

VAL HOYLE  
COMMISSIONER



DUKE SHEPARD  
DEPUTY COMMISSIONER

## BUREAU OF LABOR AND INDUSTRIES

### BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON

In the Matter of:

**WDSA INC., dba GRESHAM  
SCHMIZZA PUBLIC HOUSE, dba  
GRESHAM PIZZA SCHIMIZZA  
PUBLIC HOUSE,**

Respondent.

Case No. 50-21

**FINDINGS OF FACT  
ULTIMATE FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER**

### SYNOPSIS

The forum granted the Agency's motion for summary judgment involving a respondent corporation that acquired a restaurant business from the employer of seven wage claimants, determining that the respondent was a successor employer and liable for the claimants' wages in the total amount of \$5,227.28. ORS 652.310(1); ORS 652.140(2)(b) 652.332(1).

The above-entitled case was originally assigned to ALJ Cynthia Domas, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The matter was subsequently transferred to ALJ Kari Furnanz.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by

1 Chief Prosecutor Adam Jeffries, an employee of the Agency. Respondent WDSA Inc.,  
2 dba Gresham Schmizza Public House, dba Gresham Pizza Schmizza Public House  
3 ("WDSA") was represented by its attorney, Joseph N. Fearey, until he withdrew as  
4 counsel on July 15, 2021.

5 After the Agency issued an Order of Determination ("OOD") and an Amended  
6 OOD ("AOOD"), the Agency filed a motion for summary judgment, which the ALJ  
7 granted.

8 Having fully considered the entire record in this matter, I, Val Hoyle,  
9 Commissioner of the Bureau of Labor and Industries, hereby make the following  
10 Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and  
11 Order.<sup>1</sup>

#### 12 **FINDINGS OF FACT – PROCEDURAL**

13 1) Between October 20, 2019, and November 18, 2019, Claimants Kaleb  
14 Calen ("Calen"), Ashley Thomas ("Thomas"), Ashley Bass ("Bass"), Jorge Briceno-  
15 Salazar ("Briceno-Salazar"), Kyle Inman ("Inman"), Lynsey Payne ("Payne") and Gail  
16 Betts ("Betts") filed wage claims and assignments of wages with the Agency. (Agency  
17 Exs. 28-34)<sup>2</sup>

18 2) The Wage and Hour Division ("WHD") served an Order of Determination  
19 ("OOD") on WDSA on February 27, 2020. The OOD alleged that Littleton Industries  
20 LLC ("Littleton") employed Claimants, but failed to compensate them for work performed  
21 from June 26, 2019, through July 8, 2019. The amount of the alleged unpaid wages was  
22 \$5,272. The OOD further alleged that WDSA was a successor employer to WDSA, and  
23

24 <sup>1</sup> The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the  
25 Findings of Fact – The Merits.

<sup>2</sup> The citations to Agency exhibits refer to the exhibits that accompanied the Agency's motion for summary  
judgment.

1 is an employer as defined in ORS 652.310(1) who is jointly and severally liable for the  
2 Claimants' unpaid wages. (OOD; Proof of Service)

3 3) On April 4, 2020, WDSA's attorney, Joseph N. Fearey, filed an answer  
4 and request for hearing denying liability for the wages owed to the wage claimants.  
5 (Answer & Req for Hearing)

6 4) On April 29, 2021, the forum issued a Notice of Hearing to WDSA, the  
7 Agency, and Claimants setting the time and place of hearing for September 28, 2021, at  
8 9:30 a.m. at BOLI's Portland office. Together with the Notice of Hearing, the forum sent  
9 a copy of the OOD, a multi-language warning notice, a document entitled "Summary of  
10 Contested Case Rights and Procedures" containing the information required by ORS  
11 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification,"  
12 and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-  
13 0445. (Notice of Hearing; OOD)

14 5) On May 13, 2021, the forum issued an interim order which stated:

16 "Due to the impact of the COVID-19 outbreak, the forum is taking  
17 measures in BOLI contested cases to assist the parties in filing documents and  
18 receiving interim orders issued by the forum. BOLI offices may not be staffed for  
19 periods of time, and some interim orders may be issued by email only. In  
response to an email inquiry by the forum, the Agency indicated by email that it  
consents to accept filings by email. [WDSA] did not respond to the forum's May  
3, 2021, email asking whether the parties would consent to email service.

20 "The parties in this case may temporarily file documents by email only,  
21 without the need to file the original document with BOLI's Contested Case  
22 Coordinator. Email filings must be sent to all parties, the ALJ  
(Cynthia.Domas@state.or.us) and BOLI's Contested Case Coordinator  
(diane.anicker@state.or.us). Since [WDSA] has not yet consented to  
receiving filings by email, the Agency must still send a copy of all filings to  
IDCP1 by mail, in addition to sending the email copy. Parties may still file  
23 documents in the manner provided in BOLI's contested case rules, but must also  
24 provide courtesy email copies to the other parties and the ALJ as it may be some  
25 time before mail is delivered or processed. Any documents filed by email must

1                   be submitted no later than 11:59 p.m. PDT on the due date in order to be  
2                   considered timely filed. These provisions will remain in effect until further notice  
3                   from the ALJ."

4                   (5/13/2021 Amended Interim Order)

5                   6)       On July 9, 2021, the Agency filed a motion to compel discovery. On July  
6                   9, 2021, the forum issued an interim order noting that, pursuant to OAR 839-050-0150,  
7                   WDSA had seven days to respond to the motion. (Interim Order of 7/9/2021)

8                   7)       On June 18, 2021, attorney John Moore, of the Moore Law Group PC,  
9                   filed a motion to withdraw the law firm from the representation of Respondent in the  
10                   above matter. Moore stated that Fearey had left the firm and that the firm was no longer  
11                   representing Respondent. (7/16/2021 Interim Orders)

12                   8)       On July 15, 2021, Respondent's attorney of record, Joseph N. Fearey,  
13                   formerly of the Moore Law Group, P.C., filed a motion to withdraw, stating that his  
14                   desire to withdraw was in accordance with ORPC 1.16. He further stated that he had  
15                   no knowledge as to whether WDSA had obtained other counsel and that the Agency  
16                   should continue to use WDSA's address on file with the Agency as the address of  
17                   record for WDSA. (7/16/2021 Interim Orders)

18                   9)       In interim orders issued on July 16, 2021, ALJ Domas ruled that Fearey  
19                   and Moore Law Group PC were allowed to withdraw from the representation of WDSA.  
20                   Each of the two interim orders included the following statement: "**[WDSA] is reminded**  
21                   **that pursuant to OAR 839-050-0110(1) corporations must be represented at all**  
22                   **stages of the contested case proceeding by counsel or an authorized**  
23                   **representative.**" (7/16/2021 Interim Orders) (Emphasis in original)

1           10) The forum issued an interim order ruling on the Agency's motion to  
2 compel on July 20, 2021, which stated, in pertinent part:

3           “OAR 839-050-0200 is the administrative rule governing discovery in this  
4 forum. The sections germane to this order are listed below.

5           “OAR 839-050-0200(1) provides in pertinent part: ‘The administrative law  
6 judge has the sole discretion to order discovery by a participant in an appropriate  
7 case.’

8           “OAR 839-050-0200(7) states: ‘Any discovery request must be reasonably  
9 likely to produce information that is generally relevant to the case.’

10           “OAR 839-050-0200(8) provides in pertinent part: ‘ \* \* \* Participants must  
11 comply with such orders and have a continuing obligation, through the close of  
12 the hearing, to provide the other participants with any newly discovered material  
13 that is within the scope of the discovery order.’

14           Production of Documents

15           “The Agency has requested that Respondent produce 18 categories of  
16 documents and has provided details as to why the requested documents will  
17 likely lead to information that is generally relevant to the case. The Agency also  
18 provided documentation of its attempts to obtain the sought-after information  
19 through an informal process. However, the Agency did not receive any response  
20 to its informal requests.

21           “The forum has viewed the requests and determined that the documents  
22 requested concern business agreements, the payment of wages, and documents  
23 related to the continuation of the business. The requested documents are  
24 reasonably likely to produce information that is generally relevant to this case.

25           “The Agency's request for the production of documents is GRANTED.  
26 Respondent shall produce the documents requested by the Agency by August 9,  
27 2021.

28           Requests for Admissions

29           “The Agency sent Respondent 18 requests for admission. Requests for  
30 admission are specifically allowed in this forum pursuant OAR 839-050-  
31 0200(2)(e). While ORCP is not controlling in this forum, the forum may look to  
32 ORCP for guidance. See *In the Matter of Arthur Lee*, 22 BOLI 99, 102-3 (2001).  
33 The Agency's motion set out the reasons for its request for admissions and  
34 demonstrated how the requests were relevant to the case. The Agency informally  
35 requested Respondent to respond to \* \* \* its request. Respondent did not

1 respond to the Agency's request nor did Respondent respond to the Agency's  
2 motion to compel discovery.

3 "The requests seek information regarding the business location, the type  
4 of businesses at the location during the time period in question, the businesses'  
5 structure and operation, and other information regarding the possible  
6 continuation of the business. This information is reasonably likely to provide  
7 generally relevant information.

8 "Therefore, the Agency's request is **GRANTED**. Respondent shall provide  
9 Answers to the Agency's requests for admission no later than August 9, 2021.

10 **Interrogatories**

11 "The Agency requested that Respondent respond to seven interrogatories.  
12 The Agency attempted to informally obtain responses to the interrogatories  
13 before filing its motion to compel discovery but Respondent did not respond to  
14 the Agency's request. In its motion, the Agency set out the relevancy of the  
15 interrogatories. Respondent did not respond to the Agency's motion. The  
16 interrogatories are unchallenged.

17 "The information sought in the interrogatories is similar to the information  
18 sought in the Agency's request for production and request for admissions. The  
19 interrogatories also sought information regarding such things as Respondent's  
20 employees and contact information, information about business signage,  
21 information about business services provided and information about business  
22 websites used by the business. As in the requests for production and the  
23 requests for admission, this information is generally relevant to the Agency's  
24 assertion that Respondent is a successor in interest. The information requested  
25 in the Agency's interrogatories is reasonably likely to produce information that is  
generally relevant to the case.

26 "Therefore, the Agency's motion as to the interrogatories is **GRANTED**.  
27 Respondents must provide answers to the Agency's interrogatories by August 9,  
28 2021.

29 **SANCTIONS**

30 "OAR 839-050-0200(11) provides:

31 "The Administrative Law Judge may refuse to admit evidence that  
32 has not been disclosed in response to a discovery order or  
33 subpoena, unless the participant that failed to provide discovery  
34 shows good cause for having failed to do so or unless excluding the  
35 evidence would violate the duty to conduct a full and fair inquiry  
36 under ORS 183.417(8)."

1                   “OAR 839-050-0200(12) provides:

2                   ‘The authority to order and control discovery rests solely with the  
3                   Administrative Law Judge.’

4                   “In prior cases, the forum has looked to ORCP 45 for guidance in regard  
5                   to requests for admissions. *In the Matter of Arthur Lee*, page 103. The forum may  
6                   fashion a remedy for failure to answer requests for admissions that may include  
7                   deeming the admissions admitted if Respondent does not respond to this order.

8                   “The forum notes that counsel for Respondent has recently withdrawn.  
9                   OAR 839-050-0110(1) requires that Respondent, a corporation, must be  
10                  represented at all stages of the contested case proceeding by counsel or an  
11                  authorized representative. For Respondent’s convenience, an authorized  
12                  representative form is included with this order.”

13                  (Interim Order of 7/20/21)

14                  11) On August 16, 2021, the Agency filed a motion seeking sanctions against  
15                  WDSA for failing to produce documents, to provide interrogatory responses and to  
16                  provide responses to requests for admissions prior to the deadline of August 9, 2021,  
17                  which was set forth in the forum’s interim order of July 20, 2021. The forum issued an  
18                  interim order on August 16, 2021, informing WDSA that it had seven days to respond to  
19                  the motion and that, as a corporation, it must be represented by an attorney or  
20                  authorized representative pursuant to as required by OAR 839-050-0110(1). WDSA did  
21                  not respond to the motion for sanctions.

22                  12) On August 24, 2021, the forum issued an interim order granting the  
23                  motion. Pursuant to OAR 839-050-0200(11) and the forum’s previous cases providing  
24                  for discovery sanctions, the interim order stated that WDSA was prohibited from offering  
25                  evidence at hearing that was not disclosed in compliance with the forum’s interim order  
                        of July 20, 2021. (Interim Orders of 8/16/21, 8/24/21 and 8/30/21)

                        13) On August 30, 2021, the Agency filed a motion seeking sanctions against  
                        WDSA, specifically requesting that the forum issue a ruling stating that the “Agency’s

1 Requests for Admission No. 1 through No. 18 that Respondent failed to answer by  
2 August 9, 2021, in response to the Forum's Interim Order Re Agency Motion to Compel  
3 Discovery dated July 20, 2021, be deemed admitted." On August 30, 2021, the forum  
4 issued an interim order finding that Agency's Requests for Admissions, Nos. 1 through  
5 18, were deemed to be admitted. (Interim Order of 8/30/21)

6 14) On August 31, 2021, ALJ Domas issued an interim order transferring the  
7 case to ALJ Kari Furnanz. (Domas Interim Order of 8/31/21)

8 15) The Agency filed a motion for summary judgment pursuant to OAR 839-  
9 050-0150(4) on August 31, 2021. ALJ Furnanz issued an interim order on August 31,  
10 2021, that explained how to respond to the motion and stated, in part:

11 "OAR 839-050-0150(4) provides that any participant may make a motion  
12 for summary judgment for an accelerated decision in favor of the participant as to  
13 all or part of the issues raised in the pleadings. In ruling on the Agency's motion,  
14 the forum will consider the existing record, the supporting documents provided by  
15 the Agency, and any documents provided by Respondent in response to the  
Agency's motion, in a manner most favorable to Respondent. Respondent's  
written response, including any opposing affidavits, if applicable, and supporting  
documents must be filed by **Tuesday, September 7, 2021**. OAR 839-050-0150.

16 "PLEASE NOTE: [WDSA] has the burden of producing evidence on any  
17 issue raised in the motion as to which the [WDSA] has the burden of persuasion  
at hearing. See ORCP 47C.

18 "If [WDSA] fails to file a written response, the forum will grant the Agency's  
19 motion if the pleadings and all documents filed in support of the motion show that  
20 there is no genuine issue as to any material fact and that the Agency is entitled to  
judgment as a matter of law."

21 (Furnanz Interim Order of 8/31/2021) (Emphasis in original)

22 16) WDSA did not respond to the Agency's motion for summary judgment.  
23 (Forum File)

24 17) On October 21, 2021, the ALJ issued an interim order granting the

1 Agency's motion for summary judgment. The pertinent portion of the ALJ's interim order  
2 is reprinted below:

3 **"SUMMARY JUDGMENT STANDARD"**

4 "A motion for summary judgment may be granted where no genuine issue  
5 as to any material fact exists and a participant is entitled to a judgment as a  
6 matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B).  
The standard for determining if a genuine issue of material fact exists and the  
evidentiary burden on the participants is as follows:

7 ' \* \* \* No genuine issue as to a material fact exists if, based upon  
8 the record before the court viewed in a manner most favorable to the  
9 adverse party, no objectively reasonable juror could return a verdict for the  
adverse party on the matter that is the subject of the motion for summary  
judgment. The adverse party has the burden of producing evidence on  
any issue raised in the motion as to which the adverse party would have  
the burden of persuasion at [hearing].'

11 ORCP 47C. In reviewing a motion for summary judgment, this forum draws all  
12 inferences of fact from the record against the participant filing the motion for  
summary judgment and in favor of the participant opposing the motion. *In the*  
*13 Matter of Derrick's Custom Painting, Inc.*, 37 BOLI 271, 275 (2020).

14 "The record considered by the forum in deciding this motion consists of:  
15 (1) the AOOD, argument made in support of the Agency's motion for summary  
judgment, and the exhibits submitted with the Agency's motion; and (2)  
16 Respondent's Answer to the original Order of Determination.

17 **ANALYSIS**

18 "The Agency moves for summary judgment on two grounds. First, the  
19 Agency asks the forum to conclude that WDSA is a successor employer to  
Littleton. Second, the Agency requests a ruling that WDSA owes wages to  
20 seven wage claimants that were not paid by Littleton. Following is an analysis of  
each argument.

21 **A. Successor Employer Discussion**

22 "An 'employer' 'includes any successor to the business of any employer,  
23 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  
24 employees in full.' ORS 652.310(1). Accordingly, WDSA is an employer if (1) it is  
a successor to the business of Littleton, or (2) it is a lessee or purchaser of  
25 Littleton's business property for the continuance of the same business. Both  
clauses require the successor entity to conduct essentially the same business as

1 its predecessor. *Blachana, LLC v. Bureau of Labor & Indus.*, 354 Or 676, 692,  
2 318 P3d 735 (2014). Whether a corporation conducts essentially the same  
3 business as its predecessor depends on the totality of the circumstances,  
4 including:

5 [T]he name and identity of the business, its location, the lapse of time  
6 between the previous operation and the new operation, whether the  
7 businesses employed substantially the same workforce, whether the same  
8 product was manufactured or the same services offered, and whether the  
9 same machinery, equipment, or methods of production were used.'

10 *Id.* at 695. The forum uses these factors to determine if a respondent is  
11 'conducting essentially the same business as a predecessor;' it is not necessary  
12 for every one of the listed factors to be present. *Id.* at 695. See also *In the*  
13 *Matter of C.S.R.T., LLC, and Robert P. Sabo*, 33 BOLI 263, 273 (2014).  
14 Following is an analysis of each of the listed factors to determine if WDSA was a  
15 successor in interest to Littleton.

16 1. Name and Identity of the Business

17 "With respect to the business name, Littleton used the assumed business  
18 name of 'Schmizza Public House Gresham' in its registry with the Corporation  
19 Division of Oregon's Secretary of State. (Ex. 13, p. 3) In its Answer and its  
20 registry with the Corporation Division registry, WDSA identified the business  
name as 'Gresham Schmizza Public House.' (Answer; Ex. 14, p. 11) A  
certificate of insurance identified WDSA as doing business as 'Gresham Public  
House.' (Ex. 19) On its OLCC liquor license application, WDSA completed the  
box titled 'Trade Name of the Business (Name Customers Will See)' with  
'Gresham Pizza Schmizza Public House.' (Ex. 17)

21 "In regard to the identity of the business, the forum has previously stated:  
22  
23 'The name of a business, although entitled to substantial weight, is only  
24 one factor in determining if the identity of an alleged successor business is  
25 the same as its defunct predecessor. Other factors include, but are not  
limited to, an historical common identity, common ownership, common  
management, and common vendors and clients.'

26 *In the Matter of Blachana, LLC*, 30 BOLI 197, 222 (2009), aff'd *Blachana, LLC v.*  
27 *Bureau of Labor and Industries*, 354 Or 676, 318 P3d 375 (2014). The following  
28 undisputed facts relate to the identity of the Littleton and WDSA businesses:

29  
30 • Both operated a restaurant business pursuant to a franchise agreement

1 with Schmizza International Inc. (Ex. 6, p. 3; Ex. 22, Agency's 1st RQA,<sup>3</sup>  
2 p. 11, ## 8-9)

3

- 4 The lease of 850 NW Eastman Parkway, Gresham, Oregon 97030 (Plot  
5 850 in the Gresham Town Fair Shopping Center) was assigned to  
6 Littleton and later assumed by WDSA. The permitted use of the  
7 property under the lease was 'for the operation of a Pizza Schmizza  
8 Public House family restaurant offering an American menu, serving  
9 pizza and alcoholic beverages, beer and wine for on-premises  
10 consumption.' (Ex. 6, p. 4; Ex. 18, p. 1)
- 11 • The signage outside the restaurant stayed the same during both periods  
12 of ownership. (Ex. 22, Agency's 1st RQA, pp. 10-11; Ex. 25, Ex. 27)
- 13 • DaCorsi and Cole, the incorporators of WDSA, previously held  
14 ownership interests in the business. (Ex. 6, pp. 20-22; Ex. 11, pp. 7-8;  
15 Ex. 15, pp. 1-14)
- 16 • Among other things, DaCorsi and Cole purchased the customer lists,  
17 and the telephone number and website remained the same. (Ex. 6, p.  
18 22, Ex. 22, Agency's 1st RQA, pp. 9-10, ## 3-4, 16-17)
- 19 • Both Littleton and WDSA operated the business using the words  
20 'Schmizza,' 'Public House,' and 'Gresham' in the title. (Ex. 22, Agency's  
21 1st RQA, p. 12, #11)

22 "The forum concludes that the undisputed facts regarding the name and  
23 identity of the business indicate successorship.

24 2. Location

25 "Both Littleton and WDSA operated a business at the same location: 850  
1 NW Eastman Parkway, Gresham, Oregon. (Answer; Ex. 6, pp. 3, 20; Ex. 13, pp.  
2 7-9; Ex. 14, pp. 1, 3; Ex. 22, Agency's 1st RQA, p. 9) Additionally, WDSA  
3 assumed the lease for the space at 850 NW Eastman Parkway that originated in  
4 2017. (Ex. 18) Because the location of Littleton and WDSA is identical, this  
5 factor indicates successorship. See *In the Matter of Blachana, LLC*, 30 BOLI at  
6 223.

7 3. Lapse of Time Between the Ownership of Littleton and WDSA

8 "Littleton operated the Gresham Pizza Schmizza restaurant from August  
9 12, 2019, until it was repossessed by Gresham Public House, LLC. (Exs. 6, 16)  
10 Although there were brief transfers of ownership due to the repossession of  
11 Littleton's interest,<sup>4</sup> the business operated continuously until WDSA became the  
12

13  
14 <sup>3</sup> On August 30, 2021, ALJ Domas issued an interim order deeming all of the Agency's requests for  
15 admissions admitted due to WDSA's failure to respond, pursuant to OAR 839-050-0200(11).

16 <sup>4</sup> Claude DaCorsi and Hannah Cole filed articles of incorporation for WDSA Inc. on October 2, 2019. (Ex.  
17 14) Tyson Brafford, the sole member of in Gresham Public House, LLC sold 100% of the membership  
18 interest in Gresham Public House, LLC to DaCorsi and Cole on November 19, 2019. (Ex. 6, pp. 3, 20-25)

1 owner 42 days later, on or about November 12, 2019. (Ex. 22, Agency's 1<sup>st</sup>  
2 RQA, p. 13; Answer) This forum previously held that an interval of 47 days  
3 between one business closing and another opening was 'indicative of  
successorship.' *In the Matter of Blachana, LLC*, 30 BOLI at 224. Similarly, in  
this case, the forum also finds that the interval of 42 days in this case also  
indicates successorship.

4

5 4. Whether Littleton and WDSA Employed Substantially the Same  
Workforce

6 "The term 'same or substantial the same work force' refers to 'specific  
7 employees, not a generic labor pool.' *Id.* In its motion, the Agency states that  
8 '[s]ome of the same staff that worked for Littleton' were still working there in  
February of 2020. However, there is no evidence as to the number of employees  
9 who were the same or the percentage of employees who remained employed.  
The Agency acknowledges that this factor does not indicate successorship, and  
the forum agrees.

10

11 5. Whether the Same Product Was Manufactured or the Same  
Services Offered

12 "Both Littleton and WDSA operated a restaurant as franchisees of  
13 Schmizza International Inc. (Ex. 22, Agency's 1<sup>st</sup> RQA, p. 11 ## 8, 9) The same  
14 type of food and drinks were served, and each business appeared to use the  
same menu. (Ex. 27, Bass Decl., p.2) Each business also used the same  
15 website.<sup>5</sup> (Ex. 22, Agency's 1<sup>st</sup> RQA, p. 14, ## 16,17) Therefore, this element  
indicates successorship.

16

17 6. Whether the Same Machinery, Equipment, Or Methods of  
Production Were Used

18 "The restaurant and the kitchen looked the same during both periods of  
19 ownership. (Ex. 25, Calen Decl., p. 1) The inside tables, outdoor signs and  
20 umbrellas also looked the same. *Id.* The purchase agreement signed by  
DaCorsi and Cole stated that the purchaser was to 'retain ownership of all of its  
21 business assets, including the equipment inventory on hand, furniture, goodwill,  
and customer lists.' (Ex. 6, p. 20) As previously stated, the individual ownership  
interests of DaCorsi and Cole were placed into WDSA on the same date as the  
purchase agreement. Accordingly, this factor also indicates successorship.

22

23

24 WDSA admits it became the owner of Gresham Schmizza Public House on or about November 12, 2019.  
Based on these undisputed facts, the forum infers that DaCorsi and Cole transferred their individual  
ownership of Gresham Public House, LLC to WDSA on November 12, 2019.

25 <sup>5</sup> The address for the website was <https://schmizzapublichouse.com/locations/schmizza-public-house-gresham/>.

1                   7. Conclusion

2                   "As set forth above, five of the six elements of the test indicate that WDSA  
3                   was a successor employer, with the exception that there is insufficient evidence  
4                   of whether there was substantially the same workforce. One missing factor is not  
5                   determinative; rather, the forum analyzes the factors '[t]aken as a whole.' *In the*  
6                   *Matter of Blachana, LLC*, 30 BOLI at 224. Accordingly, the forum concludes that  
7                   WDSA conducted substantially the same business as Littleton and is a successor  
8                   business responsible for unpaid wages that are owed to Littleton's former  
9                   employees.

10                  "In the Answer, WDSA asserts that there is a lack of business succession  
11                  because 'WDSA purchased the business from Gresham Public House, LLC,' not  
12                  Littleton. The Agency provided evidence that the WHD interprets ORS  
13                  652.310(1) as follows: 'a second subsequent purchaser of a repossessed  
14                  business may be a successor to the prior purchaser of the business despite a  
15                  brief intervening period of repossession by the original seller.' (Ex. 26, WHD  
16                  Field Operations Manual Successor Employer Interpretation, p. 3) The forum  
17                  determines that this is a plausible interpretation of ORS 652.310(1), and will  
18                  apply it to the instant case.<sup>6</sup> Accordingly, the forum does not find that the brief  
19                  ownership changes negate WDSA's status as a successor business.

20                  B. Discussion of Unpaid Wages

21                  "In the AOOD, the Agency asserts that Littleton did not pay the wage  
22                  claimants all wages due to them as required by ORS 652.140(2)(b), and that  
23                  WDSA is responsible for paying those wages as a successor employer. ORS  
24                  652.140(2)(b) provides that an employee's 'wages become due and payable  
25                  within five days, 276 excluding Saturdays, Sundays and holidays, after the  
26                  employee has quit, or at the next regularly scheduled payday after the employee  
27                  has quit, whichever event first occurs.' In order to prevail in a wage claim case,  
28                  the Agency must first establish a prima facie case supporting the allegations of  
29                  its charging document. *In The Matter of Derrick's Custom Painting, Inc.*, 37 BOLI  
30                  271, 276 (2020). In this case, the elements of the Agency's prima facie case  
31                  are: 1) WDSA employed each claimant; 2) the agreed upon pay rate, if other  
32                  than the minimum wage; 3) the amount and extent of work that each claimant  
33                  performed; and 4) the claimants performed work for which they were not properly  
34                  compensated. *Id.*

35                  "As set forth above, WDSA is a successor employer and, thus, Element 1  
36                  is established. The Agency's summary judgment motion cites to the FOD issued  
37                  against Littleton as evidence of Elements 2-4. In order to conclude that the wage  
38                  claimants were not properly compensated, the forum must determine whether  
39                  WDSA's interpretation of its own policy is plausible.

40                  <sup>6</sup> See *Westfall v. State of Oregon*, 355 Or 144, 165, 324 P3d 440 (2014) ("Because the [agency] offered  
41                  its interpretation of its own policy, we will defer to that interpretation as long as that interpretation is  
42                  plausible and not inconsistent with the policy in its context or with any other source of law.").

1 claim amounts were already established by the FOD, the forum must determine  
2 that issue preclusion applies. Five requirements must be met for issue  
3 preclusion to apply. *Nelson v. Emerald People's Util. Dist.*, 318 Or 99, 103, 862  
4 P2d 1293 (1993). One of the five requirements is that “[t]he issue was actually  
5 litigated and was essential to a final decision on the merits in the prior  
6 proceeding.” *Id.* at 104; see also *In the Matter of Catalogfinder, Inc.*, 18 BOLI  
7 242, 257 (1999). In the Agency's prior proceeding against Littleton, the final  
8 decision was a default order based on Littleton's failure to file a timely request for  
9 hearing. (Ex. 5) As a result, no actual litigation over the merits of the wage  
10 claims occurred. Consequently, the individual merits of each of the seven wage  
11 claims must be determined based on the evidence presented with the Agency's  
12 motion. See *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 258 (1999).

13 1. Calen

14 “The Agency seeks \$715.26 in unpaid wages on behalf of Calen. The  
15 uncontested evidence shows that Calen's rate of pay was \$13 per hour and  
16 that Calen was not paid by Littleton for 55.02 hours worked from September 9 –  
17 22, 2019. (Ex. 28) Accordingly, the forum awards Calen \$715.26 in unpaid  
18 wages (55.02 hours x \$13/hour).

19 2. Thomas

20 “The Agency seeks \$851.34 in unpaid wages on behalf of Thomas. The  
21 uncontested evidence shows that Thomas's rate of pay was \$14 per hour and  
22 that Thomas was not paid by Littleton for 60.81 hours worked from September 11 –  
23 28, 2019. (Ex. 29, pp. 2, 6) Accordingly, the forum awards Thomas \$851.34 in  
24 unpaid wages (60.81 hours x \$14/hour).

25 3. Bass

1 “The Agency seeks \$1,234.83 in unpaid wages on behalf of Bass. The  
2 uncontested evidence shows that Bass's rate of pay was \$13.50 per hour and  
3 that Bass was not paid by Littleton for 115.31 hours worked from September 3 –  
4 October 8, 2019. (Ex. 30, pp. 6-8) Accordingly, the forum awards Bass  
5 \$1,201.22 in unpaid wages (115.31 hours x \$13.50/hour, minus \$355.47 in gross  
6 wages already paid).

7 4. Briceno-Salazar

8 “The Agency seeks \$454.95 in unpaid wages on behalf of Briceno-  
9 Salazar. The uncontested evidence shows that Briceno-Salazar's rate of pay  
10 was \$15 per hour and that Briceno-Salazar was not paid by Littleton for 30.33  
11 hours worked from September 13 – 29, 2019. (Ex. 31, pp. 1, 5) Accordingly, the  
12 forum awards Thomas \$454.95 in unpaid wages (30.33 hours x \$15/hour).

## 5. Inman

"The Agency seeks \$795.76 in unpaid wages on behalf of Inman. The uncontested evidence shows that Inman's rate of pay was \$14 per hour and that Inman was not paid by Littleton for 57.34<sup>7</sup> hours worked from September 9 – 25, 2019. (Ex. 32, pp. 1, 5) Accordingly, the forum awards Inman \$802.76 in unpaid wages (57.34 hours x \$14/hour).

## 6. Payne

"The Agency seeks \$508.13 in unpaid wages on behalf of Payne. The uncontested evidence shows that Payne's rate of pay was \$12.50 per hour and that Payne was not paid by Littleton for 40.64 hours worked from September 13 – 27, 2019. (Ex. 33, pp. 1, 7) Accordingly, the forum awards Inman \$508.00 in unpaid wages (40.64 hours x \$12.50/hour).

7. Betts

"The Agency seeks \$693.75 in unpaid wages on behalf of Betts. The uncontested evidence shows that Betts's rate of pay was \$12.50 per hour and that Betts was not paid by Littleton for 55.5 hours worked from September 18 – 29, 2019. (Ex. 34, pp. 1, 5-6) Accordingly, the forum awards Inman \$693.75 in unpaid wages (55.5 hours x \$12.50/hour).

### **C. Additional Issues in AOOD**

"The Agency's motion requests that the forum 'enter an order of summary judgment resolving all pending issues in Case No. 50-21.' The forum notes that the AOOD requests penalty wages and civil penalties solely against Littleton. However, the WHD previously entered a Final Order Default as to Littleton. Accordingly, penalty wages and civil penalties are not at issue with respect to WDSA.

## Conclusion

"The Agency's motion for summary judgment is GRANTED in its entirety. The hearing in this matter was previously canceled and will not be rescheduled. A Proposed Order incorporating this ruling will be issued as soon as possible, and the parties will have the opportunity to file exceptions to the Proposed Order pursuant to ORS chapter 183 and OAR 839-050-0380.

**"IT IS SO ORDERED."**

<sup>7</sup> The forum bases this calculation on the total of the hours printed on Ex. 32, p. 5, rather than the handwritten number on that page.

1 (10/12/2021 Interim Order) The ALJ's ruling on the Agency's motion for summary  
2 judgment is hereby CONFIRMED.

3 18) On March 17, 2022, the ALJ issued a Proposed Order that notified the  
4 participants they were entitled to file exceptions to the Proposed Order within ten days  
5 of its issuance. The Agency timely filed exceptions on March 25, 2022.

6 **FINDINGS OF FACT – THE MERITS**

7 1) Beginning on August 12, 2019, Littleton was an Oregon corporation that  
8 operated a restaurant using "Gresham Schmizza Public House" as its assumed  
9 business name. Between September 3, 2019, and October 8, 2019, Littleton engaged  
10 the personal services of one or more employees to perform work in Oregon, including  
11 the seven claimants named in the AOOD. (10/12/2021 Interim Order)

12 2) On or about November 12, 2019, WDSA became the owner of Gresham  
13 Schmizza Public House. (10/12/2021 Interim Order)

14 3) Both Littleton and WDSA operated a restaurant business pursuant to a  
15 franchise agreement with Schmizza International Inc. Littleton's property lease was  
16 later assumed by WDSA. The permitted use of the property under the lease was "for  
17 the operation of a Pizza Schmizza Public House family restaurant offering an American  
18 menu, serving pizza and alcoholic beverages, beer and wine for on-premises  
19 consumption." The signage outside the restaurant stayed the same during both periods  
20 of ownership. The incorporators of WDSA previously held ownership interests in the  
21 business. Among other things, WDSA's incorporators purchased the restaurant's  
22 customer lists. The restaurant's telephone number and website remained the same.  
23 Both Littleton and WDSA operated the business using the words "Schmizza," "Public  
24  
25

1 House" and "Gresham" in the title. Littleton and WDSA employed substantially the  
2 same work force, used the same equipment and offered the same items on the menu.  
3

(10/12/2021 Interim Order)

4) The wages owed to each complainant are computed as follows:

Calen	55.02 hours x \$13/hour	\$715.26
Thomas	60.81 hours x \$14/hour	\$851.34
Bass	115.31 hours x \$13.50/hour (minus \$355.47 paid)	\$1,201.22
Briceno-Salazar	30.33 hours x \$15/hour	\$454.95
Inman	57.34 hours x \$14/hour	\$802.76
Payne	40.64 hours x \$12.50/hour	\$508.00
Betts	55.50 hours x \$12.50/hour	\$693.75

(10/12/2021 Interim Order)

#### **CONCLUSIONS OF LAW**

1) During all times material herein, Littleton was an employer and the seven  
2 claimants were employees subject to the provisions of ORS 652.110 to 652.200 and  
3 652.310 to 652.405. During all times material herein, Littleton employed the seven  
4 claimants. ORS 652.310.

2) WDSA is a "successor to the business" of Littleton within the meaning of  
3 ORS 652.310(1) and, as an employer, is subject to the provisions of ORS 652.110 to  
4 652.405.

3) BOLI's Commissioner has jurisdiction over the subject matter herein.  
4 652.310 to 652.405.

4) Littleton failed to pay the claimants the amounts set out in Finding of Fact #4 – The Merits, and more than five days have elapsed since Claimants' employment ceased. ORS 652.140(2).

5) WDSA is liable for Littleton's failure to pay the claimants all wages earned and unpaid when their employment terminated. ORS 652.310(1).

6) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order WDSA to pay the seven claimants their earned, unpaid, due and payable wages. ORS 652.332.

## OPINION

All allegations in the Agency's AOOD were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. No further discussion is required as to the merits.

### **Exceptions to the Proposed Order**

In its Exceptions, the Agency requests that the forum make corrections to scrivener's errors and add a citation. These exceptions are well taken, and the Exceptions are GRANTED as reflected in this Final Order.

## ORDER

NOW, THEREFORE as authorized by ORS 652.140, ORS 652.150, and ORS 652.332, and as payment of unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **WDSA Inc., dba Gresham Schmizza Public House, dba Gresham Pizza Schmizza Public House**, to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

1 (1) A certified check payable to the Bureau of Labor and Industries in trust for  
2 Kaleb Calen in the amount of **SEVEN HUNDRED FIFTEEN DOLLARS AND**  
2 **TWENTY-SIX CENTS (\$715.26)**, plus interest at the legal rate on that amount  
from the date the Final Order is issued until paid.

3 (2) A certified check payable to the Bureau of Labor and Industries in trust for  
4 Ashley Thomas in the amount of **EIGHT HUNDRED FIFTY-ONE DOLLARS**  
5 **AND THIRTY-FOUR CENTS (\$851.34)**, plus interest at the legal rate on that  
amount from the date the Final Order is issued until paid.

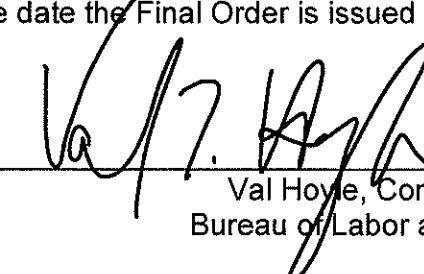
6 (3) A certified check payable to the Bureau of Labor and Industries in trust for  
7 Ashley Bass in the amount of **ONE THOUSAND TWO HUNDRED ONE**  
7 **DOLLARS AND TWENTY-TWO CENTS (\$1,201.22)**, plus interest at the legal  
rate on that amount from the date the Final Order is issued until paid.

9 (4) A certified check payable to the Bureau of Labor and Industries in trust for  
10 Jorge Briceno-Salazar in the amount of **FOUR HUNDRED FIFTY-FOUR**  
10 **DOLLARS AND NINETY-FIVE CENTS (\$454.95)**, plus interest at the legal rate  
on that amount from the date the Final Order is issued until paid.

11 (5) A certified check payable to the Bureau of Labor and Industries in trust for  
12 Kyle Inman in the amount of **EIGHT HUNDRED TWO DOLLARS AND**  
13 **SEVENTY-SIX CENTS (\$802.76)**, plus interest at the legal rate on that amount  
from the date the Final Order is issued until paid.

14 (6) A certified check payable to the Bureau of Labor and Industries in trust for  
15 Lynsey Payne in the amount of **FIVE HUNDRED EIGHT DOLLARS (\$508)**, plus  
15 interest at the legal rate on that amount from the date the Final Order is issued  
until paid.

17 (7) A certified check payable to the Bureau of Labor and Industries in trust for  
18 Gail Betts in the amount of **SIX HUNDRED NINETY-THREE DOLLARS AND**  
18 **SEVENTY-FIVE CENTS (\$693.75)**, plus interest at the legal rate on that amount  
from the date the Final Order is issued until paid.

19  
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21   
22 Val Hoyle, Commissioner  
22 Bureau of Labor and Industries  
23  
24  
25 ISSUED ON: July 5, 2022