

**In the Matter of**  
**CATALOGFINDER, INC.**

Case Number 10-99  
Final Order of the Commissioner  
Jack Roberts  
Issued May 7, 1999.

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**SYNOPSIS**

Where Respondent submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found Respondent in default of the charges set forth in the Order of Determination. The Order of Determination alleged that Intelligent Catalogs, Inc., failed to pay 15 wage claimants all wages due upon termination, in violation of ORS 652.140, and that Respondent was liable to pay the wages as a successor employer and a lessee or purchaser of Intelligent Catalogs, Inc. The Agency established a prima facie case of unpaid wages for four of the 15 claimants, and the Commissioner held that Respondent was liable to pay those wages, both as a successor employer and a lessee or purchaser of Intelligent Catalogs, Inc., pursuant to ORS 652.310. The Commissioner ordered Respondent to pay four Claimants \$27,218.49 in unpaid wages due upon termination, in violation of ORS 652.140(2). The Order of Determination also alleged that \$24,081 was paid out to the claimants by the Wage Security Fund, pursuant to ORS 652.414, and the Commissioner ordered Respondent to repay this sum, along with a 25 percent penalty of \$6,020.25, pursuant to ORS 652.414(2). ORS 652.140(2), 652.310, 652.414.

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The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts,

Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The hearing was held on January 26, 1999, at the offices of the Oregon Bureau of Labor and Industries, 165 E. 7th, Room 220, 165 E. Seventh, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Respondent Catalogfinder, Inc., was not present after due notice and was in default.

The Agency called the following witnesses: Fannilee Lynne Sheppard, Wage and Hour Division Compliance Specialist; Janetta A.M. Gallagher, Anthony Vos, Benjamin Moseley, and Carolyn L. Higgins, Claimants; and Sheriss M. Corliss, Respondent's former employee.

Administrative exhibits X-1 to X-18 and Agency exhibits A-1 through A-34 were offered and received into evidence. The record closed on January 26, 1999.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries 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 April 6, 1998, Claimants Marie Lynn Ehalt, Aaron W. Foster, Janetta M. Gallagher, Ian J. Potts, John Procopio, and Anthony Vos filed wage claims with the Agency. They alleged that they had been employed by Intelligent Catalogs, Inc. (hereinafter "ICI"), and that ICI had failed to pay wages earned and due to them. At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from ICI.

2) On April 7, 1998, Claimant Eathan M. Mertz filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay

wages earned and due to him. At the same time that he filed his wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

3) On April 8, 1998, Claimants Carolyn L. Higgins and Lowell G. Swartz filed wage claims with the Agency. They alleged that they had been employed by ICI, and that ICI had failed to pay wages earned and due to them. At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from ICI.

4) On April 9, 1998, Claimants Shawn S. Kilger, Mark R. Miner, and Janetta M. Gallagher filed wage claims with the Agency. They alleged that they had been employed by ICI, and that ICI had failed to pay wages earned and due to them. At the same time that they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from ICI.

5) On April 13, 1998, Claimant Kerry P. Stapleton filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay wages earned and due to him. At the same time that he filed his wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

6) On May 29, 1998, Claimant Benjamin G. Moseley filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay wages earned and due to him. At the same time that he filed his wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

7) On July 2, 1998, Claimant Diaricou C. Doucoure filed a wage claim with the Agency. He alleged that he had been employed by ICI, and that ICI had failed to pay wages earned and due to him. At the same time that he filed his wage claim,

Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

8) On July 14, 1998, Claimant Anna M. Hults filed a wage claim with the Agency. She alleged that she had been employed by ICI, and that ICI had failed to pay wages earned and due to her. At the same time that she filed her wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from ICI.

9) On July 13, 1998, the Agency issued an Order of Determination based upon the wage claims filed by 13 of the Claimants and Agency Compliance Specialist Sheppard's investigation. The Order named Catalogfinder, Inc., an Oregon corporation, as Respondent. Specifically, Catalogfinder was named as Claimants' successor employer and successor in interest to ICI. On July 14, 1998, the Agency served Russell Bevans, Respondent's registered agent, with the Order of Determination. The Order of Determination alleged that Respondent owed a total of \$75,548.54 in unpaid wages to the 13 Claimants listed in Table 1<sup>1</sup> based on work Claimants had performed for ICI and \$22,962 to the Commissioner based on sums paid to the Claimants from the Wage Security Fund, pursuant to the provisions of ORS 652.414. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

10) On August 3, 1998, Respondent, through counsel, filed an answer to the Order of Determination and requested a hearing. In the answer, Respondent raised the following affirmative defenses: (a) That ICI was financially unable to pay the wages at the time they accrued to the Claimants, in part due to acts of sabotage, conversion of ICI assets and other wrongful activity of the Claimants; (b) That the Final Order on Default against ICI based on the same wage claims should be set aside for good cause; and (c) That Respondent was not a successor in interest to ICI.

11) On October 8, 1998, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

**TABLE 1**

NAME	Dates Worked	Wage Rate	Amt. Earned	Amt. Paid by ICI	Amt. Owed	Amt. Paid by Wage Security Fund
L.M. Ehalt	2/2/98-3/30/98	\$30,000/yr.	\$5,140.36 incl. \$525 commissions	\$550	\$4,590.36	\$2,000
A. Foster	1/2/98-3/30/98	\$2,400/mo	\$9,526.17 (includes one month vac.)	\$600	\$8,926.17	\$2,000
J. Gallagher	2/1/98-3/30/98	\$2,500/mo	\$9,423.07 incl. \$2,000 commissions)	\$1,300	\$8,123.07	\$2,000
C. Higgins	1/6/98-3/30/98	\$2,000/mo	\$5,323.09	\$350	\$4,973.09	\$2,000
S. Kilger	2/1/98-3/30/98	\$1,500/mo	\$2,953.83	\$500	\$2,453.83	\$2,000
E. Mertz	1/1/98-3/30/98	\$2,300/mo	\$8,529.23 (incl. one month vac.)	\$600	\$8,529.23	\$2,000
M. Miner	2/1/98-3/31/98	\$3,000/mo	\$6,000	\$800	\$5,200	\$2,000
B. Moseley	1/1/98-3/31/98	\$2,300/mo	\$6,900	\$500	\$6,400	\$2,000
I. Potts	1/12/98-3/31/98	\$1,500/mo	\$3,830.76	\$0	\$3,830.76	\$2,000
J. Procopio	2/2/98-3/31/98	\$2,000/mo	\$3,753.86	\$550	\$3,203.86	\$2,000
K. Stapleton	1/2/98-3/20/98	\$6.00/hr.	\$432	\$200	\$232	\$232
L. Swartz	1/1/98-3/27/98	\$6.00/hr.	\$840	\$100	\$740	\$740
A. Vos	1/2/98-	\$5,000/mo	\$19,846.17	\$1,500	\$18,346.17	\$2,000

3/30/98

(incl. one  
month vac.)

12) On October 29, 1998, the Agency filed a motion to amend the Order of Determination. The motion sought to change two dates from "on" to "on or about" those specific dates, add the two new wage claimants listed in Table 2,<sup>2</sup> increase the amount of unpaid wages sought to \$92,949.17, increase the amount of reimbursement sought to the Wage Security Fund to \$24,081, and request a 25% penalty of \$6,020.25 on the sum of \$24,081 pursuant to ORS 652.414(2). It also amended the amount paid out by the Wage Security Fund to Claimants Kilger (reduced from \$2,000 to \$1,730), Potts (reduced from \$2,000 to \$1,799), Stapleton (reduced from \$232 to \$144), and Swartz (reduced from \$740 to \$408). The ALJ gave Respondent until November 9, 1998, to respond to the motion. Respondent did not file a response to the Agency's motion, and on November 16, 1998, the ALJ granted the Agency's motion to amend in its entirety.

13) On November 16, 1998, the Agency filed a motion to strike Respondent's first two affirmative defenses of financial inability to pay and that the Final Order of Default against ICI should be set aside. In the alternative, the Agency sought summary judgment on those issues. The ALJ gave Respondent until November 23, 1998, to respond to the motion. Respondent did not file a response to the Agency's motion, and on December 7, 1998, the ALJ granted the Agency's motion to strike in its entirety.

**TABLE 2**

NAME	Dates Worked	Wage Rate	Amt. Earned	Amt. Paid by ICI	Amt. Owed	Amt. Paid by Wage Security Fund
D. Doucoure	1/1/98 3/31/98	- \$5000/mo.	\$15,000	\$0	\$15,000	\$2,000
A. Hults	10/1/97 1/5/98	- 1 mo. @ \$1,200 2 mos., 3 days @ \$27,500/yr	@ \$6,100.63	\$3,700	\$2,400.63	\$0

14) On November 16, 1998, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by January 15, 1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary.

15) On November 19, 1998, Nick Rauch, Respondent's counsel, provided the forum with a document entitled "Substitution of Attorneys" in which he formally withdrew as attorney of record and substituted Gary Williams as attorney of record. Rauch signed the document, but Williams did not.

16) On November 25, 1998, the Agency filed a motion for a discovery order requesting documents relevant to the Agency's allegation that Respondent was a successor in interest to ICI. On December 3, 1998, the ALJ ruled that Respondent had until December 10, 1998 to respond to the motion. Respondent did not file a response to the Agency's motion, and on December 15, 1998, the ALJ issued a discovery order requiring Respondent to provide all requested documents no later than December 29, 1998.

17) On December 7, 1998, the ALJ sent a letter to all participants stating that the forum had received Mr. Rauch's "Substitution of Attorneys" form, that Mr. Williams had not yet made an appearance before the forum, and that a corporation was required to be represented by counsel at all stages during the proceeding. The forum asked that Mr. Williams contact the forum as soon as possible if he was in fact Respondent's attorney of record. The forum received no further communications from either Mr. Rauch or Mr. Williams.

18) On January 15, 1999, the Agency submitted its Case Summary. The Agency also served its Case Summary on Bevans, Respondent's registered agent.

19) At the start of the hearing, Respondent did not appear and had not announced that it would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone, the ALJ declared Respondent in default at 9:32 a.m. and commenced the hearing.

20) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

21) On February 22, 1999, the ALJ issued a proposed order. Included in the proposed order was an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. The Agency timely filed exceptions on February 26, 1999. Respondent did not file exceptions. The forum has addressed the Agency's exceptions in the Findings of Fact -- The Merits and Opinion section of this Final Order.

#### **FINDINGS OF FACT -- THE MERITS**

1) During all times material herein, ICI was a corporate employer that engaged the personal services of one or more persons.

2) During all times material herein, Deborah Marlow was the corporate president of ICI and was in charge of ICI's daily operations.

3) Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Procopio, Stapleton, Swartz, and Vos were all employed by ICI.

4) ICI's business involved operating an interactive internet website related to the online catalog industry. Specifically, ICI contracted with catalog companies to

develop and place on its website their entire online catalogs. ICI also provided "the largest, verifiable, online, yellow-page style catalog directory in the world" and sold display listings in its directory for an annual fee of \$650.

5) ICI commenced operations in September 1997, when it launched its first internet website. The data base architecture for ICI's website was designed by Vos. ICI's website location was "<http://www.CatalogFinder.com>". ICI was physically located in an office building at 392 East Third Avenue, Eugene, Oregon.

6) Claimant Gallagher was employed by ICI between 2/1/98 and 3/30/98 as a senior sales executive. Gallagher and ICI had a written employment contract in which ICI agreed to pay her an annual salary of \$30,000, with commissions of 5% for each online catalog sold and 10% for each annual listing sold. Commissions were due and payable following receipt of customer's payment. Gallagher was expected to work "40+" hours per week for her salary. She worked 60-65 hours per week for ICI during her employment. She voluntarily quit on 3/30/98. During her employment, she earned \$4923.07 in wages and earned \$2,000 in commissions for which ICI had received customer payment. ICI paid her a total of \$1300.

7) Claimant Moseley was employed by ICI between 1/1/98 and 3/30/98 as a financial assistant to Doucoure. Moseley and ICI had an employment contract in which ICI agreed to pay Moseley a salary of \$2,300/mo. Moseley was expected to work "40" hours per week for his salary. He worked at least 40 hours a week for ICI until he voluntarily quit on 3/30/98. During his employment, he earned \$6,776.16 in wages. ICI paid him a total of \$500.

8) Claimant Higgins was employed by ICI between 1/6/98 and 3/30/98 as receptionist/office manager. Higgins and ICI agreed that Higgins would be paid a salary of \$2,000/mo. Higgins was expected to work "40" hours per week for her salary. She

worked at least 40 hours a week for ICI until she voluntarily quit on 3/30/98. During her employment, she earned \$5,323.09 in wages. ICI paid her a total of \$350.

9) Claimant Vos was employed by ICI between 1/2/98 and 3/30/98 as director of technology. Vos and ICI had a written employment agreement (entitled "Employment Offer") in which ICI agreed to pay Vos a salary of \$60,000/yr. Pursuant to the written employment agreement, Vos was entitled to one month of vacation pay, effective 1/2/98. He was expected to work "over 40" hours per week for his salary. He worked 50-70 hours a week for ICI until he voluntarily quit on 3/30/98. He did not take any vacation between 1/2/98 and 3/30/98. During this time period,<sup>3</sup> he earned \$14,846.17 in wages and accrued \$5,000 in unused vacation benefits. ICI paid him a total of \$1500.

10) At the time Claimants Gallagher, Higgins, Moseley, and Vos quit, Respondent owed them the following amounts in unpaid wages: Gallagher: \$5,623.07;<sup>4</sup> Higgins: \$4,973.09; Moseley: \$6,276.16; and Vos: \$18,346.17.<sup>5</sup>

11) During the hearing, Sheppard testified that she had sent notices of claims to Respondent and that she had spoken to Deborah Marlow, ICI's corporate president, Rene Vishney, ICI's corporate secretary, and Russell Bevans, ICI's attorney, about the wage claims during her investigation. Sheppard testified that Marlow, Vishney, and Bevans acknowledged that wages hadn't been paid to the claimants and they did not contest the amount of wages earned by the employees.<sup>6</sup>

12) Claimants Doucoure, Ehalt, Foster, Kilger, Mertz, Miner, Potts, and Procopio all voluntarily quit working for ICI on or about March 30, 1998.<sup>7</sup>

13) The only evidence in the record showing the last dates of employment of claimants Swartz, Stapleton, and Hults are unsworn written statements submitted by these claimants in conjunction with their wage claims and the testimony of Sheppard.

14) The only evidence in the record showing the initial dates of employment of claimants Doucoure, Ehalt, Foster, Kilger, Miner, Potts, Procopio, Swartz, Stapleton, and Hults are unsworn written statements submitted by these claimants in conjunction with their wage claims and the testimony of Sheppard.

15) The only evidence in the record showing the initial date of employment of Claimant Mertz is his unsworn written statement submitted in conjunction with his wage claim, an employment agreement<sup>8</sup> with ICI dated "1/1/98," and the testimony of Sheppard.

16) The only evidence in the record showing the wage agreements between claimants Doucoure, Ehalt, Foster, Kilger, Miner, Potts, Procopio, Swartz, Stapleton and ICI are unsworn written statements submitted by these claimants in conjunction with their wage claims and the testimony of Sheppard.

17) The only evidence in the record showing the wage agreements between claimants Mertz and Hults and ICI are unsworn written statements submitted by these claimants in conjunction with their wage claims, Mertz' employment agreement cited in Finding of Facts--The Merits #14 that calls for an annual salary of \$27,600, an employment agreement between ICI and Hults that calls for an annual salary of \$27,500,<sup>9</sup> and the testimony of Sheppard.

18) The only evidence in the record showing the dates and hours worked by claimants Doucoure, Ehalt, Foster, Kilger, Mertz, Miner, Potts, Procopio, Swartz, Stapleton, and Hults are unsworn handwritten calendars filled out by these claimants at the time they submitted their wage claims and the testimony of Sheppard.

19) The testimony of Sheppard, Gallagher, Higgins, Moseley, and Vos was credible.

20) ICI ceased doing business on or about May 1, 1998, and Respondent continued operating the same business without interruption at the same physical location.

21) Sheppard investigated the wage claims of all 15 wage claimants and made a determination that their wage claims were valid, pursuant to ORS 652.414(1). As a result, BOLI issued checks on August 1, 1998, from the Wage Security Fund, also pursuant to ORS 652.414(1), in the following amounts to 14 of the 15 claimants:

a)	D.C. Doucoure:	\$2,000
b)	Lynn M. Ehalt:	\$2,000
c)	Aaron Foster:	\$2,000
d)	Janetta Gallagher:	\$2,000
e)	Carolyn Higgins:	\$2,000
f)	Anna M. Hults:	\$0 <sup>10</sup>
g)	Shawn S. Kilger:	\$1,730.75
h)	Eathan Mertz:	\$2,000
i)	Mark Miner:	\$2,000
j)	Benjamin Moseley:	\$2,000
k)	Ian Potts:	\$1,799.98
m)	Kerry Stapleton:	\$144
l)	John Procopio:	\$2,000
n)	Lowell Swartz:	\$408
o)	Anthony Vos:	\$2,000
	TOTAL AMOUNT	<u>\$24,082.73</u>

22) Deborah Marlow was the corporate president of Catalogfinder, Inc. and was in charge of daily operations.

23) Respondent engaged in the same type of business as ICI, previously described in Finding of Fact--The Merits #4.

24) Respondent used "http:\\ www.CatalogFinder.com" as its website location. This was the same website location that ICI used.

- 25) Respondent kept the same customers as ICI and added new customers.
- 26) The customer catalog agreements used by ICI and Respondent contain identical language in a number of sections and is substantially similar in others.
- 27) Respondent used the data base architecture Vos designed for ICI in operating its website. After taking over ICI's operations, Respondent made only minor alterations to that website.
- 28) Respondent used the same furniture, computers, and equipment as ICI. Respondent assumed ICI's leases for a FAX machine, phone system, computers, desks, modems, keyboards, and furniture.
- 29) Respondent paid ICI's outstanding bills to U.S. West, Sprint, and for the lease on the office space used by ICI and Respondent. Respondent had the names on these accounts switched over from ICI to Catalogfinder, Inc.
- 30) 1-541-687-9507 had been a primary telephone line for ICI. Respondent kept this number as a nonpublished number and adopted 1-541-687-2990, ICI's former "line 2," as its primary number.
- 31) Respondent did not have the same employees as ICI, as ICI's employees walked off the job on March 30, 1998, in protest over not being paid.
- 32) There was no interruption in business operations of the website used by ICI when Catalogfinder, Inc. commenced operations.

#### **ULTIMATE FINDINGS OF FACT**

- 1) During all times material herein, ICI was a corporation doing business in the state of Oregon that engaged the personal services of one or more employees in the State of Oregon.

2) The Commissioner of BOLI, through Compliance Specialist Sheppard, investigated all 15 wage claims and made a determination that the 15 wage claims were valid.

3) ICI employed claimant Gallagher from 2/1/98 until 3/30/98. Gallagher earned \$6,923.07 in wages and commissions during her employment with ICI and was paid \$1,300 in wages and nothing for commissions.

4) ICI employed claimant Higgins from 1/6/98 until 3/30/98. Higgins earned \$5,323.09 in wages during her employment with ICI and was paid \$350 in wages.

5) ICI employed claimant Moseley from 1/1/98 until 3/30/98. Moseley earned \$6,776.16 in wages during his employment with ICI and was paid \$500 in wages.

6) ICI employed claimant Vos from 1/2/98 until 3/30/98. Vos earned \$14,846.17 in wages during his employment with ICI and \$5,000 in accrued, unused vacation benefits and was paid \$1500 in wages.

7) ICI employed claimants Doucoure, Ehalt, Foster, Hults, Kilger, Mertz, Miner, Potts, Procopio, Stapleton, and Swartz. There was insufficient reliable evidence to establish the agreed upon wage rate between these claimants and ICI, the specific dates, and total number of hours worked by these claimants.

8) Claimants Gallagher, Higgins, Moseley, and Vos quit ICI's employment without notice on March 30, 1998.

9) When claimants Gallagher, Higgins, Moseley, and Vos quit, ICI owed them the following amounts in unpaid wages: Gallagher: \$5,623.07; Higgins: \$4,973.09; Moseley: \$6,276.16; and Vos: \$18,346.17.

9) On or about May 1, 1998, ICI ceased business operations. That same day, Respondent substantially continued ICI's business operations. Respondent used the same daily operations manager as ICI, the same website, the same physical

location, some of the same telephone lines, the same furniture, the same equipment, and provided the same services to customers that ICI had provided. Respondent assumed ICI's leases for a FAX machine, phone system, computers, desks, modems, keyboards, and furniture. Respondent paid ICI's outstanding bills to U.S. West, Sprint, and for the lease on the office space used by ICI and Respondent. Respondent had the names on these accounts switched over from ICI to Catalogfinder, Inc.

10) On August 1, 1998, BOLI issued \$24,081 in checks from the Wage Security Fund to 14 of the 15 wage claimants based on Agency Compliance Specialist Sheppard's determination that the claims were valid. Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Mertz, Miner, Moseley, Procopio, and Vos each received \$2,000. Claimant Potts received \$1,799.98. Claimant Kilger received \$1,730.75. Claimant Swartz received \$408. Claimant Stapleton received \$144.

#### **CONCLUSIONS OF LAW**

1) During all times material herein, ICI was an employer and claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hulst, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. During all times material herein, ICI employed claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hulst, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos.

2) Respondent is a "successor to the business \* \* \* of [ICI]" and a "lessee \* \* \* of [ICI's] business property for the continuance of the same business" 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) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

ICI violated ORS 652.140(2) by failing to pay claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after these claimants quit employment without notice.

5) Respondent, as a successor employer and a lessee of ICI's business property for the continuance of the same business pursuant to ORS 652.310(1), is liable for ICI's failure to pay Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Hults, Kilger, Mertz, Miner, Moseley, Potts, Stapleton, Procopio, Swartz, and Vos all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimants quit employment without notice. ORS 652.140(2).

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 has the authority to order Respondent to pay Claimants Gallagher, Higgins, Moseley, and Vos the earned, unpaid, due, and payable wages plead for in the Amended Order of Determination, plus interest until paid. ORS 652.332.

7) ORS 652.414 provides, in pertinent part:

"Notwithstanding any other provision of law:

"(1) When an employee files a wage claim pursuant to this chapter for wages earned and unpaid after July 1, 1986, and the Commissioner of the Bureau of Labor and Industries determines that the employer against whom the claim was filed has ceased doing business and is without

sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid, the commissioner, after determining that the claim is valid, shall pay the claimant the amount earned within 60 days before the date of the cessation of business, and unpaid, but only to the extent of \$2,000 from such funds as may be available pursuant to ORS 652.409(2)

"(2) The 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 pursuant to subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater. \* \* \* "

Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of BOLI may recover from Respondent the \$24,081 paid to the 14 wage claimants from the Wage Security Fund and plead for in the Amended Order of Determination, along with a penalty of \$6,020.25 assessed on that sum, plus interest until paid. ORS 652.414(2).

8) OAR 839-050-0330(1) and (2) provide, in pertinent part:

"(1) Default can occur in four ways:

" \* \* \* "

"(d) Where a party fails to appear at the scheduled hearing.

"(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the hearings referee shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the hearings referee shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing."

Respondent did not appear at the hearing and was properly found to be in default when 30 minutes had elapsed after the specified time for the contested case hearing.

## OPINION

### 1. Introduction

The Agency alleged in its Order of Determination, as amended, that claimants were employed by Respondent's predecessor, ICI; that Respondent is a successor employer to ICI and is liable for wages unpaid by ICI; and that Respondent is also liable as a successor employer for the sum paid out by BOLI from the Wage Security Fund and a 25% penalty on that sum.

### 2. Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. OAR 839-050-0330(1) and (2). In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine if a prima facie case supporting the Agency's Amended Order of Determination has been made on the record. *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997); see also OAR 839-050-0330(2).

### 3. Was Respondent an "employer" as defined by ORS 652.310(1)?

To be liable for unpaid wages owed by ICI or the money paid out by the Wage Security Fund to ICI's former employees, Respondent must be an "employer" as defined by ORS 652.310(1). ORS 652.310(1) defines "Employer," in pertinent part, as: "any person who \* \* \* engages personal services of one or more employees and includes \* \* \* any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full."

As the language of the statute shows, liability for unpaid wages may attach to "any successor to the business of any employer," or "any lessee or purchaser of any

employer's business property for the continuation of the same business." *In the Matter of Tire Liquidators*, 10 BOLI 84, 93 (1991).

Looking at the "lessee or purchaser" definition first, the evidence is clear that Respondent assumed ICI's leases for a FAX machine, phone system, computers, desks, modems, keyboards, office space, and furniture. This equipment represented the guts of ICI's business, without which it would have been unable to do business. It is also clear that Respondent continued ICI's business virtually unchanged. Consequently, the forum concludes that Respondent was a "lessee" of ICI's business property for the continuation of the same business, and an "employer" under the "lessee or purchaser" definition in ORS 652.310(1).

The "successor" test is more complex. To decide whether an employer is a "successor," the test is whether it conducts essentially the same business as the predecessor did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. *Tire Liquidators, supra, citing In the Matter of Anita's Flowers*, 6 BOLI 258, 267-68 (1987) and *N.L.R.B. v. Jefferies Lithograph Co.*, 752 F2d 459 (9th Cir 1985).

In this case, the evidence established that Respondent conducted essentially the same business as ICI. Although the corporate name changed, the website identity<sup>11</sup> and physical location of the business remained the same. There was no lapse in time between ICI's cessation of doing business and Respondent's beginning of operations.<sup>12</sup> The corporation president and person in charge of daily operations remained the same;

however, the workforce changed due to the en masse resignation of ICI's employees on March 30, 1998. Finally, the evidence is crystal clear that ICI and Respondent offered the same service and used the same equipment and methods for offering that service.

In conclusion, a preponderance of credible evidence indicates that Respondent was an "employer," both as a "lessee" and a "successor" as defined in ORS 652.310(1) and, as such, is liable for any unpaid wages the forum determines is owed by ICI.

#### **4. Claim and Issue Preclusion**

The Agency asserted in its closing argument that the judgment against ICI should be preclusive against Respondent as to the wage claims encompassed in that judgment.<sup>13</sup> Preclusion by former adjudication is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered in a claim. It encompasses two doctrines, claim preclusion and issue preclusion. *Drews v. EBI Companies*, 310 Or 134, 139, 495 P2d 531, 534 (1989). Both claim and issue preclusion apply to administrative proceedings, "provided that the tribunal's decision-making processes include certain requisite characteristics," and both have been applied in the past by this forum. *Id.* at 142. *See also In the Matter of Efrain Corona*, 11 BOLI 44, 57 (1992), *aff'd without opinion*, 124 Or App 211, 861 P2d 1046 (1993).

##### a. Claim preclusion.

In this forum, claim preclusion bars the Agency and claimants from obtaining a final judgment against a Respondent, then issuing charges in a subsequent proceeding against the same Respondent where the subsequent charges are based on the same factual transaction that was at issue in the first proceeding, seek a remedy additional or alternative to the one sought earlier, and are of such a nature as could have been joined in the first proceeding. Claim preclusion also bars the Respondent, in an action upon

the judgment, from using the defenses he or she might have interposed, or did interpose, in the first proceeding. *Drews*, at 140, citing *Rennie v. Freeway Transport*, 294 Or 319, 323, 656 P2d 919 (1982). See also *Restatement (Second) of Judgments* § 18.

Respondent is not bound by the judgment against ICI for two reasons. First, ICI, not Respondent, was the party in the first action. With limited exceptions, under the doctrine of claim preclusion, Respondent cannot be bound by the results of a prior adjudication in which it was not a party. *Restatement (Second) of Judgments* § 34. See also *In the Matter of Staff, Inc.*, 16 BOLI 97, 122 (1997). Second, this is not "an action upon the judgment," but a proceeding in which the Agency seeks to establish the successorship liability of Respondent to liabilities incurred by ICI.

Likewise, the Agency is not barred from prosecuting the same wage claims in this proceeding that it brought against ICI because Respondent was not a party in the original case.

b. Issue preclusion.

Issue preclusion bars future litigation on an issue of fact or law where that issue has been " 'actually litigated and determined' in a setting where 'its determination was essential to' the final decision reached." *Drews*, at 140, citing *North Clackamas School Dist. v. White*, 305 Or 48, 53, 750 P2d 485, modified 305 Or 468, 752 P2d 1210 9188); *Restatement (Second) of Judgments* § 17(3) Five requirements must be met for issue preclusion to apply. *In the Matter of Scott Nelson*, 15 BOLI 168, 178 (1996). One of the five requirements is that "[t]he issue was actually litigated and was essential to a final decision on the merits in the prior proceeding." *Id.* at 177-78; See also *Heller v. Ebb Auto Co.*, 308 Or 1, 5, 774 P2d 1089 (1989). In the Agency's prior proceeding against ICI, the final decision was a Final Order on Default, based on ICI's failure to file a timely

answer and request for hearing. As a result, no actual litigation over the merits of the wage claims occurred. Consequently, the individual merits of each of the 15 wage claims must be determined based on the evidence actually presented at the hearing.

## **5. Respondent's Liability for Sums Paid out from the Wage Security Fund and Statutory Penalty**

ORS 652.414(2) provides, in pertinent part:

"The 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 pursuant to subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is greater. \* \* \*"

In this case, a total of \$24,081 was paid from the Wage Security Fund to 14 of the 15 claimants. Twenty-five percent of that sum is \$6,020.25. The Agency seeks to recover these sums from Respondent.

### a. Is this proceeding an "action, suit or proceeding" under ORS 652.414?

The forum must initially determine if this proceeding is an "action, suit or proceeding" contemplated by the language of ORS 652.414(2) before determining how much money, if any, Respondent must reimburse the Wage Security Fund. In questions of statutory interpretation, this forum follows the template set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). In *PGE*, the court set out three levels of analysis for discerning the intent of the legislature, the second and third levels to be utilized only if the intent of the legislature was not clear from the prior level of inquiry. The court stated, in relevant part:

"In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by

statute, including, for example, the statutory enjoiner 'not to insert what has been omitted, or to omit what has been inserted.' ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning.

"Also at the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes. Just as with the court's consideration of the text of a statute, the court utilizes rules of construction that bear directly on the interpretation of the statutory provision in context. \* \* \*" *Id.* at 611. (citations omitted)

ORS 652.414 specifically authorizes the Commissioner to commence "an appropriate action, suit or proceeding" to recover the sums sought. Based on common usage and statutory context,<sup>14</sup> this proceeding is clearly not a "suit" or an "action." "Proceeding," on the other hand, is a more generic term, and the forum looks at related statutes to determine its meaning. ORS 652.332, which sets out the procedures available to the Commissioner for collecting wage claims, is entitled "**Administrative proceeding for wage claim collection; court enforcement and review**" (*original in bold*) and refers to a procedure before this forum as "administrative proceedings" and a "wage claim proceeding," contrasting those terms to "court action." ORS 183.470, which is entitled "**Orders in contested cases**," (*original in bold*) and is one of the forum's enabling statutes,<sup>15</sup> significantly, refers to a contested case as a "proceeding." Based on these references, the forum concludes that the present proceeding is a "proceeding" under ORS 652.414 and that the Commissioner, through this proceeding, has the authority to order Respondent to repay wages paid out by the Wage Security Fund, as well as a 25 percent penalty on those wages.<sup>16</sup>

b. What portion, if any, of the Wage Security Fund sums paid out to the 14 claimants must Respondent repay?

ORS 652.409 authorizes the commissioner to administer the Wage Security Fund. In doing so, the commissioner is required to pay wage claimants up to \$2,000 of

their unpaid wages earned within 60 days of the date of the cessation of their employer's business when the commissioner determines "that the claim is valid." ORS 652.414(2) provides that recovery may be accomplished "from the employer, or other persons or property liable for the unpaid wages." In this case, Agency Compliance Specialist Sheppard testified credibly that she made a determination that the claims were valid, the means by which she made her determination, and that \$24,081 was paid out of the Wage Security Fund to the wage claimants based on her determination that their claims were valid.

In cases involving payouts from the Wage Security Fund, where (1) there is credible evidence that a determination on the validity of the claim was made, (2) there is credible evidence as to the means by which that determination was made, and (3) BOLI has paid out money from the Fund and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out. The presumption may be rebutted by credible evidence to the contrary.<sup>17</sup>

In this case, Respondent presented no evidence whatsoever. The forum has made an independent determination that Respondent was "the employer" for purposes of ORS 659.414(2).<sup>18</sup> Consequently, Respondent is liable to repay the Wage Security Fund the sum of \$24,081, the amount actually paid out, plus a 25 percent penalty on that sum, or \$6,020.25.

#### **6. Respondent's Liability for Additional Unpaid Wages Owed by ICI.**

The rebuttable presumption of claim validity that applies to sums actually paid out by the Wage Security Fund does not apply to wages sought by the Agency on behalf of all 15 claimants that are in excess of the amount paid out by the Wage Security Fund. Consequently, the forum must make an independent determination of the validity of the claims with regard to those wages. *ORS 652.330(1)(d)*.

To establish a prima facie case for wage claims, the Agency must establish the following elements for each claimant: (1) Respondent employed claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he/she was not properly compensated; and (4) The amount and extent of work performed by Claimant.

The Agency has established a prima facie case for claimants Gallagher, Higgins, Moseley, and Vos through reliable evidence consisting of their sworn, credible testimony and supplemental documentation. That evidence established that they were employed by ICI, their agreed wage rates, that they performed work for which they were not properly compensated, and the amount and extent of their work, i.e. dates and hours worked, type of work performed, and the amount paid to them by ICI. As a successor employer, Respondent is liable for their unpaid wages.<sup>19</sup>

The situation is different with the remaining 11 wage claimants. Although it is undisputed that they all worked for ICI, they did not appear to testify, and there was no testimony, either in affidavit form or elicited from an Agency witness, that established their agreed wage rate or the amount and extent of their work.<sup>20</sup> The only evidence supporting their claims was the fact that each was clearly employed by ICI, the information each wrote on their wage claim forms stating their tenure of employment and salary or wage rate, the calendar of hours worked each completed at the time they filed their wage claims, and Compliance Specialist Sheppard's testimony.

In the proposed order, the forum concluded that this was insufficient evidence to establish a prima facie case for these 11 wage claimants.

In its exceptions, the Agency contends that the 11 wage claimants who did not testify should be awarded all back wages plead for in the Amended Order of Determination. The Agency argues that this conclusion is justified based on

Respondent's failure to present evidence controverting statements submitted in each of these 11 claimants' wage claims as to dates of work, rates of pay, and amount of unpaid wages, Sheppard's testimony, and the Agency's previous determination that all 15 wage claims were valid.

It is unusual in this forum for wage claims to be pursued without the wage claimant's testimony. Because of that fact, the forum has conducted an extensive review of Final Orders in all wage claims litigated before the forum since 1992<sup>21</sup> to determine what types of evidence the forum has relied on in awarding back wages to claimants.

By way of introduction, in wage claim cases, the employee has the burden of proving that he performed work for which he was not properly compensated. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54 (1998), *citing Anderson v. Mt. Clemens Pottery Co*, 328 U.S. 680 (1946). The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. *Id.* The forum has previously accepted the credible testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work. *Id.*

Of the cases reviewed, in the vast majority the forum has relied on the credible testimony of the wage claimant and contemporaneous time records maintained by the claimant and/or employer to show the amount and extent of work performed by the claimant.<sup>22</sup> In two cases, the forum relied on the credible testimony of the wage claimant and time records created by the claimants to show the amount and extent of work performed by the claimants.<sup>23</sup> In one case, the forum relied on the credible testimony of the wage claimant and the employer's written admission contained in the answer and request for hearing that the specific amount of wages sought was owed.<sup>24</sup>

In another case, the forum relied solely on the credible testimony of the claimants to show the amount and extent of work performed by the claimants.<sup>25</sup> In the remaining case where all wage claimants testified, the forum relied on the credible testimony of claimants and business records of the employer.<sup>26</sup>

The forum has previously wrestled with the problem of wage claimants who did not appear to testify at the hearing. *In the Matter of R.L. Chapman*, 17 BOLI 277 (1999); *In the Matter of Anna Pache*, 13 BOLI 249 (1994); *In the Matter of La Estrellita*, 12 BOLI 232 (1994); *In the Matter of Blue Ribbon Christmas Trees*, 12 BOLI 209 (1994).

In *Chapman*, the forum awarded unpaid wages to two claimants, one who testified at the hearing as to her rate of pay and dates and hours worked, and one who did not testify. However, in Findings of Fact--The Merits ##7-11, the Final Order makes specific findings that a former Respondent employee testified credibly as to the non-testifying claimant's dates of employment, rate of pay, and dates and hours worked.<sup>27</sup> The Final Order also notes that the non-testifying claimant recorded her hours on time cards provided by Respondent, and that these time cards were received into evidence and formed the basis for the computation of the claimant's total hours worked.

In *Anna Pache*, there were 57 wage claimants who were employed by Respondent as berry pickers. The Agency's only witnesses were the Agency compliance specialist who investigated the case and three of the wage claimants. The Agency and Respondent entered into a stipulation that, if called as witnesses, the non-testifying claimants would testify in accordance with the contents of their respective wage claims.<sup>28</sup> *Id.* at 249. Based on the "preponderance of the credible evidence on the whole record," the forum concluded that 51 of the 57 claimants had been employed by Respondent during the wage claim period. The forum then proceeded to an analysis

of whether the Agency had met its "its burden of proving that [the claimants] performed work for which [they were] not properly compensated," concluding that the claimants' credible testimony was sufficient evidence to prove the work alleged was performed and the extent of that work. *Id.* at 269-71.

*La Estrellita* involved wage claims by two claimants, only one of whom appeared to testify at the hearing. The testifying claimant was awarded \$5,468.86 of the \$9,060.20 in unpaid wages sought by the Agency in the Order of Determination. In support of the non-testifying claimant's wage claim, the Agency offered claim calendar forms filled out by the Agency compliance specialist in consultation with the claimant and the claimant's wage claim form. *Id.* at 233, 240. Respondent denied any wages were owed to the claimant and offered a computer printout listing gross wages, net wages, and deductions for claimant in rebuttal. *Id.* at 240. The forum denied the non-testifying claimant's claim because "Unlike the situation of Claimant Lopez [who appeared and testified], there were no witnesses to confirm Claimant Bermudez's presence or work efforts." *Id.* at 245.

In *Blue Ribbon*, also a default case, the forum awarded unpaid wages to 20 wage claimants. All 20 filed wage claims and executed an assignment of wages. Ten claimants appeared to testify, and the testimony of all ten was determined to be credible. Some of the claimants were paid by the hour, and others by piece rate based on the number of Christmas trees they sheared, topped, and staked. Where payment was by piece rate, several claimants who testified kept a record of the number of trees completed for co-workers on the same crew who did not appear to testify. *Id.* at 215, 217. In one instance, a record of hours worked was created and maintained on behalf on a non-testifying claimant by a claimant on the same crew who testified concerning that record. *Id.* at 214. Although the final order is not specific as to which claimants

were awarded wages based on hours worked or piece rate, it appears that the awards were based on the calculations of the Agency compliance specialist, who calculated wages due and owing by using hours worked, if known, and by piece rate if the number of hours worked could not be determined. *Id.* at 217.

In conclusion, this forum has universally relied on credible testimony and documentation<sup>29</sup> from claimants or witnesses to the claimants' employment to establish the nature and extent of work performed by claimants in wage claim cases. In this case, there is neither for claimants Doucoure, Ehalt, Foster, Hults, Kilger, Mertz, Miner, Potts, Procopio, Stapleton, and Swartz.<sup>30</sup> Consequently, the Agency has failed to establish a prima facie case for these 11 claimants and their wage claims for the amounts exceeding the sums paid out by the Wage Security Fund must fail.

**4. Is the Agency entitled to a presumption under OEC 311(1)(c)?**

The Agency contends that it should be entitled to a presumption, presumably for the purpose of showing the amount and extent of work performed by the wage claimants, under ORS 40.135(1)(c) (OEC 311(1)(c)) based on Respondent's failure to produce all records showing pay agreements and hours worked by the 15 claimants as required by the ALJ's discovery order.<sup>31</sup> This argument fails. Although the forum may rely on the Oregon Evidence Code for guidance,<sup>32</sup> there is no evidence on the record to prove that the required evidence was "willfully suppressed." Consequently, the forum declines to apply the requested presumption.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 652.414, and as payment of damages and penalties for INTELLIGENT CATALOG, INC.'S violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent CATALOGFINDER, INC. to deliver to the Fiscal Services Office of

the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Janetta Gallagher in the amount of THREE THOUSAND SIX HUNDRED TWENTY THREE DOLLARS AND SEVEN CENTS (\$3,623.07), less appropriate lawful deductions, representing \$3,623.07 in gross earned, unpaid, due, and payable wages; PLUS

a) Interest at the legal rate on the sum of \$3,623.07 from May 1, 1998, until paid.

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Carolyn Higgins in the amount of TWO THOUSAND NINE HUNDRED SEVENTY THREE DOLLARS AND NINE CENTS (\$2,973.09), less appropriate lawful deductions, representing \$2,973.09 in gross earned, unpaid, due, and payable wages; PLUS

a) Interest at the legal rate on the sum of \$2,973.09 from May 1, 1998, until paid.

(3) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Benjamin G. Moseley in the amount of FOUR THOUSAND TWO HUNDRED SEVENTY SIX DOLLARS AND SIXTEEN CENTS (\$4,276.16), less appropriate lawful deductions, representing \$4,276.16 in gross earned, unpaid, due, and payable wages; PLUS

a) Interest at the legal rate on the sum of \$4,276.16 from May 1, 1998, until paid.

(4) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Anthony Vos in the amount of SIXTEEN THOUSAND THREE HUNDRED FORTY SIX DOLLARS AND SEVENTEEN CENTS (\$16,346.17), less appropriate lawful deductions, representing \$16,346.17 in gross earned, unpaid, due, and payable wages; PLUS

a) Interest at the legal rate on the sum of \$16,346.17 from May 1, 1998, until paid.

(5) A certified check payable to the Bureau of Labor and Industries in the amount of THIRTY THOUSAND ONE HUNDRED AND ONE DOLLARS AND TWENTY FIVE CENTS (\$30,101.25), representing \$24,081.00 paid out of the Wage Security Fund to Claimants Doucoure, Ehalt, Foster, Gallagher, Higgins, Kilger, Mertz, Miner, Moseley, Potts, Procopio, Stapleton, Swartz, and Vos and \$6,020.25 as a 25 percent penalty on the sum of \$24,081.00; PLUS

a) Interest at the legal rate on the sum of \$10,000 from August 1, 1998, until paid.

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<sup>1</sup>Ed. Note: In the final order as initially published, Table 1 was located in this footnote. For ease of formatting, the table has been relocated to the next page of this document.

<sup>2</sup>In the original final order, Table 2 was located here. For ease of formatting, the table has been inserted into the text.

<sup>3</sup>Vos began working for ICI at the end of July 1997, but is only claiming unpaid wages for 1/2/98-3/30/98.

<sup>4</sup>Gallagher's claim includes \$2,000 in earned, unpaid commissions. It does not include \$2500 in vacation benefits because of a defect in the pleadings. Specifically, the basis for that sum is not specifically pleaded in the original or Amended Orders of Determination, although the sum of \$2500 appears to have been added to the wages and commission to arrive at the gross total of \$9,423.07 and is mentioned in her wage claim.

<sup>5</sup>Vos' claim includes \$5,000 in accrued, unused vacation benefits.

<sup>6</sup>Sheppard's testimony, in pertinent part, was as follows:

Q. "When you were speaking to Deborah Marlow, Rene Vishney, or Russell Bevans, did you discuss the merits of the wage claims?"

A. "Yes. I discussed whether the people had worked for them and whether they were owed the wages. There was acknowledgment that

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these people had worked for ICI. There was acknowledgment that there were probably wages owed. \* \* \* "

" \* \* \* "

Q. "Did any of them ever contest the amount of wages that were earned by the employees?"

A. "Never."

Q. "Did any of them ever contest that the wages had not been paid to these employees?"

A. "No, they acknowledged the wages hadn't been paid. They described to me that they had reduced their wages or not had not been able to pay wages during the first three months of 1998."

" \* \* \* "

Q. "You talked about interviewing the claimants. Did you interview all the claimants?"

A. "Yes, I made at least telephone contact, telephone interviews with all the claimants."

Q. "Did you have their wage claims when you contacted them?"

A. "Yes."

Q. "Did you speak with them individually?"

A. "Yes."

Q. "When you spoke with them, did you go over all the information on the wage claims as far as the periods of time they had worked and how much they were saying their salary or wage per hour was, to verify that was in fact correct?"

A. "I don't recall that I did that kind of detailed questioning with each one, to say 'I've got your wage claim. It says here you made \$577 a week.' I don't recall that I did exactly that detailed; no."

Q. "How did you get that information as far as the days that they worked and the specific hours they worked?"

A. "I got that from their wage claims. They submitted calendars with their wage claims with that information on it."

<sup>7</sup>Some claimants state 3/30/98 and others 3/31/98 on their wage claim forms as their last day of employment. However, credible testimony by Higgins indicates that everyone walked off the job on 3/30/98 as part of a "planned walkout." For this reason,

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the forum has concluded that 3/30/98 was the last day of employment for all claimants except those who claimed an earlier last date of employment on their wage claim forms.

<sup>8</sup>Although the agreement was admitted as evidence, no one identified the signature of the individual who signed as "Director of Engineering" and the ALJ cannot decipher the handwriting. Also, the signatures are dated "1-1-98," but there is no language in the agreement specifically stating when Mertz would start work under the terms of the agreement.

<sup>9</sup>Mertz' employment agreement entitles him to "4 weeks paid vacation per year \* \* \* effective after [Mertz] \* \* \* completed 30 day probationary period." Hults' employment agreement is unsigned and undated.

<sup>10</sup>Hults was excluded because all her wages were earned prior to 60 days before ICI ceased doing business. See ORS 652.414(1).

<sup>11</sup>In this case, the website, or "virtual" location of the business, was given significant weight in comparing the location and identity of ICI and Respondent due to the nature of the business. Respondent's only product was displayed on its electronic website; the physical location of the business was incidental.

<sup>12</sup>Based on the evidence presented, there was no clear line of demarcation as to when ICI ceased operation and Respondent commenced operation. Rather, there seemed to be an invisible seam between the two in the continuity of the operation.

<sup>13</sup>The judgment referred to is the Final Order on Default entered by BOLI against ICI after ICI's failure to file a timely answer and request for hearing. It encompasses the full amount of the wage claims by Claimants Ehalt, Foster, Gallagher, Higgins, Kilger, Mertz, Miner, Potts, Procopio, Stapleton, Swartz, and Vos.

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<sup>14</sup>ORS 652.200, 652.230, and 652.330 all contain references to "rights of action" that take place in courts of law.

<sup>15</sup>ORS 183.413 to ORS 183.470 is commonly referred to as Oregon's Administrative Procedures Act and sets out basic requirements that must be followed in all contested case hearings before state agencies. OAR 839-050-000(1) states, in pertinent part: "The purpose of OAR 839-050-0000 to 839-050-0440 is to carry out the statutory policies contained in ORS 183.413 to 183.470 \* \* \*."

<sup>16</sup>See also *Microtan Smart Cable, supra*, where the forum came to the same conclusion but did not explain its reasoning.

<sup>17</sup>This conclusion is bolstered by ORS 40.135(1)(j) [OEC 311(j)] (establishes a presumption that "Official duty has been regularly performed") and ORS 40.120 [OEC 308] ("In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.")

<sup>18</sup>See discussion establishing that Respondent is a successor employer, *supra*.

<sup>19</sup>See discussion establishing that Respondent is a successor employer, *supra*.

<sup>20</sup>This analysis only applies to back wages sought over and above the amounts paid out by the Wage Security Fund, as previously explained in "5. Respondent's Liability for Sums Paid out from the Wage Security Fund and Statutory Penalty."

<sup>21</sup>Beginning with *In the Matter of William Sarna*, 11 BOLI 20 (1992).

<sup>22</sup>See *In the Matter of Diran Barber*, 16 BOLI 190 (1997); *In the Matter of Staff, Inc.*, 16 BOLI 97 (1997); *In the Matter of Frances Bristow*, 16 BOLI 28 (1997); *In the Matter of Burrito Boy*, 16 BOLI 1 (1997); *In the Matter of Jewel Schmidt*, 15 BOLI 236 (1997); *In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258 (1995); *In the Matter of Samuel*

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*Loshbaugh*, 14 BOLI 224 (1995); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994); *In the Matter of Martin's Mercantile*, 12 BOLI 262 (1994); *In the Matter of Box Office Delivery*, 12 BOLI 141 (1994); *In the Matter of Crystal Heart Books*, 12 BOLI 33 (1993); *In the Matter of John Mathioudakis*, 12 BOLI 11 (1993); *In the Matter of Ken Taylor*, 11 BOLI 139 (1992); *In the Matter of Mark Vetter*, 11 BOLI 25 (1992).

<sup>23</sup>See *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998); *In the Matter of Sylvia Montes*, 11 BOLI 268 (1993).

<sup>24</sup>*In the Matter of William Sarna*, 11 BOLI 20 (1992).

<sup>25</sup>*In the Matter of Flavors Northwest*, 11 BOLI 215 (1993).

<sup>26</sup>*In the Matter of Microtan Smart Cable*, 11 BOLI 128 (1992).

<sup>27</sup>The Final Order, as published in 17 BOLI, does not specifically indicate the source of testimony relied on by the forum to establish the non-testifying claimant's dates of employment, rate of pay, and dates and hours worked. However, the forum notes that all final orders, when originally published, contain a parenthetical reference after each finding of fact indicating the specific evidence used by the forum to establish each finding of fact. Findings ##7-11 in the original Final Order in *Chapman* are each followed by a parenthetical reference that includes "Testimony of Simmons," and the order states that Simmons was a "former Respondent employee."

<sup>28</sup>The effect of this stipulation was to convert all statements contained in documents submitted with the wage claims of the non-testifying claimants into sworn testimony by each claimant.

<sup>29</sup>See *In the Matter of Flavors Northwest*, *supra*, for the lone case since 1992 where back wages were awarded based solely on claimants' credible testimony .

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<sup>30</sup>This is not to say that the Agency can never prevail in a wage claim without calling the wage claimant as a witness. See *In the Matter of R.L. Chapman*, 17 BOLI 277 (1999); *In the Matter of Anna Pache*, 13 BOLI 249 (1994); *In the Matter of Blue Ribbon Christmas Trees*, 12 BOLI 209 (1994). An example of evidence that might have tipped the scales in the Agency's favor with regard to one or more of the non-testifying wage claimants is credible and persuasive testimony from one or more of the testifying wage claimants regarding his or her personal knowledge of the amount and extent of work performed by the non-testifying wage claimant(s).

<sup>31</sup>ORS 40.135(1)(c) establishes a presumption that "Evidence willfully suppressed would be adverse to the party suppressing it."

<sup>32</sup>See *In the Matter of United Grocers*, 7 BOLI 1, 2 (1987). See also *In the Matter of Dan Cyr Enterprises, Inc.*, 11 BOLI 172, 179 (1993), *In the Matter of Marvin Clancy*, 11 BOLI 205, 211 (1993), and *In the Matter of Harry Markwell*, 8 BOLI 80, 91 (1989).