No. S121552

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

MIGUEL MARTINEZ, et al.,
d/b/a COMBS DISTRIBUTION CO.;
JUAN RUIZ; and
APIO, INC., a Delaware Corporation,
Defendants/Respondents

Appeal from the Second Appellate District, Div. Six
Case No. B161773
Superior Court for San Luis Obispo County No. CV001029
Hon. E. Jeffrey Burke

APPELLANTS' OPENING BRIEF ON THE MERITS

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[California Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq.) Service on the California Attorney General and on the District Attorney of San Luis Obispo County required by Bus. & Profs. Code, § 17209, Cal.Rules of Court, Rules 15(c)(3), 44.5(c)]

S121552

IN THE SUPREME COURT OF CALIFORNIA

MIGUEL MARTINEZ et al., Plaintiffs and Appellants,

v.

CORKY N. COMBS et al., Defendants and Respondents.

On application of appellants for permission to file opening brief on the merits containing 29,700 words, that exceeds the 14,000 word limit prescribed by California Rules of Court rule 29.1(c)(1) by 15,700 words is hereby GRANTED.

Chief Justice

No. S121552

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

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MIGUEL MARTINEZ, et al.,

d/b/a COMBS DISTRIBUTION CO.;

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Appeal from the Second Appellate District, Div. Six
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APPELLANTS' APPLICATION FOR LEAVE TO FILE EXTRA-LENGTH OPENING BRIEF ON THE MERITS

(Cal. Rules of Court, Rules 14(e)(1),(5))

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Service on the California Attorney General and on the District Attorney of San Luis Obispo County required by Bus. & Profs. Code, § 17209, Cal.Rules of Court, Rules 15(c)(3), 44.5(c)]

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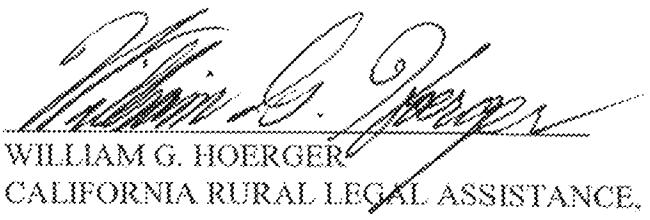
APPELLANTS' APPLICATION FOR LEAVE TO FILE EXTRA-LENGTH OPENING BRIEF ON THE MERITS
(Cal.Rules of Court, Rules 14(c)(1),(5))

Appellants respectfully apply for leave to file an Opening Brief on the Merits of approximately 29,700 words. Appellants respectfully urge that good cause is established through the following Declaration of Counsel.

DATED: January 17, 2005

Respectfully submitted:



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DECLARATION OF APPELLANTS' COUNSEL, WILLIAM G. HOERGER IN SUPPORT OF APPLICATION FOR LEAVE TO FILE EXTRA-LENGTH APPELLANTS' OPENING BRIEF ON THE MERITS

I, WILLIAM G. HOERGER, declare as follows:

1. I am a member (No. 057319) in good standing of the State Bar of California, and am employed by California Rural Legal Assistance, Inc. ("CRLA") in its San Francisco office as Director of Litigation, Advocacy and Training.

2. At all times in this action below and in this appeal, I have been counsel of record for Appellants Antonio Perez Cortes, Otilio Cortes and Asuncion Cruz, and at all times throughout the appeals, I have served as lead counsel including the responsibility for briefing at all stages of the appeals. I have prepared the contemporaneously submitted Appellants Opening

Brief on the Merits, which I have therein certified as containing 29,693 words including text and footnotes.

3. Over my career with CRLA, I have drafted either principally or as a participant approximately a dozen briefs to this Court, either on behalf of a party or an *amicus curiae*. I have diligently and carefully prepared the present Opening Brief, and I believe that it professionally and appropriately presents and argues the issues presented in this appeal. I respectfully draw to the Court's attention to the following issues:

(a) Whether the California Legislature that in 1913 established the State's Industrial Welfare Commission intended to depart from common-law principles of the employment relationship in empowering the IWC to regulate wages and other conditions of employment, particularly with respect to the provision of the act that created a private cause of action to recover unpaid wages owed under the Commission's remedial promulgations

(b) If the employment relationship for purposes of remedies under IWC wage regulation is extended byond common-law principles through application of the IWC's alternative employer definitions, what do each of the "suffer or permit to work" and "exercises control" definitions mean? The former has been a fixture of IWC orders since 1916. The alternative, "exercises control" definition has now been a part of Commission orders for 59 years. California courts have not explored the meaning of either.

This Court did not probe the meaning of "exercises control" in its recent decision in Reynolds v. Bement (No. S115823, 36 Cal.4th 1075) because it concluded that in consideration of the special policy issues at stake, the plaintiffs had not satisfactorily shown that the Commission intended its employer definition to displace corporate-agent immunity. This

Court did advise parties who assert causes of action under the Labor Code that they bear the burden of clearly demonstrating that the Legislature, in creating the cause of action, intended to depart from the common law.

Neither the Legislature's nor the IWC's respective historic intents on this issue has ever before been explored in depth in judicial proceedings. Traditional legal resources are limited, as modern, commonly-available legislative history does not exist for the period when the IWC was created and adopted its initial, "suffer or permit to work" measure of employer responsibility. Accordingly, appellants have presented a probing examination of the labor and political history of California and of contemporaneous legislative efforts in other states that attempted to address similar issues. Much of this research probes the motivations and influence of various advocacy movements that focused on minimum-wage protection in the early Twentieth Century and their influence in California's legislature.

This case also presents a distinct issue as to whether employees have third-party beneficiary standing arising from their employer's contract with his principal wherein the employer promises to comply with California employment law including minimum-wage law, only to be precluded from paying his workers as a direct result of the principal's breach.

The lower courts recognized the extraordinary significance of this case and the historic challenges it presents. The case was resolved below on defense motions for summary judgment in which the superior court on its own motion set aside a special calendar, invited the parties to provide extensive argument, and held a nearly 3 ½-hour hearing. The Court of Appeal granted leave to file an opening brief in of some 25,600 words. Those courts, as well as the parties, assumed that the IWC wage order definitions controlled and that proper application of these

definitions comprised the core issues.

The challenge raised by Reynolds has required appellants to intensively explore historic data found in the State's archives, state library collections, and to retrieve and analyze substantial volumes of non-legal, historical literature from scholars scattered about the country. We believe that we have synthesized all this into focused advocacy that provides an analysis of California labor advocacy and legislation not previously presented to the courts. The portion of appellants' opening brief on the merits that addresses the additional issue of legislative intent *vis a vis* retention of common law employment principles is some 8,700 words in length. Appellants have, accordingly, more tightly focused our discussion of the other issues that comprised the debate in the lower courts; thus, notwithstanding the new Reynolds issue, the instant brief has increased by only 4,000 words over its predecessor.

In my professional opinion Appellants' Opening Brief on the Merits has been crafted with tight focus and rigorously edited, and will substantially assist the Court in understanding the issues in this appeal.

I declare that the foregoing is true and correct except as to those matters asserted on information and/or belief, as to which I believe the same to be true. Executed this 17th day of January, 2006, in the City and County of San Francisco, California.

WILLIAM G. HOERGER

PROOF OF SERVICE
(CCP, § 1013(a),(d); Rules of Court Rule 15(c))

I, GLADYS BRISCOE, declare that I am employed by California Rural Legal Assistance, Inc., at 631 Howard Street, Suite 300, San Francisco, California 94105. I am over the age of 18 years and not a party to the within action or appeal.

On January 17, 2006, I served the attached APPELLANTS' APPLICATION FOR LEAVE TO FILE EXTRA-LENGTH OPENING BRIEF ON THE MERITS by Federal Express Overnight Delivery upon the parties listed below by placing true copies in cartons provided by Federal Express with mailing slips addressed as below, and shipping charges prepaid, and placing these cartons in the deposit box maintained by Federal Express before 5:00 pm, the scheduled pick-up time:

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Anastassiou & Associates
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(Attorneys for Respondent APIO, INC.)

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A Professional Corporation
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Salinas, CA 93902-2510

(Attorneys for Respondents CORKY N. COMBS, LARRY D. COMBS, COMBS DISTRIBUTION CO. and JUAN RUIZ)

I am also readily familiar with California Rural Legal Assistance, Inc.'s practice of collection and processing of documents for mailing with the United States Postal Service, being that first-class mail will be deposited in the ordinary course of business with the U.S. Postal Service on the same day with postage thereon fully prepaid at San Francisco, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in this declaration.

On January 17, 2006, I served the attached APPELLANTS' APPLICATION FOR LEAVE TO FILE EXTRA-LENGTH OPENING BRIEF ON THE MERITS by first-class mail upon the interested persons by placing true copies thereof in sealed envelopes addressed as follows:

Clerk, Court of Appeal of State of California (4 copies)
Second Appellate District, Division Six
200 E. Santa Clara Street
Ventura, CA 939001

//////////////

Hon. E. Jeffrey Burke, Judge
Superior Court for San Luis Obispo County
1035 Palm Street, Room 385
San Luis Obispo, CA 93408
The District Attorney of San Luis Obispo County
Consumer Law Section
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(Counsel for Appellants MIGUEL MARTINEZ, HILDA MARTINEZ, ANTONIO PEREZ CORTES, OTILIO CORTES and ASUNCION CRUZ)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on January 17, 2006, in the City and County of San Francisco, California.

GLADYS BRISCOE

No. S121552

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

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[List of Counsel continued on inside . . .]

[California Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq.)
Service on the California Attorney General and on the District Attorney of San Luis Obispo County required by Bus. & Profs. Code, § 17209, Cal.Rules of Court, Rules 15(c)(3), 44.5(e)]

[. . . continued list of Appellants Counsel)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONAL LAW

California decisions:

Other states' decisions:

Federal decisions:

California Attorney General Opinions

CAL. CONSTITUTION

STATUTORY LAW

California statutes:

TREATISES

MISCELLANEOUS AUTHORITIES

STATEMENT OF ISSUES PRESENTED
(Rule 29(b)(2)(B))

The Petition For Review at pages 1-2 identified the following issues:

"The wage orders promulgated by California's Industrial Welfare Commission (IWC) provide two alternative definitions of the term "employer." Under the wage orders, an employer is any person who "directly or indirectly" *either* (1) "employs [further defined as "suffer[s] or permit[s] to work] . . . any person" *or* (2) "exercises control over the wages, hours or working conditions of any person." This case directly raises application of both definitions of "employer"[1], as well as a third issue which is contractual.

"1a. Does "suffer or permit to work" retain the IWC's original intent to encompass work that the owner reasonably knows is being performed for its benefit – including work by persons engaged by independent contractors – or should the term be governed by the more restrictive multi-factor balancing test crafted 37 years after the IWC's promulgation in a 1947 U.S. Supreme Court decision (Rutherford Food Corp. v. McComb, 331 U.S. 722), interpreting the same words incorporated in the federal Fair Labor Standards Act of 1938?

"1b. As applied to this case, that issue is whether strawberry broker/dealers who required a contract "grower" to hire employees to cultivate and harvest plants in the broker/dealers' fields for exclusive delivery to the

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[1]"Resolution of both wage order issues is contingent on this Court's determination in *Reynolds v. Bement*, No. S115823, rev. granted July 23, 2003, that the wage order provisions define the scope of employer liability in private actions brought to enforce the wage-and-hour provisions of the Labor Code. The parties and court below assumed that definition of liability. (Footnote in original Petition.)

broker/dealers, and at all times were aware that the contract "grower's" employees were working in the broker/dealers' fields, "suffer[ed] or permit[ted those employees] to work", within the meaning of the wage orders and are liable for their unpaid wages.

"2a. What is the meaning of "exercises control over wages, hours or working conditions," the alternative wage-order definition of "employer"?

"2b. As applied to this case, the issue is whether strawberry broker/dealers, who unilaterally decided to reimburse themselves for their investment in the strawberry crop rather than distribute to the contract "grower" the latter's share of market proceeds, knowing that the contract grower would be unable to pay his workers, "directly or indirectly . . . exercise[d] control over wages, hours, or working conditions" of the contract "grower's" workers, within the meaning of the wage orders.

"3. Existing California cases hold that employees are the intended beneficiaries of remedial statutes setting wage levels and thus are third-party beneficiaries of contracts between their employer and a contracting principal to follow these laws, and may maintain a private action against their employer to enforce such agreements.

"As applied in this case, the issue is whether workers have third-party beneficiary standing to enforce such an agreement against their employer's principal, where they can prove that the principal's failure to pay contractual proceeds to their employer directly caused their employer's failure to comply with minimum-wage requirements?"

Respondent APIO's Answer, at page 6, presents a title, "III. ISSUES

PRESENTED". Respondent thereafter presents two pages of argument as to why review should not be granted, but identifies no further issues.

The Petition For Review further noted in the initial paragraph of "Issues Presented", that resolution of the wage order issues was contingent on the Court's decision in Reynolds v. Bement, *pending*. The Petition further noted that the parties and courts below had assumed that the Industrial Welfare Commission "wage order" employer definitions controlled. (Petition For Review, pp. 1, 26.) Following grant of review, the Court deferred briefing in this appeal pending resolution of Reynolds v. Bement, which was decided on August 11, 2005. (No. S115823; ___ Cal.4th ___ [32 Cal.Rptr.3d 483].)

Reynolds instructed that California Courts "generally" apply the common-law test of employment in applying California statutes referring to "employees". (*Id.*, 32 Cal.4th, at 491.) Appellants sue respondents for wages and damages under Labor Code Sections 1194 and 1194.2 which provide causes of action for "an employee". Post-Reynolds, appellants must now demonstrate the inapplicability of the "general" rule and that, as applied to this case, the Legislature intended to depart from application of the common law understanding of who qualifies as an employer. (*Id.*, at 492, fn. 8.)

Accordingly, appellants here re-articulate the initial paragraph of the "Issues Presented" to further identify as an issue:

Whether appellants' private right of action pursuant to Labor Code Sections 1194, 1194.2 incorporates the principles of employer-liability as defined in Industrial Welfare Commission Order 14?

Because resolution of original issues Nos. 1(a. and b.) and 2(a. and b.) are

contingent on the outcome of this issue, appellants will address it first in the Argument, *infra*.

INTRODUCTION[2]

In S.G. Borello and Sons v. Dept. of Industrial Relations, this Court forcefully emphasized that remedial employment statutes should be construed with "consideration of the remedial purpose of the statute, the class of persons intended to be protected," and with "particular reference to the 'history and fundamental purposes' of the statute". (*Id.* (1989) 48 Cal.3d 341, 351, 353-354.) California's minimum wage law, which concurrently established the Industrial Welfare Commission (IWC), was the immediate result of the women's suffrage movement in this state. Although the enabling statute and the Commission's ensuing orders addressed child labor, both the statute and the Commission's orders were driven by the emerging political voice of adult women and by the growing public recognition of their needs. Both statute and orders overwhelmingly focused on safeguarding adult working women. The largest single group of adult working women in California, and the ones whose needs the IWC addressed in its initial orders, were seasonal employees in an agriculturally-related industry - -the fruit and vegetable canning industry.

Appellants here are the heirs to those initial workers: they (and some 180 additional crew members) are seasonal employees in agriculture - - in this instance in fields instead of in processing plants. Thus, appellants truly are the

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[2]Appellants' counsel express their appreciation to Amadis Sotelo Leal and Cassandra Seebaum for their extraordinary research that supports this brief.

class of persons who are the intended beneficiaries of the minimum wage law and of the Commission's promulgations. (Borello, *supra*, 48 Cal.3d, at 355. By virtue of the Commission's promulgations, respondents are liable for appellants' unpaid wages as their employers.

This brief presents three arguments. Argument I will demonstrate that in creating the Commission and empowering it to regulate wages, and in providing the private cause of action at issue here, the Legislature intentionally and explicitly departed from common-law principles of the employment relationship. The Legislature further delegated to the IWC co-equal legislative powers to regulate wages and other working conditions and assign liability therefore, a co-equal power that has been recognized for nearly 90 years all branches of California government including this Court. As an integral part of that scheme, the Legislature further created a private right of action, co-extensive with the IWC's promulgations, to enable aggrieved workers to enforce those very promulgations.

Argument II will demonstrate that in its 1916 initial exercise of delegated powers, the Commission elected to assess employer liability for compliance with its mandates protecting adults (as well as child workers) against those who "suffered or permitted [persons] to work." The IWC borrowed this definition of employer liability from the established child-labor laws of some twenty states (as well as from the model legislation being advocated nationally by such groups the Commissioners for Uniform State Laws), a definition those states' courts were already uniformly applying identically to the position appellants advocate here. Pursuant to the well-

established state court interpretations that the IWC adopted in 1916 - and has since continuously maintained - respondents are appellants' employers for purposes of Commission-created protections. Argument II further will demonstrate that in 1947, the Commission elected to further broaden the reach of employer liability by legislating an additional, alternative definition establishing employer liability for any person who "exercises control . . . over wages, hours or [those] working conditions" found within the Commission's orders. Overwhelming evidence in this case establishes that respondents indeed exercised exactly that control over appellants and that their actions were responsible for appellants laboring without compensation.

This Court recently addressed application of the second, "exercises control" definition in Reynolds v. Bement, in the narrow context of immunity of the corporation's agents from liability, a core principle of corporate structure. (*Id.* (2005) 36 Cal.4th 1075.) The Court found that the IWC's "exercises control" definition was insufficiently specific to manifest the Commission's intent to impose employer liability on corporate agents in the face of this historic principle of corporate organization that had its source in the common law. Appellants here do not present the Reynolds issue; this case does not assert liability against any individual by virtue of her or his role as a corporate agent, and does not implicate the special consideration accorded corporate agents.

Argument III will demonstrate that respondent APIO INC. is further liable in contract to many of these workers who are third-party beneficiaries of the agreement between that respondent and the workers' nominal employer.

That agreement included a provision to ensure compliance with the applicable wage laws, a provision for which the workers were the intended beneficiaries as a matter of law, but which respondent APIO's breach precluded performance.

PROCEDURAL HISTORY

Appellants MIGUEL MARTINEZ, ANTONIO PEREZ CORTES, HILDA MARTINEZ OTILIO CORTES CATARINO CORTES and ASUNCION CRUZ filed suit in the superior court against respondents CORKY N. COMBS and LARRY D. COMBS, individuals d/b/a COMBS DISTRIBUTION CO. (hereafter, collectively "COMBS"), respondent JUAN RUIZ, as well as one Isidro Munoz d/b/a Munoz & Sons, and various DOES for damages and penalties and--acting for the interests of the general public--for restitution and injunctive relief. [Appellants' Appendix (hereafter, "App.") 1-10.][3] Appellants subsequently filed a First Amended Complaint For Injunctive Relief, etc. (hereafter, "Complaint") adding respondent APIO, INC. (hereafter, "APIO") as a defendant.[4] [App. 17-31.]

The Complaint alleged that each respondent (plus defendant Isidro

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[3]The parties are proceeding by appendix in lieu of clerk's transcript pursuant to Rule of Ct. 5.1 [App. 1523-1524, 1525-1527].

[4]For convenience, appellants refer to CORKY N. COMBS and LARRY D. COMBS, individuals d/b/a/ COMBS DISTRIBUTION CO., JUAN RUIZ and APIO, INC. as "respondent(s)". This term does not include other defendants in the proceedings below who are not parties to these appeals, such as Isidro Munoz. We will use the terms "appellants" and "plaintiffs" interchangeably to refer to the farmworkers.

Munoz, and certain other named persons)[5] "employed" each plaintiff and other members of the general public pursuant to oral agreements for varying periods during the 2000 strawberry season[6], primarily to harvest strawberries, and from time to time to perform other tasks related to growing and harvesting strawberries. [App. 20, ¶ 17.] As relevant to this appeal, appellants, suing individually, alleged that all respondents are liable for: failure to pay California minimum wage [App. 21 ¶¶ 24-26] and for liquidated damages arising from failure to pay minimum wage [App. 21 ¶¶ 27-28]. Appellants also alleged a claim as third party-beneficiaries for breach of contract against APIO. [App. 23-24 ¶¶ 40-45.] Acting for the public interest, appellants further alleged against all respondents violations of California's unfair competition law (Bus. & Profs. Code, §§ 17200 *et seq.*) [App. 25-27 ¶¶ 56-63].

COMBS and JUAN RUIZ denied all allegations and asserted affirmative defenses. [App. 54, *cf.*, App. 14-16.][7] Following the overruling of its

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[5]The Complaint further alleged that one Elias Ramirez and one Ernesto Ramirez also "employed" and further "exercised control over the wages, hours and/or working conditions" and further caused the violations that aggrieved plaintiffs and members of the general public. The Complaint, however, did not name the Ramirezs as defendants inasmuch as each had previously filed a bankruptcy petition. [App. 19-21, ¶¶ 13-16, 20-23 (*id.*).]

[6]The "2000 strawberry season" references the calendar year in which the strawberries were harvested. The fresh market strawberry harvest commenced in February and was gradually succeeded by the cannery/freezer-berry harvest (of the same crop) in late May to mid-June. Planting and cultivation of this crop commenced in August-October, 1999. [App. 186, at "pp. 42-43"), 188-189 (at, "pp 49-53, 56"); App. 841; App. 903; App. 944.]

[7]Respondents CORKY and LARRY COMBS dba COMBS DISTRIBUTION CO., and JUAN RUIZ, have been represented at all times by the same counsel, Terrence O'Connor. At various times all parties have resorted below to the convenience of referencing all of Mr. O'Connor's parties (continued...)

demurrer, APIO also denied all allegations and asserted various affirmative defenses. [App. 95-99, 103-104].]

The clerk entered default against Isidro Munoz [App. 100-102] and proceedings against him were subsequently stayed as a consequence of his filing a petition in bankruptcy.[8]

APIO, and later COMBS and RUIZ, filed separate motions for summary judgment and/or summary adjudication [App. 105-332, 333-483], which were granted following hearing. [App. 1490-1511 (Rulings On Motions For Summary Judgment--hereafter, "Rulings".] Judgments of dismissal in favor of APIO, CORKY and LARRY COMBS and JUAN RUIZ were entered. [App. 1512-1524.]

Plaintiffs filed timely notices of appeal. [App. 1525-1526.] On November 18, 2003, the Court of Appeal, Second Appellate District, Division Six, reversed the grant of summary judgment on a contractual cause of action against the COMBS respondents, and affirmed the dismissals on the substantive Labor-Code violations as to all respondents, and the breach of contract claim against APIO. The Court of Appeal did not address the two causes under the Unfair Competition Law, which are predicated upon the

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[7](...continued)
as the "Combs defendants". However, the Complaint alleges claims separately as to RUIZ, and does not allege that he acted at all times as an agent for the COMBS. (*See, e.g.*, App. 19 - 21 ¶¶ 7-9, 17-22.)

[8]On September 18, 2002, Munoz was granted a discharge under Title 11 U.S.C. Section 727 (Bankruptcy Code, Chapter 7) in the United States Bankruptcy Court for the Central District of California (Case No. ND 02-11142-RR).

various Labor Code and contractual claims.[9]

This Court granted Review on March 3, 2004, but deferred briefing pending resolution of Reynolds v. Bement, decided on August 11, 2005. On November 3, 2005, the Court ordered briefing in this appeal.[10]

STATEMENT OF FACTS

Former defendant Isidro Munoz (hereafter, "Munoz") contracted to cultivate and harvest strawberries for the 2000 strawberry season in three locations in southern San Luis Obispo County and one in northern Santa Barbara County. Two of the San Luis Obispo County fields were cultivated and harvested for fresh-market berries pursuant to contracts with respondent APIO. The third San Luis Obispo County field was cultivated and harvested for fresh-market berries pursuant to contracts with the COMBS and/or respondent JUAN RUIZ (hereafter, "RUIZ"). [App. 186, at "p. 43"[11]), App.

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[9]Appellants' UCL causes are predicated upon the viability of the various substantive-law allegations in the other causes. The superior court understood this, and dismissed these causes, accordingly.

[10]Appellants here abandon appeal as to their Complaint's third cause of action (failure to pay contractual wage), fourth cause of action ("waiting time penalties" pursuant to Labor Code Section 203) and fifth cause of action (penalties for failure to provide wage statements). (App. 22-23.)

[11]Certain deposition records incorporated in the proceedings below were reproduced as 4 pages of deposition transcript per sheet. Where multiple deposition transcript pages appear on a single page of appendix a secondary "depo" page reference will specifically identify the relevant transcript portions.

839, 840, 843-844;[12] App. 847-848][13]

At various dates during May and June 2000, Munoz ceased delivering the fruit from these fields to respondents as fresh-market berries, and began delivering them as cannery/freezer berries to another entity, Frozsun Foods, Inc.,[14]

A. Appellants Were Directly Hired By Isidro Munoz

Munoz hired at least 180 workers including Appellants for the 2000 strawberry season, to weed the fields and harvest the berries. During peak harvest, the workers were organized in three crews of approximately 60 workers each. Although these crews were assigned primarily to particular fields, all crews worked in all the fields at various times as needed. [App. 199, at "pp. 152-153"; App. 242, at "pp. 18-20"; App. 243,at "pp. 165-166"); App. 746-753; App. 771-777; App. 789-795; App. 806-813; App. 839-840; App. 1480-1481 ¶¶ 5-7.]

As the 2000 harvest season progressed, from time to time Munoz failed to meet his payroll, and as non-payment of wages accrued, workers

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[12]"Isidro Munoz" and "Isidro Munoz, Sr." refer to the same person.

[13]The Santa Barbara County fields were cultivated and harvested for fresh-market berries pursuant to oral agreements with the Ramirez Brothers who were not named as parties in this litigation. [App. 845.]

[14]On August 5, 2002, appellants filed an action against Frozsun Foods, Inc. in the Superior Court of San Luis Obispo County (Case No. CV 020752), alleging claims for the 2000 strawberry season virtually identical to the present action, and simultaneously filed a Notice of Related Case and requested that that case be coordinated with the instant action pursuant to Rule of Court 804. On October 1, 2002, Plaintiffs and Frozsun filed a joint motion for stay of all proceedings. On October 9, the Superior Court entered an order staying all proceedings in the Frozsun litigation pending either further order of that court or finality of the ruling in this appeal.

increasingly left his employ. Around the first of June, Munoz consolidated his remaining workers into a single crew. By late June, Munoz had lost his labor force and was unable to continue harvesting. [App. 751 ¶¶ 17-18; App. 776 ¶¶ 17-18; App. 794 ¶¶ 8, 16; App. 812 ¶¶ 18-19; App. 841-842, 843; App. 1482-1483 ¶¶ 9-11; App. 1486 ¶¶ 13-14.]

B. Isidro Munoz Provided Appellants' Labor To Harvest Strawberries Under Contract To Respondent APIO

Three years earlier, on July 23, 1997, APIO and Munoz had executed an APIO form contract entitled a "Farmer Agreement," pursuant to which Munoz cultivated and harvested various crops for APIO over a period of four years as further specified in further annual addendums referenced as "Crop Exhibits". [App. 129 ¶ 3; App. 135, 138-151 ("Farmer Agreement"/portion of Exhibit A to Murphy Dec., *supra*--hereafter, "Farmer Agreement"); *see*, App. 138 ¶ 1.A.; *cf.*, App. 136 at introductory paragraph of text ("Crop Exhibit"/(portion of) Exhibit A to Murphy Dec., *supra*--hereafter, "Crop Exhibit"); App. 192, at "pp. 82-83".]

Also in 1997, APIO subleased to Munoz a parcel of 42 acres in San Luis Obispo County (hereafter referenced as the "Oceano field") for strawberry production. This sublease extended through August 14, 2000. [App. 129 ¶ 4; App. 152-159 ("Sublease"/Exhibit B to Murphy Dec., *supra*--hereafter, "Oceano Sublease", *see*, 154 ¶ 4); App. 995 Line 19 - App. 996 Line 11; App. 998 Lines 9-23.]

On September 15, 1999, APIO and Munoz executed as an addendum to the Farmer Agreement the annual "Crop Exhibit" for the production of strawberries to be harvested in 2000. This document specified that Munoz

would cultivate and harvest strawberries on 31 acres therein referenced as the "Phelan and Taylor Ranch" [15] and on 25 additional acres referenced therein as the "Apio Lease".[16] [App. 129 ¶ 3; App.135-137 (Crop Exhibit, *supra*, *see*, 136 ¶ 6); *accord*, App. 840; App. 854-855 ("Crop Exhibit".]

Simultaneously, APIO subleased to Munoz the Zenon field also for strawberry production. [App. 129 ¶ 5; 160-164 ("Sublease"/Exhibit C to Murphy Dec., *supra*--hereafter, "Zenon Sublease"); App. 995 Line 19 - App. 998 Line 8.]

Munoz concurrently executed a secured promissory note in favor of APIO providing for repayment of a loan from APIO (characterized as "advances" totaling $163,000) toward production costs of the strawberry crop.

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[15]The "Phelan and Taylor Ranch" was the "Oceano field." The record requires close attention regarding field references: Munoz and APIO's witnesses and documents below variously reference the Phelan and Taylor Ranch by that name as well as by the names "Taylor Ranch", "Oceano ranch" or "Oceano field". [App. 129 ¶ 4; App. 152-159 (Oceano Sublease, *supra*); App. 995-998.] The field was located outside the town of Oceano, adjacent to the intersection of the railroad tracks and 22nd Street. [App. 839, 847.] Appellants and other field workers knew this location as "Oceano". [App. 747 ¶ 5; App. 772 ¶ 5; App 790 ; App. 807.] Appellants hereafter will reference this location as the "Oceano field".

The record is silent as to the reason for the Oceano field's reduction in size from 42 acres pursuant to the July 1997 sublease [App. 153 ¶ 1.B. (Oceano Sublease, *supra*] to 31 acres at the time the September 1999 "Crop Exhibit" was executed. [App. 136 ¶ 6 (Crop Exhibit, *supra*).]

[16]Again, the record demands close attention regarding field references. Munoz and APIO's witnesses and documents below variously reference the "Apio lease" by that name as well as "Zenon ranch" or "Zenon field" and "Mesa ranch". [App. 995, 1053; App. 839.] The field was located in the Nipomo Mesa area in southern San Luis Obispo County, adjacent to the intersections of Zenon Way and Chesapeake Place. [App. 839; 847.] Appellants and other field workers knew this locations as "Mesa 2". [App. 747 ¶ 5; App. 772 ¶ 5; App 790; App. 807.] Appellants hereafter will reference this location as the "Zenon field".

At least $50,900 of these advances represented Munoz' rent for the Oceano and Zenon fields, payable to APIO. Munoz and APIO further entered a "Security Agreement" [App. 130-131 ¶¶ 10-12; App. 137 ¶ 15 (Crop Exhibit, *supra*); App. 165-167 ("Secured Promissory Note"/Exhibit D to Murphy Dec); App. 851-853 ("Security Agreement"/Exhibit D to Munoz Dec., *supra*); App. 998 Line 9 - App. 1002 Line 25.]

Munoz delivered fresh-market strawberries from the Oceano and Zenon fields exclusively to APIO from March through May, 2000. The berries were packed in boxes bearing APIO's labels. [App. 187-188, at "p. 47 line 21 through p. 50 line 2"; "p. 50 line 15 through p. 51 line 6"); App. 190.] Munoz' workers, including appellants, weeded and harvested these fresh-market berries. Substantial wages remain unpaid for this work, as well as for subsequent work harvesting cannery berries in these same fields that were delivered to Frozsun. [App. 747-748 ¶¶ 3, 5, 8; 751 par. 18; 752 ¶¶ 19-20; App. 772-773 ¶¶ 3, 5, 7; 776-777 ¶¶ 18-19; App. 790-791 ¶¶ 3, 5, 7; 794-795 ¶¶ 17-19; App. 807-808 ¶¶ 3, 5, 8; 812-813 ¶¶ 19-20; App. 822-827 .]

C. Isidro Munoz Provided Appellants' Labor to Harvest Strawberries Under Contract to the "COMBS" Respondents

1. Munoz' Relationship With CORKY and LARRY COMBS

Munoz began dealing with COMBS in the spring/summer harvest of 1998. In return for two loans from COMBS totaling $80,000, Munoz contracted to harvest fresh-market strawberries exclusively for COMBS from the El Campo field[17] during the 2000 season, or until the loans were repaid.

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[17]The "El Campo" field consisted of approximately 40 acres in southern (continued...)

[App. 843; App. 861 ("Sales Agreement Between Isidro Munoz, Grower and Combs Distribution Co."/ Exhibit H to Munoz Dec., *id.*--hereafter, "COMBS Sales Agreement"); App. 926, 930.] In late May, COMBS advanced an additional $30,000 to Munoz against estimated future proceeds [App. 910 .]

Munoz' workers, including appellants, weeded the El Campo field and harvested fresh-market berries from it which were delivered to COMBS. Substantial wages remain unpaid for this work, as well as for subsequent work in this field harvesting cannery berries delivered to Frozsun. [App. 747-748 ¶¶ 3, 5, 8; 751 ¶ 18; 752 ¶¶ 19-20; App. 772-773 ¶¶ 3, 5, 7; 776-777 ¶¶ 18-19; App. 790-791 ¶¶ 3, 5, 7; 794-795 ¶¶ 17-19; App. 807-808 ¶¶ 3, 5, 8; 812-813 ¶¶ 19-20; App. 822-827.]

2. Munoz' Relationship With JUAN RUIZ

Munoz first contacted COMBS in 1998 through JUAN RUIZ, and all of Munoz' communications throughout his relationship with COMBS were through RUIZ. [App. 844; App. 926.]

Munoz knew RUIZ as COMBS' field representative. RUIZ orally translated the COMBS contract into Spanish for Munoz when he executed it in October, 1999. Munoz saw RUIZ in the El Campo field on numerous occasions between March and May, 2000, and RUIZ came on a daily basis

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[17](...continued)
San Luis Obispo County, near the city of Arroyo Grande, located between El Campo Road and California Route 1. [App. 839, 847, and Exhibit A thereto); App. 903.] Although Munoz and the COMBS witnesses referenced the field as "El Campo", appellants, other field workers and their supervisors often referenced this field as "Mesa Uno" or "Mesa 1". [App. 747 ¶ 5; App. 772 ¶ 5; App. 790 ¶ 5; App. 807 ¶ 5; App. 943, 955.] Appellants hereafter will reference this location as the "El Campo field".

between at least April and May to tell Munoz' crew how much fruit to pick, which fruit to pack or discard, and to ensure a quality pack. [App. 843-844; App. 861 (COMBS Sales Agreement, *supra.*).]

RUIZ himself testified inconsistently about his relationship with the COMBS. RUIZ first testified that he was employed by the COMBS between September, 1999, and August, 2000. Subsequently, RUIZ then modified his testimony to the effect that between January and June, 2000, he did not work for COMBS but rather worked for about 100 farmers or ranchers "helping them as much as I could". According to RUIZ' latter testimony, he only began work as COMBS' field representative in June, 2000. RUIZ acknowledged that LARRY COMBS did not speak Spanish so that if a "farmer" wanted to communicate with COMBS, he would ask RUIZ to speak for him. [App. 975, 976, 977.]

During the 2000 strawberry season, RUIZ used a business card which identified him as "Field Representative" for "COMBS DIST." of Santa Maria. [App. 906 line 14 -- 907 line 6; App 911.]

ARGUMENT I

THE LEGISLATURE INTENDED THAT LABOR CODE SECTION 1194 PROVIDE A PRIVATE REMEDY AGAINST PERSONS REGULATED BY THE IWC FOR VIOLATION OF IWC-FIXED WAGES AND OTHER CONDITIONS

Appellants sue respondents to recover unpaid minimum wages and liquidated damages as provided in Labor Code Sections 1194 and 1194.2, as well as unpaid contractual wages. [App. 21-22.] Labor Code Section 1194, subd. (a) provides,

> Notwithstanding any agreement to work for a lesser wage, any *employee* receiving less than *the legal minimum wage . . . applicable to the employee* is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage . . . .

(*Id.*, emphases added.) Section 1194.2 further provides,

> In any action under . . . Section 1194 to recover wages because of the payment of *a wage less than the minimum wage fixed by an order of the commission*, an *employee* shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. . . .

(*Id.*, emphases added.) As Section 1194.2 merely provides an additional remedy to persons who can claim under Section 1194, appellants hereafter refer to both provisions collectively as "1194."

Section "1194" neither mentions the word "employer" nor explicitly cites to the "definitions" in IWC Orders, nor otherwise defines the term "employee". Nor does IWC Order 14 expressly refer to Section 1194.[18]

Appellants were employed in an agricultural occupation as defined by California Industrial Welfare Commission (hereafter, "IWC", or "Commission") Order 14[19] (Cal.Code Regs., title 8, § 11140 (hereafter "Order 14") subds. 1, 2(D); App. 18, ¶ 3.) Relying upon the wage order definitions

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[18]The IWC's statement as to the basis upon which Order 14 is predicated does reference Labor Code Sections 1173, 1178 and 1178.5 with respect to its establishment of minimum wages in ¶ 4.

[19]The IWC has promulgated 18 Orders that remain in force today, 16 relating to specific industries and occupations, one general minimum wage order that applies (with certain exclusions) to all California employers and employees, and one Order implementing the Eight-Hour-Day Restoration and Workplace Flexibility Act. Order 14 governs all persons "employed in an agricultural occupation" as defined in the order. (Order 14, *supra*, subds. 1, 2(D); Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575, 581.) The IWC's Orders are commonly referenced as "wage orders". Both terms will be used interchangeably in this brief.

of "employer", appellants assert that respondents were liable for the unpaid wages, damages and ensuing penalties. [App. 20-21, ¶ 21 (Complaint, *supra*); App. 20 ¶ 20 (Complaint, *supra*).]

Order 14 (as do the IWC's other Orders) defines an employer in part as "any person . . . who **directly or indirectly, or through an agent or any other person**, *employs* . . . any person." (*Id.*, subd. 2(F).) The Order further defines "[E]mploy" as "to **engage, suffer, or permit to work**". (*Id.*, subd. 2(D).) Read together, sub-divisions 2(D) and 2(F) define an employer as, **any person . . . who directly or indirectly, or through an agent or any other person . . . engages, suffers, or permits any person to work**. Appellants hereafter reference this definition as the "suffer or permit to work" test.[20] As demonstrated below, the "suffer or permit to work" definition has been an unbroken feature of California's wage orders since Order No. 1 was adopted February 14, 1916. [*See, generally*, App. 550-671, "IWC Records", at Exhibits 1 through 24); text, at 55-58, 62-66, *infra*.]

Order 14 (like the Commission's other Orders) alternatively defines an "employer" as "any person . . . who **directly or indirectly, or through an agent or any other person . . . exercises control over the wages, hours or working conditions of any person**." (*Id.*, subd. 2(F).)

In Reynolds v. Bement, *supra*, this Court examined whether a private plaintiff could rely on the "exercises control" employer definition in IWC Order No. 9 to assert a cause of action pursuant to Section 1194 for unpaid

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[20]The Order further defines "employee" as "any person employed by an employer." (Cal.Code Regs., tit. 8, § 11140.2(E).)

overtime wages against a corporate officer acting in the scope of his agency. Citing the "rule" in Metropolitan Water Dist. v. Superior Court (2004) 32 Cal.4th 491, 500 that California courts have "generally" applied the common-law test of employment in construing California statutes referring to "employees", the Court found that this 1947 employer definition was insufficiently specific to manifest the Commission's intent to impose liability against the historic and well-established immunity - - an historic core principle of corporate organization - - for these corporate agents,. (*Id.*, at 491.) Appellants here do not re-argue the Reynolds issue. This case does not raised the question of employer liability in the context of corporate agent liability nor in opposition to any other explicit, distinct public policy underlying historic considerations.

The cardinal rule of construction is to ascertain the intent of the promulgating body so as to effectuate the intended purpose of the legislation. (Code Civ. Proc., § 1859; People v. Pieters (1991) 52 Cal.3d 894, 898; People v. Overstreet (1986) 42 Cal.3d 891; Cal. State Restaurant Assn. v. Whitlow (1976) 58 Cal.App.3d 340, 344-345; California Grape, etc. League v. Industrial Welfare Com. (1969) 268 Cal.App.2d 692, 698.) The "general" doctrine articulated in Metropolitan is subject to California's statutory mandate that a particular intent will control a general one that is inconsistent with it. (Code Civ.Proc., § 1859.) Consistent with this principle, this Court in Reynolds invited plaintiffs in other circumstances to demonstrate that the history and purposes of Section 1194 did manifest a legislative intent to depart from the common law understanding of who qualifies as an employer. (*Id.*, at

491-492 fn. 8.)

This case presents those circumstances. Appellants will demonstrate that, outside the narrow context of historic immunity for corporate agents, the Metropolitan "general rule" is inconsistent with the establishment of the IWC and the delegation to it of concurrent legislative powers to establish and regulate minimum wage. Appellants will here demonstrate that: *(1)* the Legislature specifically intended to depart from the common law in creating the Industrial Welfare Commission; *(2)* the Legislature delegated to the Commission co-equal legislative powers to regulate minimum wage and other conditions of employment - - thus, the Metropolitan assumption must also yield to the long-standing doctrine that disfavors implied repeal of IWC Orders, a doctrine recognized historically by the legislative and executive branches, and confirmed by this Court in Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 700-701; and, *(3)* Section 1194, through its pre-Code predecessor (Stats. 1913, Ch. 324, pp. 632, 637, § 13), was an integral component of this act, and was specifically intended to provide a private cause of action co-extensive with the IWC's exercise of its delegated powers to regulate wages and conditions, and Section 1194 actions arise solely by virtue of the Commission's promulgations.

A. The Legislature Intended to Depart From Common-Law Employment Principles in Creating the Industrial Welfare Commission and Delegating to It Power to Regulate Minimum Wage For Adults and Minors and to Fix Responsibility for Compliance

Legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees are remedial,

and are to be liberally construed and "given liberal effect to promote the general object sought to be accomplished." (Industrial Welfare Com., *supra*, 27 Cal.3d, at 702.)[21] The employment relationship under remedial legislation should be construed with "particular reference to the 'history and fundamental purposes of the statute'" and "with deference to the purposes of the protective legislation." (S.G. Borello & Sons, *supra*, 48 Cal.3d, at 351, 353, interpreting the Workers' Compensation Act.) The wider historical circumstances of the adoption or enactment are persuasive in divining intent. (American Tobacco Co. v. Superior Court (1989) 208 Cal.App.3d 480, 486; Steilberg v. Lackner (1977) 69 Cal.App.3d 780, 785.)

1. Wage Regulation For Adult Women and Children in California Was the Product of a Reform Movement That Specifically Departed From Common-Law Principles of Employment

Adoption of minimum wage in California was part of the general movement in California and the rest of the nation for remedial labor legislation that characterized the "Progressive Movement" which supported Theodore Roosevelt on the national stage and Hiram Johnson within California. (*See, e.g.*, Elizabeth Brandeis, *Labor Legislation: Minimum Wage Legislation*, in Commons, etc., 3 HISTORY OF LABOUR IN THE UNITED STATES 1896-1932 (1935) 501-539, 514-515, 518;[22] Nash, *The Influence of Labor on State*

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[21]Ironically, the "general rule" favoring the common-law test of employment was relied on in Metropolitan Water Dist., supra, to extend benefits to unprotected workers. (32 Cal.4th, at 504-508.)

[22]The original Commons' treatises are in the collection of the University of California-Berkeley library. They were re-issued in 1966, in REPRINTS OF ECONOMICS CLASSICS, Augustus M. Kelley, Publishers, New York. (continued...)

Policy 1860 - 1920 (1963), 42 CALIFORNIA HISTORICAL SOCIETY QUARTERLY No. 3, 241, 245-246; Hundley, *Katherine Philips Edson and the Fight for the California Minimum Wage 1912-1913* (1960), 29 PACIFIC HISTORICAL REVIEW No. 3, 271, 271-271; Jacqueline R. Braitman, KATHERINE PHILIPS EDSON: A PROGRESSIVE-FEMINIST IN CALIFORNIA'S ERA OF REFORM, Dissertation, University of California/Los Angeles (1988) pp. 195-203;[23] Susan Diane Casement, KATHERINE PHILIPS EDSON AND CALIFORNIA'S INDUSTRIAL WELFARE COMMISSION 1913 - 1931, *thesis* (1987), Kansas State University.)

In California, credit for the minimum wage belongs to the California Federation of Women's Clubs, led by Katherine Philips Edson, supported by the Progressives (who by 1913 occupied a solid majority in the California legislature) overcoming the active hostility of organized labor. (Brandeis, *supra*, at 507, 513-515; Nash, *supra*, at 245-246; Braitman, *supra*, at 195-203; Hundley, *supra*, at 273-277; Earl C. Crockett, THE HISTORY OF CALIFORNIA LABOR LAW LEGISLATION 1910-1930, *thesis* (1931) Graduate Division of the University of Pennsylvania, pp. 66-77;[24]

Next to the suffrage, minimum wage and child labor were the key

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[22](...continued)
These, too, are in the University of California library.

[23]The Braitman disseration, issued through University Microfilms International Dissertation Information Service, is on file at the California State Library in Sacramento.

[24]The Crockett thesis, is available through Interlibrary Loan from the Robert Crown Law Library, Stanford Law School, Stanford University.

thrusts of the women's movement. In states such as California where women's suffrage had been achieved,[25] their newly-enlarged political power was focused overwhelmingly on minimum wage and other remedial labor legislation:

> Women and children figure more prominently in the legislation proposed at the first bifurcated session than ever before in the history of the California legislature. Undoubtedly this is due in a considerable degree to the enfranchisement of women. Women's clubs have exerted a powerful influence in the preparation and introduction of bills for women and children. . . . .
>
> . . . . . The woman who works is to occupy a legislative storm center after the interregnum. That storm will be precipitated by the hearings on the measures analyzed herewith:[26]

(George A. Van Smith, "Proposed Legislation", SAN FRANCISCO CALL, February 12, 1913, p. 1[?]; *see*, *also*, Brandeis, *supra*, at 506-507, 513-515; Nash, *supra*, at 245-246; Braitman, *supra*, at 108, 174, 410; Casement, *supra*, at 16-18; David Von Drehle, TRIANGLE: THE FIRE THAT CHANGED AMERICA (2003) 15, 196, 214-215.[27])

2. The Reform Movement Adopted the National Model For Defining Employer Liability: "Suffer or Permit to Work"

In 1911, the National Consumers' League,, the organization to which

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[25]Women's suffrage was achieved in California on October 10, 1911 by special election. (Braitman, *supra*, at p. 141.)

[26]The Van Smith article then proceeds to describe the "Women's Eight Hour Law" (S.B. 466); the "Welfare Commission" Law (S.B. 1134 and A.B. 1251); and the Minimum Wages for Women and Minors" law (S.B. Nos. 8 and 24, and A.B. No. 44). S.B. 1251 became the bill selected by Philips Edson as the vehicle for enacting the IWC.

[27]Mr. Von Drehle's book was published by the Atlantic Monthly Press, of New York City.

Louis Brandeis and Felix Frankfurter lent their efforts and expertise, began a campaign to secure state laws regulating wage rates for women and children through advocacy of model bills. This program was supported not only by the California Consumers' League, but also by, among others, the California Federation of Women's Clubs, led by Katherine Philips Edson. (Goldstein, Linder, Norton & Ruckelshaus, *Enforcing Fair Labor Standards In the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment* (April 1999) 46 UCLA LAW REVIEW 983 (hereafter, "Goldstein, *et al.*"), 1033-1034; Brandeis, *supra*, at 507-514, 517; Nash, *supra*, at 245-246; Hundley, *supra*, at 273-274; Braitman, *supra*, at 195, 200-201, 410; Casement, *supra*, at 2; Von Drehle, *supra*, at 196-199, 214-215.)

> These reformers sought to eliminate the easy evasions of the existing [child labor and women's employment] law occurring outside factories, which were aided by the factory owners' disingenuous claims of ignorance about conditions in the sweatshops with which they contracted [for labor].

(Goldstein, et al., supra, 46 UCLA LAW REVIEW, at 1033-1034.)

(a) "Suffer or Permit to Work" Was Already Understood to Regulate Work Which the Business Owner Reasonably Knew Was Being Performed For Its Benefit Regardless of the Owner's Knowledge of a Violation

State legislatures in the United States had begun to use the concept of "suffer or permit" to regulate child employment in the mid-1800s. Connecticut was the first state to enact a child labor statute embodying the "suffer" standard in 1855, and Maine followed in 1857. (Goldstein, *et al.*, at 1016-1018, 1030.)

Connecticut's and Maine's enactments followed the experience in Massachusetts which in 1842 had enacted a law imposing a ten-hour day for

children under twelve in manufacturing establishments, but under which the company was not liable unless it acted "knowingly." The "knowingly" provisions led to easy evasion since it was only necessary for the employer to say that he did not know that any children under 12 were employed since, if it had occurred, the children must have lied about their ages. (Goldstein *et al.*, *id.*, at 1031, *citing*, Otey, *The Beginnings of Child Labor Legislation in Certain States: A Comparative Study* (1910) 6 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES, S.DOC. No. 61-645, at 78.)

The intended reach of "suffer or permit" is illustrated in New York State's subsequent progressive adoption of labor laws. An 1876 statute had prohibited employment of children in certain fields or for immoral or obscene purposes.

> Unsurprisingly, some owners described injured children as "'not employees'." In 1881, the state legislature enacted a criminal statute providing that "[a]ny person who shall suffer or permit any child under the age of sixteen to play any game of skill or chance in any place wherein. . . shall be guilty of a misdemeanor." Five years later, the legislature adopted this standard in regulating the employment of women and children in manufacturing establishments. This law . . . was regarded as "the real beginning of labor legislation in New York State.

(Goldstein *et al.*, *supra*, at 1032-1033, *quoting*, Hurwitz, THEODORE ROOSEVELT AND LABOR IN NEW YORK STATE 1880-1900 (1943), at 45.)

By the turn of the century, New York was the leading industrial state in the nation, and in New York City alone, nearly 275,000 children were estimated to be working. (Felt, HOSTAGES OF FORTUNE: CHILD LABOR

REFORM IN NEW YORK STATE (1965), at 1, 39.) Efforts to regulate this employment became a major public issue. (*Id.*) The "suffer or permit" language appeared in the 1903 revisions of the New York State provisions on women's hours, the hours of child labor, and restrictions on child labor. (Callcott, CHILD LABOR LEGISLATION IN NEW YORK (1931) 27-28; Felt, *supra*, 52.) One bill, the Finch-Hill Factory Act, made the employer directly responsible for any illegally-working child found in his factory.

> Under the old factory law, employers had often avoided prosecution by claiming that the underage child worker must have "wandered in" for they personally had never hired the youngster. The Finch-Hill Act made the mere finding of a child under fourteen *at work* in a manufacturing establishment evidence of illegal employment by providing that no child under fourteen could be "employed, permitted, or suffer to work" in a factory.

Felt, *id.*, p. 52.)

A New York court interpreted this law as imposing liability on the employer even without knowledge of the child's actual age and even though the child had misled the employer. (City of New York v. Chelsea Jute Mills (Mun. Ct. 1904) 88 N.Y.S. 1084, 1090.)

Moreover, courts began to adopt the view that customs and common practices in an industry not only served to impute knowledge and an opportunity for control to a business owner, but further proved that the custom or practice benefitted the owner. (Purtell v. Philadelphia & Reading Coal & Iron Co. (Ill. 1912) 99 N.E. 899.)

(b) "Suffer or Permit to Work" Was Understood to Regulate the Employees of Independent Contractors and to Defeat Contractual Relationships That Attempted to Privately Define the Employer Relationship

It was understood that these early state statutes employing the "suffer or permit" standard were designed to defeat contractual relationships that attempted privately to define the employer relationship by limiting it to a single person or entity. (Goldstein, *et al.*, *supra*, at 1042-1047.) As explained by Judge Learned Hand, these statutes regulating employment conditions "upset the freedom to contract" with respect to the control of those conditions. (Lehigh Valley Coal Co. v. Yensavage (2d Cir. 1914) 218 F. 547, 553.) As previously noted, a further goal was to eliminate owners' evasions through "permitting" work to be done at home or through intermediaries under the pretense that no employment relationship existed there. Indeed, the California Legislature in similarly regulating industrial homework, subsequently copied the IWC's definition of "employ" as meaning "to engage, suffer or permit". (Industrial Homework Act of 1939, Labor Code, § 2650, subd. (g); Stats. 1939, Ch. 809, p. 2364, § 1.)

The "suffer or permit to work" statutes were well recognized as distinct from the common-law principles of employment. Referring to its state child-labor statutes, the Oklahoma Supreme Court in 1913 analyzed:

> They very plainly say that no child under the age of 16 years shall be *employed, permitted, or suffered* to do the things which plaintiff was doing when he was hurt. The inhibition is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. The manifest purpose of the law is to positively prevent children of this age from doing work of this character, and each of the terms, "*employed*," "*permitted*," and "*suffered*," is given a distinct office in the general plan of prohibition. . . . The moving intent of the Legislature being to positively prevent children from engaging in hazardous work, the reasonable presumption is that it intended to apply an equally prohibitive force to each of the terms chosen, and that each term should be given its ordinary significance. If the statute went no farther

> than to prohibit employment, then it could be easily evaded by the claim that the child was not employed to do the work which caused the injury, but that he did it of his own choice and at his own risk; and if prohibited on the employment and *permitting* a child to do such things, then it might still be evaded by the claim that he was not employed to do such work, nor was permission given him to do so. But the statute goes farther, and makes use of a term even stronger than the term "*permitted*." It says that he shall be neither employed, permitted, nor *suffered* to engage in certain works . . . .

(Curtis & Gartside Co. v. Pigg (Okla. 1913) 1913 Okla. LEXIS 450, at pp. 12-13 [39 Okla. 31] (emphases added).) Indeed, "suffer or permit" was widely understood to impose regulation wherever the business owner had reason to know that work was being performed for his benefit. In New York, the language was held to

> cast[] a duty upon the owner or proprietor to prevent the unlawful condition, and the liability rests upon *principles wholly distinct from those relating to master and servant.* The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist.

(People ex rel. Price v. Sheffield Farms-Slawson-Decker Co. (App. Div. 1917) 167 N.Y.S. 958, *aff'd*, (N.Y.Ct. Appls. 1918) 225 N.Y. 25. (Emphasis added.)

These analyses are far removed from the "common-law principles" of employment "developed to define an employer's liability for injuries caused *by* his employee." (S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 351-352.)

3. "Suffer or Permit to Work" Was the Nationally- Recognized Model For Employer Liability When California Adopted Minimum Wage

The principles of "suffer or permit to work" quickly spread among the states. The New York amendments had been viewed as a major turning point in the effort to regulate work outside the factories by expanding the coverage

of the statute, and were in large part the result of the legislative drafting, and media campaigning of the newly-formed New York Child Labor Committee (NYCLC). The NYCLC in turn was organized in large part by persons associated with first the New York, and then the National, Consumers' League, the organization to which Louis Brandeis and Felix Frankfurter lent their efforts and expertise. "These reformers sought to eliminate the easy evasions of the existing law occurring outside factories, which were aided by the factory owners' disingenuous claims of ignorance about conditions in the sweatshops with which they contracted." (Goldstein *et al., supra*, at 1033-1034.)

After the revamped use of "suffer or permit" in New York State, the National Consumers' League (NCL), which selected the best provisions from state statutes for its model Standard Child Labor Law, adopted "employed, permitted or suffered to work" as its prohibition standard. (Goldstein *et al., id.*, at 1071-1072, *citing*, NATIONAL CONSUMERS' LEAGUE, CHILD LABOR LEGISLATION: SCHEDULES OF EXISTING STATUTES AND THE STANDARD CHILD LABOR LAW: HANDBOOK (1905) §§ 1-2, at 35.) As will be shown (pages 53-56, *below*), California's Industrial Welfare Commission, established a decade later, familiarized itself with these efforts in the process of adopting the "suffer or permit to work" language in California's wage orders.

The movement to ensure that employers did not avoid liability and undercut intended protection of both child and women workers through subterfuges premised on tort concepts of the common-law employment

relationship was well under way by the time the California Legislature took up the minimum-wage bill.

> By 1907, fourteen states already had on the books child labor laws containing the "permit or suffer to work" standard: Idaho, Illinois, Indiana, Kentucy, Maryland, Michigan, Minnesota, Missouri, Nebraska, New York, Oregon, Rhode Island, South Dakota, and Wisconsin. In addition, many states used the "permit" standard in their child or women's or other protective labor laws: Alabama, Arizona, California, Connecticut, Florida, Kansas, Maine, New Jersey, North Dakota, Oklahoma, Pennsylvania, Vermont, and Wyoming. . . . . By World War I, several more states had adopted the "employed, permitted or suffered to work" standard. For example, in 1913, Arizona enacted a law stating, "No female shall be employed, permitted or suffered to work in or about any mine quarry or coal breaker."

(Goldstein *et al.*, *supra*, at 1036-1037.) By 1915, at least twenty states regulated hours of labor performed by children using this expanded scope of accountability. (*Id.*, at 1039.)

The bill itself (Assembly Bill 1251) was selected by Katherine Philips Edson as a member of the executive board of the California Federation of Women's Clubs, who thereafter served as the bill's chief lobbyist on behalf of the California Federation of Women's Clubs. Edson is characterized as "the impetus behind" the IWC's creation. During this time, she consulted closely with Florence Kelley, the Executive Director of the National Consumers League. (Braitman, *supra*, at 176, 203; Casement, *supra*, at 2, 8, 15, 196.)

There is little room for doubt that the California Legislature and the Governor were well aware of these trends as they delegated to the Commission the power to fix wages and conditions for women and minors "*engaged* in any occupation, trade or industry." Thus, the Commission's authorization to establish minimum wages was not limited to protecting those workers who fell

within the then-common-law concept of "employment". The Act explicitly empowered the Commission, "to fix . . . [a] minimum wage to be paid to women and minors *engaged* in any occupation, trade or industry . . ." (Stats. 1913, *supra*, p. 635, § 6 (emphasis added).) The bill was approved by a wide margin, passing the Assembly by a vote of 46 to 12 and the Senate by 27 to 7. (Hundley, *supra*, at 276-277.)

This Court has endorsed "the distinction between tort policy and social-legislation policy [that] justifies departures from the common law principles" when considering a "remedial statutory purpose." (Borello, *supra*, 48 Cal.3d, at 352-353. Moreover, this Court recognized that adherence to a traditional common-law interpretation

> would suggest a disturbing means of avoiding an employer's obligations under . . . California legislation intended for the protection of "employees," including . . . laws governing minimum wages [and] maximum hours . . .

(*Id.*, p. 359.)

4. The Legislature Remained Fully Apprised of Subsequent IWC Actions Including Definitions That Determined or Affected Remedies and Liabilities

The IWC reported its proceedings to the Legislature biennially. (Stats. 1913, supra, p. 637, § 15.) Indeed, Orders Nos. 1 and 2, establishing respectively minimum wage and working conditions in the fruit and vegetable canning industry, were printed verbatim in the Commission's SECOND BIENNIAL REPORT, 1915-1916 which was itself incorporated into the Legislature's own APPENDIX TO THE JOURNALS OF THE SENATE AND ASSEMBLY OF THE FORTY-SECOND SESSION. [App. 673-709,

spec. 706-708.][28]

In 1917 and again in 1918, the IWC amended Order No. 1, respectively reducing the standard day to 9 hours and then to 8 hours, establishing double-rate pay for work over 12 hours and 1 1/4 rate of pay for work on the day of rest. And in 1917-1918, the Commission issued Orders extending minimum wage protections to the: laundry and manufacturing industry (Order No. 4); fish canning industry (Order No. 6); fruit and vegetable packing industry (Order No. 8); general and professional offices (Order No. 9); unskilled and unclassified occupations (Order No. 10); and the manufacturing industry (Order No. 11). Each of these Orders, as was true for Nos. 1 and 2, imposed minimum wage obligations on any "person, firm or corporation . . . [that] employ[ed] or suffer[ed] or permit[ted]" a woman or a minor to work. And *each* of these Orders was published verbatim and discussed narratively in the Commission's THIRD BIENNIAL REPORT, 1917-1918, delivered to the Governor and other officers. [App. 711-742, *spec.*, 733-742.][29]

During 1919-1920, the Commission twice amended its existing orders to reflect increases in the cost of living, and issued new orders extending

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[28]Plaintiffs requested [App. 550-555], and the superior court properly took, judicial notice of the Industrial Welfare Commission minutes, orders and other records [App. 1491.] (Cal. Grape, etc. League v. Industrial Welfare Com. (1969) 268 Cal.App.2d 692, 700-701, *citing*, Evid. Code, § 452.)

[29]Examples of other early Orders are found at: Apps. 576-582 (IWC Minutes, February 14, 1916), 589-594 (IWC Minutes, April 16, 1917), 596-597 (Order No. 11, Manufacturing Industry, issued Nov. 2, 1918), 599-600 (Order No. 11, Manufacturing Industry, amended June 27, 1919), 602-603 (Order No. 14, Agricultural Occupations, issued May 25, 1920), 605-608 Order No. 11, Manufacturing Industry, amended July 27, 1920), 613-617 (Order No. 15, Needle Trades Industry, issued April 11, 1922.)

minimum-wage regulation to the: printing, bookbinding, lithographing and engraving trades; the hotel and restaurant industry; and in certain field occupations. [Appellants' Request For Judicial Notice[30], Exhibit 1, FOURTH REPORT OF THE INDUSTRIAL WELFARE COMMISSION FOR THE BIENNIAL PERIODS 1919-1920 and 1921-1922, p. 10.) Thus, the Commission's numerous, early formal actions, including imposition of its expansive definition of employer liability[31] were being promptly, routinely and formally communicated.

By the beginning 1919, approximately 85,000 women, equaling 85% of all women "working in industrial life", were under the protection of the IWC. [App. 717.) During 1919-1920 and 1921-1922 alone, the IWC held 39 public hearings and conferences, some multiple-day, in northern and southern California. [Request for Judicial Notice, *supra*, Exhibit 1, at pp. 27-30]

One need not resort to a presumption concerning whether members of the legislature read this information. The reality is that legislators' constituents, particularly business-employers, rapidly bring to their representatives' attention, any regulatory requirement that is seen as onerous and/or inconsistent with their understanding of the underlying authorization or the public– or their own private – welfare. [Request for Judicial Notice, supra, Exhibit 1, at p. 11]

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[30]Appellants by separate filing, will contemporaneously request judicial notice of this and certain other documents.

[31]The "suffer or permit to work" expansion of liability was then being nationally and extensively advocated. (*See*, text at pp. 23-31, *ante*; at pp. 52-55, *infra*.)

Very shortly, the Legislature expressly manifested its knowledge of the Commission's new definitions of employer liability by engaging in the sincerest form of flattery - - it began imitating the IWC's employer definitions. (*E.g.*, the Child Labor Law of 1919 (Stats. 1919, Ch. 259, p. 415, § 1 - "No minor under the age of sixteen years shall be *employed, permitted or suffered to work* in or in connection with any mercantile establishment, manufacturing establishment . . . "); *CHILD LABOR LAW* (Stats. 1919, Ch. 259, p. 416, § 3 ½ - ". . . no minor under 12 years of age shall be *employed or permitted to work* at any time in or in connection with the occupation of selling or distributing newspapers . . . "); *CHILD LABOR LAW* Stats 1925, Ch. 123, p. 273, § 1 - Any person, firm, corporation, agent, or officer of a firm or corporation . . . . who *employs or suffers or permits* any minor to be employed . . ."); the Industrial Homework Act of 1939 (Labor Code, § 2650, subd. (g); Stats. 1939, Ch 809, p. 2364, § 1, ("'*To employ' means to engage, suffer or permit* any person to do industrial homework, or to *tolerate, suffer, or permit* articles or materials under one's custody or control to be manufactured in a home by industrial homework.").)

B. The Legislature Intentionally Delegated to the IWC Co-Equal Legislative Power to Regulate Minimum Wage and Conditions of Employment and to Determine Whom It Regulates

1. The Legislature Actively Ensured That the Commission's Co-Equal Power Was Constitutionally Sanctioned

Article XX, sec. 17 ½ provided that "[t]he legislature may . . . provide for the establishment of a minimum wage for women and minors . . . [and also may] confer upon any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of

this section." (*Id.* (Nov. 3, 1914).) This constitutional acknowledgment that minimum-wage protection and commission's establishment and powers were part of a mutual remedial scheme was anticipated by the Legislature who, having created the Commission, then submitted to the people the constitutional amendment to safeguard its enactment from judicial challenge on constitutional grounds. [FIRST BIENNIAL REPORT OF THE INDUSTRIAL WELFARE COMMISSION: 1913-1914, pp. 12-13.]

This constitutionally-sanctioned unity of minimum-wage protection with delegation of full legislative, executive and judicial powers to the Commission for that purpose was continued during the subsequent constitutional revision: "[t]he Legislature may provide *for minimum wages* and for the general welfare of employees *and for those purposes* may confer on a commission *legislative*, executive and judicial powers." (art. XIV, sec. 1 (June 8, 1976.)

The IWC's co-equal authority empowers it to provide protections that exceed those that are provided by the statutes. The relationship between the Legislature's statute and the wage order provisions is that between general and more specific statutes. (Code Civ. Proc., § 1859; Industrial Welfare Com. v. Superior Court, *supra*, 27 Cal.3d, at 733, *citing*, 2 Ops.Cal.Atty. Gen. 456, 457 (1943).)

(a) The Legislative Branch Has Subsequently Confirmed the IWC's Unique Authority

Further Legislative recognition that the Commission exercises co-equal legislative powers is manifested in exemption of the IWC Orders from the APA. (Labor Code, § 1185; Morillion, *supra*, 22 Cal.4th, at 581, *citing*

Tidewater Marine Western, Inc. v. Bradshaw (1966) 14 Cal.4th 557, 569, 577.)

(b) The Legislature Has Demonstrated That It Knows How To Overrule IWC Provisions With Which It Disagrees

The Legislature has long known how to change an IWC definition that it does not agree with. For example, many of the Commission's early Orders defined the term "minor" as a person of either sex under the age of 18." In 1929, the Legislature amended Section 3(c) of the Act to read, "For purposes of this act, a minor is defined to be a person of either sex under the age of 21 years . . ." (*See*, Request For Judicial Notice, Exhibit 2, Letter from U.S. Webb, Attorney General, State of California Legal Department to Mabel E. Kinney, Chief - Department of Industrial Relations, Division of Industrial Welfare (June 23, 1936).)

Subsequently, in codifying the Labor statutes, the legislature prohibited the Commission from imposing upon employers subject to the "Eight-Hour Day Act" any hours limitations more restrictive than the statutory ones provided in the Act. (Labor Code, § 1356, Stats. 1937, ch. 90, § 1357, repealed, Stats. 1984, ch. 778, § 1; *cf.*, 52 Ops.Cal.Atty.Gen. 125 (1969) (§ 1356 didn't prohibit IWC from imposing overtime-wage requirements on employers who violated the Eight-Hour Day Act).)

2. The Executive Branch Has Historically Acknowledged the IWC's Authority to Promulgate Remedies and Corresponding Liabilities More Expansively Than Those Provided by the Statutes

From the Commission's earliest days, it acted upon the understanding that it had the power to fill in "gaps" in the Act, and to act in all areas of employment not subject to controls expressly imposed by the Legislature. This

included the power to define and expand wage protections greater than those the Legislature itself established. Thus, early IWC Orders prohibited night work in certain industries and required one day of rest in seven in the mercantile, laundry and manufacturing industries, imposing greater restrictions on hours than those permitted by the Eight Hour Law. (*See*, Request For Judicial Notice, *supra*, Exhibit 1, *FOURTH REPORT, supra*,, p. 11.)

Although these provisions did not come before the Courts, California's Attorney General repeatedly approved the Commission's position, concluding that unless the Legislature explicitly overruled by enactment, the IWC had the power to define and expand wage protections *greater* than those that the Legislature itself established. (See, e.g.,

- Request For Judicial Notice, *supra*, Exhibit 3, Letter of May 7, 1934 from State of California Legal Department Attorney General U.S. Webb to Mabel E. Kinney, Chief, Division of Industrial Welfare.)[32] (So long as statutory provisions do not explicitly contradict or over-rule Commission actions, its powers are not constrained. Thus, under the IWC's powers to establish a "minimum wage . . . adequate to supply . . . the necessary cost of proper living . . . and to maintain the health and welfare of . . .[those workers protected by the Orders], the IWC had the power to require the same weekly wage for those workers who were engaged less than the "standard week" as for those engaged full-time.)
- (Request For Judicial Notice, Exhibit 4, Letter of August 21, 1940,

[32]Attorney General Opinions 1912 - 1939, California State Archives, Sacramento.

from State of California Legal Department, Attorney General Earl Warren to Margarete Clark, Chief, Division of Industrial Welfare, DIW No. 18/AG No. NS2840, p. 3 (The IWC had authority to impose 25-pound lifting-limit for women through its Orders notwithstanding Labor Code Section 1251's 50-pound lifting-limit for women, unless Legislature explicitly excluded IWC from addressing - - the IWC has the power to restrict and regulate further than the Legislature unless the latter indicates its intent "to fully cover the field" ; *cf.*, Industrial Welfare Com. v. Superior Court, *supra*, 27 Cal.3d, at 720.)[33]

- 2 Ops.Cal.Atty.Gen. 456 (1943) concluding that the IWC had authority to impose in its Orders rest days for all women and minors notwithstanding Labor Code Section 556's exemption for employment under 30 hours per week:

> [T]he Industrial welfare Commission Orders may provide more restrictive provisions than are provided by statutes adopted by the Legislature on this subject, and such rules have the force of statutes.

(Id., at 457.)

- 12 Ops.Cal.Atty.Gen. 319 (1948), concluding that the Division of Industrial Relations could seek recovery of overtime wages available under IWC Order against employers who violated the "Eight Hour Day" Law (Labor Code, §§ 1350, 1356), even though the latter included no provision for payment of overtime. Under grant of

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[33]Attorney General's Opinions, June 1940 - 1949, California State Archives, Sacramento.

authority in art. XX, Section 17 ½, and Labor Code Section 1184 providing the Commission the power to make mandatory orders addressing "the standard conditions of labor for women or minors", the Commission had the authority to impose in its Orders overtime premium pay based upon the "regular" rates of pay, notwithstanding that Section 1182 authorized the Commission to fix only minimum wage, and notwithstanding that the Legislature in the Eight Hour Law (Labor Code, §§ 1350, 1352) exempted the occupation in question from maximum-hours restrictions. (*Accord*, 52 Ops.Cal.Atty.Gen. 125 (1969).)

- 50 Op.AttyGen. Cal. 141 (1967) concluding that "[t]he Commission may fill in "gaps" in the Act and act in all areas of employment not subject to controls imposed by the Legislature. (Id., at 154-158.)

3. This Court Has Confirmed the IWC's Co-Equal Legislative Powers

This Court has confirmed the long-held understanding shared by the Executive and the Legislature that IWC Orders are co-equal with Legislative enactments and has applied the accompanying presumption against repeals by implication in reconciling IWC Orders with Labor Code provisions. (Cal. Drive-in Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 291.) There, this Court held that a 1929 statute requiring employers to post public notices if they either collected their employees' tips or credited such tips against wages, did not overrule a 1923 IWC Order prohibiting employers from crediting employee tips against minimum-wage obligations. (*Id.*, 290-293.) The Court found that,

> it is not necessary to conclude that the statute authorizes tipping. It does not purport to authorize or legalize the retention or deduction of the tips received by the employees. It is nothing more than a comprehensive regulation in respect to advising the public of the retention of tips, whether such retention is legal or not . . .

(*Id.*, 293.)

In so reasoning, this Court was implementing the rule that repeal of one act should not be found unless

> the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. Where a modification will suffice, a repeal will not be presumed.

(*Id.*, p. 292.)

Of course, there is no facial inconsistency between the word "employee" in Section 1194 and the words "employee" and its correlaries "employ" and "employer" in the Commission's various Orders. The tension arises only by virtue of a judicially-imposed construct, i.e., a presumption that legislative use of the word "employ" signifies intent to follow the common-law. As previously noted, that construct is not consistent with the very language of former Section 13 and, as subsequently codified, Section 1194 which ties the right of action to the Commission's promulgations, nor with the history of the 1972 amendment that substituted "employee" for "woman or minor". And that construct similarly cannot trump the rule that repeal will be found only where the two acts are "irreconcilable" and "so inconsistent" that the two cannot have concurrent operation". (*Supra.*)

The rule of Drive-in Restaurant Assn. has been followed in this Court's consistent recognition that the IWC "is the state agency empowered to

formulate regulations (known as wage orders) governing employment in the State". (Morillion, *supra*, 22 Cal.4th, at 581; Tidewater Marine Western, Inc., *supra*, 14 Cal.4th, at 561.)

C. Section 1194 Provides a Private Cause of Action That Is Congruent With IWC Exercise of Its Delegated Authority

In ascertaining intent, construction begins with the language. (Halbert's Lumber v. Lucky Stores (1992) 6 Cal.App.4th 1233, 1238.) In the case of minimum-wage enforcement, the words of both the state constitution and the legislative enactment create a strong inference that the statutorily-created private causes here at issue and the IWC orders were historically intended as a unified remedial scheme.

Before reviewing the early history of this statutorily-created private right to enforce minimum wage, it is first worth noting that the word "employee" has appeared in Labor Code Section 1194 only since 1972. The import of this is discussed at pages 48-49, *infra*.

1. Section 1194 Facially Equates the Right to Recover With the Terms of IWC Promulgations

Section 1194 was first enacted as Section 13 of the Act creating the Commission. ("An Act Regulating the Employment of Women and Minors and Establishing an Industrial Welfare Commission to Investigate and Deal With Such Employment, Including a Minimum Wage . . ." , Stats. 1913, Ch. 324, pp. 632, 637.) The Act assigned to the Commission the duty to ascertain the wages paid, the hours and conditions of labor and employment in the various occupations, and further empowered it to fix minimum wages, maximum hours and the standard conditions of labor demanded by health and

welfare of women and minors engaged in any occupation, trade or industry in this State. (Stats 1913, *supra*, pp. 633-636, §§ 3, 5, 11.) Within the nineteen total sections establishing the Commission's framework and operations, Section 13 provided that,

> [a]ny employee receiving less than the *legal minimum wage applicable to such employee* shall be entitled to recover in a civil action the unpaid balance of the full amount of *such minimum wage* . . . .

(*Id.*, p. 637, § 13.) The "legal minimum wage applicable" to any "employee" was entirely the function of the Commission, and arose by virtue of the IWC's Order(s). This cause of action was explicitly and directly tied to the Commission's order(s) establishing minimum wages, maximum hours, and other conditions to protect the general health and welfare of (women and child) employees. (*Id.*, pp. 633-635, §§ 3, 6.) The scope of liability corresponding to the existence of the right was wholly a function of the Commission's orders.

Section 13's private cause of action and the Commission's orders were inextricably integrated. Examples abound: Whether an employee in the manufacturing industry governed by Order 11 had a Section 13 claim required determining, among other factors, whether she fell within the Commission's definitions of "experienced" or "learner" (Order 11, *id.*, issued November 2, 1918, ¶¶ 1,2 [App. 740-741.] Whether - after February, 1922 - an on-farm employee had a private cause of action for unpaid minimum wage would have been determined by whether that employee fell within the IWC's definition of "cutting fruit in dry yards"- - if not, the employee had no cause of action because "agricultural occupations" did not enjoy minimum wage protection as

the IWC then had no Order for these occupations.[34] [App. 602-603; *cf.*, App. 610-611]

Fundamentally, whether a worker had a claim cognizable under Section 13 depended upon whether that worker was covered by an Order, i.e., fell within the Orders' respective definitions of regulated industries or occupations. Equally fundamentally, whether an employer was subject to liability was the mirror result of the Order. (*See*, Request for Judicial Notice, Exhibit 5, Letter of September 2, 1939, from Earl Warren, Attorney General, State of California Legal Department, to Margarete L. Clark, Chief - Division of Industrial Welfare to effect that whether worker covered by Order (and thus entitled to minimum wage) depended upon IWC's definition of the industry).[35]

Presumably, the Act's drafters inserted Section 13 because they anticipated that public enforcement efforts would not reach all instances of non-compliance, and they did not wish to leave wage-earners who fell beyond the reach of public resources without a minimum-wage remedy. But to conclude that workers who had to bring private actions under Section 13 could not utilize the definitions within the Orders in their lawsuits would result in the very discrimination in enforcement that Section 13 logically was intended to

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[34]Order 14, covering agricultural occupations was initially issued May 25, 1920 but rescinded on February 24, 1922, "because of the impracticability of enforcing a guaranteed wage for field occupations in which close supervision and record-keeping are impossible." [App. 610-611 (IWC Records, *id.*, Exhibit 13, at 1, 2.) Order 14 was re-promulgated in 1961. [App. 644-647 (IWC Records, *id.*, Exhibit 20, *IWC Order No. 14-61* (April 8, 1961, effective August 28, 1961).]

[35]Attorney General's Opinions 1912 - 1939, California State Archives, Sacramento.

overcome: Those low-wage, marginalized workers engaged under various forms of contracting who were able to secure public-enforcement resources could obtain remedies from "employers" falling within the IWC definitions; but the large numbers of workers similarly-engaged under the same arrangements but for whom public resources were unavailable, would be remediless - - their rights would extend only against persons falling within the early, tort-originated common-law concept of "employer".

The Act remained substantially unchanged until 1937[16] when it was incorporated into the new Labor Code. (Stats. 1937, ch. 90, pp. 185 *et seq.*) Former Section 3 of the Act, empowering and obligating the Commission to ascertain wages, hours and conditions of labor was reenacted as Section 1173 of the new Code. (Stats. 1937, *supra*, p. 213.) Former Section 6 of the Act, empowering the Commission to fix minimum wages, maximum hours and conditions of labor required for the general welfare, was reenacted as Section 1182, and continued to authorize the Commission to fix minimum wages "to be paid to women and minors *engaged* in any occupation, trade or industry .

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[16]In 1927, Section 3 was amended to clarify and broaden the Commission's right of free access to any place of business for the purposes of "securing any information which the Commission is authorized . . . to ascertain . . . [and] to make inspection[s] of the conditions under which [women's and minors'] labor was performed . . ." The amendment also eliminated employers' obligations to keep records of the ages of adult women. (Stats. 1927, ch. 248, p. 438, § 1.) Section 6 was simultaneously amended to increase the number of cities in which the IWC was required to publish notice of wage hearings. (*Id.*, p. 439, § 2.) Concurrently, the IWC was placed in the Division of Industrial Welfare (one of the Divisions of the Department of Industrial Relations) as part of a larger reorganization of state government. (Stats. 1927, ch. 440, pp. 733, 735, § 4 (amending Sec. 364c of the Political Code); BIENNIAL REPORT OF THE DIVISION OF INDUSTRIAL WELFARE OF THE DEPARTMENT OF INDUSTRIAL RELATIONS: 1938-1940, p. 1.) This reorganization was further amended in 1931. (Stats. 1931, ch. 978, p. 1989, § 1.)

. . ." (*Id.*, p. 215, § 1182, subd.(a) emphasis added.)[37] And former Section 13 was incorporated as Section 1194 of the new Labor Code:

> Any woman or minor receiving less than *the legal minimum wage applicable* to such woman or minor is entitled to recover in a civil action the unpaid balance of the full amount of *such minimum wage* . . . .

(*Id.*, p. 217.)[38] Thus, the existence of any private cause of action and the scope of corresponding liability continued to be tied directly to the Commission's order(s) establishing minimum wages, maximum hours, and other conditions to protect the general health and welfare.

2. The 1972 Amendment to Section 1194 Reflected Expanding IWC Protections, Including Private Recovery to All Adult Workers Rather Than a Regression to Common Law That the Legislature and the IWC Did Not Intend or Adopt

As noted, former art. XX, sec. 17 ½, provided that "[t]he legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees." (*Id.*; Industrial Welfare Com. v. Superior Court, *supra*, 27 Cal.3d, at 701 fn.4; [*See, also*, Request For Judicial Notice, Exhibit 6, INDUSTRIAL WELFARE COMMISSION - FIRST BIENNIAL REPORT: 1913-1914, pp. 12-13]

As initially codified in 1937 and in effect until 1972, Section 1194 did not use the term "employee", but provided that, "[a]ny *woman or minor*

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[37]The term "engage" was retained through subsequent amendments to Section 1182. (Stats. 1947, ch. 1188, p. 2671; Stats. 1972, ch. 1122, pp. 2152, 2154; *repealed*, Stats. 1980, ch. 1083, p. 3464, 3466, § 11.

[38]Former Sections 1 and 2 of the Act, establishing the Commission and its structure were incorporated as Sections 70 through 73 of the new Code. (Stats. 1937, supra, p. 188.)

in California. That amendment was consistent with the prior history of Section 1194 and its antecedents that the private right of action was accorded specifically to those persons benefitting from the IWC's protections rather than to some unrelated or independent category of "common-law employee". The amendment *expanded* that delegation, and was never intended to retrench workers' protections afforded by the IWC to old tort concepts that pre-dated the remedial scheme established nearly sixty years earlier. (Industrial Welfare Com., *id.*, 27 Cal.3d, at 701.)

In 1976, the state constitution was reorganized and former section 17 ½ was re-adopted as art. XIV, sec. 1, continuing to authorize the IWC and providing, "[t]he Legislature may provide for minimum wages and *for the general welfare of employees* and for those purposes may confer on a commission *legislative*, executive and judicial powers." (Italics added.)

3. IWC's Expansive Definition of Employer, Which the Legislature Has Not Only Never Overruled but Adopted in Other Employment Laws, Governs Section 1194

Today, virtually every provision within Order 14, regardless of whether the language is characterized as a "definition", defines the scope of liability reached by Section 1194. (*E.g.*, the scope of liability for a "learner" is established in subd. 4 "Minimum Wages"; the scope of liability for not being put to work after required reporting is established in subd. 5; the scope of liability with respect to provision of tools or equipment is established in subd. 9.) The inference is overwhelming that Section 1194 and the Commission's orders were intended as a unified scheme. To apply Section 1194 in Appellants' case by incorporating Title 8, Section 11140.2 subd. (D) - -

defining "agricultural occupations" - - but not incorporating subd. (F) - - defining "employer" - - defies logic and public policy.[39]

"In fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion." (Industrial Welfare Com., *supra*, 27 Cal.3d, at 702; *see also*, Morillon, *supra*, 22 Cal.4th, at 587.)

Absent all other language in Section 1194 (and its predecesor), mere inclusion therein of the word "employee," without further Legislative expression, cannot operate to preclude the IWC from more specifically imposing minimum-wage liability through its Orders–which then may be asserted in the 1194 private claim. (Industrial Welfare Com., *id.*, 27 Cal.3d, at 733-734.) Of course, the other language in Section 1194 manifestly demonstrates the intent that the scope of the private claim and corresponding liability was to be defined by the Orders.

ARGUMENT II

RESPONDENTS ARE LIABLE FOR APPELLANTS' WAGES AS EMPLOYERS UNDER THE IWC'S ALTERNATIVE "SUFFER OR PERMIT TO WORK" AND "EXERCISES CONTROL" DEFINITIONS

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[39]Whether an on-farm employee fits within the IWC's definition of "agricultural occupations" ("Order 14", Cal.Code Regs., tit. 8, § 11140, subd. 2(D)) or that of "industries preparing agricultural products for market on the farm" ("Order 13", Cal.Code Regs., *supra*, § 11130, subd. 2(H)) may determine whether that employee has a private cause of action for unpaid overtime wages. (*Cf.*, Order 14, *supra*, subd. 3 "Hours and Days of Work"; Order 13, *supra*, subd. 3 "Hours and Days of Work".) The IWC has authority to regulate overtime wages regardless of whether the affected "regular" wage exceeds minimum wage. (See, pp. 40-41, *ante*.)

In reviewing propriety of granting summary judgment, the Court first identifies the issues framed by the pleadings, as it is these allegations to which the motion must respond. (Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento (1996) 51 Cal.App.4th 1468, 1476, *rev. den'd*; Lennar Northeast Partners v. Buice (1996) 49 Cal.App.4th 1576, 1582-1583.)

Appellants alleged that respondents were their employers under alternative definitions codified in the Wage Order. [App. 20-21 ¶¶ 20-22.] Where appellants' cause of action can be based on either of alternate theories, it will not be subject to summary judgment where the defendant's declarations show only that one of the two theories cannot be established. (Conn v. National Can Corp. (1981) 124 Cal.App.3d 630, 639, *quoting*, Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal.App. 3d 117, 127.) Accordingly, respondents must demonstrate that appellants cannot prove an employment relationship under either theory. (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 849-850; Code Civ. Proc., § 437c, subds. (h), (o)(2).)

A. The IWC Intended That "Suffer or Permit To Work" Regulate the Work Performed Here For the Benefit of Respondents' Businesses

The "suffer or permit to work" definition has been an unbroken feature of California's Wage Orders since Order No. 1 was adopted February 14, 1916. [*See, generally*, App. 550-671.] No California court has directly addressed or interpreted this language, a fact recognized by this Court. (Morillion, *supra*, 22 Cal.4th, at 585.)

Appellants asserted that each respondent was their employer because each directly or indirectly or through an agent or other person engaged,

suffered or permitted to work each plaintiff (and other worker). [App. ¶ 21 (Complaint, *supra*).] Appellants here analyze the meaning of "suffer or permit to work", and demonstrate that triable issues of fact exist as to respondents' liability as employers under this definition.

1. The IWC's Intent At the Time of Promulgating the Wage Order Controls

Where regulatory language is subject to more than one reasonable interpretation, the cardinal rule of construction is that the court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the administrative regulation (Cal. State Restaurant Assn. v. Whitlow, *supra*, 58 Cal.App.3d, at 344-345; *see also*, In re Harris (1993) 5 Cal.4th 813, 844; California Grape League, *supra*, 268 Cal.App.2d, at 698, *referring to*, Labor Code, §§ 1171-1398.) "Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies." (Cal. Drive-In Restaurant Assn., *supra*, 22 Cal.2d, at 292.)

When the promulgating body uses language or terms that had at the time a well-known meaning at common law or in the law of this country, the words are presumed to have been used in that sense. (People v. Overstreet, *supra*, 42 Cal.3d, at 897.) Consequently, the meaning of "suffer or permit to work", as it was used and applied at the time of the regulation's adoption, is presumed, in absence of proof to the contrary, to be the meaning the IWC intended when it adopted the definition.

> . . . [I]n ascertaining legislative intent, the courts should consider not only the words used, but should also take into account other matters, such as the object in view, the evils to be

> remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction. [citations omitted]

(Steilberg v. Lackner, *supra*, 69 Cal.App.3d, at 785.)

In deciding how to construe and apply a statute, courts employ three categories of extrinsic aids in considering evidence of legislative intent: pre-enactment history, enactment history, and post-enactment history. (SUTHERLAND ON STATUTORY CONSTRUCTION, Chapter 48 generally, *see*, § 48.03.) The circumstances under which the promulgation was adopted, the mischief at which it was aimed and the object it was supposed to achieve are relevant in making decisions about how a rule is to be construed and applied. (SUTHERLAND, *supra*, § 48.03.)

(a) The Meaning of "Suffer or Permit to Work" Was Well Recognized When California Adopted the Language

California's adoption in 1916 of "suffer or permit to work" was part of a nation-wide effort early in the Twentieth Century to create state minimum-wage laws that built upon extensive earlier adoption of this doctrine by many states in the regulation of child and women's labor (and the even earlier application of the concept in England to regulate a variety of moral activities.)

(b) "Suffer" and "Permit to Work" Were Historically Recognized as Distinct in Meaning From "Employ"

California's rule of construction is identical to that applied by the Oklahoma court in its 1913 analysis of "employed, permitted or suffered to do". (Curtis & Garside Co. v. Pigg, supra; see discussion at pages 29-30, *ante*. Whenever possible, effect and significance must be given to every word in a statute when pursuing the legislative purpose, and a court should avoid a

construction that makes some words surplusage. (Garcia v. McCutchen (1997) 16 Cal.4th 469, 476; Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230, 234.)

(c) The IWC Intentionally Followed the Then-Existing National Model in Adopting "Suffer or Permit to Work" in California's First Wage Order

As described at pages 23-32, *ante*, the impetus in California for developing and enforcing minimum wage standards came from professional reformers and women's advocates. The California statute establishing the IWC, like those of other states, followed the model minimum wage law prepared by Florence Kelley of the National Consumers League. (Casement, supra, at 2.)

Following the Legislature's establishing the IWC in 1913 and affirmation of its constitutionality in 1914 by an initiative (see pages, 36-37, *ante*), Katherine Edson, the drafter and chief proponent of the Act, became the first woman appointed to the IWC. From 1916 to 1931, she served as the IWC's Executive Officer. (Casement, *id.*, 2, 16-18.)

In implementing its powers, the Commissioners visited other states and reviewed the conditions they found therein. [App. 563-564 (IWC Records, *supra*, *IWC Minutes*, March 12, 1915 ("The reports of Commissioner Edson on conditions in New York and Massachusetts were read and ordered filed."); App. 565-566, *IWC Minutes*, April 10, 1915 ("Commissioner Edson made oral report supplementing her written report of conditions she found in various other states visited by her."); App. 682 at "p.15" ("During the early part of 1915, Commissioner Edson visited the Industrial Welfare Commissions of

Oregon and Washington, also the Minimum Wage Commission of Massachusetts, members of the Factory Investigating Commission of New York . . . .").]

The IWC also studied the work and recommendations of the advocacy groups promoting model legislation, including the National Consumers' League. [App. 568, *IWC Minutes*, May 29, 1915 ("The Chairman announced that the *purpose of the meeting* was to confer with Mrs. Florence Kelly of the *National Consumers' League*", emphases added; App. 683 (*id.*, at p. 17, therein, listing other visitors during the year as including among others the chair and secretary of the Industrial Welfare Commission of Oregon, the chair of the Industrial Welfare Commission of Washington, a representative of the Massachusetts Consumers' League, and the former chief of the Women's Division of the United States Bureau of Labor Statistics).]

At the beginning of 1916, the IWC convened a wage board to consider wages, hours and conditions in the fruit and vegetable canning industry. [App. 569-574, *IWC Minutes*, Jan. 7, 1916, pp 1-2).] On February 14, 1916, the Board adopted IWC Order No. 1, regulating wages and hours in that industry. Order No. 1 specifically provided that "No person, firm or corporation shall *employ or suffer or permit* any woman or minor *to work* . . . [at piece rates less than specified]" [App. 576-579, *IWC Minutes*, February 14, 1916, pp. 1-2, *see* App. 577 *at* ¶ 1, emphasis added)[40] . . . "shall *employ or suffer or permit* any woman or minor *to work* [at hourly rates less than specified] (*id.*, *see* p. 2 *at* ¶

[40]Throughout this brief, appellants will add emphasis to the phrase "suffer or permit to work" quoted from the various Wage Orders. These emphases are not found in the text of the Orders.

2, emphasis added) . . . "shall *employ or suffer or permit* any woman or minor *to work*. . . [more than hours specified]" (*id.*, *see*, App. 577-578 at ¶¶ 3-5, emphasis added.). Simultaneously, the IWC adopted Order No. 2, mandating that "[n]o person, firm or corporation shall *employ or suffer or permit* any woman or minor *to work* . . . [in health and safety conditions below specified standards]" (*id.*, App. 579 *at* ¶ 1.)

The Commission thus adopted the child-labor model language, and acknowledged its examination and reliance upon the developing legal landscape in other states. As it stated in its Second Biennial Report:

> The commission appreciates full well the pioneer character of minimum wage legislation in the United States, and has proceed with great caution it its work. . . . Being the largest state in the west that is attempting by legislative action to regulate industry, particularly in providing for a living wage for women workers, it is imperative that any action taken here must . . . be indicative of what may be accomplished in more complex industrial communities.

[App. 681-682, at "Introduction", pp. 13-14 therein.)

2. The IWC Intended to Maintain the Broad Reach of "Suffer or Permit to Work" While It Continually Re-Adopted the Definition

After observing implementation for a year, the IWC found that the minimum wage rates in Order No. 1 and working conditions requirements in Order No. 2 were inadequate, and convened hearings to consider modifications. [App. 583-587, *IWC Minutes*, March 9, 1917; *see*, App. 584-585).] Original Order No. 1 was subsequently modified and re-issued as Order No. 3, and original Order No. 2 was modified and simultaneously reissued as Order No. 4. [App. 588-594, *IWC Minutes*, April 16, 1917.] Orders Nos. 3 and 4 retained the identical substantive mandates that "[n]o person, firm or

corporation shall *employ, or suffer or permit* any woman or minor to *work* . . ." [App. 589 (*id.*, at ORDER No. 3 ¶ 1; App. 590 ¶3-5; App. 591, at ORDER No. 4 ¶ 1).]

During the biennial period of 1917-1918, the IWC established seven additional minimum-wage orders which covered the mercantile industry, laundry industry, fish canneries, dried fruit industry, green fruit and vegetables packing industry, general and professional offices, unskilled and unclassified occupations, and the manufacturing industry. [App. 716, *id.*; App. 733-742 at "pp. 97-112".) Order No. 11, regulating the manufacturing industry, issued on November 2, 1918, is typical of the language in all, continuing to mandate that "[n]o person, firm or corporation shall *employ, or suffer or permit* . . . [App. 596-597 ¶¶ 1, 5, 7(a), 10, *IWC Order No. 11/Manufacturing Industry* (Nov. 2, 1918), emphasis added; App. 716 (*id.*, Exhibit 26, *supra*, at pp. 10-11 therein).]

In the next two years, the Commission continued to issue orders applying to new industries, as well as amending the existing orders to raise minimum wage. In 1920, the Commission issued its first order regulating wages and hours in agricultural occupations. [App. 601-603, *IWC Order No. 14/Agricultural Occupations* (May 25, 1920).] The mandates remained identical: "No person, firm or corporation shall *employ or suffer or permit* any . . . [App. 602 ¶¶ 1, 2, 4(a) (*id.*, emphasis added.) Order No. 14 was subsequently rescinded on February 24, 1922 "because of the impracticability of enforcing a guaranteed wage for field occupations in which close supervision and record-keeping are impossible." [App. 610-611, at 1,2.]

Agricultural (field) occupations would not again be regulated by the IWC until 1961. [App. 644-647, *IWC Order No. 14-61* (April 8, 1961), effective August 28, 1961.] Between 1916 and 1920, the IWC issued over a dozen new or modified Orders. All retained the same prohibitory language.

Minimum wage orders continued to be issued through the 1920s and 1930s. Certain wage orders slightly varied introductory language of prohibition, to read, "No employer shall *pay or suffer or permit to be paid . . .*" [App. 613 ¶ 1, *IWC Order No. 15/Needle Trades Industry* (April 11, 1922); App. 614 ¶ 2(d),(e) (*id.*); App. 616 ¶ 11 (*id.*); App. 619 ¶¶ 1,2, *IWC Order No. 11A* (January 30, 1923); App. 621 ¶¶ 4, 10, 11 (*id.*), emphasis added.) Others continued the more traditional mandate that, "[n]o person, firm or corporation shall employ or *suffer or permit . . to work*" [App. 624, *IWC Order No. 18/Sanitary Regulations etc.*(Dec. 4, 1931).]

3. Following Initial IWC Adoption of "Suffer or Permit to Work", State Courts Throughout the Nation Continued to Apply the Doctrine Consistently

(a) During This Period, "Suffer or Permit to Work" Continued to be Applied to Protect Employees of Independent Contractors

As the IWC continued to issue these Orders, courts in various states continued to apply their respective "suffer or permit" statutes to the employees of independent contractors. (Vida Lumber Co. v. Courson (Ala. 1926) 112 So. 737 (lumber company held liable for death of under-aged boy working for his father who was an independent contractor with the company--existence of employment relationship between child and defendant immaterial); Commonwealth v. Hong (Mass. 1927) 158 N.E. 759, 759-760 (fact that minors

were employed by an independent contractor not a defense to restaurant owner's conviction of child labor violations); Nichols v. Smith's Bakery, Inc. (Ala. 1929) 119 So. 638; Daly v. Swift & Co. (Mont. 1931) 300 P. 265 (defendant Swift liable for death of 12-year-old-child working for an independent junk dealer, under contract to a general contractor, removing ice-making apparatus from the cellar of Swift's meat-packing plant. "[A]lthough the child's common-law employer, the junk dealer, was two contracts removed from Swift, '"yet in making the contracts and doing the work,"' the ice company and junk dealer were 'furthering solely and entirely the plan of work and the business desires and designs of [Swift]' within its plant, 'occupied, owned, controlled and possessed by it.'" (*Id.*, at 266.)

(b) "Suffer or Permit to Work" Also Continued To Be Applied to Businesses That Reasonably Knew Work Was Being Performed For Their Benefit

The IWC's Orders continued to issue during a period in which "suffer or permit" was widely understood to impose regulation wherever the owner had reason to know that work was being done for his benefit. In People ex rel. Price v. Sheffield Farms, *supra*, a business engaged in the sale of home-delivered milk was convicted of violating child labor law because its drivers had hired minors to guard their wagons during deliveries despite a company rule that its drivers could not allow anyone to assist them. Of New York's child labor statute, the Sheffield Farms intermediate court said that its

> purpose and effect . . . is to impose upon the owner or proprietor of a business the duty of seeing to it that the condition prohibited by the statute does not exist. He is bound at his peril so to do. The duty is an absolute one, and it remains with him whether he carries on the business himself . . . [or entrusts] the conduct of it to others.

(*Id.*, 167 N.Y.S., at 960.) In affirming the lower court, Justice Cardozo concluded that

> [The defendant] must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he had delegated "his own power to prevent." . . . Sufferance as here prohibited implies knowledge or *the opportunity through reasonable diligence to acquire knowledge* . . . Within that rule, the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided.

(Sheffield Farms, *supra*, (N.Y.Ct. Appls. 1918) 225 N.Y. 25 [121 N.E., at 475-476], emphasis added.) Thus, under "suffer or permit to work," the business owner became the responsible for labor conditions within his business if he knew that work was being performed for his benefit.

Meanwhile, other state courts have continued to interpret the "suffer or permit" language in their respective state laws consistently with the historic interpretation that existed at the time California adopted that language in its Wage Orders. Thus, in 1948, the Illinois Supreme Court held that even though horse owners who hired an underage child were not employees of the defendant race-track owners, the latter had an extensive right to control the stables and therefore *could* have controlled the child working there.

> [A]ppellants knew or could have known by the exercise of reasonable care, or by the performance of their effective duty as prescribed by the racing board, that plaintiff was illegally employed on its premises and under such circumstances permitted or suffered plaintiff to work in violation of the statute.

(Gorczynski v. Nugent (Ill. 1948) 83 N.E.2d 495, 499, affirming liability for minor's injury; *accord*, Teel v. Gates (Okla. 1971) 482 P.2d 602; Gabin v.

Skyline Cabana Club (1969) 54 N.J. 550, 553-555.)

4. The IWC Continued Its Association With the Drafters of the National Model

The IWC continued its close relationship with the early advocates of "suffer or permit". For example, in 1924, the IWC was supported before this Court in litigation seeking to enjoin IWC operations, by an *amicus* brief prepared by Felix Frankfurter, then advisor to the Consumers' League (and Professor of Law at Harvard), and Mary Dewson, Research Secretary of the National Consumers' League. [Helen Gainer v. A.B.C. Dohrman, Katherine Philips Edson, et al., S.F. No. 10,990, Brief on Behalf of Amici Curiae Supporting Respondents' Contention, June 9, 1924;[41] The challenge to California's law arose as a result of the U.S. Supreme Court's 1923 decision in Adkins v. Children's Hospital, 261 U.S. 525 [43 S.Ct. 394], holding the District of Columbia's minimum wage law to be unconstitutional. This Court dismissed the case without decision upon the named plaintiff's petition for dismissal alleging that she had been duped into bringing the suit. [App. 1371, IWC *FIFTH REPORT* FOR THE BIENNIAL PERIODS July 1, 1922 to June 30, 1924 and July 1, 1924 to June 30, 1926, at p. 18.]

Although California courts did not have the opportunity to review the early regulations of the IWC, they nevertheless contemporaneously expressed

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[41] Women continued to be the watchdogs for minimum wage. The *amici* represented by Frankfurter and Dewson included: The California Federation of Women's Clubs; The California League of Women Voters; United Garment Workers of America, Local No. 125 of Los Angeles; Waitress and Cafeteria Workers Union, Local No. 639, Los Angeles; The Women's Christian Temperance Union of Northern California; and The Women's Christian Temperance Union of Southern California. The brief is on file at the Robert Crown Law Library, Stanford Law School, Stanford University.

a judicial philosophy supportive of protecting the classes of workers for whom loss of wages amounted to deprivation of daily necessities:

> Probably two-thirds of the inhabitants of the United States live out of a pay envelope--that is, on wages or on salaries that are only wages under a polite name. . . . A very large per cent of those persons are day laborers, the greater part of whose earnings are necessarily paid out to them from day to day or week to week in the support of themselves and their families. . .

(Moore v. Indian Spring, etc. Min. Co. (1918) 37 Cal.App. 370, 379 [174 P. 378], *quoting*, "*SATURDAY EVENING POST*", January 22, 1916, editorial.) Referring to the State's interest in wage laborers' welfare, the Indian Spring court declared:

> Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obliga-tions to others, and, in may cases may make the wage-earner a charge upon the public.

(*Id.*, 37 Cal.App., at 379-380.)

5. The IWC Continues to Incorporate the Same "Suffer or Permit to Work" Definition In Its Modern Wage Orders

In 1942, the IWC began revising its orders into the present-day format exemplified in Order 14 while demonstrating the Commission's intent to continue the same level of protection. Beginning with Order 1 NS, the operative language became that found in current orders, mandating that "[n]o employer shall *employ* any woman or minor . . .", and then spelling out the definition of "employ", retaining the core, historic language. [App. 628, *IWC Order 1NS* (April 9, 1942), *see*, ¶ 2. "DEFINITIONS", . . . "(c) 'Employ' means to *engage, suffer, or permit to work*" . . . "(e) 'Employer' means any person . .

. who *employs* any woman or minor . . .", emphasis added.).][42]

The 1942 reformatting also added the definition of "Hours Employed" to the Commission's orders. As then written, "hours employed" meant all time during which . . . an employee [was] suffered or permitted to work whether or not required to do so." [*See, e.g.*, App. 628, Order No. 1 NS (Manufacturing Industry), p. 1, par. 2, subd. (f)(2).] In 1947, this definition was re-characterized as "Hours Worked", and modified to read, "Hours Worked means the time during which an employee is subject to the control of an employer, and includes the time the employee is suffered or permitted to work, whether or not required to do so." [*See, e.g.*, App. 635, Order No. 1 R (Manufacturing Industry), p. 1, par. 2, subd. (h).]

This Court examined the scope of the "hours worked" definition for agricultural workers protected by Order 14, in Morillion, *supra*, 22 Cal.4th, at 582-593.) Apart from noting that state courts had not interpreted "suffer or permit to work", this Court concluded that the phrase "encompasses a meaning distinct from merely 'working" (*id.*, at 584), and that, in the context of "hours worked", the phrase expanded the definition beyond just the time when the employee was subject to the control of the employer. (*Id.*, at 582.)

In early 1947, the IWC undertook two simultaneous steps to expand this "employer" definition to its current form. First, the IWC added an alternative definition providing that any person who "exercises control over the wages, hours or working conditions of any person" is an employer. This provision is

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[42]As will be explained at page 63, *infra*), in 1947 the Wage Orders added an alternative employer definition to the existing "suffer or permit to work" language.

discussed at pages 77-102, *infra*. Second, the IWC further broadened both the "exercises control" and the "suffer or permit to work" definitions by providing that an employer is "any person . . . who *directly or indirectly, or through an agent or any other person . . .*" commits either predicate act, i.e., either "suffers or permits to work" or "exercises control." [*See, generally*, Industrial Welfare Commission Orders, at paragraph 2, subdivisions (D), (F); e.g., Wage Order 14, 8 Cal.Code Regs. § 11140.2 subds. (D),(F).]

Appellants have been unable to locate any IWC minutes or other internal records that discuss these two modifications. It appears that use of the "indirect" modifier in California employment law originated in the Child Labor Act of 1919. (Stats. 1919, Ch. 259, p. 415, § 1.) Section 1 of the Act prohibited manufacturing establishments from "employ[ing], permit[ting] or suffer[ing] to work" any minor under the age of sixteen years, and further defined "work for a manufacturing establishment" as including, "[work] done at any place upon the work of a manufacturing establishment, or upon any of the materials entering into the products of a manufacturing establishment, whether under contract or arrangement with any person in charge of or connected with a manufacturing establishment *directly or indirectly or through the instrumentality of one or more contractors or other third persons*." (*Id.*, § 1 (emphasis added) codified in 1937 as Labor Code. § 1291.) Section 6 required that, "[e]very person, firm . . . employing *either directly, or indirectly through the instrumentality of one or more contractors or other third persons*" minors under the age of eighteen to keep separate, additional registers of employee information, post certain notices, and maintain records available at

all times to school, probation and labor officials. (*Id.*, § 6 (emphasis added).) Section 7 provided criminal penalties for any "person, firm . . . employing *either directly or indirectly through the instrumentality of one or more contractors or other third persons* . . ." who failed to comply with the provisions of the Act. (*Id.*, § 7 (emphasis added) codified in 1937 as Labor Code Section 1303.) Appellants are unaware of any decisions interpreting the "indirectly" clause under any of these provisions.

Perhaps the most telling re-affirmation of the IWC's intent to maintain the protections of the original wage orders occurred in the mid-1970s, following federal courts' invalidation of a substantial portion of the then-prevailing wage orders on the ground that limitation of the orders to *women* workers (and children) violated title VII of the federal Civil Rights Act of 1964. In response to these decisions, the California Legislature in 1972 and 1973 amended the applicable provisions of the Labor Code to authorize the IWC to establish minimum wages, maximum hours and standard conditions of employment for *all* employees, men as well as women. (Industrial Welfare Com. *supra*, 27 Cal.3d. at 700-701.) At this point, having before it the review and revision of all wage orders, the Commission retained for *all* workers the same "suffer or permit to work" definition previously applied to women and children. The IWC thus manifested its intent that the historic language was not relegated to an earlier history of heightened protection for special classes of workers.

6. The Court of Appeal Erroneously Adopted the Federal, Multi-Factor "Economic Reality" Test To Interpret California's "Suffer or Permit to Work" Definition of Employer

The court of appeal, ignoring appellants' history of California's statutes, IWC promulgations, or similar laws in other states, cursorily concluded that California's "suffer or permit to work" standard was governed by the federal multi-factor, balancing "economic reality" test applied by the U.S. Supreme Court in 1947 to the federal Fair Labor Standards Act of 1938. (Rutherford Food Corp. v. McComb, 331 U.S. 722.) The court of appeal relied solely on decisions of North Carolina and New Mexico courts interpreting their respective state statutes, both of which had been enacted after the 1947 federal test, and both of which facially or in explicit legislative history, had specifically incorporated the "economic reality" test. (Slip opinion, p. 9.) The lower court rejected the uniform application of "suffer or permit" statutes in other states that were contemporaneous (i.e., pre-FLSA and pre-Rutherford) on the ground that those decisions were "child labor cases" and the instant appeal "is not a child labor case" but involves adult workers. (Slip Op., *id.*) The lower court affirmed the trial court's conclusion that plaintiffs had not met their burden of proof under the "economic reality test", an issue that plaintiffs have never asserted in this case.

The court of appeal manifestly erred. Regardless of whether "suffer or permit" originated in early child-labor legislation, and was judicially applied most frequently in child-labor cases, it is not appellants who applied that standard to California's minimum-wage law. The IWC, exercising its legislative power and its "policy-making judgment and discretion" (Industrial Welfare Com., *supra*, 27 Cal.3d at p. 702), adopted the *suffer or permit* language and explicitly applied it to minimum-wage law applicable to adults.

As previously demonstrated, *suffer or permit* had a well-known meaning at the time the Commission promulgated it (*cf.*, People v. Overstreet, *supra*, 42 Cal.3d, at 897) as the standard of liability, and its application was virtually uniform in all state courts. (See, 52, 57-60, *ante*.) The court of appeal failed to recognize the "circumscribed" nature of judicial review of the IWC's legislative promulgations and superimposed its own policy judgment, contrary to this Court's admonition in Industrial Welfare Com.. (*Id.*, at 702.)

(a) The IWC's "Suffer or Permit to Work" Definition Was Not Patterned on Federal Laws

APIO argued, and the court of appeal agreed, that appellants cannot prove that the company was an employer under the federal-judiciary-created, multi-factor "economic reality" test (analyzed in *e.g.*, Torres-Lopez v. May (9th Cir. 1997) 111 F.3d 633) that is applied to the words "suffer or permit in the federal Fair Labor Standards Act of 1938 (29 U.S.C., § 203 *et seq.*) The short response is that appellants do not attempt to do so. Neither below nor in this Court, do appellants argue that respondents were their employers under FLSA, particularly under the FLSA's "suffer or permit" provision adopted in 1938 to define "employ" under the federal Act. (29 U.S.C., § 203, subd. (g).) The interpretation of "employ" under the FLSA requires a brief overview of its legislative and judicial history.[43]

In 1938, Congress adopted and the President approved the FLSA. An

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[43]Agricultural workers have causes of action for wage and hour violations under both FLSA and the federal Migrant and Seasonal Agricultural Worker Protection Act ("AWPA", 29 U.S.C., §§ 1801 et seq.) which incorporates FLSA's definition of "employ". (29 U.S.C., § 1802 subd. (5); Torres-Lopez (9th Cir. 1997) 111 F.3d 633, 639.) The application of "employ" under AWPA thus requires understanding its application under FLSA.

"employer" under the FLSA includes--but is not limited to[44]--any person who "employs," which is further defined as "suffer(s) or permits to work." (29 U.S.C., § 203, subds. (d), (e)(1) and (e)(2).) The federal Supreme Court addressed the coverage of FLSA in 1947. (Rutherford Food Corp. v. McComb, 331 U.S. 722.) Rather than examining the history of "suffer or permit to work", the Court defined employees as workers who were such as a matter of "economic reality." (*Id.*, 331 U.S., at 723.) The Rutherford Court did not find this test in any history of either FLSA or the preceding state laws, but borrowed it directly from the Court's earlier decisions under the National Labor Relations Act ("NLRA", National Lab. Rel. Board v. Hearst Publications (1944) 322 U.S. 111) and under the Social Security Act ("SSA", United States v. Silk (1947) 331 U.S. 704), neither of which included "suffer or permit to work" language, nor any other definition of employees. (Nationwide Mut. Ins. Co. v. Darden (1992) 503 U.S. 318, 324-325; *see*, Hearst, *supra*, 322 U.S., at 129; Silk, *supra*, 331 U.S., at 713-714.)

In Hearst and Silk, the Supreme Court spelled out a number of factors to examine in determining whether as a matter of "economic reality," workers were employees. The federal courts have continued to apply (albeit, with varying emphasis and interpretations) the multi-factor "economic reality" test to determine the employer-employee relationship under the FLSA's "suffer or permit to work" definition. The test has evolved into a complex, "balancing"

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[44]FLSA further defines as an employer "any person acting directly or indirectly in the interest of an employer in relation to an employee". (29 U.S.C., § 203 subd. (3)(d), hereafter, "FLSA 3(d)" or "3(d)".) (*See*, pages 48-55, *infra*.)

test of many factors not subject to an arithmetical formula. (Torres-Lopez, *supra*.) The U.S. Department of Labor developed a series of regulatory factors to assist in enforcement of "suffer or permit" under the federal Migrant and Seasonal Agricultural Worker Protection Act, which incorporates FLSA. These are described, and their weight is evaluated, in Torres-Lopez. (*supra*, 111 F.3d, at 639-643.)

Ironically, although the Supreme Court adopted the "economic reality" test in FLSA directly from its development under the NLRA and the SSA, that test was soon abandoned under these two statutes because Congress amended both to require use of the common-law test. (Darden, *supra*, 503 U.S., at 324-325.)[45]

The simple historic fact is that California promulgated our "suffer or permit to work" definition 22 years *before* Congress adopted these words in the FLSA, and 31 years before the U.S. Supreme Court applied its unprecedented interpretation in Rutherford. Nothing in logic leads to an inference that the IWC in 1916 patterned its Order on then non-existent and unanticipated federal law. "Absent convincing evidence of the IWC's intent to adopt the federal standard," the latter should not be imported to the IWC's orders. (Morillion, *supra*, 22 Cal.4th, at 592.) The doctrine that federal authority should serve as persuasive guidelines for interpretation of California statutes *patterned* on federal laws (see, e.g., Morillion, *supra*, 22 Cal.4th, at 593, *citing*

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[45]And ultimately, the U.S. Supreme Court itself recognized its error in creating and applying the non-common-law "economic reality" test to statutes which did not provide definitions of employee. (Darden, *supra*, 503 U.S., at 324-325.)

numerous cases) is inapplicable where, as here, the California statute is NOT so patterned.

(b) "Suffer or Permit to Work" As Intended by the IWC Provides Appellants and Other Agricultural Workers Greater Protection Than the Federal Multi-Factor "Economic Reality" Test

The federal multi-factor "economic reality" test provides less protection than the IWC's intended reach of "suffer or permit" [App. 1498 lines 16-18 (Rulings, *supra*)].[46] Unquestionably, most--if not all--of the out-of-state decisions reviewed above finding "suffer or permit to work" employment relationships would be decided negatively under FLSA/AWPA "economic reality". The multi-factor "economic reality" test simply would not sustain findings of employer relationships in Gorzynski, *supra*, Daly v. Swift, *supra*, Commonwealth v. Hong, *supra*.

California courts have recognized that state law, and particularly the IWC's wage orders, may provide employees greater protection than the FLSA. (Morillion, *id.*, 22 Cal.4th, at 592.) Indeed, where the IWC intends to pattern wage orders after the FLSA, it specifically so states. (*Id.*; *citing*, Wage Orders 4, 5, Cal.Code Regs., tit. 8, §§ 11040, subd. 2(H), 11050, subd. 2 (H).)

Maintaining the maximum level of the IWC wage-order protections, in distinction to FLSA coverage, is consistent with the California rule that statutes relating to minimum wages, hours of labor and working conditions are

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[46]The superior court appeared to confuse the concededly greater protection of the "economic reality" application of "suffer or permit" *vis a vis* the common-law test of "control" (*see*, Rutherford, *supra*, 331 U.S., at 726-727) with the level of protection offered by pre-FLSA state laws such as California's.

remedial in nature and are to be liberally construed to promote the general object sought to be protected. (Industrial Welfare Com., *supra*, 27 Cal. 3d, at 698, *cited in*, Morillion, *supra*, 22 Cal.4th, at 592.)

Maximizing wage order protections is also consistent with California's well-established public policy that public welfare depends upon prompt delivery of wages to workers. This Court has repeatedly emphasized that, "wages are not ordinary debts . . . and that because of the economic position of the average worker and, in particular his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay [promptly]." (In re Trombley (1948) 31 Cal.2d 801, 809, upholding Labor Code Section 216 against constitutional challenge; Kerr's Catering Service v. Dept. of Industrial Relations (1962) 57 Cal.2d 319, 326, upholding D.I.R. regulations prohibiting wage deductions for cash shortages as constitutional and statutorily authorized; Pressler v. Donald L. Bren Co. (1982) 32 Cal.3d 831, 837.)

(c) The IWC's Original Intent Should Be Retained

Appellants have already demonstrated that the promulgating body's intent should be gauged by the meaning of the words and the historic circumstances at the time of adoption. (Pages 51-52, *ante*.) Other states that adopted their "suffer or permit to work" statutes before Rutherford have continued to construe them in accord with the historic application of "suffer or permit to work". (Gorczynski, *supra*, 83 N.E.2d 495; Teel v. Gates, *supra*, 482 P.2d 602 (continuing to apply the Oklahoma court's 1913 analysis of "suffer or permit" articulated in Curtis & Gartside, *supra, ante* ; Swift v.

Wimberly (1963) 51 Tenn.App. 532 [370 S.W.2d 500]; Smith v. Uffelman (Tenn. 1974) 509 S.W.2d 229; Gabin v. Skyline Caban Club, *supra*, 54 N.J., at 553-555 (applying traditional "suffer or permit to work" analysis to 1940 New Jersey statute).)

7. Appellants Demonstrated Triable Issues of Material Fact Sufficient to Preclude Summary Judgment on the "Suffer or Permit to Work" Employer Relationship

This Court reviews the trial court's grants of summary judgment *de novo*, considering all of the evidence the parties offered in connection with the motion, and the uncontradicted inferences the evidence reasonably supports. (Artiglio v. Corning, Inc. (1998) 18 Cal.4th 604, 612; Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476.) The Court on appeal of summary judgment assumes the role of a trial court and applies the same rules and standards that govern a trial court's determination of a motion for summary judgment. (Distefano v. Forester (2001) 85 Cal.App. 4th 1249, 1258.) Thus, the Court construes the moving party's evidence strictly, and the non-moving party's evidence liberally, in determining whether there is a triable issue precluding summary judgment. (Alex R. Thomas & Co. v. Mutual Service Casualty ins. Co. (2002) 98 Cal.App. 4th 66, ___ [119 Cal.Rptr.2d 394, 398]; Distefano, *supra*, 85 Cal.App.4th, at 1259.)

Summary judgments are reversible on the finding of factual issues based on inferences first drawn by the appellate court. (Conn, *supra*, 124 Cal.App.3d, at 637, *citing*, Maxwell v. Colburn (1980) 105 Cal.App.3d 180.)

(a) The Trier of Fact Could Reasonably Conclude That APIO Knew Work Was Being Performed For Its Benefit

Isidro Munoz' workers, including appellants, labored on APIO's land from at least February through late June, 2002, cultivating and harvesting strawberries, the marketing of which APIO concedes is its business. Although Munoz ceased delivering fresh-market berries to APIO approximately May 21, Munoz continued harvesting on the APIO fields with these same workers, delivering the berries as cannery fruit to Frozsun Foods, Inc. while awaiting payment from APIO. [App. 187-190, 190, 195; App. 747-748 ¶¶ 5, 8[47]; App. 772-773 ¶¶ 5, 7; App. 790-791 ¶¶ 5, 7; App. 807-808 ¶¶ 5, 8; App. 832 ¶ 12; App. 839-840; App. 943-944; App. 1480 ¶¶ 5-6; App. 1485 ¶¶ 2-4.]

From the outset, APIO was aware that Munoz would hire labor to fulfill his contractual obligations on APIO's land. Indeed, APIO was aware on a daily basis that Munoz' workers were laboring in APIO's Oceano and Zenon fields as a consequence of the morning field visits by its field agents and surely as a consequence of receiving at the end of the day the thousands of cartons of harvested fruit. [App. 138-139 ¶¶ 1.A, 2 (Farmer Agreement, *supra*) App. 140 ¶ 5 (*id.*); App. 148-149 ¶¶ 14.D, 16 (*id.*); App. 194, 920-921; App. 841; App. 946-947, 948-951.]

These workers labored on APIO's land daily with APIO's knowledge and consent. They harvested berries which were immediately delivered to APIO, which thereupon marketed them in its name and sold them to its benefit. This was exactly the situation contemplated by the drafters of Wage Order No. 1 in adopting "suffer or permit to work".

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[47]As noted previously, workers generally referred to APIO's Zenon field as "Mesa 2", and to the El Campo field (contracted with the COMBS) as "Mesa 1". (Footnote 12, *ante.*)

That APIO contracted with Munoz to cultivate and harvest the berries on its fields and to employ the required workers does not sever its liability for their wages under the clear intent of "suffer and permit to work" as adopted by the IWC. These statutes, as explained by Justice Learned Hand, "upset the freedom to contract" with respect to control of those conditions. (Lehigh Valley Coal Co. v. Yensavage (1914), *supra*, 218 F.2d, at 553; *accord*, Daly v. Swift & Co. (1931), *supra*, 300 P. 265.)

That APIO in its contract directed Munoz to comply with the applicable wage laws does not relieve respondent of liabilility as an employer. "Suffer or permit to work" "casts a duty upon the owner or proprietor to prevent the unlawful condition" which is not satisfied by a company rule prohibiting the conduct (Sheffield Farms (1917) *supra*, 167 N.Y.S. 958 ("the defendant's duty did not end with the mere promulgation of a rule . . . [and t]he inference was permissible that there was no adequate system . . . of detection"); Gorcznyski v. Nugent (1948) *supra*, 83 N.E.2d, at 499 ("appellants . . . could have known by the exercise of reasonable care . . .").) In Sheffield Farms, the prohibited condition was child labor; here, the prohibited condition is the failure to pay wages. As in Sheffield Farms, the purpose of "suffer or permit to work" is to impose upon APIO the duty to see that the prohibited condition does not exist. And as in Gorcznyski, APIO could have known by exercise of reasonable care.

APIO's initial argument is that it did not have an employment agreement with the strawberry workers, and that it did not "participate in the selection, hiring, firing, supervision, assignment, direction, setting of wages,

hours and working conditions, preparing and making payroll records paying payroll taxes, providing workers compensation insurance, providing field sanitation facilities, providing transportation, and providing the tools, equipment and material required for the employees of Munoz to grow and harvest strawberries during the year 2000 strawberry season . . ." *Even if true*, is unavailing. The defendants in Chelsea Jute Mills, Pigg, Lehigh Valley Coal, Sheffield Farms, Purtell, Vida Lumber, Hong, Nichols, Daily v. Swift, and Gorczynski, *supra*, did none of those things either. But, as is the case with APIO, they knowingly did "suffer, or permit to work" these employees on property they controlled.

(b) Munoz' Workers Performed Work on APIO's Property During Periods In Which They Were Not Paid Wages

Six years later, appellants and other workers remain unpaid for work performed in 2000 on APIO's lands. Review of the records for a sample of 65 Munoz workers revealed a total of unpaid wages remaining of $105,256.81, of which $18,263.46 was for work done prior to May 22--the last day Munoz delivered fresh-market berries to APIO. [App. 747-748 ¶¶ 3, 5, 8, App. 751-752 ¶¶ 18-20; App. 772-773 ¶¶ 3, 5, 7, App. 776-777 ¶¶ 18-19; App. 790-791 ¶¶ 3, 5, 7, App. 794-795 ¶¶ 17-19; App. 807-808 ¶¶ 3, 5, 8, App. 812-813 ¶¶ 19-20; App. 822-827.]

The lower court erred in finding no triable issues of material fact as to whether APIO was plaintiffs' employer for wage purposes.

(c) The Trier of Fact Could Reasonably Conclude That COMBS Knew Work Was Being Performed For Its Benefit

Larry Combs testified that COMBS did not own or lease the El Campo field on which Munoz' workers harvested the strawberries that COMBS marketed. [App. 903.]

Nevertheless, the contract between Isidro Munoz and the COMBS was irrevocably tied to the El Campo field. In return for an $80,000 loan from the COMBS, Munoz was committed to delivering all the strawberries from the El Campo field to the COMBS for the 2000 season (or until the loan was repaid). The contract did not obligate Munoz to liquidate the loan from, or otherwise do business with the COMBS for, so much as a single strawberry from any other field. On the other hand, the contract facially encompassed *every* berry from the field. [App. 861 ¶ 1 (COMBS Sales Agreement, *supra*).][48]

COMBS, of course, was not merely a lender. His business was the marketing of berries (and other produce). [App. 861 (COMBS Sales Agreement, *supra*); 911 (Exh. B [business card] to Combs depo, *supra*).]

Like APIO, the COMBS were aware on a daily basis that Munoz' workers were laboring in the El Campo field cultivating and harvesting berries delivered to, and for, COMBS' benefit. [App. 194, 920-921; App. 843-844; App. 946-947, 948-951.]

This, again, was the situation contemplated by the drafters of "suffer or permit" in Wage Order No. 1. For the reasons discussed, *supra*, at pages 44-45, *ante* (*vis a vis* APIO), the superior court erred in finding no triable issues

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[48]Notwithstanding the all-encompassing language, the parties apparently treated the contract as applying only to the fresh-market harvest. Munoz delivered the subsequent "cannery" berry harvest to Frozsun Foods, Inc. [App. 189.]

of material fact as to whether the COMBS were the employers of Munoz' workers for wage purposes.

(d) Munoz' Workers Performed Work For Which They Were Not Paid on Property From Which Combs Had the Exclusive Benefit of Their Work

Plaintiffs and Isidro Munoz' other workers labored in the El Campo field from at least February through late June, 2002 cultivating and harvest-ing fresh-market strawberries in an enterprise financially underwritten and controlled by the COMBS. They remain unpaid for work performed in that field. [App. 187-188, 190, 195; App. 747-748 ¶¶ 3, 5, 8, App. 751-752 ¶¶ 18-20; App. 772-773 ¶¶ 3, 5, 7, App. 776-777 ¶¶ 18-19; App. 790-791 ¶¶ 3, 5, 7, App. 794-795 ¶¶ 17-19; App. 807-808 ¶¶ 3, 5, 8, App. 812-813 ¶¶ 19-20; App. 832 ¶ 12; App. 839-840; App. 943-944; App. 1480-1481 ¶¶ 5-7; App. 1485-1486 ¶¶ 4-10.]

Although Munoz ceased delivering fresh-market berries to COMBS approximately mid-May, Munoz continued harvesting the El Campo field, thereafter delivering cannery berries to Frozsun Foods, Inc. Plaintiffs and certain other workers also harvested cannery berries and split their harvest time after May 27 evenly among the El Campo, Zenon and Oceano fields. Their wages for that work performed remain unpaid. Review of the records for a sample of 65 Munoz workers revealed a total of unpaid wages remaining of $105,256.81, of which $18,263.46 was for work done prior to May 22. [App. 189, 927; App. 751-752 ¶¶ 17-19; App. 776-777 ¶¶ 17-19; App. 794-795 ¶¶ 16-19; App. 812-813 ¶¶ 18-20; App. 822-827; App. 953; App. 1481-1482 ¶¶10-11; App. 1486 ¶¶ 13-14.]

B. Each Respondent Directly or Indirectly Exercised Control Over the Wages, Hours or Working Conditions of Munoz' Employees, and Is Liable As Their Employer For Wages Under Wage Order 14

Plaintiffs also alleged that each respondent was their employer be-cause each also directly or indirectly exercised control over their (and other workers') wages, hours, and or working conditions. Plaintiffs additionally alleged that each respondent was responsible for causing the violations that have aggrieved them and other workers. [App. 20-21 ¶¶ 20, 22 (Complaint, *supra*).]

The present 2(F) "exercises control" language first appeared in Wage Order 1R applicable to the manufacturing industry, issued February 8, 1947. [App. 635 ¶ 2.(f). ("IWC Records, *supra*).]

1. The "Exercises Control" Test Is Facially Satisfied Through Evidence Establishing (Direct or Indirect) Control of a Single Factor

Subdivision 2(F) establishes several separate disjunctive or alternative factors by which, in addition to the "suffer or permit" test. one may be liable as an employer. The "control" may be of wages; it may be of hours, or it may be of working conditions. (*Id.*) Moreover, under 2(F) , a person is liable if he *directly* exercises control; the person is equally liable if he *indirectly* exercises control; he is still equally liable if through *an agent or any other person* he exercises control. (*Id.*)

No California court has addressed the "exercises control" employer definition[49] nor the modifying language, "directly or indirectly or through an

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[49]Although the "exercises control" definition was at issue in Reynolds, supra, this Court concluded that the IWC had not sufficiently specifically manifested intent to make it applicable to corporate officers against the strong presumption of corporate-agent immunity, and the Court did not reach the (continued...)

agent or any other person." However, in Borello, *supra*, this Court examined the employment relationship under California's Workers' Compensation Act which defines an independent contractor as "any person who renders service for a specified recompense for a specified result, under the *control* of his principal as to the result of the work only and not as to the means by which such result is accomplished." (Labor Code, § 3353.) This Court examined whether the circumstances under which the Borello "sharefarmers" labored satisfied California's "principle test of [the] [Workers Compensation] employment relationship . . . whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired." (Borello, *supra*, 48 Cal.3d, at 350, *citing*, Tieberg v. Unemployment Insurance Appeals Bd. (1970) 2 Cal.3d 943, 946.) This Court concluded that the "control test" should not be applied "rigidly, and in isolation", but must include "consideration of the remedial statutory purposes. (Borello, *id.*, at 350, 352-353.) The Court concluded that, although Borello did not supervise work in the field, did not set the harvesters' hours, did not direct when the harvesters should select and pick the respective sizes of the cucumbers, and did not have the authority to discharge them, "all *meaningful aspects of the business relationship*" were controlled by the company. (*Id.*, at 346-349, *cf.*, 356 (emphasis added).) The Court further characterized this as "all *necessary* control over the harvest portion of its operations." (*Id.*, at 357

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[49](...continued)
substance of the language.

(emphasis in original).)[50]

These concepts are applicable to, and useful in, examining respondents' conduct.

2. Plaintiffs Established Triable Issues of Material Fact Sufficient to Preclude Summary Judgment For Each Respondent on the "Exercises Control" Employer Relationship

(a) The Trier of Fact Could Reasonably Conclude That APIO Indirectly Exercised Control Over Plaintiffs' Wages and Hours

The APIO-Munoz contract facially provided APIO with *sole* control of Munoz' harvest, and Munoz was obligated to pick fresh market berries and deliver to APIO as long as APIO desired. APIO had no obligation to market and sell Munoz' berries if APIO determined in its *sole* judgment that there was insufficient market demand for the crops and, at APIO's request, Munoz had to stop harvesting and packing the berries. APIO had the right to reject any berries delivered by Munoz which APIO, in its sole judgment, determined to be unsuitable for purchase, marketing and/or sale, either at the time of delivery by Munoz or which subsequently became unsuitable while in APIO's possession. APIO could dispose of these crops without notice. [App. 138 ¶ 1.B (Farmer Agreement, *supra*), App. 140-141 ¶¶ 7, 8.A. (*id.*), App. 147 ¶ 13 (*id.*), App. 148 ¶ 15 (*id.*); *cf.*, App. 136 ¶ 1 (Crop Exhibit, *supra*); App. 153-

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[50]IWC orders also reference the word "control" in their definition of "hours worked". (Order 14, 8 Cal.Code Regs, § 11140 par. 2, subd. (G), examined in Morillion v. Royal Packing, *supra*; *see*, fn. X, *ante*.) In Morillion, this Court determined that the time employees spent on employer-required bus rides to the work-sites was time subject to their employers' control within the meaning of the IWC "hours worked" definition, notwithstanding that the riders were free to sleep, read or perform other personal activities on the bus. (*Id.*, 22 Cal.4th, at 586-588.)

154 ¶¶ 1.B.,C., 5 (Oceano sublease, *supra*); App. 161 ¶¶ 1.B.,C., 5 (Zenon sublease, *supra*); App. 166 first paragraph (Secured Promissory Note, *supra*); *accord*, App. 188, 190; *accord*, App. 1047 line 12- -1048 line 8.]

Conversely, Munoz could not sell berries to any third party without the express written consent of APIO. Such sales would be authorized only if the third party agreed in writing that the proceeds go to APIO to repay advances to Munoz and other charges. Moreover, Munoz was required to resume delivering crops to APIO upon notification that APIO was again "accepting" berries for marketing. [App. 140-141 ¶ 7 (Farmer Agreement, *id.*).]

APIO, having advanced money to Munoz, had the right upon determining that Munoz had failed to perform any obligation under the agree-ment--including harvesting berries, or complying with labor law— to either (1) enter the fields and maintain the business; or (2) contract with third parties to perform the functions; or (3) pay Munoz' expenses. [App. 148 ¶ 15 (*id.*).]

APIO retained control of the fields on which Munoz grew berries for APIO. Moreover, APIO could declare Munoz in default of the subleases for any failure to comply with the Farmer Agreement. [App. 154-156 ¶¶ 5, 8 10 (Oceano sublease, *supra*); App. 161-164 ¶¶ 5, 8, 10 (Zenon sublease, *supra*).]

Munoz and his supervisor Arturo Leon both testified that APIO sent field representatives to both the Oceano and the Zenon fields on a daily basis to tell both him and his workers how many boxes of strawberries to pick, which fruit to pack and to discard, and how to pack the fruit to ensure quality. Tim Murphy, APIO's Vice President with responsibilities for general supervision of strawberry production and harvest, conceded that APIO's field

representative, Juan Toche, told the "growers" in the morning what to pack informing the latter of the quantities of different types or styles of pack needed that day. [App. 194, 920-921; App. 841; App. 940-941, 946-947, 948-952; App. 1003.] Murphy testified that there was,

> a little bit of negotiation, but everybody has to work together, because ultimately we have to fill the orders that we have business for.
>
> Everybody can't just decide they're all going to pack the same style of pack and we're stuck selling them. . . .

[App. 1003 lines 13-18; *see, also*, App. 1048 lines 9-14.]

The parties' conduct buttresses the inference that Munoz was not acting independently in continuing to harvest berries for APIO. Particularly probative are APIO's own calculations which showed that over the final four weeks of peak fresh-market harvest Munoz was picking berries at a personal loss: the market price was below his break-even point. Notwithstanding the below-break-even market price (for Munoz), this state of affairs apparently benefitted APIO. APIO kept demanding more berries. [App. 1003 lines 6-15, App. 1029-1033; App. 1068 (APIO "Estimated Proceeds/Strawberries" for Isidro Munoz, *cf.*, 4th col from left "Estimated Dollars Per Carton", *with* 5th col. from right "Est. Net Proceeds Before Note Repayment", *with* "Break Even Point" in lower portion of sheet); App. 1205 line 20 - - 1207 line 24.]

The trier of fact could reasonably infer that APIO's financial interest benefitted from continuing to convey fresh-market orders to Munoz as long as the market price exceed APIO's out-of-pocket costs for cooling and marketing (and for advancing "Pick Pack" payments to retain Munoz' labor force at work--see discussion re "Pick Pack", at sub-section (ii), *infra*), since any

amount over those costs could be retained by APIO to reimburse its own earlier advances to Munoz. The trier of fact could equally reasonably conclude that APIO was exercising all control *necessary* to ensure that it continued to benefit from continued harvest of the berries even though, as will be shown in the following section, continuing that harvest ensured that the workers could not be paid for their labor.

Indeed, Munoz believed he had no option to seek alternative disposition that might enable him to continue to pay his harvest workers. And APIO would have continued to accept Munoz' berries if the latter could have continued to deliver them in adequate condition. [App. 141 ¶ 8.A. ("Farmer Agreement", *supra*); App. 188, 190; App. 840; App. 1049 line 11 - - 1050 line 16.]

(1) APIO's Dominion Over Munoz' General Harvest Proceeds Amounted to Control Over His Workers' Wages

Pursuant to the Farmer Agreement, *supra*, and Crop Exhibit, *supra*, APIO was obliged to pay the net proceeds from berry sales to its "growers" on the third Friday following the calendar week in which berries were harvested. However, so long as Munoz' account with APIO resulted in a negative balance, i.e., the charges owed APIO from its earlier advances to Munoz (either direct or to vendors on his behalf) exceeded credits from APIO, Munoz received no cash payment of net proceeds. [App. 137 ¶¶ 13, 15 (Crop Exhibit, *supra*)]; App. 1004 line 16 - - 1007 line 11; App. 1060, 1068 (APIO grower statements "Estimated Proceeds/Strawberries" for Isidro Munoz, *see* second column from right, captioned, "Note/Grower Statement Balance"); App. 1195-1197 (APIO's

General Ledger for Isidro Munoz for fiscal year 2000--hereafter, "G/L".)]

Indeed, in the entire 2000 season, APIO did not pay Munoz a single cent of net proceeds. Following deductions for the cooling, marketing and handling costs, all of Munoz' "net" proceeds were credited against his outstanding balance due APIO and/or due other vendors or suppliers to which APIO directed payments from Munoz' proceeds. [App. 1006-1007; *cf.*, App. 1195-1197 (G/L, *supra*).]

Munoz, of course, needed substantial funds during harvest. Once peak harvest began about mid-April, Munoz' payroll was directly tied to the volume of berries delivered since he (and virtually all strawberry producers) paid their harvest workers piece rate wages. Munoz' workers received a nominal cash piece rate of $1.35 per carton. [App. 748 ¶ 7; App. 772 ¶ 6; App. 792 ¶ 6; App. 808 ¶ 7; App. 1481 ¶ 8; App. 1485-1486 ¶¶ 8-9.]

APIO's Tim Murphy testified that, because of "growers'" problems with cash flow during the harvest, APIO had implemented a system of partial advance payments on cartons already delivered but for which net proceeds had not yet been calculated nor delivered to the "growers". [App. 1008-1009, 1020.] The scope of the "cash flow" referenced by Murphy is illustrated by University of California Cooperative Extension data for local fields. Strawberry production costs in the Santa Maria Valley typically approach $21,400 per acre. Of this total, approximately $13,200 (or 62% of total production costs) represent field-harvest labor. [App. 367-369, 376 [51] (Note

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[51]This document was introduced without objection from any party as Exhibit F to the Declaration of Terrence R. O'Connor, counsel for COMBS (continued...)

should be made that this study discusses procedures and costs considered "*typical*" for the area rather than recommended or "best practices" procedures and costs. (App. 368, 369).] This field-harvest labor expense is incurred during the months of March through July, distributed typically as follows: 19% in March; 29% in April; 30% in May; 15% in June; and 7% in July. [App. 380 (*id.*).] APIO had been in the strawberry business for close to 15 years and Murphy had been with APIO approximately 21 years. . [App. 129 ¶¶ 2-3.] The trier of fact could reasonably conclude that respondent understood the cost structure and financial needs of strawberry production.

APIO called its system of partial advance payments "Pick and Pack" or "Pick Pack", and fixed the "Pick Pack" rate (per carton) in the annual Crop Exhibit addendum to the Farmer Agreement. "Pick Pack" payments were issued 5 days following the end of the week for which the advances were credited, and the total of each advance was based upon the number of cartons delivered since the preceding "Pick Pack" payment. "Pick Pack" payments were then later deducted as a further charge against the grower's net proceeds or account for the year. [App. 136 ¶ 4 (Crop Exhibit, *id.*)]; App. 1007-1009, 1020, 1022-1024; App. 1060, 1068 (APIO grower statements "Estimated Proceeds/ Strawberries" for Isidro Munoz--*see* 6th column from left "Less Estimated Pick/Pack"); App. 1176-1178 (APIO "Pick Pack" calculation, check request and check to Isidro Munoz); App. 1166-1168 (*same*); App. 1153-1155 (*same*); App. 1133-1135 (*same*); App. 1112-1114 (*supra*); App. 1102-1104

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[51](...continued)
and RUIZ...

(*supra*); App. 1092-1094 (*same*).]

"Pick Pack" payments for the 2000 season were contractually fixed at $2.00 per carton. However, from mid-March to the week ending April 23, APIO increased the "Pick Pack" advances to $2.50 per carton. Those payments corresponded to the period during which Munoz paid his harvest workers hourly, at the rate of $5.75. [App. 136 ¶ 4 (Crop Exhibit, *supra*); *cf.*, App. 1178 (APIO "Pick Pack Advance Calculation"/week ended March 12); App. 1168 (*same*, week ended March 19); App. 1155 (*same*, week ended March 26); App. 1135 (*same*, week ended April 2); App. 1114 (*same*, week ended April 9); App. 1104 (*same*, week ended April 16); App. 1094 (*same*, week ended April 23); App. 747-748 ¶¶ 6-7; App. 808 ¶¶ 6-7; App. 1485 ¶ 7.]

Following April 23, APIO's "Pick Pack" payments for the balance of Munoz' harvest dropped significantly below the contractually guaranteed rate of $2.00 per carton. On May 5, APIO issued a "Pick Pack" check of $43,105.30 to Munoz for 26,719 cartons of berries delivered the week end-ing April 30, 2000. The average payment for that week was only $1.61. [App. 1082-1084.] Had APIO honored the $2.00 "Pick Pack" rate established by the contract, this check would have been for $53,438.00, or $10,332.70 more than Munoz actually received. On May 12, APIO issued a "Pick Pack" check of $66,791.40 to Munoz for 43,374 cartons delivered the week ending May 7. The average payment for that week was only $1.59. [App. 1071-1073.] Had APIO honored the $2.00 "Pick Pack" rate, that check would have been for $86,748.00, or $19,956.60 more than Munoz actually received.

APIO then suspended "Pick Pack" checks for cartons delivered by

Munoz for the weeks ending May 14 and May 21. Finally, on May 31, APIO "issued"--but did *not* deliver to Munoz--a check for $77,622.50 covering delivery of 58,420 cartons for those weeks. That amount represented an average "Pick Pack" payment for those two weeks of $1.33 per carton. [App. 1022; App. 1062-1064 (APIO "Pick Pack Advance Calculation"/week [*sic.*] ended May 8 through May 21).] Had APIO honored the $2.00 "Pick Pack" rate, that check would have been for $116,840.00, or $39,177.50 more than Munoz actually received.

APIO logically and actually knew that Munoz' continued delivery of berries was being accomplished only through the continued employment of workers.

The cumulative deficiencies from the contractual rate of the "Pick Pack" checks delivered by APIO following April 23 was $69,4666.80. APIO's unilateral decisions to pay either more or less than the contractual rate illustrate the "control" that it exercised over Munoz' receipts and ability to meet his payroll. Indeed, the cumulative difference between what Munoz actually received after April 23 for the 128,513 car-tons delivered and the $2.50 "Pick Pack" rate that APIO had been previously paying amounted to $133,763.30. There is no evidence that APIO ever discussed those changes in the "Pick Pack" rate with Munoz.

APIO, through its own accounting, was aware of Munoz' liabilities, and that their magnitude during the 2000 season was increasing even as Munoz was delivering berries to APIO for sale. [App. 1013-1014; App. 1195-1196 ("G/L", *see* three right-hand columns ["Debit"-"Credit"-"Balance", *showing*

monthly balances due to APIO of: $84,771.97-Feb.1; $99,881.93-Mar. 1; $157,667.36-April 1; $163,634.65-May 1; $206,582.49-June 1; $188,234. 69-July 1).] It is apparent that APIO could not have been unaware that its continued permitting or encouraging or demanding that MUNOZ continue to harvest would have the inevitable consequence that MUNOZ could not pay the workers.

Indeed, in March, barely at the beginning of the harvest, Munoz informed APIO that he was running out of cash. Murphy authorized a $30, 000 advance beyond the loan amounts committed at the beginning of the season. [App. 1049; App. 1164-1165 (check); App. 1196 (G/L, *supra*--March 24 grower advance appears in G/L entries for May).]

Munoz told APIO that he was not paying his employees and that he was unable to pay his workers because APIO was withholding payments. [App. 1034-1035, 1037.]

Moreover, APIO con-tinued to withhold from Munoz the check issued May 31 until June 10 when that check's proceeds were converted at the personal bank of APIO's manager into individual cashier's checks payable to *some* of the employees to whom Munoz owed wages, and delivered to the Division of Labor Standards Enforcement.. [App. 1038 (*id.*).]

Even assuming that Munoz ever "received" this check on June 10, it represented respective delays of 22 days in delivery of the "Pick Pack" for the week ending May 14, and 12 days in delivery of the "Pick Pack for the week ending May 21. These delays occurred at a time when Munoz' labor expenses were at their peak, and Munoz' need for cash was critical.

The "Pick Pack" payments were not the only proceeds generated by Munoz' harvest that were withheld by APIO. Although APIO nominally charged $1.45 per carton for cooling, Munoz was entitled to a partial rebate of $0.70 per carton at the end of the season. Munoz' cooler rebates for the 2000 fresh-market harvest totaled $111,623.40. Although Munoz' delivery of fresh-market berries to APIO ended on May 21, APIO retained this cooler rebate until July 28, when it applied the entire amount against Munoz' outstanding balance. [App. 136 ¶ 8 (Crop Exhibit, *supra*, "Cooler Upcharge"), *cf.*, ¶ 10 "Cooler Rebates"); App. 1060 (APIO "Estimated Proceeds/Strawberries" for Isidro Munoz, *see*, right column "Rebate .70"; *see* 4th through 6th columns from right margin for "Final Liquidation Date" of 07/28/00).]

APIO had been in the strawberry business for close to 15 years. APIO had done business with Munoz for three years. [App. 129 ¶ 3; App. 139 initial text (Farmer Agreement, *supra*); App. 153 initial text (Oceano sublease, *supra*); App. 1024.] The trier of fact could reasonably conclude that APIO's combination of "cooler upcharge" and "rebate" were a procedure for withholding or controlling net proceeds of the "grower" to ensure retirement of its own advances in preference to wage payments for the workers who harvested the berries that generated its revenues. Indeed, APIO's practices not only served to impute knowledge and an opportunity for control over its growers, but support the inference that the practices benefitted it. (Purtell v. Philadelphia & Reading Coal & Iron, *supra*, 99 N.E. 899.)

APIO's general and pervasive control over Munoz' business and financial affairs exceeds by far the level found by this Court in Borello to

amount to "all meaningful aspects of the business relationship." (48 Cal.3d, at 356.) Of course, the IWC employer definition does not require control over the entire business relationship, but only over wages *or* hours *or* working conditions. Here, too, the evidence overwhelmingly supported an inference that APIO's control over Munoz enabled the latter at one point to meet its payroll so that he could continue to supply the berries that respondent demanded; and at a later point the same control sabotaged Munoz' ability to continue to pay his employees. Because the employer relationship exists when the control is "indirect or through an agent or third party", it exists here. Munoz was APIO's "third party".

The mere fact that Munoz issued the workers' payments (when he could) does not negate an inference that APIO exercised control over disbursement of the funds. "[A]s experience and . . . decisions . . . indicate, control over disbursement of funds may be exercised by persons other than those who actually write the checks." (Metropolitan Water Dist. v. Superior Court, *supra*, 32 Cal.4th, at 504 fn. 9.) This Court did not reach the legal question of how much control was "enough" in Metropolitan. (*Id.*)

These inferences do not stand unsupported. Munoz testified that as a "direct result of [APIO] not paying . . . [him] for the strawberries . . . [Munoz] had no funds to pay the . . . harvest workers in . . . [his] employ", and he was unable to pay them for several weeks of work. This testimony was not merely post-litigation rationalization. Munoz repeatedly called APIO's field representative Juan Toche during harvest and complained that without APIO's payment, he could not pay his harvest workers. Munoz told respondent RUIZ

in late April or early May that payment problems with APIO were leaving him unable to pay his workers. Larry Combs testified that he knew Munoz needed money, and Combs paid him from anticipated proceeds that he had not yet received. At some point in May, Munoz' supervisor, Arturo Leon was telling workers that Munoz was unable to pay them because APIO had not reimbursed Munoz. [App. 749-750 ¶ 14; App. 774-775 ¶ 15; App. 792 ¶ 13; App. 810 ¶ 15; App. 841; App. 904; App. 931.]

Thus, APIO was at least indirectly responsible for causing the wage nonpayment for Munoz' workers.

(2) APIO Exercised Control Over Which of Munoz' Expenses and Accounts Payables (Including Wages) Were Paid

APIO controlled whether many of Munoz' non-labor costs would be paid in advance of unpaid wages by virtue of its system of "advancing" expenses and subsequent recovery of these charges from Munoz' market proceeds in advance of remitting Munoz' net proceeds. Thus, APIO con-trolled whether many of Munoz' other production expenses would be paid in advance of his workers' wages. Setting aside the "Pick Pack" payments, APIO at a minimum exercised control over repayment of $193,000 of ex-penses ($163,000 provided under the Crop Exhibit, and $30,000 additionally advanced in March). [App. 137 ¶ 15 (Crop Exhibit, *supra*); App. 1049.] Of this amount, at least $50,900--the rent for the Oceano and Zeno fields--was payable directly to APIO. Another $112,100 was for production costs for the Oceano field. [App. 137 ¶ 15.]

The Oceano field was one parcel of the 400-some-acre Phelan and

Taylor ranch which had a common or shared irrigation system. APIO wanted to maintain control of the irrigation system as it was responsible to the owner, John Taylor, for its maintenance. Either the owner, John Taylor, or APIO made decisions concerning repairs or other expenditures on the system, and then decided who of the tenants, i.e., sublessees should bear or share the costs. [App. 1015-1017.]

Vendors or suppliers to Munoz would bill APIO who then entered these expenses as charges against Munoz in the general ledger. APIO then ensured that it recovered these charges before any net proceeds were remitted to Munoz, thus determining that these bills were paid ahead of workers' wages. [App. 1006-1007, 1013-1014; App. 1057-1058 ("G/L [General Ledger] Activity Detail Incl 0 Bal" [7/27/00]--see, 5th column from left captioned "Vend").] (*cf.*, Dole v. Simpson, *supra*, 784 F.Supp., at 546-547, defendant decided which accounts payable would be satisfied and thus controlled whether sufficient funds to meet payroll.)

The trier of fact could reasonably infer that APIO's financial control over Munoz affected the latter's ability to meet payroll, and that APIO was fully aware that its financial control and Munoz' perilous financial condition affected Munoz' ability to meet his payroll. Through Munoz, APIO could ensure that labor was engaged to harvest the berries that its core business relied upon while simultaneously "insulating" itself from their wage obligations until respondent had first recovered all other costs of its enterprise. Through Munoz, APIO could ensure that those operating-cost obligations owed commercial vendors - whose business relationship was essential each

year - would always be satisfied in advance of the wage obligations to workers - whose satisfaction was irrelevant to obtaining a new work force the following season.

(b) The Trier of Fact Could Reasonably Conclude That APIO Also Directly Controlled At Least Some of Munoz' Workers' Wages

After Munoz told APIO's field representative, Juan Toche, that some of his workers had filed wage claims with the Labor Commissioner, APIO instructed Munoz sometime prior to May 31 to provide it a list of unpaid workers who harvested strawberries delivered to APIO. However, APIO told Munoz to limit the list to those "employees he wanted to pay out of" the outstanding "Pick Pack" payment of approximately $77,000; i.e., the wages due workers on the list could not exceed that amount.[52] [App. 133 ¶ 26; App. 170-176; App. 1035 lines 3-9, App. 1039 lines 21-23, App. 1041 lines 1-6, App. 1041 line 24 - 1044 line 20; App. 1043 line 18 - 1044 line 9.]

On June 6, California Division of Labor Standards Enforcement DLSE) Bureau of Field Enforcement (BOFE) Investigator Paul Rodriguez met with APIO's Vice President Murphy who told him that APIO had a $75,000 check pending to Isidro Munoz, and confirmed that the Oceano field and the Zenon field which Rodriguez had visited earlier in the day were APIO's. On the following day, Rodriguez received a phone message from Murphy to the effect that the latter would provide Rodriguez with a copy of Munoz' payroll information the following day, that he [Murphy] was "holding the money", and

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[52]This outstanding payment represented the withheld "Pick Pack" amounts due 5 days after, respectively, May 14 and May 21. See pages 86-88, *ante*.

thought that "we should try to pay all workers at one time." On following days, Rodriguez was informed by his co-investigator that Murphy was helping to plan a worker check distribution that was to occur at the Betteravia Government Center in Santa Maria on Saturday, June 10. The location has not been suggested by D.L.S.E. [App. 831-832, 833.]

Meanwhile, Toche told Munoz that APIO "would write out cashier's checks to each worker individually", and a time was set for Munoz to accompany Toche and "Tim" to the Mid-State Bank in Guadalupe, California. [App. 842 (Munoz Dec., *supra*).] On June 10, Munoz met Murphy and Toche at APIO's office and accompanied them to the Mid-State Bank in Guadalupe which was neither APIO's nor Munoz' bank but *was Tim Murphy's personal bank*. At Mid-State, Munoz endorsed the APIO check "over to the bank"; the list of workers' names and corresponding wages owed was given to the bank, and Murphy informed the bank that the APIO check needed to be converted into cashier's checks corresponding to the names and amounts on the list. [App. 1038, 1039-1040.] [App. 133 ¶26; App. 170-176; App. 1035 lines 3-9, App. 1039 lines 21-23, App. 1041 lines 1-6, App. 1041 line 24 - 1044 line 20.]

Murphy took the 71 cashier's checks plus a list containing 71 names and amounts to be paid to the Betteravia Government Center and delivered them to D.L.S.E. BOFE Investigator Paul Rodriguez. The list supplied by Murphy to Rodriguez on June 10 showed unpaid wages for 71 workers of $77,349.83, of which $67,216.83 was for work performed prior to May 22. Rodriguez recognized some of the names on the list given him by Murphy as

some of the claimants who had filed with D.L.S.E. [App. 196; App. 833, 833-834 ¶ 16; 836-837; App. 843.] Comparison of the lists of unpaid employees given by Munoz to Murphy, and given by Murphy to Rodriguez, shows that they are distinct documents--the amounts owed for two payroll periods are transposed. [App. 171-176; *cf.*, App. 836-837.]

During the distribution, many of the workers who received checks told Rodriguez that they were owed more wages than covered by the checks; many other persons came to the site also claiming unpaid wages from Munoz, whose names were not on the list provided by Murphy (and for whom there were no checks). Rodriguez' review of DLSE files confirmed that 78 wage claims had been filed against Munoz prior to June 10, and 83 additional wage claims were filed against him after June 10. [App. 834, 835.]

It should be noted that approximately 80 of Munoz' harvest workers did not file wage claims with the Labor Commissioner, but continued to pick berries for Munoz. These workers' names also were not on Jose Popoca's Serrano's list of May 27. [App. 843.]

The trier of fact could reasonably conclude that APIO exercised direct control over payroll here, determining which of Munoz' workers were paid, and the extent of those payments.

(c) The Trier of Fact Could Reasonably Conclude That the COMBS Respondents Exercised Control Over Munoz' Workers' Wages, Hours and Working Conditions

(1) COMBS Exercised Control Over Munoz' Harvest Activities and Thus Had At Least Indirect Control Over Munoz' Workers' Wages and Working Conditions

The contract between COMBS and Munoz required the latter to deliver all fresh-market berries from the El Campo field to COMBS until Munoz' loan from the former was repaid. It did not permit Munoz to deliver berries elsewhere, even in the event that other dealers might have offered higher prices that theoretically would enable Munoz to more readily repay the loan. [App. 189, 930; App. 843; App. 861 ¶ 1 (COMBS Sales Agreement, *supra*); App. 953.]

COMBS' agent RUIZ came on a daily basis between at least April and May to tell Munoz' crew how much fruit to pick, which fruit to pack or discard, and to ensure a quality pack. [App. 843-844; App. 861 (COMBS Sales Agreement, *supra.*); App. 953-957, 959-961.]

COMBS knew that market conditions were "real bad", and was aware that Munoz needed money. In late May, COMBS advanced Munoz an additional $30,000 against anticipated proceeds. [App. 904, 910.]

(2) The COMBS Respondents Exercised Direct Control Over Munoz' Workers' Hours Following May 27, 2000

On Friday, May 27, Munoz' crews harvesting in the El Campo field walked out of the field in protest over non-payment of wages, and provided their names and information concerning unpaid amounts to a "community organizer" who came to the field to assist them in preparing wage claims. Munoz' foreman's attempt to get the workers to return was ineffectual. [App. 750-751; App. 774-775; App. 792-793; App. 810-811.]

RUIZ--whom the workers recognized as the representative who checked the berry harvest daily--arrived during the walk-out and told the

workers that they should return to work to help Munoz and that *he* [RUIZ] guaranteed they would be paid as he was delivering checks to Munoz from his boss. When workers expressed concern that available funds would be insufficient to pay everyone, RUIZ further told them not to worry as he would deliver even larger amounts of money the following week and even more the subsequent week. Thereupon, numerous workers crossed off their names and information on the "organizer's" list, and returned to work the following Monday, based upon their belief in RUIZ' representations. [App. 750-751; App. 775-776; App. 793-794; App. 811-812; App. 1481 ¶¶ 8-9; App. 1486 ¶¶ 12-13.]

Strawberry harvest workers customarily work by oral contract. Plaintiffs and other workers testified that not only had their immediately-prior employment agreements with Munoz been oral, but that all of their agricultural employment experience in the surrounding Santa Maria Valley--including agreements concerning wage payments--had been solely through oral contracts. These employment agreements always take place at the field locations. [App. 747 ¶ 4; App. 772 ¶ 4; App. 790; App. 807 ¶ 4.]

The trier of fact could reasonably conclude that COMBS offered employment through its agent RUIZ. Offers of employment in accord with customary hiring practices must constitute control over hours of employment.

(d) The Trier of Fact Could Reasonably Conclude That RUIZ Exercised Control Over Munoz' Workers' Wages, Hours and Working Conditions

Appellants identified RUIZ as a defendant and plead that he conducted business in San Luis Obispo County. Plaintiffs further plead that RUIZ "[a]t

times" was an agent and/or employee of COMBS. However, plaintiffs did not plead that RUIZ was at *all* times an agent of COMBS, and plead all claims under Wage Order liability against him individually. [App. 19 ¶¶ 7-9; App. 21-23 ¶¶ 24-39..]

Appellants have demonstrated triable issues of fact that RUIZ during many weeks appeared in the El Campo field every harvest day to give instructions concerning the strawberry harvest to Munoz, his supervisors and directly to his workers, and that on May 27, RUIZ promised to Munoz' former workers that they would be paid if they returned to work for Munoz performed the at all times relevant to this appeal RUIZ was an agent and/or employee of COMBS. Plaintiffs have further demonstrated triable issues of fact that at times during these activities, RUIZ was functioning as an agent or employee of COMBS.

Nevertheless, the record includes evidence which, if credited by the trier of fact, would support a finding that RUIZ did not become COMBS' agent and/or employee until June 1--after the above-described activities. [App. 343 ¶¶ 10-11, 21; App. 976.] Consequently, the record presents a triable issue of fact that RUIZ undertook some or all of these activities while not the ostensible or actual agent of COMBS and, consequently, bears individual liability as an employer under the Wage Order definitions.

The lower courts' rulings on summary judgment insofar as they discussed COMBS and RUIZ addressed only whether COMBS was liable for statutory violations and whether COMBS agreed to pay the workers' wages. The rulings did not explicitly address whether RUIZ was an employer but it

appears that the lower court assumed or concluded that RUIZ was COMBS' agent. [App. 1505-1509.] In so doing, the court impermissibly resolved conflicts of fact, and its judgment for RUIZ on all claims was error.

3. The Court of Appeal Erred In Concluding That the IWC "Exercises Control" Definition Adopts the Federal Multi-Factor, Balancing "Economic Reality " Test

The Court of Appeal applied the multi-factor, balancing "economic reality" test to appellants' claim that respondents were their employers under the IWC "exercises control" definition. (Slip Opinion, pp. 4-7.) The lower court concluded that "Apio did not control the number of workers, the hiring or firing of specific individuals or the selection of the crews" and therefore "lacked sufficient control over the workforce to be classified as a joint employer," relying upon a single federal appellate decision in the 11th Circuit. (Aimable v. Long and Scott Farms (11th Cir. 1994) 20 F.3d 434.)

The court of appeals erred in at least four respects: (1) the Aimable analysis was predicated upon the multi-factor balancing test developed under the federal "suffer or permit" doctrine; the issue here arises not under the IWC "suffer or permit" definition but under the *alternative*, "exercises control" definition--the lower court thus essentially relegated this alternative definition to meaningless surplusage; (2) The court of appeal concluded that Apio was not appellants' employer because the company did not control the number of workers, the hiring or firing of specific individuals, or the selection of crews. The IWC "exercises control" definition explicitly includes control over *wages* or *hours*, or *working conditions* - - none of which was included in the court of appeal's analysis. Even assuming, *arguendo*, that the Aimable factors used by

the court of appeal could be characterized as "working conditions", the lower court completely ignored 2(F)'s plain language that the employer test is satisfied through control of other alternatives, including *wages* or *hours*, and further ignored appellants' evidence of the multitude of other factors constituting working conditions over which Apio did exercise control. In redefining "exercises control", the court of appeal substituted other words for the express language contained in the definition which amounted to improper judicial legislation. (Morillion, *supra*, 22 Cal.4th, at 585); (3) even as a multi-factor, balancing case, Aimable's analysis is contrary to that undertaken by every other federal circuit, and has not been followed in subsequent decisions in its own circuit. (*Cf.*, Antenor v. D. & S. Farms (11th Cir. 1996) 88 F.3d 925.) It has been specifically rejected by the Ninth Circuit in Torres-Lopez v. May (1997) 111 F.3d 633, at 641.

The court of appeal did not address the exercises control definition with respect to the COMBS defendants or defendant RUIZ.

The lower court's reasoning thus violates the principle that construction begins with the actual language (*cf.*, Halbert's Lumber v. Lucky Stores, *supra*), and this court's instruction that, absent convincing evidence of the IWC's intent to adopt a federal standard, federal law should not be imported to the IWC's orders. (Morillion, *supra*, 22 Cal.4th, at 592.)

Beyond the plain language of disjunction, however, no court has addressed what is meant by "control" as each is used in subdivision 2(F). In Borello, *supra*, this Court examined the employment relationship under California's Workers' Compensation Act which defines an independent

contractor as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of the work only and not as to the means by which such result is accomplished." (Labor Code, § 3353.) This Court examined whether the circumstances under which "sharefarmers" labored satisfied California's "principle test of [the] employment relationship . . . whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired." (Borello, *supra*, 48 Cal.3d, at 350, *citing*, Tieberg v. Unemployment Insurance Appeals Bd. (1970) 2 Cal.3d 943, 946.) This Court concluded that the "control test" should not be applied "rigidly, and in isolation", but must include "consideration of the remedial statutory purposes. (Borello, *id.*, at 350, 352-353.) The Court concluded that, although the principal did not supervise work in the field, did not set the harvesters' hours, did not direct when the harvesters should select and pick the respective sizes of the cucumbers, and did not have the authority to discharge them, "all meaningful aspects of the business relationship" were controlled by the principal. (*Id.*, at 346-349, *cf.*, 356.) The Court further characterized this as "all *necessary* control over the harvest portion of its operations." (*Id.*, at 357 (emphasis in original).)

IWC orders also reference the word "control" in another context. Order 14 defines "hours worked" as "the time during which an employee is subject to the *control* of an employer, and includes all the time the employee is *suffered or permitted to work*. (8 Cal.Code Regs. § 11140 par. 2, subd. (G).) This definition apparently appeared for the first time during the 1947 re-

issuance of the orders as the "R" series. The Court

Here the issue is whether respondents "directly or indirectly or through . . . any other person . . . exercise[] control over the wages [or] hours or working conditions of any person." (Order 14, supra, para. 2, subd. (F). In applying the word "control" as used in the IWC orders, this Court's approach in Borello to analyze whether the exercise was "meaningful" or all that was "necessary" provides a useful and reasonable analysis. This application, although compelled by, finds its parallel in federal courts' analysis of control in applying Section 3(d) of the Fair Labor Standards Act. (29 U.S.C., § 201, 203, subd. 3.)

> The "right to control" does not require continuous monitoring of employees. Instead, control may be restricted, or exercised only occasionally . . . since such limitation on control "do not diminish the significance of its existence."

(Donovan v. Janitorial Servs., Inc. (5th Cir. 1982) 672 F.2d 528, 531.)

Another federal court, referring to the principal's visits to the job sites only once or twice a month, concluded that, "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control". (Donovan v. Superior Care, Inc. (2d Cir. 1988) 840 F.2d 1054, 1060.)

Dominion over financial affairs of the nominal employer, Munoz, such as unilateral decisions as to when and under conditions his share of market proceeds would be distributed, or as to discontinuance of the contractually-provided "Pick Pack" advance payments to cover labor costs is sufficient to constitute exercise of control.

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ARGUMENT III

APPELLANTS WERE THIRD-PARTY BENEFICIARIES OF THE APIO-MUNOZ CONTRACT, AND HAVE STANDING TO SUE FOR APIO's BREACH

The APIO-Munoz "Farmer Agreement" expressly obliged Munoz to comply with California's wage laws, and also defined APIO's obligations to reimburse Munoz from the market proceeds generated by sale of the strawberries. [CITATIONS] APIO breached its payment obligations under the "Agreement", directly, and knowingly, causing Munoz to default in his contractual obligation to pay the workers' wages. Appellants assert that they are the third party beneficiaries of the wage payment provision, and that they have standing to sue APIO for its breach. [App. 23-24 ¶¶ 40-45 (Complaint, *supra*).]

Appellants alleged that the APIO-Munoz "Agreement" included specific promises specifying how APIO would pay Munoz [*id.*, ¶ 42], and that both APIO and Munoz

> knew that to fulfill the contract MUNOZ had to hire and retain workers, specifically plaintiffs and other members of the general public, willing to perform direct labor in the strawberries; and that employment of such workers would result in the legal and statutory liability for the contract and/or minimum wages due those workers; and that MUNOZ would be unable to pay the workers without direct and timely payments from APIO, INC.; and intended that part of the money received from the payments made by APIO INC. to MUNOZ would be used to pay the wage liability owed to the plaintiffs and other members of the general public.

[*Id.*, at ¶ 43.]

A. The Contractual Wage-Payment Provision Was for the Benefit of Appellants and Other Workers

APIO's and Munoz' "Farmer Agreement", *supra*, facially acknowledged that Munoz would hire employees to cultivate, harvest and deliver the berries to APIO. [App. 138-139 ¶ 2 (all persons performing work in connection with Munoz services shall be Munoz' employees, contractors or agents); App. 139 ¶ 2 (*id.*--Munoz shall be solely responsible for preparing and making payroll records, preparing and issuing paychecks, paying payroll taxes, providing workers' compensation insurance).]

As part of the Agreement, Munoz promised to comply with all state labor laws. [App. 148 ¶ 14.D (*id.*).] As has been described at pages 83-90, *ante*. APIO's obligations to pay Munoz net proceeds from berry sales, to advance "Pick Pack" payments, and to partially rebate cooling charges were also spelled out in the Farmer Agreement and incorporated annual "Crop Exhibits". And also has been described, APIO was aware that its "growers" including Munoz suffered cash-flow problems as a consequence of the nearly 3-week delay in distribution of market proceeds and had created the "Pick Pack" advance payments procedure to alleviate growers' payroll problems (pages 84-88, *ante*); was fully apprized of Munoz' labor costs through its own on-going analysis of grower costs (pages 81-82, 87, *ante*); and was repeatedly informed by Munoz that he was unable to pay his workers because of APIO's withholding payments. (Page 90, *ante*.)

1. By Incorporating California's Remedial Laws Setting Wage Levels the Provision Made Workers Including Appellants the Intended Beneficiaries

Munoz' promise to comply with all state labor laws obviously included the minimum (and other) wage laws. [App. 148 ¶ 14.D (*id.*).] The central

purpose of California's remedial statutes setting wage levels is to protect and benefit employees. (The Union v. G & G Fire Sprinklers (2002) 102 Cal.App.4th 765.) Employees are thus the intended beneficiaries of these remedial statutes. (*Id.*; Tippet v. Terich (1995) 37 Cal.App.4th 1517, 1533.) Consequently, the employees are as a matter of law third-party beneficiaries of agreements between their employer and the contracting principle to follow these laws even though the employer is under a pre-existing statutory duty to obey that law. The employees may maintain private suits as third-party beneficiaries in event the agreements are breached. (Tippet, *id.*)

APIO's assertion that it received no consideration for Munoz' promise inasmuch as the latter was under a prior existing duty to comply with the statutes, is unavailing. Here, as in The Union, *supra*, and Tippet, *supra*, Munoz' "prior existing duty" to pay lawful wages was not owed to APIO, but was a statutory duty to the workers. Munoz' promise in the Farmer Agreement added a new, contractual duty running from Munoz to APIO for which APIO received, as benefit, the new right to *enforce* that duty (including the rights arising from its determination that Munoz had failed to perform obligations under the contract). [App.148 ¶ 14.D; cf., App. 138-139 ¶ 2.]

Beyond the principles set forth in The Union, *supra*, and Trippet, *supra*, APIO's assertion that no consideration existed for Munoz' promise (to lawfully pay his workers) is further unsound inasmuch as it implies that every individual promise in a contract must be supported by new and different consideration. The general rule is to the contrary: one promise in a contract "may be consideration for several counter promises"; unless other-wise

explicitly identified, all promises or performances on one side are indiscriminately made consideration for all promises or performances on the other. (Martin v. World Savings (2001) 92 Cal.App.4th 803, 809.) This rule is an extension of California law that a written instrument is presumptive evidence of a consideration. (Civil Code, § 1614.)

2. The Provision Also Made Workers Including Appellants Third-Party Beneficiaries Under Traditional Contract Principles

The parties contractually created a duty in Munoz to timely and adequately pay wages due his workers. The promise in the Farmer Agreement created a separate contractual duty in Munoz. (1 CAL. LAW, supra, § 660, p. 599 [main text].)

A third party qualifies as a beneficiary under a contract where the contracting parties must have intended to benefit the third party and the intent appears on the terms of the contract. (Civil Code, § 1559; Johnson v. Superior Court (2000) 80 Cal.App.4th 1050, 1064.) The term "expressly" in Civil Code Section 1559 excludes only persons who are "incidentally" or "remotely" benefitted by the contract. (Kaiser Engineers, Inc. v. Grinnell Fire Protection Systems, Co. (1985) 173 Cal.App.3d 1050, 1055.) Whether a third party is an intended beneficiary under a contract involves construc-tion of the contracting parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. (Johnson, *supra*, 80 Cal.App.4th, at 1064; Neverkovec v. Fredericks (1999) 74 Cal.App.4th 337, 349.)

One may be a third party beneficiary of an agreement to pay money although the contract calls for payment to another; *i.e.*, performance under the

contract need not be rendered directly to the beneficiary. (1 Witkin, SUMMARY OF CALIFORNIA LAW (9th ed. 1987) (hereafter, "1 CAL. LAW") "Contracts" § 656, p. 595 [main vol.], *citing*, Arata v. Bank of America (1963) 223 Cal.App.2d 199.) The third party need not be identified by name; it is sufficient if the third party belongs to a class of persons for whose benefit the contract was made. (Johnson, *id.*) Moreover it is not necessary that the contract be exclusively for the benefit of the third party; she need not be the sole beneficiary. (*Id.*)

In Marina Tenants Assn. v. Deauville Marina Dev. Co. (1986) 181 Cal.App.3d 122, Los Angeles County leased public land to defendant developer for construction of apartments. The lease provided that rents to be charged tenants "shall be fair and reasonable" and subject to approval by the county's director. Although the director did approve rents charged during a 4-year period, plaintiff tenants brought an action, as third party beneficiaries, alleging that the rents were excessive. Upon appeal from the trial court's sustaining of a demurrer, the court of appeals examined the lease and although finding that the lease expressed intent to benefit the general public and the developer, it also contained ambiguities and could be interpreted to make the tenants intended beneficiaries since the tenants would obviously be the beneficiaries of the restriction on rents. (*Id.*, 181 Cal.App.3d, at 130, 131, 132.)

Thus, whether APIO may have benefitted in some way from Munoz' compliance with his promise to pay wages does not control. As was true of the tenants in Marina Tenants, *supra*, here, also, the appellants and other workers

would obviously benefit from Munoz' compliance with his contractual obligation to pay all wages due.

Similarly, in Schell v. Schmidt (1954) 126 Cal.App.2d 279, veterans who purchased homes from a building contractor were held to be beneficiaries of an agreement between the building contractor and the government requiring the former to construct the houses in conformity with plans and specifications he had submitted to the government. (Schell, *id.*, at 290.)

California courts examine the contract as a whole in light of the circumstances under which it was entered to determine whether a third party is an intended beneficiary. Substantial evidence supports an inference that Munoz, the promisor, understood that APIO intended to protect the workers, i.e., to benefit the third parties. (Lucas v. Hamm (1961) 56 Cal.2d 583, 591; Shephard v. Miles & Sons (1970) 10 Cal.App.3d 7, 15.) The various contractual provisions, *e.g.*, compliance with all state labor laws, the obligations to prepare payroll records and provide workers' compensation insurance, were all provisions presented to Munoz by APIO in its form "Farmer Agreements". Munoz clearly understood that APIO's "Pick Pack" advances, also provided in the company's form "Crop Exhibit", was intended to ensure ability to meet employee payroll.

The court of appeal concluded that the contract was not intended to benefit the workers, relying on parole evidence in the nature of a conclusory assertion by company Vice President Tim Murphy that "[APIO] did not make the Farmer Agreement to expressly benefit any employee of [Munoz]" [App. 132 ¶ 22.] Murphy's assertion was offered with no foundation concerning his

role in drafting, negotiating or executing the Agreement with Munoz–the Agreement itself manifests that Murphy did not execute it. [App. 151.] Murphy's declaration is contradicted by substantial evidence, not only in the form of other provisions within the Agreement, but in Murphy's own actions on behalf of APIO.

APIO clearly knew that the employment of workers generates obligations to comply with applicable regulatory mandates adopted for the protection and benefit of workers. [App. 139 ¶ 2 ("Farmer Agreement", *supra*--Munoz "shall be solely responsible for preparing and making payroll records, pre-paring and issuing paychecks, paying payroll taxes, providing workers' compensation insurance"); App. 148 ¶ 14.D (*id.*--Munoz promised to comply with all state labor laws).] APIO obviously expected that part of its payments to Munoz would be used to pay the wage liabilities owed to the plaintiffs and other members of the general public. [App. 139 ¶ 2 (*id.*).]

Beyond the provisions already described, one is particularly relevant: As part of a reciprocal agreement, APIO agreed to,

> indemnify defend and hold . . . [Munoz] free and harmless from any from any liability arising from any allegation, complaint, action or proceeding, whether civil or administrative, concerning . . . the employment of . . . [workers]. . . , including but not limited to matters pertaining to . . . wages,

whether or not either or both APIO or Munoz contended that the laws were inapplicable to them. [App. 149 ¶ 16 (*id.*).] APIO's obligation under this provision would clearly have the effect of benefitting the workers who sued a largely judgment-proof Munoz. The court of appeal ignored the obligation imposed on APIO by this provision, and looking only at the reciprocal provision that

obliged Munoz to hold APIO free and harmless, concluded merely that a "reasonable inference" was that APIO intended through the compliance provision to protect itself from litigation. (Slip Opin., p. 11.)

(a) APIO's Conduct May Be Considered In Interpreting the Contract's Intent

APIO took special concern for the benefit of (some of) Munoz' workers that it probably does not for other service-providing contractors. When Murphy, APIO's chief operating officer, learned that Munoz' workers had filed wage claims, he promptly undertook an elaborate course of action to ensure that those of Munoz' workers who had harvested APIO's fields would receive 100 % of the outstanding "Pick Pack" payments due Munoz. (See pages 92-95, *ante*.)

B. Plaintiffs Demonstrated a Triable Issue of Fact That APIO Breached Its Contract With Munoz Directly Causing Munoz' Inability to Comply With Wage Obligations

The facts discussed in pages 83-92, *ante*, raise ample inferences that APIO did indeed breach its contractual relationship with Munoz. Moreover, APIO was aware of the effect of its position upon Munoz, and upon Munoz' workers. APIO Vice President Murphy understood that it was "possible" that Munoz' inability to pay workers was the result of APIO's withholding funds. [App. 1037.] APIO of course also knew that Munoz was operating at a loss with every carton of berries that he delivered to APIO. [App. 1003 lines 6-15, 1029-1033; App. 1068 (APIO "Estimated Proceeds/Strawberries" for Isidro Munoz, *supra*).] APIO, however, was generating a positive cash flow from the sale of Munoz' berries. The inference is inescapeable that during the 2000 strawberry season, APIO made a decision to recover as much of its earlier

investment in the crop being harvested by Munoz, regardless of the ultimate cost to Munoz or the harvest workers.

The contract facially recognized that Munoz' employment of workers would result in liability for the contractual and/or minimum wages due the workers. [App. 139 ¶ 2 ("Farmer Agreement", *supra*--Munoz shall be solely responsible for preparing and making payroll records, preparing and issuing paychecks, paying payroll taxes, providing workers' compensation insur-ance); App. 148 ¶ 14.D (*id.*--Munoz promised to comply with all state labor laws); App. 149 ¶ 16 (*id.*-- APIO and Munoz agreed to indemnify, defend and hold each other free and harmless from any liability arising from any allegation, complaint, action or proceeding, whether civil or administrative, concerning employment of workers, including but not limited to matters pertaining to wages, whether or not either or both APIO or Munoz contended that the laws were applicable to them).]

CONCLUSION

This case involves fundamental issues that arise in a familiar context - - one this Court has grappled with in many cases - - how to protect the rights of California's most vulnerable workers, the farm workers who cultivate and harvest our crops. This Court has repeatedly intervened for that purpose.

As is true for tens - - if not hundreds - - of thousands of California's farmworkers, the appellants' immediate employer, Isidro Munoz, did not own, control or market the crop upon which his workers were laboring. Like virtually all such arrangements the agreements between Munoz and respondents recited that Munoz was an independent contractor.

This case presents indeed the dilemma that California's reform-motivated Legislature and innovative Industrial Welfare Commission intended to resolve in the pioneering work undertaken early in the Twentieth Century, and maintained steadfastly.

California's policy is to vigorously enforce minimum labor standards in order to ensure that employees are not required or permitted to work under substandard, unlawful conditions. (Labor Code, § 90.5.) Wage and hour laws are to be given liberal effect to promote the general object sought to be accomplished. The goals of allowing employees to effectively enforce their rights to a fair wage also call for construction of Section 1194 in harmony with the IWC's promulgations to ensure that employees can recover unpaid wages.

Accordingly, appellants respectfully request this Court to reverse the court of appeals' affirmance of dismissals as the First, Second and Sixth as well as the Eighth and Ninth Causes insofar as the latter two are predicated upon the reinstated causes.

DATED: January 17, 2006 Respectfully submitted:

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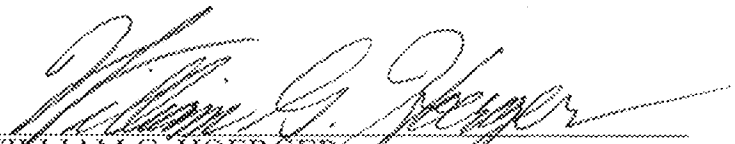
By 
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RULE 14(e)(1) CERTIFICATION

I, WILLIAM G. HOERGER, certify that I am appellate counsel for Appellants in the instant matter; that I have prepared the foregoing Appellants Opening Brief on the Merits in this matter using WordPerfect version 9.0, and that the word count for this brief including footnotes is 29,693, as generated by the appropriate word-count command to the WordPerfect program.

DATED: January 17, 2006

WILLIAM G. HOERGER

PROOF OF SERVICE
(CCP, § 1013(a),(d); Rules of Court Rule 15(c))

I, GLADYS BRISCOE, declare that I am employed by California Rural Legal Assistance, Inc., at 631 Howard Street, Suite 300, San Francisco, California 94105. I am over the age of 18 years and not a party to the within action or appeal.

On January 17, 2006, I served the attached APPELLANTS' OPENING BRIEF ON THE MERITS by Federal Express Overnight Delivery upon the parties listed below by placing true copies in cartons provided by Federal Express with mailing slips addressed as below, and shipping charges prepaid, and placing these cartons in the deposit box maintained by Federal Express before 5:00 pm, the scheduled pick-up time:

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I am also readily familiar with California Rural Legal Assistance, Inc.'s practice of collection and processing of documents for mailing with the United States Postal Service, being that first-class mail will be deposited in the ordinary course of business with the U.S. Postal Service on the same day with postage thereon fully prepaid at San Francisco, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in this declaration.

On January 17, 2006, I served the attached APPELLANTS' OPENING BRIEF ON THE MERITS by first-class mail upon the interested persons by placing true copies thereof in sealed envelopes addressed as follows:

Clerk, Court of Appeal of State of California (4 copies)
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on January 17, 2006, in the City and County of San Francisco, California.

GLADYS BRISCOE