

In the Matter of

FJORD, INC.,

Case No. 104-00

Final Order of the Commissioner Jack Roberts

Issued May 9, 2001

SYNOPSIS

The Nordic Group, LLC, was a manufacturer of sporting apparel doing business in Hubbard, Oregon, and Vancouver, Washington. Nordic went out of business on January 6, 2000. At that time, 93 employees were owed wages for 18 days and filed wage claims. The commissioner made a determination that the claims were valid and caused \$73,699.06 to be paid to the 93 claimants from the Wage Security Fund. On January 31, 2000, Respondent commenced business operations at Nordic's Hubbard plant. The commissioner determined that Respondent was a "successor" employer and "purchaser" under ORS 652.310(1) and ordered Respondent to repay the wage Security Fund \$73,699.06, as well as a 25% penalty of \$18,424.77. ORS 652.140(1), 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 Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 7, 2000, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Respondent was represented by Caroline R. Guest, attorney at law. Norman Dversdal, Respondent's president, was present throughout the hearing to assist Respondent's case, as permitted by OAR 839-050-0110(3).

The Agency called as witnesses: Norman Dversdal, Betty Kissinger, Respondent's office manager; and Michael Wells, Wage & Hour Division Compliance Specialist.

Respondent called as witnesses: Norman Dversdal; Peter Yazzolino, Respondent's plant manager; Brent Cleveland, managing director of The Nordic Group, LLC (by telephone); and Conrad Myers, a "turnaround" consultant, who was called as an expert witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing) and administrative exhibits X-10 through X-23 (submitted or generated after the hearing);

b) Agency exhibits A-1 through A-5 and A-7 through A-17 (submitted prior to hearing), A-18 and A-19 (submitted at hearing). Exhibit A-20 was offered but not received;

c) Respondent exhibits R-1 through R-11 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 March 28, 2000, the Agency issued Order of Determination No. 00-0360 in which it alleged the following:

(a) Ninety-four (94) separate wage claimants filed wage claims with the Agencyⁱ and assigned those claims to the Agency, alleging that they were all employed in Oregon between December 18, 1999, and January 8, 2000, by Fjord, Inc., an Oregon corporation ("employer"), as a successor to the business of The Nordic Group, LLC dba Nordic Enterprises, and that they performed work, labor and services for the employer and were

paid all sums due and owing except the sum of \$73,699.06, which is due and owing along with interest.

(b) Pursuant to ORS 652.414, the Agency determined that the wage claimants were entitled to receive payment from the Wage Security Fund ("Fund") in the sum of \$73,699.06.

(c) The wage claimants received payment in the amount of \$73,699.06 from the Fund.

(d) The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(2) to recover from the employer the amount paid from the Fund, together with a penalty of 25 percent of the sum paid from the Fund, which amount is \$18,424.77, along with interest at the legal rate per annum from March 1, 2000, until paid.

2) On April 17, 2000, Respondent, through counsel, filed an answer and request for hearing. Respondent denied that it employed the employees listed in the Order of Determination during the time period of December 18, 1999, to January 8, 2000, and that it was a liable successor to The Nordic Group, LLC dba Nordic Enterprises. Respondent also raised the following affirmative defenses:

a) The Order of Determination failed to state a claim for which relief may be granted;

b) Imposition of liability upon Respondent is unconstitutional;

c) Imposition of liability on Respondent in this situation is fundamentally unfair and inequitable;

d) Imposition of liability on Respondent in this situation is contrary to public policy.

3) On June 19, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

4) On July 7, 2000, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as November 7, 2000, at 9:00 a.m., at the Hearings Room, 10th Floor, State Office Building, 800 NE Oregon Street, Portland, Oregon. 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, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0440.

5) On October 3, 2000, the Agency moved to postpone the hearing based on the reassignment of the case to another case presenter, the new case presenter’s caseload, and the amount of time required to prepare the case because of the sheer number of wage claimants.

6) On October 4, 2000, Respondent filed objections to the Agency’s motion to postpone. Respondent argued that the Agency had already had seven months to prepare its case and stated that Respondent was prepared to stipulate to the validity of the 93 underlying wage claims, leaving Respondent’s successor liability as the only issue at hearing.

7) On October 9, 2000, the ALJ issued an interim order denying the Agency’s motion for postponement, basing the ruling on Respondent’s statement that it was prepared to stipulate to the validity of the 93 underlying wage claims. The order stated the ALJ would reconsider the Agency’s motion if Respondent declined to enter into this stipulation.

8) On October 9, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to submit case summaries no later than October 27, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

9) The Agency and Respondent both filed their case summaries, with attached exhibits, on October 27, 2000.

10) 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.

11) Prior to opening statements, Respondent and the Agency agreed that the following exhibits were the same: A-12 and R-3, A-13 and R-5, A-14 and R-6, and A-17 and R-4.

12) Prior to opening statements, the Agency moved to amend the Order of Determination to add the word "claimants" immediately after the word "wage" at the end of the first line of paragraph III. Respondent did not object, and the amendment was granted.

13) Prior to opening statements, Respondent withdrew its second affirmative defense of unconstitutionality.

14) Prior to opening statements, Respondent stipulated that "Fjord, Inc." and "Fjord, Ltd." are the same company.

15) During the hearing, Respondent moved to amend its answer to include a defense stated in its case summary, namely that "Respondent is facially excluded from the definition of 'employer' pursuant to ORS 652.310(b), in that respondent is a 'person[]otherwise falling under the definition of employers so far as the times or amounts of their payments are regulated by laws of the United States.'" The Agency objected, arguing this was an affirmative defense that Respondent had waived by omitting it from its answer. The ALJ stated he would rule on the motion in the proposed order, and allowed Respondent to present testimony by Norman Dversdal, over the

Agency's objection, as an offer of proof in support of this defense. The Agency's objection to Respondent's offer of proof is sustained, for reasons stated in the Opinion.

16) At the conclusion of the hearing, the ALJ directed the participants to submit closing arguments in writing, and to submit briefs on the issue of whether or not Respondent is a successor to The Nordic Group, LLC, dba Nordic Enterprises. The ALJ ordered that the submissions be filed by November 21, 2000.

17) On November 13, 2000, the ALJ held a post-hearing conference with Mr. Gerstenfeld and Ms. Guest, during which Ms. Guest was asked to state Respondent's theory as to why Respondent is facially excluded from the definition of "employer" under ORS 652.310(1)(b). Ms. Guest stated that the defense is based on the fact that the FLSA is a law of the United States that regulates the amounts of money paid to employees, and Respondent is regulated by the FLSA. Mr. Gerstenfeld responded that the Agency did not require a continuance to present more evidence to meet Respondent's defense, but requested additional time to prepare the Agency's closing argument and obtain a brief from the Agency's counsel. The ALJ set a new filing deadline of December 4, 2000, for submitting closing arguments and briefs and directed the participants to address the following issues in their briefs:

- 1) Whether Respondent's defense that it is excluded from the definition of employer under ORS 652.310(1)(b) is an affirmative defense;
- 2) The merits of that defense; and
- 3) Whether or not Respondent is a successor to The Nordic Group, LLC or Nordic Enterprises.

18) On November 17, 2000, Respondent filed a motion to obtain a copy of the audiotapes from the hearing. That same day, the ALJ granted Respondent's motion, stating that the Agency was also entitled to a copy of the tapes if it so desired.

19) On November 17, 2000, the Agency requested a copy of the hearing audiotapes.

20) The Hearings Unit made copies of the hearing audiotapes available to both participants. Respondent and the Agency both picked up copies on November 21.

21) On December 1, 2000, Respondent filed its post-hearing brief and closing argument.

22) On December 4, 2000, the Agency case presenter filed the Agency's closing argument.

23) On December 4, 2000, Stephanie Andrus, assistant attorney general and the Agency's counsel, requested an extension of time until December 8, 2000, to file the Agency's brief. Respondent did not object, so long as Ms. Andrus agreed not to look at Respondent's brief and closing argument, which had already been filed, before she filed the Agency's brief. The ALJ granted the request and extended the deadline until December 8. In the interim order, the ALJ ordered Ms. Andrus not to look at Respondent's brief and closing argument, or to receive communications from anyone else regarding the contents of Respondent's brief and closing argument prior to filing her brief.

24) On December 8, 2000, Ms. Andrus filed the Agency's brief.

25) On March 20, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Norman Dversdal filed exceptions on Respondent's behalf. The forum has not considered those exceptions for reasons stated in the Opinion. The Agency did not file exceptions.

FINDINGS OF FACT – THE MERITS

1) Norman Dversdal started Nordic Enterprises, Ltd., ("NEL") in 1972. Dversdal was NEL's sole shareholder, as well as its president and manager, from its inception until its sale in 1999.

2) Throughout its existence, NEL's business consisted of sewing various products, including sports apparel and equipment, as a "CMT" manufacturer.ⁱⁱ Examples of the products produced by NEL were swimsuits for Jantzen, day packs for Jansport, and goose down coats for Eddie Bauer.

3) From 1972 until 1998, NEL operated one manufacturing facility, located at 2860 "J" Street in Hubbard, Oregon. In 1998, NEL purchased and began operating another manufacturing facility in Vancouver, Washington.

4) A substantial amount of the sewing and embroidery equipment used by NEL at the Hubbard facility was personally leased to Dversdal by Allco Enterprises, Inc., and Beacon Funding.

5) NEL's telephone and fax numbers at the Hubbard facility were 503-982-3130 and 503-982-1814, respectively. NEL's mailing address was P.O. Box 448, Hubbard, Oregon.

6) Elizabeth "Betty" Kissinger was hired as NEL's office manager in 1988. Peter Yazzolino was hired as NEL's production manager in 1998.

7) In 1999, Dversdal decided to retire and sell NEL. Dversdal used The Piper Group, a group that buys and sells businesses for a fee, to locate a buyer. The Piper Group located The Nordic Group, LLC ("Nordic"), an Oregon limited liability company, as a potential buyer.

8) Nordic's principal owner and managing director was Brent Cleaveland. Nordic had no other directors or officers. Dversdal had never met Cleaveland before putting NEL up for sale.

9) After negotiations, Cleaveland agreed to buy NEL. Dversdal and Cleaveland signed an "Agreement for Sale and Purchase of Business Assets" ("Agreement") on April 30, 1999.

10) In the Agreement, Dversdal and NEL agreed to sell to Nordic assets in NEL's Vancouver and Hubbard facilities that included the following:

- a) All equipment, rolling stock, tools, furniture, and fixtures of every nature, kind and description;
- b) NEL's inventory of supplies owned by NEL, excluding inventory used in the ordinary course of business of NEL's business prior to closing;
- c) All rights, benefits and interest under all leases of real property used or held in connection with NEL's business [including the Vancouver and Hubbard manufacturing facilities], and all leasehold improvements and fixtures relating to the business;
- d) NEL's work in process;
- e) All of NEL's rights under manufacturing orders and contracts for manufacture to which NEL was a party;
- f) The name Nordic Enterprises, Ltd., NEL's phone numbers, NEL's goodwill, and NEL's and Dversdal's interest in the names Western Trails, Oregon Expressions and Cascade Casuals; and Dversdal's personal business goodwill, including but not limited to Dversdal's manufacturing techniques, marketing programs, customer relations, vendor relations, and supplier relations, established by Dversdal during his career;
- g) All books, records and other data relating to NEL's business, including, without limitation, customer lists and records, formulations, technology and proprietary information, patterns, samples, manufacturing processes, digitized images (to the extent of NEL and Dversdal's interest therein), production reports and records, equipment logs, operating guides and manuals, sales and marketing information, correspondence and other similar documents and records;
- h) All permits, licenses, consents, authorizations and approvals held or used in connection with NEL's business from all federal, state, local or foreign governmental or regulatory authorities, or industrial bodies, to the extent they were transferable.

11) The Agreement excluded from sale NEL and Dversdal's rights to the name "Body Gear," NEL's accounts receivable, cash, notes receivable, prepaid accounts, NEL's minute and stock record books, ledgers and books of original entry and any other assets not listed under Finding of Fact – The Merits 10.

12) In the Agreement, NEL agreed to terminate all of its employees as of the closing date and to pay each employee all wages, commissions, and accrued vacation pay earned up to the time of termination, including overtime pay.

13) In the Agreement, Nordic assumed responsibility for all of NEL's post closing obligations involving leases and other contracts. This included promissory notes to Jantzen, Inc., and Cascade West on which Dversdal was personally liable.

14) In the Agreement, Nordic agreed to pay NEL specified amounts for equipment, leasehold improvements, furniture and fixtures, supplies, an agreement not to compete, and work in process. Nordic also agreed to pay Dversdal specified amounts for equipment, furniture and fixtures, an agreement not to compete, and goodwill

15) Nordic obtained financing for its purchase of NEL from Pacific Continental Bank ("PCB"). One of the financing terms gave PCB a primary security interest in the equipment being transferred from NEL to Nordic. Dversdal retained a secondary security interest in this equipment. NEL retained a security interest that was subordinate to Dversdal's.

16) NEL and Nordic both intended that there would be "continuity of enterprise" and that Nordic would continue operating the same business that NEL had operated.

17) Nordic took over NEL's assets and operations in June 1999. At that time, NEL had approximately 325 employees at its Hubbard and Vancouver plants. 100-150 of these employees worked at the Hubbard plant. NEL ceased to exist, except for tax purposes, and Dversdal changed NEL's name to Fjord, Ltd. ("Fjord"). Fjord, Ltd. is an Oregon corporation. Nordic thereafter conducted "essentially the same business" that NEL had conducted.

18) After the sale of NEL, Kissinger continued working as office manager for Nordic. She worked at the Hubbard plant, but was responsible for both the Hubbard and Vancouver plants. 60% of her work was related to the Vancouver plant. Yazzolino continued working for Nordic as production manager of the Hubbard plant.

19) After Nordic began operations, Dversdal continued as the lessee of the Vancouver and Hubbard plants and the equipment leased from Allco and Beacon and subleased them to Nordic. This was because Nordic was unable to take over the leases as anticipated.

20) After the sale of NEL, Dversdal continued working for Nordic under the terms of an employment agreement that required him to work 20 hours per week for 24 months in exchange for payment of \$1,000 per month. Dversdal had his own office at Nordic. His primary work consisted of bringing in work and maintaining good relationships with vendors. Dversdal was not paid after November 1999, but continued going to work. He did little actual work for Nordic after November 1999.

21) Nordic's Hubbard physical location, mailing address, telephone and FAX number were the same NEL had used. Nordic used MCI as its long distance telephone carrier.

22) During Nordic's operation of NEL's former business, its personnel structure consisted of the following:

1. Brent Cleaveland, president, B. Kissinger, officer manager, K. Roberts and K. Milliron, office assistants (Vancouver and Hubbard plants);

2. Hubbard plant: P. Yazzolino, factory manager; G. Veenker and J. Kunz, engineers; T. Iliboi, mechanic; S. Hilgers, ship/rec supervisor; P. Lim, cutting supervisor; B. Brenden, and R. Moreno, sewing supervisors; L. Olivares, training supervisor; J. Tornero, warehouse; final dept.; cutters; sewers; and layup;

3. Vancouver plant: R. Bradstreet, factory manager; J. Thompson, engineer; R. Thompson, R. Kilde and L. Warrenbours, mechanics; S. Purviance, ship/rec supervisor; J. Berry and C. Woods, cutting

supervisors; G. Larson, M. Miesbauer, C. Larson, and R. Whitlock, sewing supervisors; warehouse; cutters; layup, and sewers.

23) In 1999, Nordic's Hubbard plant had gross sales of \$1,701,543.56. Nordic's Vancouver plant had gross sales of \$1,436,861.41. Three of Nordic's customers were Nike, Incorporated, Hanna Anderson, and Solstice. In both plants, those three customers accounted for \$688,807.92 in gross sales, or 22 per cent of Nordic's total gross sales. In the Hubbard plant, those three customers accounted for \$476,997.40 in gross sales, or 28 per cent of the Hubbard plant's total gross sales.

24) Nordic's Vancouver and Hubbard plants had 42 other customers besides Nike, Hanna Anderson, and Solstice.

25) On January 6, 2000, Nordic ceased operations. Dversdal did not participate in making the decision to cease Nordic's operation and only learned on January 6 that Nordic would be ceasing operations on that same day. Cleaveland took the paychecks for all Nordic employees with him when he left work on January 6

26) On January 6, 2000, Nordic owed wages to employees for 18 days work. At that time, Dversdal was aware that these wages were owed.

27) On January 14, 2000, Nordic filed a voluntary petition under Chapter 11 of the Bankruptcy Code.

28) The 93 persons listed on Appendix A of this Order were employed by Nordic and, on January 6, 2000, were owed, but not paid, the wages listed in the column entitled "TOTAL UNPAID WAGES" in Appendix A. After Nordic ceased business operations, those 93 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the wages listed in the column entitled "TOTAL UNPAID WAGES" in Appendix A were paid to the persons listed out of the Wage Security Fund pursuant to ORS 652.414(1) and the administrative rules adopted thereunder.

29) Nordic had 450-500 employees when it ceased operations. 110-115 of these persons were employed at the Hubbard plant.

30) When Nordic ceased business operations, it had unfulfilled contracts with customers that included work in process. Among these customers was Hanna Anderson.

31) When Nordic ceased business operations, it had 821 pieces of equipment in its Vancouver plant and about 250 pieces of equipment in its Hubbard plant.

32) In the three weeks after Nordic ceased operations, all of Nordic's customers, with the exception of Hanna Anderson, picked up their work in process. Dversdal facilitated this process at the Hubbard and Vancouver plants by directing the customers to former employees of Nordic, primarily supervisors, who were then hired by the customers to categorize and mark their work in bags and send it back to the customer.

33) As a result of Nordic's bankruptcy filing, Dversdal assumed approximately \$1.1 million in personal indebtedness, most of which had been assumed by Nordic when Nordic purchased NEL's assets. This included liability for leases on the Vancouver and Hubbard plant buildings, leases with Allco and Beacon for equipment, and promissory notes to Jantzen, Incorporated and Cascade West.

34) When Nordic ceased business operations, Dversdal called a meeting of Respondent's Board of Directors and asked for advice about going back into business. At that time, Dversdal's personal assets consisted of \$500,000 in an IRA in stocks and bonds. After the meeting and against the Board's advice, Dversdal decided to go back into business as Fjord at Nordic's Hubbard facility. At that time, Dversdal was not aware that Respondent might be liable to pay the wages still due and owing to Nordic's employees.

35) At the time Respondent began operating the Hubbard facility, Respondent had no borrowing power. Dversdal had already borrowed \$300,000 for operating capital, with his house as collateral, and at that time could not have borrowed \$100,000 to pay the wages owed by Nordic.

36) In January 2000, Kissinger registered Fjord with the Oregon Employment Department and Department of Revenue. Based on Kissinger's representation that Fjord was a new company, the State of Oregon assigned a 3.0 percent unemployment tax rate to Respondent instead of the 1.5 percent unemployment tax rate assessed against Nordic. In contrast, Nordic had been assigned the same 1.5 percent unemployment tax rate that NEL had.

37) On January 31, 2000, Respondent hired its first employees. At the end of its first payroll period, February 12, 2000, Respondent employed eleven persons. All but one had previously been employed by Nordic or NEL.

38) As of February 1, 2000, Respondent's personnel structure consisted of the following: N. Dversdal, president; cutter; sewers; layup and assembly.

39) On February 2, 2000, Nordic, Dversdal, PCB, and Respondent filed a "Stipulated Emergency Motion for Interim Approval of Lease Agreement" with the bankruptcy court. The motion sought the court's approval for Respondent to lease the equipment in the Hubbard facility from Nordic for \$6,000 per month. The court issued an interim order granting the motion on February 20, 2000, that provided that Respondent would pay Nordic \$6,000 per month directly for use of equipment at the Hubbard facility. The order specified that some of the equipment was subject to the Allco and Beacon leases and that Dversdal would make payments directly to Allco and Beacon in the amounts and at the rates specified in the original leases originally entered into between Dversdal, Allco, and Beacon. The order specified that Respondent would

complete the work in process from Hanna Anderson and the final payment from Anderson would be split equally between Respondent and Nordic. On February 24, 2000, the court issued a final order approving this lease agreement. Respondent leased the equipment for two months, making payments to the bankruptcy trustee. On March 10, 2000, Dversdal, on behalf of Respondent, sent a check in the amount of \$6,000 for lease of equipment and a check for \$4,981.50, representing 50% of the total received from Hanna Anderson, to the bankruptcy trustee.

40) At the end of March, the bankruptcy court cancelled the lease agreement between Respondent and Nordic after Respondent made two \$6,000 lease payments. That same day, Nordic's bankruptcy was converted from a Chapter 11 to a Chapter 7 proceeding. At that time, Nordic abandoned its assets. Subsequently, PCB took possession of the equipment in which it had a security interest, including equipment at the Hubbard facility.

41) Dversdal negotiated with PCB for certain equipment at the Hubbard facility that had been used by Nordic to operate its business and, in June 2000, Respondent purchased that equipment at the Hubbard facility from PCB for \$177,500. This purchase included at least four pieces of sewing equipment that had been used at Nordic's Hubbard plant.ⁱⁱⁱ The majority of this equipment had previously been transferred from NEL to Nordic. Respondent only wanted to purchase 170 machines in the Hubbard plant, but PCB insisted that Respondent purchase all 250 machines. As of the date of hearing, Respondent was not using 70 of those machines. Respondent uses this equipment to operate its business, along with equipment leased from Allco and Beacon that was used by NEL and Nordic.

42) Respondent did not pay any outstanding debts of Brent Cleaveland or Nordic.

43) Dversdal is the sole owner of Fjord, Ltd.

44) As of November 7, 2000, Respondent had 80-90 employees.

45) As of October 25, 2000, 81 persons employed by Respondent at some time between January 31, 2000, and October 25, 2000, had been previously employed by Nordic. 68 of these persons were employed by Nordic within 60 days of January 6, 2000.^{iv} 13 others were employed at some time during Nordic's operation.^v Respondent employed 143 persons in total between January 31, 2000, and October 25, 2000.

46) Respondent uses the same CMT manufacturing techniques used by NEL and Nordic.

47) Respondent uses AT&T as a long distance carrier.

48) Respondent has received no benefit from any credit established by Nordic.

49) Respondent has received no other work from Hanna Anderson since completing Nordic's work in process.

50) From February 1 through October 13, 2000, Respondent had gross sales of \$1,648,529.38. \$1,443,619.58, or 88 per cent of this total, represented sales to Nike, Incorporated, Solstice, and Hanna Anderson. Respondent did not do business with Nordic's remaining 42 former customers.

51) Nike Corporation had been NEL's customer since 1977. Nike continued as Nordic's customer. There was no Nike work in progress at either the Vancouver or Hubbard plant at the time Nordic declared bankruptcy, as all of Nike's business was done between the months of April and August. After Nordic declared bankruptcy, Nike agreed to send more work to Respondent, so long as Brent Cleaveland and Nordic weren't associated with Respondent. Between February 1 and March 14, 2000,

Respondent billed Nike a total of \$17,975.68 for work performed during that period of time.

52) After Nordic filed for bankruptcy, the assets of its Vancouver plant were sold at auction for a total of \$455,000.

53) After January 6, 2000, Kissinger performed various administrative and personnel functions for Nordic on an unpaid basis, including determining the hours worked by Nordic's employees for which they had not been paid, mailing W-2 forms to employees, and completing paperwork for NAFTA relief, which entailed compiling sales records and projections. After January 6, 2000, Kissinger also began doing some "volunteer" work for Respondent before going to work fulltime for Respondent as office manager/handling payroll and personnel on June 5, 2000. Respondent paid Kissinger a bonus, from which taxes were taken, for this "volunteer" work after she went to work fulltime for Respondent.

54) Peter Yazzolino was hired by NEL in 1998 as plant manager. He continued to occupy that position for Nordic in the Hubbard plant. He performed "volunteer" work for Dversdal after Nordic's bankruptcy, including helping Dversdal determine if going back into business was feasible, helping prepare W-2s, completing paperwork for NAFTA relief, and answering the phone at the Hubbard plant. He was hired by Respondent on June 5, 2000, as plant manager. After his hire, he received a bonus from Respondent for his work in helping start up Respondent. At the time of the hearing, he was plant manager for Respondent and a member of Respondent's board of directors.

55) On February 12, 2000, Kissinger ran a payroll report for Respondent, using the same format she used while employed by Nordic.^{vi} The report listed 11 employees. All but one, William Simon, had been employed by Nordic. The report

listed each employee's "number," which was a sequential number assigned to each employee at the time of his or her hire at NEL, Nordic, or Respondent. Persons who had worked for NEL, Nordic, or both were reassigned their original employee number at the time they were hired by Respondent. New employees hired by Respondent were assigned sequentially larger employee numbers. Simon's number was 3082.

56) On October 25, 2000, Kissinger prepared a list of Respondent's employees. The report was titled "The Nordic Group, LLC – Employee Listing 10/25/00." The report listed 143 employees, with 103 assigned numbers lower than 3082. 81 had worked for Nordic.

57) Respondent uses the same two computer systems that Nordic used. As of the date of the hearing, the business name on Respondent's "internal" forms still read "Nordic Group, LLC." Correspondence to customers, including invoices, and paychecks have the name "Fjord, LTD" imprinted on them.

58) Except for the equipment purchased from PCB, the Hubbard physical plant and equipment used by Respondent is personally owned or leased by Dversdal and subleased to Respondent. The equipment leased from Allco and Beacon is the same equipment used by NEL and Nordic at their Hubbard plant.

59) Respondent's board of directors includes Norman Dversdal, Jon Dversdal, Peter Yazzolino, and Don Linville. Its officers are Norman Dversdal, president, and Betty Kissinger, secretary. None of these persons were on the board of directors or officers of Nordic.

60) Nordic's Hubbard engineers were Gary Veenker and Judy Kunz. Respondent's engineer is Judy Kunz, who was hired by Respondent on June 5, 2000. Veenker was also hired by Respondent on August 1, 2000.^{vii} There is no credible evidence in the record identifying Respondent's training supervisor.^{viii} However,

Nordic's training supervisor at Hubbard, Luisa Olivares, was hired by Respondent on August 14, 2000. There is no credible evidence in the record identifying Respondent's sewing superintendent.^{ix} However, Nordic's sewing supervisors at Hubbard - B. Brenden, R. Moreno, and B. Padron, were all hired by Respondent on June 5, 2000.^x Nordic's release auditor at Hubbard was Juanita Gonzales. Respondent's release auditor is Mary Meyers, a former employee of Nordic who was hired by Fjord on March 13, 2000. Gonzales was hired by Respondent on August 21, 2000.^{xi} Phil Lim, Nordic's cutting supervisor at Hubbard, was hired by Respondent on June 5, 2000.^{xii} Sheri Hilgers, Nordic's shipping/receiving supervisor at Hubbard, was hired by Respondent on June 5, 2000.^{xiii}

61) In Respondent's offer of proof made in support of its proffered ORS 652.310(1)(b) affirmative defense, Dversdal testified that Respondent ships its product to Australia, to 26 colleges and 11 NFL teams, shipping products to 26-30 states in all.

62) Betty Kissinger was a reluctant witness who had a long employment history with Norman Dversdal at the time of the hearing and was one of Respondent's corporate officers. Her testimony was slanted in Respondent's favor, as demonstrated by the contrast between her testimony and documentary evidence that she prepared. For example, she testified that Respondent's mailing address was P.O. Box 248, whereas her current business card and Respondent's letterhead list Respondent's mailing address as P.O. Box 448, the same as NEL and Nordic. She testified that only 67 of the persons listed on Respondent's employee list had worked for NEL or Nordic, whereas employee numbers revealed that 103 employees of Respondent had worked for NEL or Nordic. Her memory was also suspect in that she was unable to recall the bonus amount paid to her by Respondent only 4-5 months earlier. The forum has

credited her testimony only where it was uncontradicted or supported by other credible evidence.

63) Peter Yazzolino was Respondent's plant manager at the time of the hearing and a corporate officer. Like Kissinger, he worked as a volunteer to help Dversdal get Respondent's business operation going. His testimony was diminished by his inability to explain the scope of two documents he should have understood from his position as plant manager – Nordic's list of customers and why Nordic's Hubbard plant produced a higher gross volume of sales than the Vancouver plant. He also testified that Shirley Stone was a current supervisor for Respondent, whereas Stone's name does not appear on Kissinger's list of Respondent employees. The forum has credited his testimony only where it was uncontradicted or supported by other credible evidence.

64) The forum has not relied on the testimony of Conrad Meyers because of the forum's determination that it is irrelevant.^{xiv}

65) The forum has credited the testimony of Norman Dversdal, Brent Cleaveland, and Michael Wells in their entirety.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, The Nordic Group, LLC, was an Oregon limited liability corporation doing business that engaged the personal services of one or more employees in the state of Oregon. Nordic was a "CMT" manufacturer of sports apparel and equipment that operated manufacturing plants in Hubbard, Oregon and Vancouver, Washington. Nordic subleased the plant buildings and real estate from Norman Dversdal and subleased the majority of equipment it used from Dversdal. About 25 percent of Nordic's employees worked at the Hubbard plant and about 25 percent of Nordic's pieces of equipment were located at the Hubbard plant. 54 percent of Nordic's gross sales were generated from the Hubbard plant, and its administrative headquarters was located at the Hubbard plant.

2) Nordic ceased business operations on January 6, 2000. At that time, Nordic owed the wages listed in the column entitled "TOTAL UNPAID WAGES" in Appendix A to this Order to the 93 persons listed in Appendix A.

3) After Nordic ceased business operations, those 93 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the wages listed in the column entitled "TOTAL UNPAID WAGES" in Appendix A were paid to the persons listed out of the Wage Security Fund pursuant to ORS 652.414(1) and the administrative rules adopted thereunder. The total amount of wages paid out from the Fund was \$73,699.06.

4) On January 31, 2000, Fjord, Ltd. began manufacturing operations in Hubbard, Oregon, in Nordic's former plant, using the same equipment Nordic had used at that plant. Prior to that time, Dversdal, Respondent's president; Kissinger, Nordic's personnel manager; and Yazzolino, Nordic's Hubbard factory manager, were engaged in start-up operations for Respondent, the latter two as "volunteers." Dversdal, Respondent's president, had worked for Nordic under a private employment contract. Respondent's initial customers were Hanna Anderson and Nike Corp., both of whom had been customers of Nordic. Respondent initially employed 11 persons, 10 of who had been employees of Nordic or its predecessor, NEL.

5) In June 2000, Respondent purchased \$177,500 worth of equipment from Pacific Continental Bank that had been used by Nordic to operate its Hubbard plant. At the time of the hearing, Respondent was using 170 of the 250 machines purchased from PCB to operate its Hubbard plant, along with equipment subleased from Dversdal that had also been subleased to Nordic by Dversdal. Respondent subleases its Hubbard plant from Dversdal, who had also subleased the Hubbard plant to Nordic.

6) 81 of the 143 persons employed by Respondent between January 31, 2000, and October 25, 2000, had also been employed by Nordic.

7) Respondent uses the same "CMT" manufacturing techniques as Nordic and uses equipment that was used by Nordic and manufactures the same type of product.

8) Respondent uses the same two computer systems as Nordic. Respondent has the same phone number, mailing address, and personnel numbering system as Nordic.

9) Respondent employs Yazzolino, Nordic's Hubbard factory manager, as its factory manager, and Kissinger, Nordic's personnel manager, as personnel manager.

CONCLUSIONS OF LAW

1) During all times material herein, Nordic was an employer and the 93 wage claimants listed in Appendix A to this Order were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. During all times material herein, Nordic employed all 93 claimants.

2) ORS 652.310(1) provides:

"As used in ORS 652.310 to 652.414, unless the context requires otherwise:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes any producer-promoter, and 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. 'Employer' includes the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter but does not include:

"(a) The United States.

"(b) Trustees and assignees in bankruptcy or insolvency, and receivers, whether appointed by federal or state courts, and persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof."

Respondent Fjord is a “successor to the business” of Nordic and a “purchaser” of Nordic’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(1) provides:

“(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.”

Nordic violated ORS 652.140 by failing to pay the 93 wage claimants listed in Appendix A all wages earned and unpaid not later than the end of the business day on January 6, 2000, the date the wage claimants were terminated.

5) Respondent, as a successor to the business of Nordic and a purchaser of Nordic’s business property for the continuance of the same business pursuant to ORS 652.310(1), is liable for Nordic’s failure to pay the 93 wage claimants listed in Appendix A.

6) ORS 652.414 provides, in pertinent part:

“Notwithstanding any other provision of law:

(1) When an employee files a wage claim under this chapter for wages earned and unpaid, 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, to the extent provided in subsection (2) of this section:

“(a) The unpaid amount of wages earned within 60 days before the date of the cessation of business; or

“(b) If the claimant filed a wage claim before the cessation of business, the unpaid amount of wages earned within 60 days before the last day the claimant was employed.

“(2) The commissioner shall pay the unpaid amount of wages earned as provided in subsection (1) of this section only to the extent of \$4,000 from such funds as may be available pursuant to ORS 652.409 (2).

“(3) 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 under 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. All amounts recovered by the commissioner under this subsection and subsection (4) of this section are appropriated continuously to the commissioner to carry out the provisions of this section.”

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 \$73,699.06 paid to the 93 wage claimants from the Wage Security Fund and sought in the Order of Determination, along with a penalty of \$18,424.77 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(2).

OPINION

INTRODUCTION

NEL, a CMT manufacturer, sold its business operation in 1999 to Nordic. Nordic then commenced CMT manufacturing operations. On January 6, 2000, Nordic closed its doors and ceased business operations. At that time, \$73,699.06 in wages was due to 93 separate employees. Those wages were subsequently paid by funds from the Wage Security Fund, which is administered by BOLI. On January 31, 2000, Respondent began CMT manufacturing operations in Nordic’s former Hubbard facility, and was still conducting CMT manufacturing operations there at the time of the hearing. In this action, BOLI seeks to recover the funds paid out of the Wage Security Fund, plus a 25% penalty, from Respondent. The question presented is whether Respondent is an

“employer” from whom the commissioner is entitled to recover these funds pursuant to ORS 652.414.

RESPONDENT’S PROPOSED AMENDMENT

At hearing, Respondent moved to amend its answer to include a defense that “Respondent is facially excluded from the definition of ‘employer’ pursuant to ORS 652.310(1)(b), in that respondent is a ‘person[] otherwise falling under the definition of employers so far as the times or amounts of their payments [to employees] are regulated by laws of the United States.’” The Agency objected on the grounds that this was an affirmative defense that had been waived by virtue of Respondent’s failure to raise it in the answer. The ALJ reserved ruling on the motion until the proposed order and allowed Respondent to present testimony by Norman Dversdal as an offer of proof in support of this defense. After hearing, Respondent and the Agency’s counsel both submitted briefs on this issue.

In support of its motion, Respondent argues that the defense is not an affirmative defense and could not be waived. In the alternative, Respondent argues that even if the forum finds the defense to be an affirmative one, the forum should grant the amendment based on the fact that Respondent’s proposed amendment did not prejudice the Agency.

RESPONDENT’S ORS 652.310(1)(b) DEFENSE IS AN AFFIRMATIVE DEFENSE.

Respondent contends the ORS 652.410(1)(b) defense raised in its proposed amendment is not an affirmative defense because it simply rebuts the element of the Agency’s prima facie case requiring the Agency to prove that Respondent is an “employer.” Because ORS 652.310 does not specifically state whether or not subsection (1)(b) constitutes an affirmative defense, the forum must interpret the statutory language.

ORS 652.310(1) defines “employer” in the following words:

“(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *, and 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. ‘Employer’ includes the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter but does not include:”

“(a) The United States.

“(b) Trustees and assignees in bankruptcy or insolvency, and receivers, whether appointed by federal or state courts, and persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof.”

Where statutory interpretation is required, the forum must attempt to discern the legislature’s intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature’s intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id.* at 611. If the legislature’s intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *Id.*

The first sentence of paragraph (1) contains the statute’s general definition of “employer” and describes the range of actions that qualify a person or entity as an “employer.” It is this definition the Agency must allege Respondent falls within to establish the “employer” element of its prima facie case. The second sentence does not add to that definition, but merely clarifies that “the State of Oregon * * * and any of their instrumentalities organized and existing under law or charter” are included in the definition contained in the first sentence. In short, every “necessary ingredient of [the] definition” of employer is contained in the first sentence of paragraph (1). *Cf. State v.*

Vasquez-Rubio, 323 Or 275, 279 (1996) (quoting *State v. Schriber*, 185 Or 615, 631) (quoting *State v. Tamler & Polly*, 19 Or 528, 530-31 (1890)).

The definition relied on by Respondent is contained in a subsequent paragraph, qualified by the limiting phrase - “but does not include” - set out at the end of paragraph (1). This limiting phrase indicates that subsections (a) and (b) are intended as exceptions to the definition of “employer.” As exceptions, they constitute an affirmative defense that must be pleaded and proved by Respondent.^{xv}

AFFIRMATIVE DEFENSES MUST BE RAISED IN THE ANSWER

OAR 839-050-0130 and OAR 839-050-0140 are the procedural rules relevant to these issues. OAR 839-050-0130 governs responsive pleading and provides, in pertinent part:

“(2) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document, and not denied in the answer, shall be deemed admitted by the party. The failure of the party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Any new facts or defenses alleged in the answer shall be deemed denied by the Agency. Evidence shall not be taken at the contested case hearing on any factual or legal issue not raised in the charging document or the answer as originally filed or as amended pursuant to OAR 839-050-0140.

This rule unambiguously states that affirmative defenses are waived unless raised in the answer. It goes on to state that no evidence shall be taken in support of any legal issue, which would include Respondent’s proffered affirmative defense, except pursuant to amendment. Therefore, the forum must conclude that Respondent has waived its defense unless Respondent’s motion to amend is granted.

AMENDMENTS AT HEARING.

Where a party moves to amend its answer at hearing to include an affirmative defense not previously raised, OAR 839-050-0140(2) defines the parameters within which the motion may be granted. Those rules provide:

“(a) After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is express or implied consent of the participants. Consent will be implied where there is no objection to the introduction of such issues and evidence or where the participants address the issues. Any participant raising new issues must move the administrative law judge to amend its pleading to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.

“(b) If evidence is objected to at hearing on the grounds that it is not within the issues raised by the pleadings, the administrative law judge may allow the pleadings to be amended to conform to the evidence presented. The administrative law judge shall allow the amendment where the participant seeking to amend its pleading shows good cause for not having included the new matter in its pleading prior to hearing and the objecting participant fails to satisfy the administrative law judge that it would be substantially prejudiced by the admission of such evidence. The administrative law judge may grant a continuance to enable the objecting participant to meet such evidence.

“(c) Charging documents and answers may be amended as provided in paragraphs (a) and (b) of this rule. Permissible amendments to charging documents include, but are not limited to: additions to or deletions of charges; changes to theories of liability; and increases or decreases to the damages, penalties, or other remedies sought. Permissible amendments to answers include, but are not limited to, additions to or deletions of affirmative defenses.”

Respondent contends it falls within the exclusionary language of ORS 652.310(1)(b) solely because it is regulated by the Fair Labor Standards Act (“FLSA”). During her examination of Norman Dversdal, Respondent’s counsel asked Dversdal – “Is Fjord engaged in interstate commerce?” Dversdal answered “yes.” The Agency did not object. As a result, subsection (2)(a) applies. Respondent’s engagement in interstate commerce brings it within the regulatory coverage of the FLSA. 29 U.S.C. § 201, *et seq.* Based on the Agency’s failure to object, the forum must find implied consent by the participants to the admission of evidence showing that Respondent is engaged in interstate commerce. However, this does not end the analysis. In order to grant Respondent’s motion, the forum must determine that the proposed amendment conforms to the evidence. In this case it does not, for the reason that simply being an

FLSA-regulated employer is not a defense under ORS 652.310(1)(b).^{xvi} Consequently, the forum denies Respondent's motion to amend its answer. The forum also sustains the Agency's objection to Dversdal's testimony presented as an offer of proof showing the extent of Respondent's engagement in interstate commerce on the basis that it is irrelevant.

AN FLSA-REGULATED EMPLOYER IS NOT PER SE A "PERSON" UNDER ORS 652.310(1)(b).

As stated earlier, Respondent argues that it falls within the meaning of "persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof" solely because of its FLSA-regulated status. ORS 652.310(1)(b). If so, then the "implied consent" provision of OAR 839-050-0140(2)(a) would lead the forum to grant Respondent's motion to amend on the basis that the amended pleading would conform to evidence presented by Respondent. For reasons that follow, the forum disagrees with Respondent's argument.

The forum must begin its analysis of the statutory language with an examination of the text and context of ORS 652.310(1)(b). *PGE*, 317 Or at 610. The text itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* The context of the statutory provision, which includes other provisions of the same statute and other related statutes, is also relevant to this analysis. *Id.*, at 611.

The forum first examines the specific text of the statutory provision. The text's critical words are "times or amounts." Because neither word is modified or defined anywhere in the statute or related statutes, and both are words of common usage, their plain, natural and ordinary meaning must be ascribed to them. *Id.* In its statutory context, the meaning of "times" is "a point or period when something occurs * * *; an appointed, fixed, or customary moment * * * for something to happen." *Webster's Third*

New International Dictionary, 72 (unabridged ed 1985). In other words, “times” here means a set time of interval when wages must be paid. In its statutory context, the ordinary meaning of “amounts” is “the total number or quantity: AGGREGATE (the ~ of the fine is doubled) :SUM, NUMBER (add the same ~ to each column) (the ~ of the policy is 10,000 dollars).” *Id.* at 2394. This unmistakably refers to a specific sum.

Respondent argues that its coverage by the FLSA’s minimum wage and overtime provisions means the “times” and “amounts” of its payments to employees are regulated by federal law. Respondent is incorrect on both counts. First, the FLSA does not regulate the “times” of payment to employees. Second, in this context, “amounts” refers to a specific dollar amount. The FLSA requires payment of a minimum wage of \$5.15 per hour. 29 U.S.C. § 206(1). It also requires that hours worked over 40 in a workweek be paid at time and a half. 29 U.S.C. § 207(1). These provisions do not establish specific “amounts” of payments to employees; rather, they only construct a floor below which wages for FLSA-covered employers may not sink. Furthermore, there is no evidence in this case that any of Respondent’s workers were paid minimum wage and, even if they were, Respondent would be subject to the Oregon minimum wage, which is higher than the federal minimum wage. 29 U.S.C. §218(1)(a).

The context of ORS 652.310(1)(b), which includes other provisions of that statute and other related statutes, makes it even more clear that Respondent’s FLSA coverage does not bring it within the definition of “persons * * *” in ORS 652.310(1)(b).

First, the affirmative defense relied on by Respondent is placed in the same sentence, and immediately follows, two other categories of narrowly defined persons, “[T]rustees and assignees,” and “receivers.” These two categories both involve circumstances where another court is currently exercising jurisdiction over the assets of the “employer” entity from whom unpaid wages are sought. This placement tends to

indicate that Respondent's affirmative defense was intended to encompass a narrow group of persons, rather than the broad group urged by Respondent.

Second, Oregon's minimum wage law requires payment of \$6.50 per hour, as compared to the FLSA's \$5.15 per hour. ORS 653.025, 29 U.S.C. § 206(1). The FLSA requires that, if state minimum wage is higher than FLSA minimum wage, employees must be paid the higher amount. 29 U.S.C. § 218(1)(a).^{xvii} The current version of ORS 653.025 was enacted in 1997, long after ORS 652.310(1)(b) and 29 U.S.C. § 218(1)(a) went into effect. This statutory scheme is not indicative of a legislative intent to excuse FLSA-regulated employers from paying Oregon's minimum wage, the result urged by Respondent. In fact, the FLSA prohibits this result. *Id.*

Third, five different statutes contained in Oregon's wage and hour laws, which include child labor, specifically state when the FLSA should impact enforcement of Oregon's wage and hour laws.^{xviii} This shows that the legislature knows how to say when the FLSA should have an impact on enforcement of Oregon's wage and hour laws. Mention of the FLSA is conspicuously absent in ORS 652.310(1)(b).

The narrow scope of other entities mentioned in ORS 652.310(1)(b), the irreconcilable conflict between Oregon's minimum wage law and the FLSA under the result urged by Respondent, and the absence of any mention of the FLSA in the statute leads the forum to conclude that the legislature did not intend mere fact of FLSA regulation to bring an otherwise covered employer within the exclusion contained in ORS 652.310(1)(b).

This conclusion is bolstered by the existence of at least two other laws of the United States that fall within the precise definition of "persons" in ORS 652.310(1)(b). Those laws are the Davis-Bacon Act, 40 U.S.C. § 276a,^{xix} and the Service Contract Act, 41 U.S.C. § 351.^{xx} By reference to a determination by the Secretary of Labor of the

prevailing wage rate, the Davis-Bacon Act sets out the specific dollar amount of wages that must be paid by covered employers. It also requires that those wages must be paid at least once a week. Significantly, ORS Chapter 279, which regulates public contracts and purchasing, exempts projects regulated under the Davis-Bacon Act from the prevailing wage requirements of ORS 279.348 to 279.380.^{xxi} The Service Contract Act likewise requires covered employers to pay either a specific prevailing wage rate determined by the Secretary of Labor or the specific rates provided in a relevant collective bargaining agreement, although it does not regulate the intervals at which those wages must be paid. It is these laws that the definition of “persons * * *” in ORS 652.310(1)(b) was intended to compass, not every employer regulated by the FLSA.

As Respondent succinctly states in its brief, where the meaning of the ORS 652.310(1)(b) provision can be determined from its text and context, the statutory interpretation ends and neither legislative history nor maxims of statutory construction are properly reached. The forum has determined that the text and context of ORS 652.310(1)(b) does not exclude Respondent from the definition of “employer” under ORS 652.310(1) and goes no farther in its analysis of ORS 652.310(1)(b).

RESPONDENT IS AN “EMPLOYER” UNDER ORS 652.310.

There is no dispute to the validity of the underlying wage claims in this matter, that the Wage Security Fund paid out \$73,699.06 to reimburse the wage claimants, or that Nordic was the wage claimants’ employer. Respondent’s potential liability in this matter depends on whether it is a “successor to the business” of Nordic or a “lessee or purchaser” of Nordic’s “business property for the continuance of the same business.” ORS 652.310(1). These are separate tests. Before continuing, the forum notes that the analysis for determining whether a person is an “employer” either as a “successor” or

“lessee or purchaser” is same for wage claim and Wage Security Fund recovery cases.^{xxii}

A. Respondent is a successor to the business of Nordic.

The test used by this forum in determining whether Respondent is a “successor to the business” of Nordic is whether Respondent conducts essentially the same business as Nordic 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 for an employer to be a successor; the facts must be considered together. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 256 (1999) (citing *In the Matter of Tire Liquidators*, 10 BOLI 84, 93 (1991)). The relevant facts are as follows.

1. Did the name or identity of the business change?

The name of the business changed from The Nordic Group, LLC, to Fjord, Ltd. In some ways the identity changed, and in some ways it stayed the same. Respondent kept the same phone number and mailing address, the same computer systems and personnel numbering system as Nordic. Respondent also maintains its equipment and physical plant by the same means as Nordic, through a sublease from Dversdal. However, Nordic was identified with Brent Cleaveland, and Respondent has no identification with Cleaveland. In fact, Nike, the company with whom Respondent had by far its largest amount of sales in 2000, told Dversdal that it would not do business with Respondent if Cleaveland and Nordic were in any way associated with Respondent. In addition, Nordic and Respondent share no corporate officers or directors, Respondent has a different long distance carrier than Nordic, and Respondent

was assigned a higher unemployment tax rate than Nordic. In short, while several important elements associated with Nordic's identity changed when Respondent commenced operations, other critical elements stayed the same. As a result, this element is neither indicative of successorship or the absence of successorship.

2. Did the location of the business change?

Nordic operated manufacturing plants in Hubbard, Oregon, and Vancouver, Washington. Although the Vancouver plant employed more persons and used three times as much equipment, fifty-four percent of Nordic's gross sales were generated by the Hubbard plant. Nordic's administrative headquarters were also located at the Hubbard plant. Respondent operates the same manufacturing plant in Hubbard, but does not have and has never had any interest in the Vancouver plant. The forum concludes that the primary location of the business did not change, but Respondent did not continue to operate Nordic's second plant, located in Washington. These facts indicate successorship.^{xxiii}

3. What was the lapse in time, if any, between the previous and new operation?

Nordic ceased operations on January 6, 2000. Respondent officially commenced manufacturing operations on January 31, 2000. Between January 6, 2000, and January 31, 2000, Dversdal, Yazzolino, and Kissinger were engaged in work at the Hubbard plant that involved wrap-up operations for Nordic and start-up operations for Respondent. This relatively brief lapse in time indicates successorship.

4. Does Respondent employ the same or substantially the same work force as Nordic?

Respondent's first payroll period ended on February 12, 2000. During that period, Respondent employed eleven persons, 10 of whom had been employed by Nordic at the time it ceased operations.^{xxiv} This does not include Dversdal, Yazzolino,

and Kissinger. Dversdal, Respondent's president and sole shareholder, was actively involved in running Respondent from its inception. He also worked for Nordic, working under an employment contract. Yazzolino and Kissinger, who had been employed by Nordic as production manager and office manager, respectively, worked as "volunteers" for Respondent from Respondent's start-up period until they officially went on the payroll on June 5, 2000.^{xxv} Between January 31, 2000, and October 25, 2000, Respondent employed a total of 144 persons, with a maximum of about 90 at any one time. At least 103 of those persons had previously been employed by NEL or Nordic, not counting Dversdal. A minimum of 81 had worked for Nordic, 68 who were employed by Nordic in the last few weeks of its business operations. At least eleven of these persons – Judy Kunz, Gary Veenker, Luisa Olivares, B. Brenden, R. Moreno, B. Padron, Juanita Gonzales, Phil Lim, Sheri Hilgers, Peter Yazzolino, and Betty Kissinger – were employed as managers at Nordic's Hubbard plant. Fjord's release auditor, Mary Meyers, was also an employee of Nordic. The forum concludes that there is a substantial similarity between the workforces employed by Nordic and Respondent, indicating successorship.

5. Does Respondent manufacture the same product or offer the same service as Nordic?

Respondent, like Nordic, manufactures sporting apparel and equipment for its clients. Although the specific product may differ due to client specifications, Respondent produces the same general type of product as Nordic and offers exactly the same service – CMT manufacturing. This indicates successorship.

6. Does Respondent use the same machinery, equipment, or methods of production as Nordic?

Respondent, as a CMT manufacturer, uses the same method of production as Nordic. It uses the same machinery and equipment that Nordic used in its Hubbard

plant, and at least four pieces of equipment that Nordic used in its Vancouver plant. At the time of the hearing, Respondent also owned, but did not use, approximately 70 pieces of equipment that Nordic had used in its Hubbard plant.^{xxvi} This indicates successorship.

Before deciding whether these facts make Respondent a successor employer or a “lessee or purchaser” under ORS 652.310(1), the forum reviews previous final orders involving these issues to put this case in perspective.

The first case where this issue was raised before the forum was *In the Matter of Anita’s Flowers & Boutique*, 6 BOLI 258 (1987). In that case, respondent Anita Peterson owned and operated a boutique called the Flower Shop, which she sold to Evans on June 15, 1985. Evans then operated the business until October 15, 1985, during which time she employed Lewis for about three months. On or about October 15, 1985, Evans abandoned the Flower Shop. At that time, she owed Lewis \$820.40 in unpaid wages and mileage reimbursement and had not paid the purchase price for the Flower Shop to Peterson. On October 15, 1985, Peterson regained possession of the Flower Shop and reopened it for business within four days. Peterson continued operating the business under the same name and at the same location, and thereafter conducted essentially the same business as Evans had during her possession of it. Peterson used the same suppliers and serviced the same market with the same product as Evans had, but did not employ any employees who had been employed by Evans. *Id.* at 264-65. Peterson argued that “only a purchaser, who can protect himself against unpaid wages, can be a successor, and that a repossessing seller, who has no opportunity to so protect himself, should not be a successor.” *Id.* at 265. The forum disagreed, concluding that the definition of a “successor” employer under ORS 652.310(1) was not limited to “the ‘purchaser’ type of successor” and was “broad

enough to encompass the facts presented.” *Id.* at 269. The forum then applied a six-element test taken from *N.L.R.B. v. Jefferies Lithograph Co.*, 752 F2d 459 (9th Cir 1985), and determined that Peterson was a “successor” employer who was liable for Lewis’s unpaid wages. *Id.* at 267-68. The forum did not consider the issue of whether Peterson was a “lessee or purchaser.”

The second case where a successor issue arose was *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991). In *Tire Liquidators*, respondent Stephen Brown owned and operated a business called Rainier Tire & Auto Center. In October 1988, Brown sold the business, along with his inventory, fixtures, equipment, other assets including goodwill, and a covenant not to compete, to Performance Tires, which assumed respondent’s business name and thereafter did business as Rainier Tire & Auto Center at the same address. Brown kept a security interest in the equipment, fixtures, and inventory to secure payment of the purchase price. Brown terminated his employees when the sale closed. Performance then hired most of Brown’s employees. On May 31, 1989, Performance ceased doing business at the Rainier Tire. Six wage claimants were not paid wages and were paid from the Wage Security Fund. Brown took the business back the day after Performance closed and on June 19, 1989, opened a business called Tire Liquidators at the same address. When Brown opened Tire Liquidators, all six employees had been employees of Performance when it closed. Tire Liquidators used much of the same equipment as Performance and offered many of the same products and services. Tire Liquidators used different bookkeeping practices than Performance, did not assume any of Performance’s contractual obligations, and sold different brands of tires. The forum again used the *Jefferies* test relied on in *Anita’s Flowers* to determine whether or not respondent Brown was a successor to Performance and concluded that Brown was a successor because he “conducted

essentially the same business as [his] predecessor, Performance Tires, conducted.” *Id.* at 93-94. Respondent argued that he could not be a successor employer under ORS 652.310 because he never purchased any assets or succeeded in any interest of Performance, and never intended to succeed to any interest or assume any of Performance’s obligations. *Id.* at 94. The forum rejected this argument, holding that no sale of assets is required for one who succeeds to the business of an employer to become a successor employer under ORS 652.310, reasoning that the statute’s alternate definition of an employer as a “lessee or purchaser” indicated that a “successor” did not have to be a “lessee or purchaser” of the predecessor’s assets. *Id.* Finally, the forum noted that where “the seller of a business regains possession of it when a buyer walks away, and the seller then continues to operate essentially the same business – the seller’s intention to avoid the liabilities of the buyer will carry little weight with regard to the issue of successorship” for the reason that “a buyer and a seller of a business are in a position, as they negotiate the terms of their contract, to protect themselves from unforeseen events rising from their deal.” In contrast, “[E]mployees cannot protect themselves.” *Id.* at 95.

In the Matter of Gerald Brown, 14 BOLI 154 (1995), was the next successor case decided by the forum. In that case, Brown, an individual owner, following the employment of two claimants, transferred real property and business assets to Life Awareness Centers International (“LACI”), a corporation, in exchange for a promise to pay \$50,000 at some later time. LACI then continued to operate the same business, under the same name, at the same location, using the same equipment, and providing the same services as the business previously operated by Brown. The forum found that LACI conducted essentially the same business that Brown had conducted and, as a matter of law, under the test used in *Anita’s* and *Tire Liquidators*, LACI was a

“successor” within the meaning of ORS 652.310(1). *Id.* at 166-67. Significantly, the forum noted that “[T]he purpose for the application of the successor doctrine in the wage claim context is, foremost, protection of employees.” The forum did not reach the issue of whether LACI was a “lessee or purchaser” under ORS 652.310(1).

In the Matter of Susan Palmer, 15 BOLI 226 (1997), was the next case to come along. Oregon 101 Services, Inc. (“101”), an Oregon corporation, was a business that contracted with airline companies at the Portland International Airport to deliver lost luggage and baggage to its owners in Oregon and southwest Washington. 101 did conducted business under the assumed business name (“ABN”) of Sea Breeze Delivery. Respondent Palmer was 101’s corporate secretary and the authorized representative for the ABN registration. On February 16, 1996, 101 was involuntarily dissolved by the state Corporation Division. Before and after February 16, 1996, Palmer operated the same business and held herself out as the owner and operator, using the same assumed business name, at the same location, using substantially the same workforce, providing the same service, and with substantially the same equipment. There was no lapse in time between the operation of 101’s business and Palmer’s business. *Id.* at 228-29. Two of the three wage claimants were employed before and after February 16, 1996. *Id.* at 229. Applying the *Anita’s* test, the commissioner concluded that respondent Palmer conducted essentially the same business as her predecessor, 101, and that, as a matter of law, Palmer was a “successor” within the meaning of ORS 652.310(1). *Id.* at 234. The forum did not consider the issue of whether Palmer was a “lessee or purchaser” under ORS 652.310(1).

In 1999, the forum decided *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242 (1999). In that case, 15 wage claimants were employed by Intelligent Catalogs, Inc.

("ICI") and quit en masse on March 30, 1998, in response to not being paid wages due and owing. On May 1, 1998, ICI ceased doing business, and respondent Catalogfinder commenced operations. Catalogfinder maintained the same physical location and website^{xxvii} as ICI, offered the same service and used the same equipment and methods for offering that service as ICI, and had the same corporate president and person in charge as ICI. There was no lapse in time between ICI's cessation of doing business and Catalogfinder's beginning of operations. The only change was in the workforce, due to the mass resignation of ICI's employees. *Id.* at 256. The 15 wage claimants filed wage claims and received payment of their wages from the Wage Security Fund. *Id.* at 251. Subsequently, the Agency issued an Order of Determination against ICI and Catalogfinder seeking repayment of the Wage Security Fund payout, plus a 25 percent penalty, against ICI and Catalogfinder. Based on the facts stated above, forum concluded that Catalogfinder was a "successor" employer under ORS 652.310(1) and ordered Catalogfinder to repay the Wage Security Fund the amount paid out by the Fund, plus a 25 percent penalty. The forum also concluded that Catalogfinder was a "lessee" under ORS 652.310(1) based on the fact that Catalogfinder assumed ICI's leases for equipment which "represented the guts of ICI's business, without which it would have been unable to do business." *Id.* at 256.

The final case in which successorship under ORS 652.310 was an issue lends no additional guidance, as the respondent admitted he was a successor employer. *In the Matter of Sabas Gonzalez*, 19 BOLI 1 (1999).

Respondent argues that the forum has historically applied the wrong test to determine successorship, and that the proper test is an equitable balancing test set out in *Steinbach v. Hubbard*, 51 F3d 843, 846 (9th Cir 1995). Alternatively, Respondent

argues that it is not a successor under the *Anita's* test relied on by the forum. *Anita's Flower Shop*, 6 BOLI at 267-68. The forum disagrees with Respondent on both counts.

Steinbach was an FLSA wage claims case. In *Steinbach*, the 9th Circuit was faced with a question of first impression – does successorship exist under the FLSA? *Steinbach*, 51 F3d at 844. The court concluded that it did, and announced a test composed of three primary considerations, plus several equitable principles to be balanced. The three primary considerations were whether the subsequent employer was “a bona fide successor” who had “notice of the potential liability,” and “the extent to which the predecessor is able to provide adequate relief directly.” *Id.* at 846. The first equitable principle was the policies underlying the FLSA which could “best be effectuated by seeing to it that violations are remedied in as many cases as possible. The second was the public’s “substantial interest in the free transfer of capital and the reorganization of unprofitable businesses.” *Id.* The third was fairness. *Id.* at 847.

Where Oregon wage and hour law is silent, the forum has sought guidance in the past from federal court cases interpreting the FLSA. *See, e.g. In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997) (commissioner adopted the “economic reality” test used by federal courts when applying the FLSA to determine whether a wage claimant was an employee or independent contractor); *In the Matter of Burrito Boy*, 16 BOLI 1, 8-9 (1997) (forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946) regarding burden and method of proving hours worked by wage claimant). Oregon wage and hour law is not silent in this case. Unlike the FLSA, which contains no statutory directive that unpaid wage liabilities may be passed on to successor employers, ORS 652.310(1) specifically provides for successor liability. Consequently, *Steinbach* is not controlling, and the forum relies on the test used in the line of cases beginning with *Anita's* and ending at *Gonzalez*. That test does not take

into consideration whether Respondent had prior notice of the potential liability or the public's "substantial interest in the free transfer of capital and the reorganization of unprofitable businesses." It also does not contain an exception for cases in which the business property was leased or purchased during the pendency of a bankruptcy proceeding, or any circumstances affecting the bargaining power of the parties.

Anita's (composition of work force), *Tire Liquidators* (some different services and a different name), and *Catalogfinder* (composition of work force) each had one element that did not indicate successorship. In this case, five of the six elements of the successor test are indicative of successorship, with the sixth - name or identity - being neutral. Based on Agency precedent and the facts of this case, the forum concludes that Respondent conducts essentially the same business that Nordic conducted and is a "successor to the business" of Nordic under ORS 652.310(1).

B. Respondent is a "purchaser," but not a "lessee" of the "business property" of Nordic "for the continuance of the same business."

The Agency also seeks to hold Respondent liable under the "lessee or purchaser" definition of "employer" in ORS 652.310(1). Prior BOLI orders lend little guidance in determining whether Respondent meets this definition, and the forum begins its analysis with an examination of the text and context the relevant statute. *PGE*, 317 Or at 610. That language defines "employer" as "any lessee or purchaser of any employer's business property for the continuance of the same business * * *." There are two distinct parts to the definition – the transaction that must occur and the purpose for the transaction. Restated, a person must lease or purchase an employer's business property for the purpose of continuing the same business to fit within this definition. A mere repossession of a business by a prior owner, without new acquisition of assets, would not qualify as a lease or purchase, although it would likely meet the "successor" definition in ORS 652.310.^{xxviii} A person does not have to lease or

purchase *all* of an employer's business property so long as the business property is leased or purchased for the purpose of continuing the same business.

The first question is whether there was a lease or purchase. The facts show that Respondent purchased a substantial portion of Nordic's Hubbard assets from PCB for \$177,500. This purchase brings Respondent within the statutory definition of "purchaser." The facts also show that Respondent acquired the Norco lease for the Hubbard plant and the Allco and Beacon leases for Hubbard equipment. Even though both of these leases were actually subleases, as Dversdal personally leased this property, then subleased it to both Nordic and Respondent, the term "lessee" is broad enough to include a sublessee.^{xxix} However, the term "property" denotes ownership.^{xxx} Because the leased property was never owned by Nordic, the forum concludes that Respondent was not a "lessee" of Nordic's "business property," and is excluded from the statutory definition of "lessee."

The second question is whether Respondent's purchase and lease was for the "continuation of the same business." Respondent argues that because Respondent's business is not identical to Nordic's, it cannot meet the statutory requirement of being the "same business," as opposed to a "substantially similar business." Respondent misreads the statute. The word "same" must be interpreted as a modifier of the word "business" in the larger context of the statute. ORS 653.310(1) sets out two distinct categories of employers who may be liable to pay wage claims. The first category is the person for whom the claimant actually worked. The second category involves successors, lessees, and purchasers, all persons who did not employ the claimant, but inherit liability based on the legislative policy expressed in the statutory language of protecting employees. *Brown*, 14 BOLI at 167. If the legislature intended that a business must remain identical, this phrase would be meaningless, as mere change of

ownership alone, which must occur before a person can become a “lessee” or “purchaser,” prevents a business from being identical to its predecessor. Therefore, the forum concludes that the term “same business” in this context does not mean an identical business in every respect, but instead means a business “of like nature or identity * * *.” *Webster’s*, 2007. The question remains, however – what is a business of “of like nature or identity?” Based on statutory context and the legislative policy of protecting employees, the forum concludes that the test for determining if a business is a “successor” employer is the most appropriate test for determining if a purchaser has purchased another employer’s property for “the continuance of the same business.” That test is whether the purchaser “conducts essentially the same business.” *Anita’s*, 6 BOLI at 267-68. In this case, the forum has already determined that Respondent is a “successor employer” to Nordic. Consequently, Respondent is also liable to repay the Wage Security Fund as a “purchaser” of Nordic.

RESPONDENT’S REMAINING AFFIRMATIVE DEFENSES

In its answer, Respondent raised the four affirmative defenses set out in Finding of Fact – Procedural 2. During the hearing, Respondent withdrew its defense of unconstitutionality. The other three defenses are: (1) failure to state a claim upon which relief can be granted; (2) imposition of liability on Respondent in this situation is fundamentally unfair and inequitable; and (3) imposition of liability on Respondent in this situation is contrary to public policy. The first defense is negated by a preponderance of the evidence supporting the Agency’s prima facie case.^{xxxi} The second and third defenses do not apply in this case based on the forum’s rejection of the *Steinbach* test for determining whether Respondent is a “successor” employer.

RESPONDENT'S ORS 79.5040(4) DEFENSE

Respondent contends that the language of ORS 79.5040(4) prevents it from being held liable as a successor or purchaser. That language reads as follows:

“(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor’s rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of ORS 79.5010 to 79.5070 or of any judicial proceedings.”

In this case, the secured party is PCB, the purchaser is Respondent, and the debtor is Nordic. Respondent’s argument is that “because Fjord purchased the assets pursuant to an ORS 79.5050(4) sale, [Fjord] purchased the goods free and clear of all liens, including any WSF liability that purports to arise from the purchase of the assets.” The WSF lien Respondent refers to is created by statutory language in ORS 652.414(4).^{xxxii}

The forum rejects this defense on two grounds. First, because it is an affirmative defense that was not raised in Respondent’s answer. In the alternative, even if it is not an affirmative defense, it does not relieve Respondent from liability.

An affirmative defense is “a defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.” *Black’s Law Dictionary*, 430 (Seventh ed 1999). In this case, Respondent’s ORS 79.5050(4) defense does not defeat any of the elements of the Agency’s prima facie case. Instead, it raises a legal argument that would relieve an ORS 652.310 “successor” or “purchaser” from liability. Consequently, it must be pleaded as an affirmative defense. By not raising this issue in the answer or amending the answer, Respondent waived the defense. OAR 839-050-0130. Raising it in the case summary did not cure this deficiency.

Even if Respondent had not waived this defense, it would not escape liability as an ORS 652.310 “successor” and “purchaser.” If applied, the effect of ORS 79.5040(4) in this case would be to discharge PCB’s security interest in the \$177,500 worth of assets Respondent purchased from PCB and any ORS 652.414(4) lien that the Agency had or might have had on those specific assets. It would not discharge Respondent’s liability to repay the Wage Security Fund.

RESPONDENT’S EXCEPTIONS

Respondent’s exceptions were filed by Norman Dversdal, Respondent’s president. Respondent is a corporation, and OAR 839-050-0110(1) requires that corporations must be represented “either by counsel * * * or by an authorized representative * * * . OAR 839-050-0110(3) further requires that a person who seeks to appear as an authorized representative must first “file a letter authorizing the person to appear on behalf of the party.” Respondent was represented by counsel from the time the answer and request for hearing was filed until submission of post-hearing briefs and closing argument. The forum has not received any letter authorizing Norman Dversdal to appear on behalf of Respondent. As a result, although exceptions were timely filed, Dversdal lacks standing to file exceptions on Respondent’s behalf and the forum will not consider his exceptions.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 652.414 and as payment of the unpaid wages and penalty assessed as a result of The Nordic Group, LLC’s violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **FJORD, INC. and FJORD, LTD.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of NINETY TWO THOUSAND ONE HUNDRED TWENTY THREE DOLLARS AND EIGHTY THREE CENTS DOLLARS (\$92,123.83), representing \$73,699.06 paid out of the Wage Security Fund to the 93 wage claimants listed in Appendix A and \$18,424.77 as a 25 percent penalty on the sum of \$73,699.06, plus interest at the legal rate on the sum of \$73,699.06 from February 1, 2000, until paid and interest at the legal rate on the sum of \$18,424.77 from March 1, 2000, until paid.

APPENDIX A

| NAME | UNPAID HOURS | HOURLY WAGE | TOTAL UNPAID WAGES |
|-------------------------------|---------------------|--------------------|---------------------------|
| Aguirre, Maria | 100.33 | \$6.70 | \$675.85 |
| Alfaro, Jesus | 104 | \$7.01 | \$729.04 |
| Alfaro, Roberto | 22 | \$14.66 | \$322.52 |
| Anaya, Carolina | 111.5 | \$7.51 | \$837.37 |
| Andrade, Rosa | 106 | \$6.50 | \$689.00 |
| Angel, Ana | 99 | \$6.50 | \$643.50 |
| Bogarin, Sara | 79.08 | \$7.15 | \$533.52 |
| Bravo, Emelia | 113 | \$6.50 | \$734.50 |
| Bernden, Be Thi | 85.75 | \$14.00 | \$1,200.00 |
| Cervantes, Manuela | 56 | \$6.50 | \$364.00 |
| Christiansen, Ellen | 113 | \$6.50 | \$734.50 |
| Cortes, Olgalilia | 57 | \$6.50 | \$370.50 |
| Cortez, Yurina | 104 | \$6.72 | \$693.60 |
| Cruz, Lucina | 113 | \$6.50 | \$734.50 |
| Cuevas-Tarula, Arcelia | 107 | \$6.94 | \$730.70 |
| De Cisneros, Fransica | 89 | \$6.50 | \$578.50 |
| Erofeeff, Ustina | 80 | \$7.01 | \$560.80 |
| Erofeeff, Julie | 113 | \$7.55 | \$850.70 |
| Esparza, Margarita | 120 | \$6.52 | \$781.20 |
| Figuroa, Ofelia | 57 | \$6.50 | \$370.50 |
| Gonzalez, Maria | 103.75 | \$6.50 | \$674.38 |
| Gonzalez, Edna | 113 | \$6.50 | \$734.50 |
| Gonzalez, Juanita | 80 | \$8.51 | \$680.80 |
| Grindinar, Natalya | 113 | \$6.50 | \$734.50 |
| Grindinar, Nina | 95 | \$6.50 | \$617.50 |

| | | | |
|-------------------------------|------------------|----------------|-------------------|
| Grindinar, Svetlana | 80 | \$6.50 | \$520.00 |
| Hall, Deborah | 113 | \$10.25 | \$1,158.25 |
| Hernandez, Josefina | 103 | \$6.84 | \$712.67 |
| Hilgers, Sheri | 113 | \$13.65 | \$1,542.45 |
| Hing, Chan | 57 | \$6.50 | \$370.50 |
| Inzhirova, Svetlana | 111.5 | \$6.50 | \$724.75 |
| Kenagy, Melissa | 83.13 | \$6.50 | \$540.39 |
| Kissinger, Elizabeth | 113 | \$21.63 | \$2,444.19 |
| Kozyreva, Lyudmila | 89 | \$6.51 | \$579.39 |
| Kunz, Judy | 113 | \$15.35 | \$1,734.55 |
| Kuyan, Olga | 113 | \$8.86 | \$1,001.18 |
| Lim, Phil | 113 | \$15.85 | \$1,791.05 |
| Lopez-Aguilar, Juan | 113 | \$6.53 | \$736.15 |
| Lopez-Franco, Carolina | 112.5 | \$6.54 | \$733.85 |
| Lopez-Franco, Griselda | 57 | \$6.50 | \$370.50 |
| Marmolejo, Alejandra | 102.5 | \$6.75 | \$685.85 |
| Martinez, Isela | 65.5 | \$6.50 | \$425.75 |
| Matynnyuk, Marina | 89 | \$6.50 | \$578.50 |
| Mendoza, Susana | 014 (sic) | \$6.69 | \$691.20 |
| Mendoza, Obdulia | 86.5 | \$7.45 | \$644.00 |
| Meyers, Mary | 107 | \$10.51 | \$1,124.57 |
| Meza, Guadalupe | 113 | \$7.01 | \$792.13 |
| Mares, Lucia | 104 | \$6.55 | \$679.60 |
| Moreno, Rosalba | 113 | \$10.00 | \$1,130.00 |
| Nguyen, Tao | 113 | \$6.50 | \$734.50 |
| Nguyen, Thu | 113 | \$6.50 | \$734.50 |
| Nguyen, Thuy | 104 | \$6.50 | \$676.00 |
| Olivares, Maria | 113 | \$11.25 | \$1,271.25 |
| Onofrash, Yemiliya | 43 | \$6.50 | \$279.50 |
| Ormanzhi, Galina | 104 | \$6.50 | \$676.00 |
| Orozco, Luz | 81 | \$7.20 | \$582.10 |
| Padron, Rebecca | 107.75 | \$11.00 | \$1,185.25 |
| Perez, Martha | 113 | \$6.50 | \$734.50 |
| Pizano, Katerina | 42.75 | \$13.30 | \$568.58 |

| | | | |
|------------------------------|-------------------|----------------|-------------------|
| Plukchi, Stephanida | 62 | \$6.50 | \$403.00 |
| Plukchi, Ivan | 86 | \$6.50 | \$559.00 |
| Polanco, Maria | 108.25 | \$6.50 | \$703.63 |
| Quach, Co | 113 | \$6.50 | \$734.50 |
| Ramirez, Doris | 110 | \$6.85 | \$742.60 |
| Ramos, Blanca | 113 | \$7.14 | \$785.70 |
| Ramos-Lopez, Maria | 61 | \$6.50 | \$396.50 |
| Reyes, Leonarda | 89 | \$6.50 | \$578.50 |
| Reyes-Rojas, Eliodora | 72 | \$6.50 | \$468.00 |
| Rivera, Maria | 111 | \$6.78 | \$746.35 |
| Roberts, Karen | 118.5 | \$12.00 | \$1,422.00 |
| Rodriguez, Diana | 113 | \$6.50 | \$734.50 |
| Rodriguez, Margarita | 86 | \$7.15 | \$594.20 |
| Rodriguez, Maria | 113 | \$6.50 | \$734.50 |
| Rodriguez, Maura | 113 | \$6.50 | \$734.50 |
| Rodriguez, Teresa | 105 | \$6.57 | \$687.70 |
| Rosales, Manuela | 113 | \$6.50 | \$734.50 |
| Sanchez, Irene | 72 | \$6.50 | \$468.00 |
| Semenyuk, Aleona | 89 | \$6.50 | \$578.50 |
| Shadrin, Arina | 98 | \$6.63 | \$648.84 |
| Shevchuk, Valentina | 113 | \$6.50 | \$734.50 |
| Songuilay, Emone | 113 | \$6.59 | \$740.77 |
| Spasova, Anna | 70.5 | \$6.50 | \$458.25 |
| Strayer, Kim | 104 | \$6.50 | \$676.00 |
| Tarula, Sara | 113 | \$7.09 | \$796.22 |
| Tornero, Jose | 1116 (sic) | \$9.60 | \$1,189.63 |
| Tran, Lai | 112 | \$6.95 | \$779.29 |
| Valenzuela, Maria | 59 | \$6.50 | \$383.50 |
| Vallejo, Silveria | 56 | \$6.50 | \$364.00 |
| Veenker, Gary | 113 | \$25.00 | \$2,825.00 |
| Vshivkoff, Anastasia | 39 | \$6.50 | \$253.50 |
| Vu, Thao | 112 | \$6.94 | \$763.20 |
| Yazzolino, Peter | 113 | \$28.25 | \$3,260.05 |
| Salgado, Marisela | 105 | \$6.50 | \$682.50 |

ⁱ The wage claimants, number of unpaid hours, hourly wage, and total sums alleged due and owing to them, are listed in Appendix A to this proposed order. The wage claimants, their unpaid hours, hourly wage, and total unpaid wages were identically listed in Exhibit A attached to the Order of Determination. Although the Order of Determination alleges 94 wage claimants filed wage claims, Exhibit A attached to the Order of Determination only lists 93 wage claimants by name.

ⁱⁱ Dversdal testified that “CMT” is an industry acronym for “cut, make, and trim,” and that NEL, like other CMT manufacturers, only provided the thread, sewing machines, and labor for the products it manufactured. Its customers provided the fabric, sundries, findings, elastic and labels for the goods to be sewn.

ⁱⁱⁱ Juki machines with serial numbers of OXAO7495, VG06267, VF05408, and a Singer machine with serial number PC21498.

^{iv} The forum draws this conclusion from the fact that the Wage Security Fund paid back wages to 68 persons who were employed by Nordic and Respondent, and ORS 652.414 only pays “wages earned within 60 days. before the date of the cessation of business.” ORS 652.414(1)(b).

^v The forum draws this inference based on the fact that these thirteen persons appear on Respondent’s lists showing persons who worked for Nordic and Respondent, but they were not paid from the Wage Security Fund, indicating they did not earn wages from Nordic in Nordic’s last few weeks of operation. These 13 persons are Virginia Cabrera de Gasca, Francisco Cortez, Lucia Espinoza, Imelda Giron Mora, Elena Gokk, Esperanza Hernandez de Perez, Carmen Ibarra, Lyudmila Levko, Yadira Reyes, Esperanza Rosas, Ivan Rud, Rosa Varela, and Ibeth Veles.

^{vi} In fact, the payroll report was titled “The Nordic Group, LLC – Payroll Register 2/12/00.”

^{vii} There is no evidence in the record as to the job Veenker was hired to perform at Respondent.

^{viii} Yazzolino testified that Respondent’s training supervisor is Shirley Stone; however, there is no listing for anyone with the last name of Stone or the first name of Shirley in Respondent’s list of employees contained in Exhibit R-4.

^{ix} Yazzolino testified that Respondent’s sewing superintendent is Shirley Stone; however, there is no listing for anyone with the last name of Stone or the first name of Shirley in Respondent’s list of employees contained in Exhibit R-4.

^x There is no evidence in the record as to the jobs these individuals were hired to perform at Respondent.

^{xi} *Id.*

^{xii} *Id.*

^{xiii} *Id.*

^{xiv} The relevance of Meyers’ testimony hinges on whether the forum utilizes the *Steinbach* test for determining if Respondent is a successor employer. The forum has rejected that test.

^{xv} *Cf. State v. Vasquez-Rubio*, 323 Or 275, 281 (1996) (“the legislature can provide for a defense or affirmative defense by using words of limitation such as ‘except that,’ ‘however,’ or ‘provided that.’”); *In the Matter of Graciela Vargas*, 16 BOLI 246, 256 (1998) (exception in ORS 652.150, which states “provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued” is an affirmative defense.)

^{xvi} See discussion in next section of this Opinion, *infra*.

^{xvii} The specific FLSA language is: “No provision of this Act * * * or of any order thereunder shall excuse noncompliance with any Federal or State law * * * establishing a minimum wage higher than the minimum wage established under this Act * * *.”

^{xviii} See ORS 653.035(3) (prohibiting employers from including any amount received by employees as tips in determining the amount of minimum wage required to be paid); ORS 653.307(1) (rules governing total

hours a minor can work shall not be more restrictive than requirements of FLSA); ORS 653.355 (Oregon law regulating children aged 9-11 in berry picking shall not apply to employers exempt from the child labor provisions of FLSA); ORS 653.370(5)(a)(A) (commissioner may not impose a civil penalty for child labor violations on an employer who has paid a civil penalty to USDOL for violation of child labor provisions of FLSA); ORS 653.370(5)(b)(A) (commissioner shall refund any civil penalty if the person from whom the penalty is collected who has paid a civil penalty to USDOL for violation of child labor provisions of FLSA).

^{xix} The Davis-Bacon Act provides, in part: “(a) The advertised specifications for every contract in excess of \$ 2,000 to which the United States or the District of Columbia is a party, for construction * * * of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications * * *.”

^{xx} The Service Contract Act provides, in part: “(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$ 2,500, except as provided in section 7 of this Act [41 USCS § 356], whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. * * *”

^{xxi} ORS 279.357 reads, in part: “(1) ORS 279.348 to 279.380 [requiring payment of the prevailing wage rate as determined by the Commissioner of the Bureau of Labor and Industries to workers on public works projects in Oregon, among other things] do not apply to: * * * (b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a).”

^{xxii} This is based on the fact that the definition of “employer” with regard to both wage claims and Wage Security Fund recovery is contained in the same language in ORS 652.310.

^{xxiii} If Respondent was conducting its manufacturing operations in a physical plant different from those used by Nordic, the forum would reach the opposite conclusion.

^{xxiv} The forum draws this inference from the fact that 10 of the 11 employees received payments from the Wage Security Fund.

^{xxv} “Volunteer” is a legal misnomer. Under Oregon law, the definition of “volunteers” in the employment setting is limited to person who perform “voluntary or donated services * * * for no compensation or

without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer * * * or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws.” ORS 653.010(3). Yazzolino’s and Kissinger’s work for Respondent does not fall within any of these categories, and both were eventually compensated for their work. Consequently, the forum considers both to have been employed by Respondent for purposes of the “successor” analysis.

^{xxvi} See Finding of Fact 41-The Merits, *supra*.

^{xxvii} The website location was significant because ICI and Catalogfinder conducted all their business over the internet.

^{xxviii} See, e.g., *In the Matter of Anita’s Flowers & Boutique*, 6 BOLI 258, 267-68 (1987); *In the Matter of Tire Liquidators*, 10 BOLI 84, 93-94 (1991).

^{xxix} A “sublessee” is “3^d party who receives by lease some or all of the leased property from a lessee.” *Black’s Law Dictionary*, 1439 (Seventh ed 1999). A “lessee” is “one who has a possessory interest in real or personal property under a lease.” *Id.* at 914.

^{xxx} In this context, property is defined as “**2a**: something that is or may be owned or possessed: WEALTH, GOODS * * * b: the exclusive right to possess, enjoy, and dispose of a thing: a valuable right or interest primarily a source or element of wealth: OWNERSHIP * * * c: something to which a person has legal title * * *.” *Webster’s Third New International Dictionary*, 1818 (unabridged ed 1985).

^{xxxi} The Agency’s prima facie case here consists of the following elements: (1) Nordic was an Oregon employer that did not pay all wages due and owing to 93 claimants earned within 60 days before the date that Nordic ceased doing business; (2) The Commissioner made a determination that the 93 claimants’ wage claims were valid; (3) Respondent is a “successor” employer under ORS 652.310(1); (4) Respondent is a “purchaser” of Nordic’s “business property for the continuance of the same business.”

^{xxxii} In pertinent part, the statute reads as follows: “(4) The commissioner has a lien on the personal property of the employer for the benefit of the fund when the claim is paid under subsection (1) of this section for the amount so paid and the penalty referred to in subsection (3) of this section.”