Honorable Julie Spector

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER, on their own behalves and on behalf of all persons similarly situated.

Plaintiffs,

v.

GARDA CL NORTHWEST, INC., f/k/a AT SYSTEMS, INC. a Washington Corporation,

Defendant.

CLASS ACTION

NO. 09-2-07360-1 SEA

~~[PLAINTIFF'S PROPOSED~~] FINDINGS OF FACT AND CONCLUSIONS OF LAW

By order dated June 1, 2015, this Court granted summary judgment on liability to plaintiffs. The issue of damages was tried to the Court, without a jury, on June 16-18, 2015. The Court held over trial and the issue of double damages was tried to the Court on September 21-22, 2015.

To the extent the following Findings of Fact contain legal conclusions, those shall be deemed Conclusions of Law, and to the extent the following Conclusions of Law contain factual findings, those shall be deemed Findings of Fact.

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I. FINDINGS OF FACT

A. Background

1. This case was filed on February 11, 2009. Plaintiffs Larry Hill, Adam Wise, and Robert Miller claimed, on behalf of themselves and the class members, that they and the class members were denied lawful rest and meal breaks under Washington law.

2. This case was certified as a class action pursuant to CR 23(a) and CR 23(b)(3) on July 23, 2010. The class was defined as "all people who have been employed by Garda CL Northwest or its predecessor to work on armored trucks in the State of Washington and who, at any time between February 11, 2006 and the present, were denied meal and/or rest breaks."

3. Following notice to the class, 29 putative class members opted out.[1] After the opt-outs, 277 class members remained.

4. On September 24, 2015, the Court granted Garda's motion to compel arbitration, and ordered class arbitration.

5. The parties appealed, and the Washington Supreme Court, at 179 Wn.2d 47, 308 P.3d 635 (2013), held that the arbitration provisions in Garda's Labor Agreements were unconscionable and unenforceable. On June 16, 2014, the United States Supreme Court denied certiorari.

6. On remand, a second notice was sent to additional class members. None opted out and thereafter there were 480 class members.

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[1] The employees who opted out are James W. Anderson, David M. Burrow, Ryan Franck, Michael Gayken, Rudi J. Greer, Dustin Hagemann, Joshua J. Higgins, Franklin Johnson, Rudy L. Krager, Robert F. Larson, Jason R. Milam, Robert Patty, Daniel B. Pells, Roberto Pineda, Keith Pryor, Keith Rector, Allen K. Reser, Many Rim, David Sandberg, Scott A. Scott, Lenny S. Sensui, Kyle L. Shelley, Joshua D. Simonson, Melissa Trowbridge, David Turgeon, John S. Ueda, Dale Visser, Daniel Vondrachek, and Benjamin R. Wright.

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7. On motions for summary judgment, the Court dismissed three affirmative defenses: waiver (with respect to meal breaks), preemption by the Labor Management Relations Act (LMRA), and preemption by the Federal Aviation Administration Amendments Act (FAAAA). On plaintiffs' motion, the Court granted summary judgment on liability.

8. Trial on damages took place June 16-18, 2015, and continued on the issue of double damages September 21-22, 2015.

9. At trial the Plaintiffs sought damages for all class members from February 6, 2006, to February 7, 2015 and double damages from November 20, 2011 to February 7, 2015.

B. Findings of Fact Regarding Damages

10. Plaintiff presented the testimony of Dr. Jeffrey Munson, a database and data management expert, regarding calculation of damages from electronic payroll and timekeeping detail data produced by Garda.

11. Garda produced two sets of data which Dr. Munson used to calculate damages. For the period from February 2006 through May 2010 (Period 1), Garda produced only biweekly payroll data, which specify how many regular and overtime hours an employee worked over a two-week pay period and the employee's regular rate of pay. *See* Exh. 12. The biweekly payroll data do not allow precise calculation of missed rest and meal breaks and consequent damages because they do not contain information on the number of hours worked on any particular day.[2]

[2] Thus, for example, an employee working 40 hours in a week may have worked five eight-hour shifts (missing five meal periods), four ten-hour shifts (missing four meal periods), or three 10.5 hour shifts and one 8.5 hour shift (missing seven meal periods). In addition, the biweekly payroll data do not specify how many hours were worked in each week of the two-week period.

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12. For the period from June 2010 through February 7, 2015 (Period 2), Garda produced daily timekeeping data, as well as biweekly payroll data. These data allow a precise calculation of missed rest and meal breaks during the later period.[3] *See* Exhs. 1-11.

13. Dr. Munson applied the following assumptions to calculate the number of rest break minutes due to class members for Period 2, when daily timekeeping data were available: if the daily total hours worked were greater than or equal to four hours but less than eight hours, 10 minutes of break time; if the duration was greater than or equal to eight hours but less than 12 hours, 20 minutes of break time; and if the duration was greater than or equal to 12 hours, 30 minutes of break time.

14. Similarly, Dr. Munson applied the following assumptions to calculate the number of meal period minutes due to class members for Period 2: if the daily total hours worked was greater than five hours but less than or equal to 10 hours, 30 minutes of meal time; if the duration was greater than 10 hours but equal to or less than 15 hours, 60 minutes of meal time; and if the duration was greater than 15 hours, 90 minutes of meal time.

15. For Period 1, when no daily timekeeping data and only payroll data were available, Dr. Munson employed the assumptions described above to estimate missed meal and rest breaks and additional assumptions regarding the division of biweekly hours worked among work weeks and days. For example, Dr. Munson generally allocated the total hours in a biweekly pay period evenly between the two weeks, unless a comparison of regular and

[3] The daily timekeeping data were missing for 12 class members who worked during Period 2, so only payroll data were available for them. For those class members, Dr. Munson calculated damages following the same assumptions used for Period 1.

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overtime hours suggested a more reasonable distribution.[4] He also assumed a typical 9.5 hour day in dividing the weekly hours into days of work, and calculated missed rest and meal breaks on that basis.

16. For the months of June and July, 2010, Dr. Munson calculated damages from both biweekly payroll and daily timekeeping data. This allowed a comparison between the damages calculated based on assumptions about the biweekly payroll data and damages calculated with full information from the daily timekeeping data. The two methods yielded very similar results, with the payroll-based calculations only 1.7% higher than the timekeeping-based calculations. This supports the conclusion that Dr. Munson's assumptions and estimates for Period 1 damages are reasonable.

17. The Court finds Dr. Munson's methodology to be reasonable and appropriate and his calculations to be reasonable and sound.

C. Findings of Fact Regarding Double Damages

18. Dr. Munson also calculated double damages for the period between November 20, 2011 and February 7, 2015. The beginning of this period is approximately two weeks after the Washington Court of Appeals issued its decision in *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011), holding that one of Garda's armored car industry competitors failed to

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[4] For example, if the payroll data showed that an employee worked 80 regular hours and ten overtime hours in a biweekly pay period, Dr. Munson's calculations assume that the employee worked 45 hours (40 regular plus five overtime hours) in each week. However, if the payroll data showed that an employee worked 75 regular hours and ten overtime hours in a pay period, the calculations assumed that the employee worked 35 hours in one week and 50 hours (40 regular plus ten overtime hours) in the other. In the latter example, the employee did not work enough regular hours to reach the 40 hour threshold for overtime hours in both weeks of the pay period, so it is reasonable to assume that all of the overtime hours were worked in the one week where the employee did reach 40 regular hours.

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provide lawful rest breaks and meal periods to its armored car messengers and drivers both because the messengers and drivers were required to maintain constant vigilance while on their routes, and thus were required to engage in unremitting work throughout any breaks, and because the armored truck crews were not provided sufficient time to take lawful breaks. As of the date of the *Pellino* decision, Garda knew or should have known that requiring constant alertness by its armored truck crews and failure to provide sufficient time for breaks violated the Washington Industrial Welfare Act and its implementing regulations.

19. Garda's affirmative defenses to double damages did not create a "bona fide dispute" over its liability for failing to provide lawful breaks after *Pellino*. Garda did not show that it considered and "genuinely believed" in the FAAAA defense to plaintiffs' claims prior to fall 2014. By that time the law was clear that the FAAAA did not preempt state meal and rest break rules. The law was clear that meal breaks could not be waived in a Collective Bargaining Agreement (CBA) outside of public employment and construction trades, and the law was clear that statutory wage claims were not preempted by the LMRA.

20. Plaintiffs did not "knowingly submit" to Garda's unlawful meal and rest break policies after *Pellino*. Garda failed to show that plaintiffs knowingly and voluntarily waived an existing right to take lawful rest and meal breaks. Garda's CBAs generally provided, on paper, for regular rest breaks and the option of an off-duty or on-duty meal break; they did not contain statements that employees agreed not to take any breaks.

21. Three CBAs, signed or acknowledged in writing by only 29 of the class members, stated that employees waived meal breaks. Garda failed to show that these employees could have taken meal breaks or that they

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knowingly and voluntarily chose not to do so. The CBAs were not negotiable by individual employees and they applied to all employees whether they read, acknowledged, and signed them or not.

22. Garda did not show that class members actually had the option to take an off-duty meal break or that they knowingly and voluntarily chose not to do so. Employees were never relieved of the obligations to guard the truck and/or the liability and to maintain constant vigilance. Class members testified that they did not believe they could take off-duty meal breaks and Garda managers admitted they did not know how they would have provided actual off-duty meal breaks if they had been asked to do so.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter.

A. General Legal Framework

2. If an employer fails to provide rest breaks to its employees, it must pay for the missed break time. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 850, 50 P.3d 256 (2002). The same principle applies to missed meal breaks, even if paid. *See Pellino v. Brink's Inc.*, 164 Wn. App. 668, 690-91, 267 P.3d 383 (2011). In both cases, the employer is getting more work time from its employees than the law allows and must pay additional compensation for that time. *Wingert* at 849. Where, as here, the fact of injury has been established, Plaintiff does not need to establish the amount of damages owed with certainty. *Pugh v. Evergreen Hospital Medical Center*, 177 Wn. App. 363, 368 (2013) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)); *Pellino*, 164 Wn. App. at 698 ("Damages need not be proven with mathematical certainty, but must be supported by evidence that

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provides a reasonable basis for estimating the loss and does not amount to mere speculation or conjecture.").

3. Plaintiffs' burden is only to provide sufficient evidence from which the finder of fact can make a reasonable approximation of the amount of damages owed. *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 713, 257 P.2d 784 (1953).

4. The Court also concludes that it is appropriate in this case to adopt the burden shifting approach set forth in *Mt. Clemens* with respect to proof of the amount of damages. As explained in *Mt. Clemens*, 328 U.S. at 687-88:

> [W]e hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

The Court went on to say, at 688:

> [E]ven where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-work activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages.... It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of damages.

5. To the extent there was not a completely accurate record of the hours worked by class members on the trucks each day, the risk of error is better placed on Garda than on the Plaintiff employees. The same principles

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that support burden-shifting under the federal Fair Labor Standards Act ("FLSA") are also present in this case, including: 1) the remedial nature of the Industrial Welfare Act; 2) the principle that where the fact of damage is certain, the wrongdoer should provide compensation; 3) the similarity in statutory schemes between Washington law and the FLSA, particularly the employer's duty under Washington wage laws (at RCW 49.46.070), as well as the FLSA (at 29 U.S.C. § 211), to keep accurate and complete records of the hours worked each day and the wages paid; and 4) the fact that the employer "is in the position to know and to produce the most probative facts concerning the nature and amount of work performed." *Mt. Clemens* at 688.

B. Dr. Munson's Calculations Are Reasonable.

6. Plaintiff's evidence regarding the amount of damages came through the testimony of Dr. Munson. The Court concludes that Dr. Munson's overall methodology for calculating damages was sound and reasonable, reflected the requirements of Washington law, and generally resulted in reasonable calculation of the damages due to the class members.

7. In particular, the determination of missed rest and meal break time in Dr. Munson's calculations are consistent with WAC 296-126-092 and *Wingert*, *supra*. His use of the daily timekeeping data during Period 2 is reasonable because it yields the most accurate information possible about the class members' work hours and entitlement to breaks. His use of biweekly payroll data along with assumptions about the work hours of class members during Period 1 is reasonable because it was the best information available for that period and the assumptions were reasonable under the law and on the evidence.

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8. As in *Pellino,* Dr. Munson's assumptions and calculations based on the biweekly payroll data and daily timekeeping data meet the legal standard for proving damages, and the Court concludes that Plaintiffs have met their burden in this case.

9. Garda attempted to call into question Dr. Munson's calculations, principally by challenging his use of a "typical" work day of 9.5 hours in allocating weekly work hours and calculating damages for Period 1. However, Garda did not present enough evidence to cast doubt on Dr. Munson's assumptions or methodology. Indeed, much of Garda's evidence confirmed that the assumptions and methodology were reasonable. Garda manager testimony confirmed, for example, that 9.5 hours was a reasonably accurate figure for a typical or average workday. The reasonableness of this assumption also is confirmed by the average shift length reflected in a number of the daily timekeeping spreadsheets for Period 2 and by the close correlation between the damage calculations under the Period 1 and Period 2 methodologies for the overlap period of June and July 2010. Garda's evidence does not overcome the Court's conclusions that the calculations were reasonably accurate and reliable.

10. Garda also suggested Dr. Munson's calculations were faulty because he did not take into account "guaranteed time" or "idle time." These terms refer to the fact that Garda generally guaranteed full-time truck crew members that they would be paid for 40 hours per week, even if they worked less. Garda did not show the frequency with which class members worked less than 40 hours per week and received pay for guaranteed time.

11. Garda did not show that any guaranteed time was included in Dr. Munson's calculations for Period 2. During Period 2, Garda's data showed

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guaranteed time separately from hours worked, and Dr. Munson excluded those hours from his calculations.

12. During Period 1, Garda did not record guaranteed time. If a class member worked less than 40 hours, only his daily time card would show the actual hours he worked. His manager would then record "40 hours" on the payroll sheet that was used to calculate pay. There would be no way to determine whether and when guaranteed time was provided and included in hours worked during Period 1, except by comparing each time card with its corresponding payroll sheet. That would be extremely difficult or impossible. Garda did not even show that these documents existed, and did not offer any evidence whether or how much guaranteed time may have been included in the damages calculations.

13. Garda produced the data that Dr. Munson relied upon. If it had better data, it could have and should have produced it. Under these circumstances, it is appropriate to apply *Mt. Clemens* burden shifting principles to the Defendant. The Court concludes that Garda did not come forward with sufficient "evidence of the precise amount of work performed" or sufficient "evidence to negative" the reasonableness of Dr. Munson's calculations. *See Mt. Clemens*, 328 U.S. at 687-88.

14. It appeared during trial that the damages originally calculated by Dr. Munson for certain class members were mistaken, either because the class members had opted out of the case in 2010 and were mistakenly included in the calculations, or because, in the case of two class members, they appeared as two different people, with slightly different names in the Period 1 payroll and

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Period 2 timekeeping data.[5] However, during redirect examination and after the first hearing concluded, Dr. Munson was able to provide reasonable adjustments to his damage calculations for these individuals. *See* Declaration of Jeffrey Munson, PhD., dated June 24, 2015 (hereafter "Munson Dec."). The Court concludes that the adjustments testified to by Dr. Munson are reasonable and adequately address the errors that were identified during trial.

15. After his corrections, Dr. Munson calculates total backpay owed to the class members as **$4,209,596.61**. Munson Dec. ¶ 6. The Court finds this amount of damages to be reasonable, and hereby awards that amount to the class as backpay damages.

C. Plaintiffs Are Entitled To Double Damages

16. Plaintiffs claim double damages for "willful" withholding of wages pursuant to RCW 49.52.050(2) and RCW 49.52.070. RCW 49.52.050 provides, in relevant part:

> Any employer or officer ... who... (2) Wilfully [sic] and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract ...
>
> Shall be guilty of a misdemeanor.

17. Under RCW 49.52.070, the civil penalty for such violations makes the employer liable for "twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees."

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[5] Hubie Meadows and Hubie Meadows III are apparently the same person, and Duane Wilks and Duane Wilks, Jr., are apparently the same person.

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18. Under these statutory provisions, "[a]n employer's nonpayment of wages is willful and made with intent 'when it is the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.'" *Wingert*, 146 Wn.2d at 849.

19. The Court of Appeals' decision in *Pellino* affirming Judge Trickey's verdict for the plaintiff driver/messengers against Brink's was issued November 7, 2011. The Court concludes that, as of that time, no bona fide dispute existed over whether Garda's policy and practice, requiring its driver/messengers to continuously act as a guard and maintain constant vigilance, violated Washington law by depriving its employees of lawful rest and meal breaks.

20. Garda claims that even after *Pellino* there remained a bona fide dispute over whether its waiver defense to meal break violations relieved it of liability on that claim. However, Garda's waiver defense was based solely on language in Collective Bargaining Agreements (CBAs) that did not generally waive meal breaks but instead provided for "on-duty" meal breaks, which are still meal breaks requiring complete relief from active work under Washington law. *See* Exhs. 119-125. Furthermore, Washington law clearly forbids waiver of the right to meal breaks through a CBA, except for public and construction industry employees. Wash. Dept. Labor & Indus. Admin. Policy ES.C.6, § 15; RCW 49.12.187; *Watson v. Providence St. Peter Hosp.*, 2013 U.S. Dist. LEXIS 99980 *16 (W.D. Wash. July 17, 2013). Thus, Garda's waiver defense was not "fairly debatable" and did not create a bona fide dispute over its liability for failing to provide lawful meal breaks.

21. Garda also claims that, even after *Pellino*, its preemption defenses created a bona fide dispute over its liability. Its defense that

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Washington meal and rest break rules are preempted by the federal Labor Management Relations Act (LMRA) is meritless. Plaintiffs' claims were based solely on Washington statutory and regulatory requirements, not on Garda's CBAs. Nor did the application of Washington law to Plaintiffs' claims require substantial interpretation of the CBAs. Garda raised the CBAs in defense, and as noted above, that defense was not meritorious. Legal arguments that are contrary to well-established law are not sufficient to give rise to a bona fide dispute that would avoid liability under RCW 49.52.070. *Department of Labor & Industries v. Overnite Transp. Co.*, 67 Wn. App. 24, 34 (1992).

22. Garda's argument that Washington law was preempted by the Federal Aviation Administration Amendments Act (FAAAA) was not even raised until December 2, 2014, nearly six years after the suit was filed, three years after *Pellino* was decided, and three months before the end of the class period in the case. Defenses that are not considered and "genuinely believed" to be defenses at the time do not create a "bona fide dispute" between the parties over the wages at issue. Garda did not establish that, notwithstanding its delay in raising the defense, it had a "genuine belief" that despite *Pellino*, the Plaintiffs' claims in this case were preempted by the FAAAA. And by the time Garda did raise the FAAAA in this case, the law was settled that it does not preempt state meal and rest break laws. *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (2014).

23. Garda also argued that class members "knowingly submitted" to meal break violations (but not rest break violations) by acknowledging and accepting the CBAs which, it contended, contained waivers of the right to a meal break.

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24. "Knowing submission" is an affirmative defense to double damages under RCW 49.52.070. For an employer to prove "knowing submission" it must demonstrate that the employees "deliberately and intentionally deferred to [the employer's] decision to whether they would ever be paid." *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 682 (2001). There is no evidence of any such deliberate or intentional action on the part of the class members. This defense, which must be construed narrowly, includes a component of choice, because otherwise the exception would swallow the rule. Any employee who is forced to work off the clock or continues to work without pay would obviously "know" that, but it would destroy the purpose and liberal application of the rule to deny double damages in those instances. Here, because it is undisputed that all class members were required to be vigilant at all times and therefore were continuously "working," the employees had no legitimate choice about foregoing their meal periods.

25. As noted above, Garda's CBAs generally did not contain waivers of the right to a meal break, so they cannot serve as evidence that class members knowingly submitted to the denial of that right. Garda failed to present any other evidence of knowing submission.

26. Nor is a finding of knowing submission supported by the provision in the CBAs giving employees, on paper, the right to request off-duty meal breaks and the failure of employees to do so. Garda did not show that the option of taking an off-duty meal break was realistic, and the weight of the evidence showed it was not. Knowing submission must be explicit, not implied. *See Chelius*, 107 Wn. App. at 683. Furthermore, failure to request an off-duty meal break, even if voluntary, does not constitute a knowing submission to the denial of a lawful, work-free, on-duty meal break.

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27. Therefore, the Court grants Plaintiff's request for double damages under RCW 49.52. Dr. Munson calculated the amount of backpay due to the class members beginning November 20, 2011, as **$1,668,235.62.** Munson Dec. ¶ 9. The Court finds this amount to be reasonable and awards this amount to the class as double damages.

D. Plaintiffs Are Entitled To Prejudgment Interest

28. Washington courts regard judgments for back wages as liquidated and award prejudgment interest. *See, e.g., Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007); *Mothers Work, Inc. v. McConnell*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006); *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 948 P.2d 397 (1997), *rev. denied*, 135 Wn.2d 1003, 959 P.2d 126 (1998); *Curtis v. Security Bank of Washington*, 69 Wn. App. 12, 847 P.2d 507, *rev. denied*, 121 Wn.2d 1031, 856 P.2d 383 (1993). A claim is liquidated when the evidence "furnished data that...made it possible to compute the amount with exactness." *Mothers Work, Inc., supra,* at 536. This is true even if the number of unpaid hours are determined on an average or approximate basis, or when a damages expert is used to assist the trier of fact in determining the amount of back wages owed. *Stevens v. Brink's, supra*; *Mothers Work, Inc., supra.* Here, the damages were readily ascertainable based on pay rates, hours worked, and other objective data in the record and the Court's findings regarding the calculation of the number of rest and meal break minutes for which compensation is owed.

29. Accordingly, the Court concludes that prejudgment interest is due on the back pay owed here at a rate of 12% simple per annum, or one percent per month. *Stevens*, 162 Wn.2d at 42.

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30. Dr. Munson calculated prejudgment interest at 12% simple per annum through June 30, 2015, as **$2,350,255.63**. Munson Dec. ¶ 6. Garda has not challenged this calculation, and the Court awards this amount to the class as prejudgment interest. The Court will award additional prejudgment interest at the time of entry of judgment, at 12% simple per annum, to the date of the judgment, upon request with appropriate support.

IT IS SO ORDERED.

DATED: 10/23/2015

Hon. Julie Spector

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CERTIFICATE OF SERVICE

I, Jamie Telegin, under penalty of perjury under the laws of the State of Washington, hereby certify that on this 7th day of October, 2015, I caused the foregoing document to be sent in the manner indicated below, to the following attorneys of record:

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