chairs
- 1 sofa table (ladies restroom)
- 1 liquor gun system
- janitorial stuff
- 1 double safe
- 1 floor safe
- 1 cash safe
- 1 Bloomfield coffee maker
- 1 True 2 door cooler
- 1 bread warmer
- 1 phone system
- 1 100 gallon hot water heater
- 3 fire extinguishers
- 6 sm. shelf units

5) On March 31, 2005, NW, a Washington corporation, registered with the Oregon Corporation Division. NW's registered agent was listed as Vincent Drago; its president was listed as Dustin Drago ("Drago"). That same day, NW registered with the

Corporation Division as the authorized representative for "Portsmouth Club," an assumed business name that had been registered in 1988.

6) Prior to February 28, 2005, CPU owned and ran the business that was sold to NW. CPU also held the OLCC liquor license in its name.

7) For the rest of 2005, and until going out of business in May 2006, NW operated a bar and restaurant under the names of Portsmouth Club and Anchor Grill at the property leased from CPU and C. Penner. A sign on the outside of the building read "Anchor Grill." NW had a restaurant time, a happy hour time, and an entertainment time, with a full service kitchen, and did some limited catering. It offered food and drinks that included, among other things, beer, salad, and pizza. NW offered live hip hop, reggae and blues music as entertainment, and as part of its business catered extensively to a "late night hip hop crowd." It also offered video poker. Drago managed the business and hired the four wage claimants.

8) Between January and May 2006, NW partially remodeled the Portsmouth Club's interior physical premises.

9) Claimant Peterson was hired to work at NW in August 2005. Peterson was hired primarily to work as a manager, but also to tend bar and do some kitchen work. Drago agreed to pay Peterson a \$2,000 a month salary for his managerial work and \$11 per hour when he tended bar and worked in the kitchen. Peterson did that work until the end of April 2006. As a manager, Peterson did marketing, ordered liquor, made up employee schedules, and trained bartenders, cooks, and waitresses. During his employment, Peterson made a \$20,000 personal loan to Drago. He hoped that, in return for the loan, Drago's business would take off and eventually Peterson "could afford to become a partner in the business."

10) NW paid Peterson his managerial salary through the end of 2005, but did not pay him anything additional for his bartending and kitchen work. At the end of 2005, Drago told Peterson he could not pay him any longer for his work, but he would pay Peterson when he could. Peterson agreed to continue to work under those conditions and worked through April 30, 2006 without pay, earning his manager's salary of \$2,000 a month. His last day of work was April 30, 2006. From March 10 through April 30 2006, he earned \$3,450.62 in salary (1 month @ \$2,000 salary per month = \$2,000.00 + 3.143 weeks @ \$461.54 per week = \$1,340.62; \$2,000.00 + \$1,340.62 = \$3,450.62).

11) On Peterson's last day of work, Drago told him that NW was closing and that the Penners had given Drago notice that they were shutting the building down.. Peterson asked Drago for his pay, and Drago told him that he had no money.

12) When Peterson left NW's employment, he took with him some personal property that he had used at NW, including all his marketing books, food from the kitchen that he had purchased to use for "outside catering events," some light bulbs, and some sound systems.

13) Claimant Alexander worked for NW doing "maintenance/janitorial/security" from December 1, 2005, through May 1, 2006. He was hired at \$7.50 per hour, with the agreement that he would be paid \$15 per hour when business picked up. As Alexander's employment continued, Drago began paying him irregularly, but Alexander kept working based on Drago's promises that things would get better. In March and April 2006, Alexander's workweek was Tuesday through Saturday. Between March 10 and April 29, 2006, Alexander worked 38 days, working at least eight hours a day. The last day he worked was April 29, 2006.ⁱⁱⁱ Based on a 40 hour workweek, he earned \$2,280 in gross wages in March and April 2006 (38 days x 8 hours x \$7.50 per hour). NW paid him nothing for that work.

14) Claimant Cleary worked for NW as a night waitress and day bartender from about January 19, 2006, through April 29, 2006. She worked 125 hours from March 10 through April 29, 2006, earning a total of \$937.50 (125 hours x \$7.50 per hour), and was paid nothing for that work.

15) Claimant Smith worked for NW as a bartender and waitress from April 15 through May 7, 2006. She worked one to three days a week, approximately six hours per shift, and was paid \$7.50 per hour. In total, she worked 64 hours, earning \$480 in gross wages (64 hours x \$7.50 per hour = \$480). She was paid nothing for her work. She stopped working when NW went out of business and closed its doors.

16) By May 2006, Drago was three months' behind in his payments on the sale agreement. In early May, Drago called J. Penner and told her "I'm done." J. Penner met with Drago to discuss NW's closing and CPU's repossession of the business. At the time, NW's business was no longer operating. Drago and J. Penner then executed an agreement to protect CPU against financial liability.

17) On May 9, 2006, Drago, as an individual, NW, and CPU, through J. Penner, executed a Surrender and Release Agreement. The Agreement included among its terms the following language:

"THIS SURRENDER AND RELEASE AGREEMENT ('Agreement') is made and entered into effective this 9th day of May, 2006 * * * by and among C.P. Underhill, LLC, * * * NW Sportsbar, Inc. * * * and Dustin Drago * * * ("Drago").

“* * * * *

“A. Drago is the sole shareholder of NW Sportsbar.

“B. Pursuant to that certain Agreement for Sale of Business dated February 28, 2005 (the 'Sale Agreement'), by and among C.P. Underhill, LLC, Christopher Penner and NW Sportsbar, C.P. Underhill and Christopher Penner sold to NW Sportsbar substantially all of the assets (i) used in a bar known as The Portsmouth Club (the 'Bar') and (ii) used in a restaurant business known as Mama's BBQ (the 'Restaurant'). * * * The Bar and Restaurant are collectively referred to herein as the 'Business.'”

“C. NW Sportsbar has changed the name of the Restaurant to Anchor Grill.

“D. C.P. Underhill owns the real property and improvements thereon commonly known as 5264 N. Lombard Street, Portland, Oregon 97203 (‘Business Premises’). The Business is located at and operated out of the Business Premises. * * *

“* * * * *

“F. NW Sportsbar is in default on its payment obligations under both the Sale Agreement and Lease.

“G. NW Sportsbar desires to surrender all of its assets used or useful, or intended for use, in the Business and the Business Premises to C.P. Underhill in full satisfaction of NW Sportsbar’s obligations and liabilities arising under the Sale Agreement and Lease.

“* * * * *

“NOW, THEREFORE, for good and valuable consideration as provided for in this Agreement, the sufficiency of which is hereby acknowledged by the parties, the parties hereby agree as follows:

“1. Surrender of Assets of Business. In consideration for (i) C.P. Underhill’s agreement to terminate all further obligations and liabilities of NW Sportsbar under the Sale Agreement as provided for in Section 2 of this Agreement, (ii) C.P. Underhill’s agreement to terminate all further obligations and liabilities of NW Sportsbar under the Lease as provided for in Section 3 of this Agreement, and (iii) C.P. Underhill’s release as provided for in Section 4 of this Agreement, effective as of the Effective Date, NW Sportsbar hereby surrenders, bargains, sells, assigns, transfers and delivers to C.P. Underhill all of the assets used or useful, or intended for use, in the operation of the Business * * * including, but not limited to, all of the assets listed on Exhibit A to the Sale Agreement, all of the assets located at the Business Premises as of the Effective Date, and all of the following assets:

“1.1 The names ‘The Portsmouth Club,’ ‘Mama’s BBQ’ and ‘Anchor Grill’ and all goodwill associated with such names;

“1.2 All food, beverage and liquor inventory located at the Business Premises as of the Effective Date;

“1.3 To the extent transferable, all approvals, authorizations, consents, licenses, permits, franchises, tariffs, orders, and other registrations of any federal, state, or local court or other governmental department, commission, board, bureau, agency, or instrumentality held by NW Sportsbar and required or appropriate for the conduct of the Business;

“1.4 All assignable rights, if any, to all telephone lines and numbers used in the conduct of the Business;

“1.5 All accounts receivable and other receivables of NW Sportsbar; and
“1.6 All choses in action, causes of action, rights of recovery and setoff, warranty rights, and other similar rights of NW Sportsbar.

“* * * * *

“3. **Surrender of Business Premises and Termination of Remaining Obligations and Liabilities under Lease.** Effective as of the Effective Date, NW Sportsbar hereby surrenders and relinquishes possession of the Business Premises to C.P. Underhill. Subject to the condition set forth in Section 5 of this Agreement, the parties agree that effective as of the Effective Date, the Lease is hereby terminated and the parties shall have no further obligations or liabilities to each other under the Lease.

“* * * * *

“22. **Entire Agreement.** This Agreement * * * constitutes the entire agreement and understanding of the parties with respect to the subject matter of this Agreement and supersedes all prior understandings and agreements, whether written or oral, among the parties with respect to such subject matter.”

18) As a result of the Surrender and Release Agreement, CPU got back “the building and what was in it,” taking over everything that was in the building in which NW had conducted its business and in which CPU had previously run the business before selling it to NW.

19) On May 17, 2006, Blachana, LLC registered with the Oregon Corporation Division, with J. Penner listed as a manager and member.

20) On May 18, 2006, Blachana, LLC (“Respondent”) registered the assumed business name of “Penner’s Portsmouth Club” with the Corporation Division, with J. Penner listed as its authorized representative. (Testimony of J. Penner; Exhibit A-12)

21) Respondent had no financial interest in NW.

22) On May 18, 2006, Smith filed her wage claim. On it, she stated, among other things: (1) that she had worked as a bartender for NW from 4/15/06 through 5/7/06, earning \$7.50 per hour and she had been paid nothing; (2) that her employer Drago had sold the business; (3) that it had closed on May 8, 2006; (4) that she had

heard that the owner was bankrupt and had left town; and (5) that the business phone number was 503-286-4644. Her wage claim was assigned to Agency Compliance Specialist Yap-Sam for investigation. Because there was evidence that NW was no longer in business, Yap-Sam handled Smith's case from the outset as a Wage Security Fund ("WSF") case.

23) With her wage claim, Smith submitted a calendar showing the dates and specific hours in which she had worked a total of 64 hours for NW.

24) On June 1, 2006, Yap-Sam telephoned 503-289-4644. A male who identified himself as Chris Penner answered the phone with the words "Portsmouth Club." Penner told Yap-Sam that he had sold the business to Dustin Drago 14 months earlier, that Drago had closed on May 9, 2006, and left town, owing a lot of money to individuals and the state, and that the new business was owned by Blachana, LLC.

25) On June 2, 2006, Yap-Sam sent a letter to Chris and Janet Penner in which she described Claimant Smith's wage claim, explained that Blachana, LLC might be considered a "successor" employer, stated six factors that the Agency uses to determine if an employer is a successor, and asked the Penners to take one of three actions by June 19, 2006:

"1. Submit to my attention a check or money order payable solely to Jerri A. Smith for the gross amount of \$480.00 (or the gross amount you do not dispute is owed to the claim) together with an itemized statement of all lawful deductions, if any;

"2. [P]rovide me with a written explanation as to why you did not believe that Blachana, LLC is a successor to the business of Portsmouth Club and address the six factors outlined above;

"3. [P]rovide me with any additional information, evidence, records, etc., that you feel supports your position that Blachana, LLC is not or should not be held liable for Ms. Smith's unpaid wages."

26) On June 9, 2006, Yap-Sam phoned 503-289-4644 again. Once again, a male who identified himself as Chris Penner answered the phone with the words

“Portsmouth Club.” Penner told Yap-Sam he had heard that Drago was going to Arizona, but that he did not have a current address for Drago. He also said that he had lost Yap-Sam’s June 2 letter. In response, Yap-Sam faxed a copy of that letter to Penner.

27) On June 23, 2006, the OLCC granted Respondent a “Full On-premises [F-com] license to sell liquor.

28) On June 26, 2006, Yap-Sam sent another fax to Penner in which she stated:

“Mr. Penner, when we spoke on June 20, you stated that you were going to respond to my June 2nd letter immediately. At the time, I asked that you also provide a copy of the correspondence that you had mentioned you had received from ADP (payroll service). Your response was that you would if you could find it. Since that conversation I have received nothing from you.

“Please note that if you do not respond very soon, Ms. Smith will be paid wages from the Wage Security Fund and the Bureau will pursue recovery of such payments from Blachana, LLC.”

29) Respondent opened for business on June 26, 2006, as a neighborhood bar under the assumed business name of “Penner’s Portsmouth Pub.” The Club was located at the same address, in the same building, as the “Portsmouth Club” that NW had operated. Respondent closed the Anchor Grill, initially used the space it had occupied for storage before remodeling it, and has never operated under the name of “Anchor Grill.” By late summer or early fall, Penner’s Portsmouth Pub began to feature live jazz and blues artists. At the time of hearing, it no longer featured live jazz. Since Respondent opened for business, it has operated a bar and restaurant, serving food, drinks, and beer. Respondent has repainted the interior of the premises and remodeled the bar, but the stage and dance floor have not changed. It has also replaced all the kitchen equipment except for the dishwasher station.

30) Since opening, Respondent has used different food vendors and the same beer vendors as NW.

31) On August 14, 2006, Yap-Sam sent another letter to the Penners. Among other things, she stated that:

“Peterson and Alexander have recently filed wage claims against Portsmouth Club. Mr. Peterson states that he was the General Manager and that he worked from August 29, 2005 until April 30, 2006. He further alleges that he was paid \$2,000 salary per month for managerial duties and \$11 per hour for other duties such as cooking, bartending, and security. His wage claim is for \$9,514.00. Mr. Alexander states that he performed maintenance and janitorial duties from December 1, 2005 until May 1, 2006 at the rate of \$7.50 per hour and that he is owed \$4,888.00 in wages.

“With respect to each claimant, please take on of the following actions by no later than **August 30, 2006**:

“* * * * *

“Explain in writing why either or both claimants are not entitled to be paid any wages by Blachana, LLC and provide any and all supporting documentation.”

32) In the course of her investigation, Yap-Sam made unsuccessful attempts to locate Drago. She received no information or documents from the Penners to prove or disprove that Claimants were employed by NW or relating to their wage rates and the unpaid hours and dates claimed in their wage claims. She further determined there was no bond or any other source available to pay the wages. Based on the information contained in their wage claims, interviews with the claimants, and the fact that NW had gone out of business and she could not find Drago, she made a determination that the Claimants' wage claims were valid, that NW had ceased doing business, and that Claimants' wage claims could not be fully and promptly paid except through the WSF.

33) On July 6, 2006, Yap-Sam caused the WSF to issue a check for \$443.28 to Claimant Smith, representing \$480.00 in gross, unpaid wages.

34) Claimant Alexander filed his wage claim on July 6, 2006. He stated on it, among other things: (1) that he had performed maintenance for NW from 12/1/05 to 5/1/06, earning \$7.50 per hour; (2) that Drago had skipped town and filed bankruptcy; (3) that NW had closed on 5/1/09; and (4) that he was owed almost \$5,000 in earned, unpaid wages.

35) With his wage claim, Alexander submitted a calendar showing that he had worked eight hours a day, 40 hours a week, from December 2005 through May 2006.

36) Claimant Peterson filed his wage claim on July 14, 2009. He stated on it, among other things: (1) that he had worked for NW from 8/29/05 to "4/31/06," earning \$2,000/month salary as manager; (2) that Drago closed NW with no warning and had to file bankruptcy; and (3) that he was still owed over \$9,000 in earned and unpaid wages.

37) With his wage claim, Peterson submitted a calendar showing all the dates and hours he worked from September 2005 through April 2006.

38) On August 31, 2006, Yap-Sam caused the WSF to issue a check for \$3,186.65 to Claimant Peterson, representing \$3,450.62 in gross, unpaid wages.

39) Claimant Cleary filed her wage claim on September 15, 2006. She stated on it, among other things: (1) that she was a waitress and bartender for NW from 1/19/06 through 4/29/06, earning \$7.50 per hour; (2) that NW closed on 5/8/06; (3) that Drago had filed bankruptcy and was "out of reach"; and (4) that she received no paycheck for her last two months of employment.

39) With her wage claim, Cleary submitted a calendar showing that she had worked 125 hours between March 10 and April 29, 2006.

40) On September 27, 2006, Yap-Sam caused the WSF to issue a check for \$807.50 to Cleary, representing \$937.00 in gross, unpaid wages and a check for \$1,836.82 to Alexander, representing \$2,180.00 in gross, unpaid wages.

41) The telephone number at Portsmouth Club remained the same, both before and after NW bought the business from CPU. Respondent kept the same phone number that NW had used. Prior to May 2007, C. Penner answered the phone with the words "Portsmouth Club" or "P Club."

42) Respondent has its own liquor and lottery licenses, city business licenses, and tax and employer identification numbers.

43) Respondent has not employed any of the same persons who worked for NW.

44) As of the date of hearing, the status of the equipment listed in Schedule A in the sale agreement between CPU and NW was as follows:

- 1 beer tap system – still in use
- 1 glass cooler – still in use
- 1 under counter cooler– still in use
- 2 ice wells– still in use
- 4 bar cabinets – still in use
- 1 parking lot awning – replaced by new awning
- 1 store front awning – replaced by new awning
- 1 tall outside sign – sold
- 1 square outside sign – still in use
- 1 outside sign with/readerboard – still in use
- lighting – 90% of inside lighting fixtures replaced
- 11 booths – gone
- 10 hard wood table tops – 5 still in use
- 77 wooden chairs – still in use
- 17 bar stools, black – still in use
- 16 bar stools, red – gone because they didn't match
- 1 BBQ room stereo with 8 speakers – gone
- 1 bar stereo with 9 speakers – gone
- 1 espresso maker – gone
- 1 espresso grinder – gone
- 3 cash registers – gone
- 1 sm. Deep freezer – gone

1 lg. prep cooler – gone
1 sm. Prep cooler – still in use
1 4 slot steam table – gone
1 broiler – gone
2 deep fryers – gone
1 grill – gone
1 range – gone
3 microwaves – 2 still in use
1 under counter freezer – gone
175 dishes – gone
100 sets table ware – gone
275 glassware – gone
1 Sears upright freezer – still in use
1 Holbart slicer – still in use
1 Kitchen Aid mixer – gone
1 Triumph mixer – gone
Stephan vertical mixer – gone
1 sm. stainless prep table – gone
1 lg. stainless prep table – still in use
1 maple prep table – gone
? pots, pans, heat lamps & kitchen stuff – gone
3 rolling carts – gone
1 stainless prep sink – still in use
1 stainless dish station – still in use
2 lg. store room shelves – gone
1 security camera system – replaced
1 alarm system – replaced
1 new ice maker – still in use
1 used ice maker – gone
1 lg. chest freezer – gone
1 set kitchen cooler shelves – gone
1 set keg cooler shelves – still in use
5 TV's – gone
1 cigarette machine – gone
1 ATM – gone
2 ceiling fans – still in use
2 x 10 seater round tables – still in use

12-15 various table tops – gone
table bases – gone
1 x 2 door upright freezer – gone
4 ladders – 2 still in use
1 hand truck – still in use
2 high chairs – gone
1 sofa table (ladies restroom) – still in use
1 liquor gun system – gone
janitorial stuff – replaced
1 double safe – still in use
1 floor safe – gone
1 cash safe – gone
1 Bloomfield coffee maker – gone
1 True 2 door cooler – gone
1 bread warmer – gone
1 phone system – still in use
1 x 100 gallon hot water heater– replaced old heater with new one
3 fire extinguishers – replaced; not there when Blachana, LLC opened
6 sm. shelf units – still in use

Some tables and booths, televisions, and sound equipment on the list were missing when Respondent opened, and all three fire extinguishers were missing. There was no other evidence to show when Respondent stopped using these objects, replaced them, or disposed of them.

45) On May 31, 2007, Respondent registered the assumed business name of “Portsmouth Pizza and Pub” with the Corporation Division, with J. Penner listed as its authorized representative. Subsequently, Respondent began serving pizza, cooking it with a pizza oven that Respondent had purchased. At some time, Respondent also placed a sign reading “Portsmouth Pizza and Pub” on the outside of the building.

46) Respondent has never run a catering business or as a hip-hop club or as an “after-hours club.”

47) At the time of hearing, the bar, stage, dance floor, and part of the carpeting at Respondent were still the same as those used by NW.

48) In the daytime, Respondent caters to retired men, some of whom who come in who as early as 10 a.m. Most of its business in the early evening is the “work crowd.” At night, it caters primarily to persons aged 35 and up, mostly mid-upper income white singles or couples who enjoy jazz music.

CREDIBILITY FINDINGS

49) Yap-Sam was a credible witness and the forum has credited her testimony in its entirety.

50) Cleary and Smith were credible witnesses and the forum has credited the entirety of their testimony.

51) Peterson was candid and forthcoming in all his testimony except for his marked reticence to testify about the amount and circumstances of his personal loan to Drago. As Drago’s manager, he was in the best position to observe the type of business that Drago was operating. Since Drago was not available as a witness, the forum has primarily relied on Peterson’s testimony to determine the nature of Drago’s business operation. Surprisingly, despite the fact that Drago owes him considerable wages that Peterson will likely never recover and has not repaid him any of the \$20,000 personal loan, Drago and Peterson remain friends. Any potential bias caused by his unpaid wages was offset by the fact that Peterson had already recovered all the wages the Agency was seeking on his behalf through a WSF payout, leaving him nothing to gain by his testimony. The forum has credited his testimony in its entirety.

52) Alexander’s inaccurate time records and improbable testimony regarding a statement allegedly made to him by an Agency representative made his testimony suspect. In addition, during cross examination he pointedly tried to avoid answering the

question of whether NW's sign had the same words on it as Respondent's present sign. He wrote on his wage claim form that the time period for his wage claim ended May 1, 2006, yet filled out a calendar in support of his wage claim that showed he worked the entire month of May 2006, and offered no explanation for that calendar. He also testified that the eight hours per day, 40 hours per week he recorded on the Agency's calendar for December 2005 through May 2006 (Form WH-127) were true and accurate, but explained that he worked more than the 40 hours he was guaranteed and only wrote down 40 because someone at BOLI told him he could not be paid for more than 40 hours per week. The forum is aware of no law, administrative rule, or agency policy that prohibits BOLI from pursuing wages earned for hours worked in excess of 40 hours a week in an ordinary wage claim proceeding or a WSF recovery proceeding, and the Agency called no witnesses to support Alexander's claim. As a result, the forum finds Alexander's testimony on this issue to be improbable. However, based on the entire record, the forum has found that Alexander worked at least 40 hours per week and that his wage claim was valid for that amount. In conclusion, the forum has credited Alexander's testimony that he worked at least 40 hours per week, but has only credited the remainder of his testimony when it was corroborated by other credible evidence.

53) Janet Penner's credibility was seriously undermined by her demeanor. When called as a witness by the Agency, her demeanor was characterized by an almost nonstop smirk and her repeated attempts to avoid answering questions in a direct manner. As an example, when Burgess asked her if she was a manager or member of Blachana, LLC, she cavalierly instructed him to look at the exhibits before finally consenting to answer "yes." Her testimony was also disingenuous. For example, she answered "I don't remember" in response to Burgess's question whether Blachana, LLC

offered live musical entertainment and claimed to have no knowledge of whether Blachana, LLC offered live music. She also feigned surprise when Burgess asked, as a leading question, whether there was a “reader board” on the outside of the building, a fact no one else disputed. In marked contrast, when testifying on Respondent’s behalf, her demeanor was calm, thoughtful, and polite. The forum has only believed her testimony when it was uncontradicted or corroborated by other credible evidence.

54) On direct and cross examination, Christopher Penner answered questions directly, with little hesitation, and the content of his answers demonstrated that he had a good memory. However, the forum disbelieved his statement that, when Respondent opened, he did not believe that wages were owed to any of NW’s employees, for the reason that Yap-Sam had twice sent Penner the same letter describing Smith’s wage claim against NW before Respondent opened for business on June 26, 2006. Except for that statement, the forum has credited C. Penner’s testimony in its entirety and has relied on his testimony to determine the nature of Respondent’s business operation as Penner’s Portsmouth Club and Portsmouth Pizza and Pub.

ULTIMATE FINDINGS OF FACT

1) Prior to February 28, 2005, CPU, doing business as The Portsmouth Club and Mama’s BBQ, operated a restaurant and bar in a building located at 5264 N Lombard, Portland, Oregon. J. Penner and C. Penner, mother and son, were CPU’s managers. Since 1940, five different businesses have operated a bar and restaurant in that location, and customers have referred to each business as the “Portsmouth Club.”

2) On February 28, 2005, CPU, C. Penner, and NW executed a lease agreement in which NW agreed to lease the property located at 5264 N Lombard comprising The Portsmouth Club, Mama’s BBQ and the attached parking for a period of five years. The same day, the same parties executed a sales agreement in which NW agreed to buy the inventory and good will of the Portsmouth Club.

3) On March 31, 2005, NW, a Washington corporation, registered with the Oregon Corporation Division as a foreign business corporation and also registered as the authorized representative for "Portsmouth Club," an assumed business name that had been registered in 1988.

4) For the rest of 2005 and until going out of business in May 2006, NW operated a bar and restaurant under the names of Portsmouth Club and Anchor Grill at the property leased from CPU and C. Penner. NW offered food, drinks, and live music. Drago, NW's president, managed the business and hired the four wage claimants.

5) Claimant Peterson was employed by NW in from August 2005 until April 30, 2006, and was paid a \$2,000 monthly salary. His last day of work was April 30, 2006, his last day of work. He was not paid anything for his work in 2006 and earned \$3,450.62 from March 10 through April 30 2006.

6) Claimant Alexander was employed by NW from December 1, 2005, through April 29, 2006, at the rate of \$7.50 per hour. His last day of work was April 29, 2006. He worked at least 40 hours per week in March and April 2006, and earned \$2,280 in gross wages between March 10 and April 2006.

7) Claimant Cleary was employed by NW from about January 19, 2006, through April 29, 2006, at the rate of \$7.50 per hour. She worked 125 hours from March 10 through April 29, 2006, earning \$937.50 in gross wages, and was paid nothing for that work.

8) Claimant Smith was employed by NW from April 15 through May 7, 2006, at the rate of \$7.50 per hour. She worked 64 hours, earning \$480.00 in gross wages, and was paid nothing for her work.

9) By May 2006, NW was unable to continue in business because of its debts. On May 9, 2006, Drago, NW, and CPU executed a Surrender and Release

Agreement in which NW surrendered all the assets sold to it in the February 28, 2006, sales agreement. More specifically, NW surrendered:

“* * * all of the assets used or useful, or intended for use, in the operation of the Business * * * including, but not limited to, all of the assets listed on Exhibit A to the Sale Agreement, all of the assets located at the Business Premises as of the Effective Date, and all of the following assets:

“1.1 The names ‘The Portsmouth Club,’ ‘Mama’s BBQ’ and ‘Anchor Grill’ and all goodwill associated with such names;

“1.2 All food, beverage and liquor inventory located at the Business Premises as of the Effective Date;

“* * * * *

“1.4 All assignable rights, if any, to all telephone lines and numbers used in the conduct of the Business;

“1.5 All accounts receivable and other receivables of NW Sportsbar; and

“1.6 All choses in action, causes of action, rights of recovery and setoff, warranty rights, and other similar rights of NW Sportsbar.”

10) As a result of the Surrender and Release Agreement, CPU got back “the building and what was in it,” taking over everything that was in the building in which NW had conducted its business and in which CPU had previously run the business before selling it to NW.

11) After NW closed its business, the four wage Claimants filed wage claims with the Agency, and the Agency investigated the claims. Based on the information contained in and submitted with the four Claimants’ wage claims, interviews with the Claimants, and the fact that NW had gone out of business and Drago could not be located, the Agency made a determination that the Claimants’ wage claims were valid, that NW had ceased doing business, and that Claimants’ wage claims could not be fully and promptly paid except through the WSF.

12) On July 6, 2006, the Agency caused the WSF to issue a check for \$443.28 to Claimant Smith, representing \$480.00 in gross, unpaid wages. On August 31, 2006, Yap-Sam caused the WSF to issue a check for \$3,186.65 to Claimant

Peterson, representing \$3,450.62 in gross, unpaid wages. On September 27, 2006, Yap-Sam caused the WSF to issue a check for \$807.50 to Claimant Cleary, representing \$937.00 in gross, unpaid wages, and a check for \$1,836.82 to Claimant Alexander, representing \$2,180.00 in gross, unpaid wages. In total, the WSF paid out \$7,047.62 to the four Claimants.

13) Twenty-five percent of \$7,047.62 is \$1,761.91.

14) Respondent opened for business on June 26, 2006. In its first year of operation, Respondent: (a) conducted business as Penner's Portsmouth Club; (b) conducted business in the same building as NW; (c) opened 47 days after NW closed; (d) offered food, drinks, and live music; (e) used much of the same equipment as NW; and (f) employed an entirely different workforce than NW.

CONCLUSIONS OF LAW

1) During all times material herein, NW was an employer and Jerri Smith, Gye Alexander, Katharine Cleary, and Jerry Peterson were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. During all times material herein, NW employed Smith, Alexander, Cleary, and Peterson.

2) Respondent is a "successor to the business" of NW within the meaning of ORS 652.310(1) and, as an employer, is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.414.

4) NW violated ORS 652.140 by failing to pay the Smith, Alexander, Cleary, and Peterson all wages earned and unpaid after the termination of their employment.

5) The Agency paid out a total of \$7,047.62 from the WSF to reimburse Smith, Alexander, Cleary, and Peterson for wages earned and unpaid within 60 days

before NW ceased operating its business and is entitled to recoup \$7,047.62, plus a 25 percent penalty of \$1,761.91. ORS 652.414(1), ORS 652.414(3).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries may recover from Respondent the \$7,047.62 paid to the four wage claimants from the WSF and sought in the Order of Determination, along with a 25 percent penalty of \$1,761.91 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(3).

OPINION

WAGE SECURITY FUND PAYOUT

In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claims was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Robert J. Thomas*, 30 BOLI ____ (2009); *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). In this case, the Agency established that rebuttable presumption through credible documentary evidence and witness testimony showing:

(1) It determined that the Claimants' wage claims were valid for \$7,047.62 in wages earned within 60 days before May 9, 2006, NW's last day of business, that NW had ceased doing business, and that Claimants' wage claims could not otherwise be fully and promptly paid;

(2) It based its determination on an investigation that included Claimant interviews, unsuccessful attempts to locate Drago, NW's president, an inspection and evaluation of written statements and calendars showing dates and hours worked that were submitted by the Claimants in support of their wage claims, and an unsuccessful effort to obtain NW's records; and

(3) It paid out \$7,047.62 from the WSF, an amount equal to Claimants' unpaid, due, and owing wages, and seeks to recover that money.

Respondent unsuccessfully attempted to rebut this evidence by moving to amend its answer to include the defense that Claimants Peterson and Alexander were independent contractors and not employees of NW, a motion that was denied by the forum. The Agency established, by a preponderance of the evidence, that Claimants were employees of NW and entitled to the unpaid wages paid out to them by the WSF. However, Respondent is not liable to repay those wages or a penalty unless the forum determines that it is a successor in interest to NW.

A SUCCESSOR IS LIABLE FOR WSF PAYMENTS OF WAGES BASED ON A PREDECESSOR EMPLOYER’S FAILURE TO PAY EARNED AND DUE WAGES.

Respondent argues that it is not a successor. In the alternative, Respondent contends that, even if it is a successor, it is not liable to repay the WSF for the reason that there are no unpaid wages, in that the WSF has already reimbursed Claimants in full for the unpaid wages they earned during NW’s last 60 days of business. Respondent’s argument lacks merit.

ORS 652.414(3) provides that “[t]he commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund * * *.” OAR 839-001-0500(6) provides that “[e]mployer has the same meaning given it in ORS 652.310(1).” ORS 652.310(1) provides that “[e]mployer’ * * * includes any successor to the business of any employer * * *, so far as the such employer has not paid employees in full.” OAR 839-001-0500(10) defines “successor” as “one who follows an employer in ownership or control of a business so far as such employer has not paid employees in full.” Finally, the commissioner has long held in that a successor is liable to repay the WSF for wages paid from the WSF. See *In the Matter of SQDL Co.*, 22 BOLI 223, 238-42 (2001); *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001), *affirmed without opinion*, *Fjord, Inc. v. Bureau of Labor and Industries*, 188 Or App 566, 65 P3d 1132

(2003); *In the Matter of Tire Liquidators*, 10 BOLI 84, 93-95 (1991). If Respondent is a successor in interest to NW, it is liable to repay the WSF for all the wages paid to the Claimants by the WSF, plus a 25 percent penalty.

BLACHANA, LLC IS A SUCCESSOR IN INTEREST TO NW

This forum's test for determining whether a respondent is a "successor" employer is the same for wage claim and WSF recovery cases. *Fjord* at 286. This forum has consistently held that the test to determine whether an employer is a successor in a wage claim case is whether it conducts essentially the same business as conducted by the predecessor. The elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. The forum considers all of the facts together to reach a determination. See *In the Matter of Bukovina Express, Inc.*, 27 BOLI 184, 201 (2006); *In the Matter of Mermac, Inc.*, 26 BOLI 218, 225 (2005); *In the Matter of Stephanie Nichols*, 24 BOLI 107, 121 (2002); *In the Matter of SQDL Co.*, 22 BOLI 223, 240 (2001); *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001), *affirmed without opinion, Fjord, Inc. v. Bureau of Labor and Industries*, 188 Or App 566, 65 P3d 1132 (2003); *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 256 (1999); *In the Matter of Susan Palmer*, 15 BOLI 226, 234 (1997).

Respondent urges the forum to abandon this test and to substitute the nine element successor in interest test used by the commissioner in deciding cases alleging violations of anti-discrimination laws contained in ORS Chapter 659A. In support of its argument, Respondent specifically cites *In the Matter of Tyree Oil, Inc.*, 17 BOLI 26

(1998), *reversed*, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000). The nine elements set out in *Tyree*, a case in which the Agency alleged that Respondent Tyree had committed an unlawful employment practice by failing to reinstate an injured worker in violation of *former* ORS 659.415(1)^{iv} are: (1) whether the successor had notice of the charge; (2) the predecessor's ability to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether the new employer uses the same or substantially the same work force; (6) whether the new employer uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the new employer uses the same machinery; and (9) whether the new employer produces the same product. *Tyree*, at 36-37.

The forum declines Respondent's invitation to adopt *Tyree's* nine element successor in interest test and decides this case based on the six element successor test used in deciding wage claim cases set out in *Bukovina* and its predecessor cases.

Since NW went out of business, Respondent has operated a club in the same location under two assumed business names, Penner's Portsmouth Club and Portsmouth Pizza and Pub. The Order of Determination specifically names "Blachana, LLC dba Penner's Portsmouth Club," the assumed business name under which Respondent conducted business for its first year of operation. The forum focuses its inquiry on that business.

A. Name Or Identity Of The Business

In its Order of Determination issued on January 17, 2007, the Agency named "Blachana, LLC dba Penner's Portsmouth Club" as the alleged successor to NW. Since Portsmouth Pizza and Pub did not exist as a legal entity until May 2007, the proper

comparison for this first element is between NW dba "Portsmouth Club" and Respondent dba "Penner's Portsmouth Club."

The name of a business, although entitled to substantial weight, is only one factor in determining if the identity of an alleged successor business is the same as its defunct predecessor. Other factors include, but are not limited to, an historical common identity, common ownership, common management, and common vendors and clients. *SQDL at 239*. The forum examines these factors below.

The same building in which NW and Respondent operated their businesses has been used to operate a neighborhood bar and restaurant since 1940 and has been historically known as the "Portsmouth Club." In or around March 2005, NW commenced operations after leasing premises comprising "The Portsmouth Club, Mama's BBQ and the attached parking designated for said business" and purchasing the inventory of the Portsmouth Club, valued at \$50,000, and the "good will" of the business, valued at \$285,000, from C. Penner, as an individual, and CPU, through J. Penner, one of CPU's managers.^v NW then registered with the Oregon Secretary of State as the new authorized representative for "Portsmouth Club" and commenced business under that assumed business name. NW continued to operate under that name and the name "Anchor Grill" until May 9, 2006, when NW surrendered the business to CPU due to NW's inability to make the monthly payments required by the sales agreement.

When Respondent took over the business, it acquired "all good will" associated with the names "The Portsmouth Club, Mama's BBQ, and Anchor Grill." The good will of "Portsmouth Club" had been originally transferred from CPU and C. Penner to NW in their sales agreement at a stated value of \$285,000. After taking over the business, Respondent operated for almost an entire year under the assumed business name of

“Penner’s Portsmouth Club.” During that period of time, C. Penner commonly answered Respondent’s business phone with the words “Portsmouth Club” or “P Club.”

NW and Respondent use the same beer vendors but different food vendors. Both offered live blues music, initially shared the same address,^{vi} and have the same telephone number.

Respondent’s *present* clientele is drawn from a different demographic than NW’s, and there is no reliable evidence that Respondent has ever offered hip hop music, one of NW’s mainstays. NW and Respondent share no common management or ownership, and Respondent has its own liquor, lottery, and city business licenses, as well as its own tax and employer identification number.

Considering all the foregoing facts, the forum finds that Respondent’s name and identity indicate successorship.

B. Location Of The Business

The geographical location of Respondent’s business is identical to the location of NW’s business, with the caveat that Respondent initially used the space that NW used for the Anchor Grill as storage space. This indicates successorship.

C. Lapse In Time, If Any, Between The Previous And New Operation?

In prior cases in which successorship was alleged and a lapse in time existed, the forum has found successorship when the interval between the close of a predecessor’s operation and the start of an alleged successor’s operation was 3-4 days,^{vii} 18 days,^{viii} 25 days,^{ix} and “a maximum of three to four months.”^x In this case, 47 days elapsed between May 9, 2006, the date NW closed its doors, and June 26, 2006, the date Respondent reopened for business. This interval falls within the range of prior lapses of time that the forum has found indicative of successorship and the forum finds it indicates successorship in this case.

D. Does Respondent Employ The Same Or Substantially The Same Work Force as NW?

The “same or substantially the same work force” refers to specific employees, not a generic labor pool. There is no evidence that Respondent has ever employed any of the same persons as NW. This indicates a lack of successorship.

E. Does Respondent Manufacture The Same Product Or Offer The Same Service As NW?

The products and services offered by NW were food, drinks, and beer, and live hip hop, reggae and blues music in a bar and restaurant. When Respondent took over the business after Drago, CPU, and NW executed the Surrender and Release Agreement on May 9, 2006, CPU acquired “all food, beverage and liquor inventory” located at the Portsmouth Club and Anchor Grill, along with everything else in the building. When Respondent opened for business under the assumed business name of Penner’s Portsmouth Club, it also operated a bar and restaurant, serving food, drinks, and beer, and provided live jazz and blues music.

Respondent argues that it did not offer the same service as NW because its food and drink menu was different than NW’s. However, other than general testimony that NW and Respondent both served food, drinks, and beer in a bar and restaurant, there is no reliable evidence about the specific food and drinks menu offered by NW and Respondent in its first year of operation that would allow the forum to make this comparison.

Respondent further urges the forum to concentrate on the fact that its *present* focus is pizza and drinks. The forum does not give this evidence any weight because Respondent did not purchase a pizza oven and began business as Portsmouth Pizza and Pub until in or around July 2007, 11 months after Respondent opened for business.

Based on undisputed evidence that the services and products offered by both NW and Respondent consisted of food, drinks, and beer, and live music in a club atmosphere, and in the absence of evidence identifying specific differences between the food, beer, and drinks offered by NW and Respondent, the forum concludes that this element is indicative of successorship.

F. Does Respondent Use The Same Machinery, Equipment, Or Methods Of Production As NW?

When NW purchased the Portsmouth Club from CPU and C. Penner, it acquired all of the equipment listed on Exhibit A of the Sales Agreement, plus the “good will” of the Portsmouth Club. The lengthy list of equipment was valued at \$50,000, and the good will was valued at \$285,000. When NW surrendered the business to CPU, it specifically surrendered “all the assets listed on Exhibit A to the Sale Agreement.” As of the date of hearing, nearly three years after Respondent commenced operations, Respondent had stopped using, disposed of, or replaced much of that equipment listed on Exhibit A, but Respondent was also still using a considerable amount of the listed equipment. Except for three fire extinguishers, some tables and booths, some television sets, and some sound equipment that were missing when Respondent opened for business, there is no evidence as to when Respondent stopped using, disposed of, or replaced any of the equipment listed on Exhibit A. Respondent also conducted business in the same building, although it had been remodeled to an extent to suit Respondent’s business needs. Taken as a whole, these facts indicate successorship.

CONCLUSION

In this case, five of the six elements of the successor test are indicative of successorship, with the only exception being the workforce. Taken as a whole, the forum concludes that, in its first year in business, Respondent conducted essentially the

same business that NW conducted and is a “successor to the business” of NW under ORS 652.310(1).

WAGE SECURITY FUND PENALTY

In this case, the Agency caused the WSF to pay out \$7,047.62 in gross, unpaid wages. As a WSF penalty, the Agency seeks recovery of a total of \$1,841.91, computed as follows:

<u>Claimant</u>	<u>WSF Paid</u>	<u>Penalty</u>
Alexander	\$2,180.00	\$545.00
Cleary	\$ 937.00	\$234.25
Alexander	\$3,450.62	\$862.66
Smith	\$ 480.00	\$200.00

ORS 652.414(3) provides that, when the commissioner commences an action or proceeding to recover amounts paid from the WSF under ORS 652.414(1), “the commissioner is entitled to recover * * * a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater.”

In previous cases involving multiple wage claimants in which a WSF penalty was assessed, the commissioner has consistently ordered respondents to pay a 25 percent penalty on the total amount of wages paid out,^{xi} except in one case in which \$200 was greater than 25 percent of the amount paid out by the WSF.^{xii} This is consistent with the wording in ORS 652.414(3), which bases its 25 percent penalty assessment on “the amount of wages paid from the Wage Security Fund” and does not provide for a 25 percent or \$200 penalty, “whichever amount is the greater,” based on the amount of unpaid wages paid out to each individual claimant when the case involves multiple claimants. Consequently, the forum assesses a penalty amounting to 25 percent of the total amount paid out by the WSF, or \$1,761.91 ($\$7,047.62 \times .25 = \$1,761.91$).

ORDER

NOW, THEREFORE, as authorized by ORS 652.414 and as payment of payment of amounts paid from the Wage Security Fund ("WSF"), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Blachana, LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

- (1) A certified check payable to the Bureau of Labor and Industries in the amount of EIGHT THOUSAND EIGHT HUNDRED NINE DOLLARS AND FIFTY THREE CENTS (\$8,809.53), representing \$7,047.62 paid to Gye Alexander, Jerry Peterson, Jerri Smith, and Katharine Cleary from the WSF, and a 25 percent penalty of \$1,761.93 on the sum of \$7,047.62, plus interest at the legal rate on the sum of \$7,047.62 from June 1, 2006, until paid;
- (2) Interest at the legal rate on the sum of \$120.00, representing a 25 percent penalty on \$480.00 in unpaid wages paid to Jerri Smith from the WSF, from July 5, 2006, until paid;
- (3) Interest at the legal rate on the sum of \$866.66, representing a 25 percent penalty on \$3,450.62 in unpaid wages paid to Jerry Peterson from the WSF, from August 31, 2006, until paid;
- (4) Interest at the legal rate on the sum of \$234.25, representing a 25 percent penalty on \$937.00 in unpaid wages paid to Katharine Cleary from the WSF, from October 2, 2006, until paid; and
- (5) Interest at the legal rate on the sum of \$545.00, representing a 25 percent penalty on \$2,180.00 in unpaid wages paid to Gye Alexander from the WSF, from October 2, 2006, until paid.

ⁱ For the rest of this Final Order, the term "Respondent" refers only to Blachana, LLC.

ⁱⁱ See, e.g. *In the Matter of Logan International, Ltd.*, 26 BOLI 254, 257-58 (2005) (agency not required to produce interviews specifically conducted by the agency case presenter); *In the Matter of Wing Fong*, 16 BOLI 280, 283 (1998)(agency case presenter's communications with complainant were protected from disclosure.)

ⁱⁱⁱ He wrote on his wage claim that his last day was May 1, but May 1, 2006, fell on a Monday, a day Alexander was not scheduled to work. According to his testimony, he was also not scheduled to work on Sunday, April 30. Also, the calendar he completed at the Agency's request shows he did not work those on April 30 or May 1.

^{iv} ORS Chapter 659 and the anti-discrimination statutes contained in it were reorganized in 2001 into ORS Chapters 659 and 659A. The anti-discrimination statutes in it that are enforced by the Bureau of Labor and Industries were placed in ORS Chapter 659A.

^v C. Penner was also one of C.P. Underhill's managers.

^{vi} At some point, C. Penner had the address changed from 5264 N Lombard to 5262 N Lombard, although the location is exactly the same.

^{vii} *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258, 267-69 (1987).

^{viii} *In the Matter of Tire Liquidators*, 10 BOLI 84, 93-94 (1991).

^{ix} *In the Matter of Fjord, Inc.*, 21 BOLI 260, 297 (2001), affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries*, 188 Or App 566, 65 P3d 1132 (2003).

^x *In the Matter of Stephanie Nichols*, 24 BOLI 107, 121-122 (2002).

^{xi} See, e.g., *In the Matter of Robert J. Thomas dba More and More Construction*, 30 BOLI ____ (2009)(WSF paid out \$2,037.50 in unpaid wages to two wage claimants and a 25 percent penalty of \$509.38 was assessed); *In the Matter of Carl Odoms*, 27 BOLI 232, 240 (2006)(WSF paid out \$5,399.13 in unpaid wages to four wage claimants and a 25 percent penalty of \$1,349.78 was assessed); *In the Matter of Hickox Enterprises, Inc.*, 22 BOLI 10, 17 (2001)(WSF paid out \$46,602.37 in unpaid wages to 50 wage claimants and a 25 percent penalty of \$11,650.59 was assessed).

^{xii} *In the Matter of Lisa Sanchez*, 27 BOLI 56, 62 (2005).