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IN THE

SUPREME COURT COPY

SUPREME COURT

OF THE STATE OF CALIFORNIA

o

MIGUEL MARTINEZ, et al.,
Plaintiffs and ~~Petitioners~~ Appellants

vs.

CORKY N. COMBS and LARRY D. COMBS
d/b/a COMBS DISTRIBUTION CO.;
JUAN RUIZ; and
APIO, INC., a Delaware Corporation,
Defendants and Respondents

o

SUPREME COURT
FILED

DEC 3 0 2003

Frederick K. Ohlrich Clerk

DEPUTY

After a Decision by the Court of Appeal,
Second Appellate District, Division Six
Case No. B161773

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PETITION FOR REVIEW

O

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Unfair Competition case
(*See* Bus. & Prof. Code, § 17209, and Cal. Rule of Court 15(e)(2).)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONAL LAW

California decisions:

Other states' decisions:

Federal decisions:

STATUTORY LAW

California statutes:

Cal. Rules of Court:

Federal statutes:

MISCELLANEOUS AUTHORITIES

ISSUES PRESENTED

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 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.

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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.

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?

INTRODUCTION

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. (*See, e.g.*, Morillion v. Royal Packing (2000) 22 Cal.4th 575; S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal.3d 341.)

Petitioners are California farm workers. In 2000, they and 180 other seasonal farmworkers were hired by an individual, one Isidro Munoz, to weed and harvest strawberries that Munoz cultivated under various contractual arrangements with respondents. As is true for tens – if not hundreds – of thousands of California's farmworkers, the workers' immediate employer, i.e., Munoz, did not own, control or market the crop upon which his workers were laboring. Respondents held the land, determined what crops to raise upon it, underwrote production costs, required exclusive delivery of the strawberry harvest to them, and controlled all aspects of the harvesting and marketing. Like virtually all such arrangements, the agreements between Munoz and respondents recited that Munoz was an independent contractor.

Munoz' principal investment in the enterprise was to be the cost of labor he supplied through petitioners and the other workers. Munoz' return was a share in the market proceeds which however became subject to respondents' unilaterally determining how much Munoz would receive and when. Indeed, Respondent APIO withheld not only every cent of Munoz' share of the market proceeds for the season in order to recover its own production costs, but further withheld the greater part–and delayed the rest–of contractual advances intended to meet harvest labor costs – all despite Munoz' repeated complaints that APIO's conduct prevented him from paying his workers who were harvesting APIO's crop.

Petitioners sued Munoz and respondents for their unpaid wages, alleging that all were employers under the IWC wage order governing agricultural workers (Order 14, 8 Cal.Code Regs., § 11140) and thus under the Labor Code. Petitioners further sued respondent APIO in contract, alleging that the workers were third-party beneficiaries under a contractual provision by which Munoz agreed to comply with all California statutory

wage requirements and that APIO's breach of the contract had directly caused Munoz' inability to comply with this provision. Munoz defaulted and declared bankruptcy. Respondents denied all liability, and the court of appeal entered summary judgment in their favor on all claims except for one involving an oral contract made to certain workers by COMBS and RUIZ.

This case presents the ideal opportunity to decide whether a legal solution for this all-too-typical tragedy is provided in the wage orders promulgated by California's Industrial Welfare Commission (IWC). Beginning with Order No. 1 in 1916, the IWC has continuously defined "employer" as – and thus imposed liability for wages on – anyone who "suffer[s] or permit[s] any person to work". As this Court recognized in Morillion v. Royal Packing Co., *supra*, 22 Cal.4th, at 585, this wage order definition of "employer" has never been interpreted by any California court.

Petitioners' extensive research of IWC archives and historic other sources–provided in the record below--demonstrates without contradiction that the Commission clearly understood – and intended -- that these words regulate work which the owner reasonably knows is being performed for his benefit, i.e., that the owner become the guarantor of labor conditions within his business if he knows the work is being performed for his benefit. Equally clear was the Commission's understanding and intent that "suffer or permit to work" regulate the employees of independent contractors and defeat contractual relationships that attempted to privately define the employer relationship.[2]

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[2]The purposeful inclusion of independent contractors within the sweep of the "suffer or permit" test is thus the opposite of their express exclusion under the Workers Compensation Act. (S.G. Borello & Sons, *supra*, 48 Cal.3d, at 354.)

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. Second, the IWC further broadened both 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 Wage Orders (hereafter, "Orders") at paragraph 2, subdivisions (D), (F), *e.g.*, Wage Order 14 - Agricultural Occupations, 8 Cal.Code Regs., Section 11140.2(D),(F).)

Subsequent to the IWC's 1947 actions to expand the definition of "employer," the U.S. Supreme Court in Rutherford Food Corp. v. McComb (1947) 331 U.S. 772 addressed the *"employee"* definition of the federal Fair Labor Standards Act (FLSA)of 1938. That employee definition (29 U.S.C., 203 (e)(1), (g)) incorporated the same "suffer or permit to work" language found in California's *"employer"* definition and in the laws of some 30 additional states. Although acknowledging that the FLSA language had been borrowed from the states' earlier remedial employment laws, the federal Supreme Court ignored the state courts' virtually unbroken expansive application of the phrase and instead applied a multi-factor balancing test which it borrowed from its recent interpretations of two other federal statutes, the National Labor Relations Act and the Social Security Act, and which it termed "economic reality." (Rutherford, *supra*, 331 U.S. at 1475,

1477). Federal decisions have continued to use this multi-factor balancing test in applying FLSA's "suffer or permit to work" definition.[3]

The court of appeal concluded that this FLSA-based federal multi-factor balancing test crafted 31 years after California's "suffer or permit to work" employer definition nevertheless controlled. The court's cursory analysis relied solely on decisions in two states that first adopted "suffer or permit" provisions in their respective wage-and-hour laws years *after* Rutherford and, that either facially or in legislative history, had specifically incorporated the federal test. (Slip Opinion, p. 9; Laborers' Intern. Union of North America v. Case Farms (N.C. 1997) 127 N.C. App. 312, 314; Garcia v. American Furniture Co. (N.Mex.. 1984) 101 N.M. 785, 789.) The court ignored the numerous decisions of other sister states that had applied their respective pre-FLSA "suffer or permit" provisions--contemporaries of California's--consistent with original intent that the entrepreneur who was reasonably aware of work being done for his benefit was liable under "suffer or permit". These sister-state decisions occurred prior to and contemporaneous with the IWC's original Order, as well as during the subsequent decades in which the IWC repeatedly re-adopted the definition as it re-issued and expanded wage orders to cover the overwhelming majority of California employment. The court also ignored the record of hundreds of pages of IWC records including early Orders, early reports to the legislature and Commission minutes.

The court below also took an identical approach to the wage orders' alternative "exercises control" definition, notwithstanding that this language

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[3]However, federal decisions have simultaneously crafted a non-balancing single-factor test to apply FLSA's employer definition (29 U.S.C., § 203(d)) which the courts equally characterize as "economic reality". (*See, e.g.*, Rubin v. Tourneau, Inc., et al. (S.D.N.Y. 1992) 797 F.Supp. 247.)

is found nowhere in the FLSA and that the IWC had also promulgated this provision prior to Rutherford. In holding that respondents' multiple acts did not make them "employers" under this provision, the court of appeal relied upon a single 1994 decision by the United States Court of Appeal for the Eleventh Circuit and found conclusive the facts that respondents did not "control *number of workers*, the *hiring or firing of specific individuals*, or the *selection of crews*". (Slip Opinion, p. 7; Aimable v. Long & Scott Farms (11th Cir. 1994) 20 F.3d 434, 440-441.) The court's reliance on Aimable was remarkably misplaced inasmuch as: (1) the above-described Aimable factors relied upon by the court of appeal clearly do not include at least two nor arguably any of the three alternative factors appearing in the plain language of the wage order ("control over *wages, hours or working conditions*"); (2) the Aimable analysis was predicated upon the multi-factor balancing test developed under "suffer or permit"–thus the court essentially relegated "exercises control" to surplusage–a disfavored approach; and (3) as a multi-factor, balancing case, Aimable already had been discredited in the federal courts, being specifically rejected by the Ninth Circuit (Torres-Lopez v. May (1997) 111 F.3d 633, 641) and not followed in its own Circuit. (Antenor v. D. & S. Farms (11th Cir. 1996) 88 F.3d 925, wherein the court reversed summary judgment in favor of defendants that had been based on the recently-issued Aimable decision.)

The court's resolution of both definitions ignored this Court's frequent instructions that (1) the cardinal rule of construction where regulatory language is subject to more than one reasonable interpretation, is to ascertain the intent of the promulgating body (*e.g.*, People v. Pieters (1991) 52 Cal.3d 894, 898; (2) when a promulgating body uses language or terms that had at the time a well-known meaning at common law or the law of

this country, the words are presumed to have been used in that sense. (People v. Overstreet (1986) 42 Cal.3d 891); (3) the employment relationship under California remedial legislation should be construed with "particular reference to the 'history and fundamental purposes of the statute'" (S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations, *supra*, 48 Cal.3d 341); and (4) 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 v. Royal Packing Co., *supra*, 22 Cal.4th at 592.)

Finally, petitioners assert that they have standing as third-party beneficiaries to assert a claim in contract against respondent APIO whose contract with their employer Isidro Munoz included a provision requiring Munoz to comply with minimum-wage and other statutory employment standards. California law has established 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 private actions against their employer to enforce the agreements. (The Union v. G & G Fire Sprinklers (2002) 102 Cal.App.4th 765; Tippet v. Terich (1995) 37 Cal.App.4th 1517.) Here, petitioners presented evidence (opposing summary judgment) that APIO's breach proximately caused their employer to default. The court of appeal ignored this theory of the pleadings and concluded merely that a "reasonable inference" was that APIO intended through the compliance provision to protect itself from litigation (Slip Opin., p. 11), although that assumption is inconsistent with other evidence in the face of the contract such as APIO's mutual promise to indemnify and hold Munoz harmless from liability in the event of suit against him for labor violations.

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THE COURT SHOULD GRANT REVIEW IN ORDER TO RESOLVE WHO IS LIABLE AS AN EMPLOYER FOR WAGES IN PRIVATE ACTIONS BROUGHT UNDER CALIFORNIA'S LABOR CODE

California's Labor Code, which establishes employees' rights to minimum and overtime wages, to various related payroll rights such as the frequency and timing of wage payments and requirement for accompanying written wage statements, and to penalties against employers who fail to comply with these provisions (Labor Code, Div. 2, §§ 200-2695.2) has never defined who is an employer liable for compliance with these provisions.

Since 1913, California has empowered the Industrial Welfare Commission (IWC) to formulate regulations (known as wage orders) governing minimum wage, overtime and other wage-and-hour-related issues such as employer liability to provide tools and equipment. (Labor Code, §§ 1171, 1173; Stats 1913, Chptr 324; Morillion, *supra*, 22 Cal.4th 575, 581.) Beginning with Order No. 1 in 1916 and continuing to the present, the IWC has in its wage orders imposed employer liability upon persons who "suffer or permit to work" any person. As this Court recognized in Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575, no California court has directly addressed or interpreted the wage orders' "suffer or permit to work" definition. On February 8, 1947, the IWC supplemented that definition by adding a new and alternative provision: henceforth, an employer became also, "any person . . . who . . . exercises control over the wages, hours or working conditions of any person". Pending this Court's decision in *Reynolds v. Bement*, *supra*, No. S115823, there is no California case law interpreting this provision.

The IWC never contemplated the 1947 federal test when it originally adopted "suffer or permit to work" in 1916, nor during the ensuing decades

when it re-issued and expanded its wage orders to cover the vast majority of California employment nor even when it promulgated its 1947 expansions of the employer definition (which also preceded the Rutherford decision). And as will be further demonstrated, the federal test provides less protection to workers.

This Court should grant review to settle these important issues of law.

STATEMENT OF THE CASE

Statement of Facts

A. The Workers' Relationships With Isidro Munoz

Petitioners and some 180 other seasonal farmworkers were hired by one Isidro Munoz in 2000 to weed and harvest strawberries that Munoz grew under differing contractual arrangements with respondents in three San Luis Obispo County fields. Two of the fields were cultivated and harvested for fresh-market berries pursuant to contracts with respondent APIO. The third field was cultivated and harvested for fresh-market berries pursuant to contracts with the COMBS and respondent JUAN RUIZ (hereafter, "RUIZ"). [Appellants' Appendix In Lieu of Clerk's Transcript (hereafter, "App.") 186–(at p. 43)[4]; App. 839, 840, 843-844; App. 847-848.]

A. Respondent APIO's Relationships With Isidro Munoz

Munoz' and respondent APIO's relationship began in 1997 when they executed an APIO-prepared form contract, captioned "Farmer Agreement". Pursuant to this agreement Munoz was to cultivate and harvest various crops

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[4]The parties proceeded on appeal by appendix pursuant to Rule of Court 5.1. Although the parties were unable to stipulate to a Joint Appendix, no respondent filed an appendix. Certain deposition records incorporated in the proceedings below reproduced 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.

for APIO over a period of four years as further specified in annual addendums referenced as "Crop Exhibits". [App. 129 ¶ 3; App. 138 ¶ 1.A.; *cf.*, App. 136 at introductory paragraph of text; App. 192.] APIO sold the crops under its own labels to its own customers, and after deducting various charges, remitted "net proceeds" to its "farmers" or "growers" such as Munoz.

The Farmer Agreement recognized that Munoz would hire employees to cultivate, harvest and deliver the berries to APIO [App. 138-139 ¶ 2; App. 139 ¶ 2] and also contained a further provision whereby Munoz promised to comply with all state labor laws. [App. 148 ¶ 14.D.] The Agreement proclaimed that the relationship between APIO and Munoz was that of independent contractors but also contained a provision that *both* APIO and Munoz would "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 . . . 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 applicable to them. [App. 149 ¶ 16 (*id.*).]

APIO subleased to Munoz through August 14, 2000 a parcel known as the "Oceano field" for strawberry production. [App. 129 ¶ 4; App. 152-159; App. 995 Line 19 - App. 996 Line 11; App. 998 Lines 9-23.]

Munoz' production and delivery of strawberries to APIO in 2000 was further governed by a "Crop Exhibit" addendum to the Farmer Agreement, executed on September 15, 1999. This document specified that Munoz would cultivate and harvest strawberries on 31 acres of the Oceano field[5] and

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[5]The record requires close attention regarding field references: Munoz and APIO's witnesses and documents below variously reference the Oceano field as the Phelan and Taylor Ranch, the "Taylor Ranch", "Oceano ranch" or "Oceano field". [App. 129 ¶ 4; App. 152-159; App. 995-998.]

on 25 additional acres referenced therein as the "Apio Lease" but otherwise referred to as the "Zenon field".[5] [App. 129 ¶ 3; App.135-137, *see*, 136 ¶ 6); *accord*, App. 840, App. 854-855.] APIO concurrently subleased to Munoz the Zenon field. [App. 129 ¶ 5; 160-164; App. 995 Line 19 - App. 998 Line 8.]

Munoz also concurrently entered 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 2000 strawberry crop. 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; App. 165-167; App. 851-853; App. 998 Line 9 - App. 1002 Line 25.]

This combined APIO-Munoz agreement facially provided APIO with *sole* control of Munoz' harvest. 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,

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Petitioners and other field workers knew this location as "Oceano". [App. 747 ¶ 5; App. 772 ¶ 5; App 790; App. 807.]

[6]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.] Petitioners and other field workers knew this locations as "Mesa 2". [App. 747 ¶ 5; App. 772 ¶ 5; App 790; App. 807.] Petitioners hereafter will reference this location as the "Zenon field".

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, App. 140-141 ¶¶ 7, 8.A., App. 147 ¶ 13 (*id.*), App. 148 ¶ 15 (*id.*); *cf.*, App. 136 ¶ 1; App. 153-154 ¶¶ 1.B.,C., 5; App. 161 ¶¶ 1.B.,C., 5; App. 166 first paragraph; *accord*, App. 188, 190; *accord*, App. 1047 line 12- -1048 line 8.]

Munoz could not sell berries to any third party without the express written consent of APIO.

APIO had the right upon determining that Munoz had failed to perform any obligation under the agreement--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.] 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; App. 161-164 ¶¶ 5, 8, 10.]

APIO sent field representatives to both the Oceano and the Zenon fields on a daily basis to tell both Munoz 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. [App. 194, 920-921; App. 841; App. 940-941, 946-947, 948-952; App. 1003 lines 13-18; *see, also*, App. 1048 lines 9-14.]

The berries were field-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; App. 841.] Substantial wages remain unpaid for this work, as well as for subsequent work in these same fields harvesting cannery berries delivered to Frozsun Foods, Inc. [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.]

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 as a consequence of receiving at the end of the day the thousands of cartons of harvested fruit. [App. 138-139 ¶¶ 1.A, 2; App. 140 ¶ 5; App. 148-149 ¶¶ 14.D, 16; App. 194, 920-921; App. 841; App. 946-947, 948-951.]

Under the provisions of the combined agreement, APIO paid 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; App. 1004 line 16 - - 1007 line 11; App. 1060, 1068, *see* second column from right, captioned, "Note/Grower Statement Balance"); App. 1195-1197.]

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.]

APIO's own calculations showed that over the final four weeks of peak fresh-market harvest Munoz was picking berries at a 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; App. 1205 line 20 - - 1207 line 24.] Munoz believed he had no option to seek alternative disposition that might enable him to continue to pay his harvest workers. [App. 141 ¶ 8.A; App. 188, 190; App. 840; App. 1049 line 11 - - 1050 line 16.]

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.] Indeed, field-harvest labor represents approximately 62 percent of total strawberry production costs. [App. 367-369, 376.]

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.] 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 for the 2000 season were contractually fixed at $2.00 per carton.

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 ending April 30, 2000. The per-carton payment for that week averaged only $1.61. [App. 1082-1084.] 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 per carton. [App. 1071-1073.]

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* then *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 continued to withhold that check from Munoz until June 10 when the 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.]

The cumulative deficiencies from the contractual rate of the "Pick Pack" checks delivered by APIO following April 23 was some $69,466. There is no evidence that APIO ever discussed those changes in the "Pick Pack" rate with Munoz.

Moreover, 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, *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).] 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; App. 1196.] Thereafter, Munoz continued to tell APIO that he was unable to pay his workers because APIO was withholding payments. [App. 1034-1035, 1037.]

APIO also withheld other proceeds generated by Munoz' harvest. Although APIO nominally charged $1.45 per carton for cooling the fruit, 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, *cf.*, ¶ 10; App. 1060, *see*, right column "Rebate .70"; *see* 4th through 6th columns from right margin for "Final Liquidation Date" of 07/28/00).]

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. [App. 137 ¶ 15; App. 1049.] 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, see, 5th column from left captioned "Vend").]

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. Munoz repeatedly called APIO's field representative during harvest and complained that without APIO's payment, he could not pay his harvest workers.

After Munoz told APIO's field representative that some of his workers had filed wage claims with the Labor Commissioner, APIO instructed Munoz 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. [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.]

APIO's Vice President Murphy told a California Division of Labor Standards Enforcement DLSE) Bureau of Field Enforcement (BOFE) Investigator that APIO had a $75,000 check pending to Isidro Munoz, and confirmed that the Oceano field and the Zenon field were APIO's. On June 7, Murphy left BOFE a message that he would provide the investigator with a copy of Munoz' payroll information the following day, that he [Murphy] was "holding the money", and thought that "*we* should try to pay all workers at one time." Murphy then helped plan a worker check distribution that was to occur at a location apparently of his choosing. [App. 831-832, 833.]

Meanwhile, APIO told Munoz that it "would write out cashier's checks to each worker individually", and a time was set for Munoz to accompany its field representative and Murphy to Murphy's personal bank. There, 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 delivered the 71 cashier's checks plus a list containing 71 names and amounts to be paid to the BOFE Investigator. Many of the workers who received checks were owed more wages than covered by the checks; many other persons whose names were not on the list provided by Murphy (and for whom there were no checks) came to the site also claiming unpaid wages from Munoz. Eighty-three additional wage claims were filed against him after June 10. [App. 834, 835.]

C. Respondents COMBS' and RUIZ' Relationships With Isidro Munoz

Respondents COMBS' business was also the marketing of berries (and other produce). [App. 861; 911.] Munoz first contacted COMBS in 1998 through respondent RUIZ, and all of Munoz' communications throughout his subsequent relationship with COMBS were through RUIZ. [App. 844; App. 926.]

Munoz began growing and harvesting produce for COMBS in the spring/summer harvest of 1998. Subsequently, in return for two loans from COMBS totaling $80,000, Munoz contracted to harvest fresh-market strawberries exclusively for COMBS from the 40-acre "El Campo" field.[7]

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[7]Although Munoz and the COMBS witnesses referenced the field as "El Campo", petitioners and 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.] Petitioners hereafter will reference this location as the "El Campo field".

[App. 843; App. 861; App. 926, 930.] RUIZ orally translated the COMBS contract into Spanish for Munoz when he executed it in October, 1999.

The contract between Munoz and the COMBS was tied exclusively to the El Campo field. In return for the loan, 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. [App. 861 ¶ 1.]

Munoz saw RUIZ in the El Campo field on numerous occasions between March and May, 2000, and 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. Munoz knew RUIZ as COMBS' field representative. [App. 843-844; App. 861.]

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 this 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 the former, 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.]

Munoz' workers, including petitioners, weeded and harvested fresh-market berries in the El Campo field from at least February through late June,

2000, delivering fresh-market fruit to COMBS until approximately mid-May. At some point in May, after Munoz advised the COMBS that he was unable to pay his workers and was losing his harvest crews, COMBS advanced an additional $30,000 to Munoz against estimated future proceeds. [App. 910.] Nevertheless, substantial wages remain unpaid for this work. [App. 187-188, 190, 195; 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 ; App. 832 ¶ 12; App. 839-840; App. 943-944; App. 1480-1481 ¶¶ 5-7; App. 1485-1486 ¶¶ 4-10.]

Petitioners and certain other workers also harvested cannery berries after the fresh-market deliveries ended, 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.]

On Friday, May 27, Munoz' crew harvesting cannery berries in the El Campo field walked out of the field in protest over non-payment of wages. 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 all 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. As of that date, Munoz continued to owe COMBS a substantial portion

of the latter's advances. 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 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.]

Procedural History

Petitioners filed suit for their own and the interests of some 180 other workers in the superior court against Munoz and respondents COMBS and RUIZ. Munoz defaulted. Plaintiffs subsequently filed a first amended complaint (hereafter, "Complaint"), adding respondent APIO, Inc. as a defendant.

The Complaint alleged that each respondent (plus Munoz) "employed" petitioners and other members of the general public for varying periods during the "2000" strawberry season, primarily to harvest strawberries, and from time to time to perform other tasks related to growing and harvesting strawberries. Plaintiffs, suing individually, alleged in five causes that all respondents were liable for: failure to pay California minimum wage; liquidated damages arising from failure to pay minimum wage; failure to pay contractual wages; waiting-time penalties for failure to pay wages due at termination; and penalties for failure to provide statutorily-required wage statements. Plaintiffs also alleged separate claims for breach of contract against APIO, and against the COMBS. Acting for the interest of all workers, plaintiffs further alleged against all respondents violations of California's unfair competition law (Bus. & Profs. Code, §§ 17200 *et seq.*) predicated

upon the same failures, and asserted they were entitled to enforce penalties for the public interest under Bus. & Profs. Code Section 17202.

Respondents COMBS and JUAN RUIZ denied all allegations and asserted affirmative defenses. Following the overruling of its demurrer, APIO also denied all allegations and further asserted various affirmative defenses. Munoz again defaulted and proceedings against him were subsequently stayed as a consequence of his filing a petition in bankruptcy.

APIO, COMBS and RUIZ filed separate motions for summary judgment and/or summary adjudication on all causes, and the trial court subsequently granted the motions and entered judgments of dismissal. Petitioners timely appealed.

The court of appeal affirmed the dismissals of all statutory claims (first through fifth causes of action) predicated upon the employer relationships of respondents under the Wage Order definitions. The court of appeal also affirmed dismissal of the contractual claim against respondent APIO predicated upon petitioner's assertion that they had third-party-beneficiary standing to enforce the contractual provision between Munoz and APIO that all statutory wage requirements would be complied with (sixth cause of action). The court of appeal reversed dismissal of the claim against the COMBS and RUIZ predicated upon evidence that certain workers reasonably and detrimentally relied upon an oral "guarantee" by those respondents that the former's wages would be paid if they returned to work (seventh cause of action). Although not addressed in its opinion, the court of appeal's decision also results in summary judgment on petitioners' eighth and ninth causes for the public interest under the Unfair Competition Law except as to those claims against the COMBS and RUIZ predicated upon the oral contract.

FURTHER REASONS TO GRANT REVIEW

I. THE WAGE ORDER DEFINITIONS PROVIDE AGRICULTURAL AND OTHER LOW-WAGE WORKERS GREATER PROTECTION THAN THE FEDERAL MULTI-FACTOR, BALANCING TEST

Farm labor advocates see on a daily basis what the press occasionally reports with, unfortunately, all too little consequence.

> By the thousands, agricultural employers in California are breaking state and federal labor laws by underpaying, sometimes stiffing, tens of thousands of farm workers toiling at the bottom rung of the state's economic ladder.

(Furillo, "Toiling under abuse", *SACRAMENTO BEE* (Special Report), May 20, 2001 [http://www.sacbee.com/static/archive/news/projects/workers/20010520_main.html]. As that article further informs,

> These days, violations of wage and hour laws are increasingly the result of a transformation in the industry's employment structure. Instead of growers directly hiring their workers, they are now employing middlemen–farm labor contractors–to round up their pickers and pruners. That system has obscured lines of responsibility and entangled workers' efforts to attain the minimum wage.

(*Id.*)

Indeed, probably over one-half of California's nearly one-million farmworkers are engaged by farm labor contractors or through other contingent or labor-intermediary arrangements including those created by respondents that attempt to privately contract away the entrepreneurs' liability for wages for labor that benefits the enterprise.

These arrangements have spread to millions of other California workers engaged through employee-leasing arrangements, temporary-services and various sub-contracting schemes now prevalent in low-wage employment such as commercial house-keeping, health-care, taxi and

delivery services. As noted by California's leading scholar of agricultural labor, "Increasingly the purpose of contractors is to be risk absorbers." (Greenhouse, "Middlemen in the Low-Wage Economy", *NEW YORK TIMES* (Dec. 28, 2003), WK 10, quoting Phillip Martin, Professor of Agricultural Economics at the University of California-Davis.) Unstated by Dr. Martin is the corollary that when the contractors and middlemen do not have the resources to absorb the risk, that risk is then transferred to the wage-earner--a result at odds with the special status accorded wages of California workers. (Kerr's Catering Service v. Dept. of Industrial Relations (1962) 57 Cal.2d 319, 325.)

It is doubtful that a more pervasive exercise of control could be exercised over the wages of a contractor's workers than was imposed by APIO. Both APIO and COMBS were fruit merchants and both established the mechanisms to ensure production of the fruit for their businesses. That they separated the business into distinct parts cannot obscure the fact that the workers cultivating and picking fruit exclusively for their sales performed for their respective benefits. If either "suffer or permit to work" or "exercises control" retain the vitality intended by their promulgator, employer liability for wages is found here. But the court of appeals' begrudging approach will indeed assure the employer community that these intermediate and layered approaches are effective strategies in ensuring that all other production costs can be effectively recovered before wage earners (the majority of whom in these arrangements receive minimum or near-minimum wage) are accorded the residual. The risks of (often high-risk) enterprise can be shifted to fall most heavily on the workers.

The complex, multi-factor balancing test adopted by the court of appeal[8] dooms the majority of these low-wage workers, especially farmworkers, to enforcement as myth whenever joint or several liability is joined. No worker is capable of prosecuting his own wage claim against a jointly-liable employer under this test in either small claims court or within the purportedly streamlined, alternative administrative procedures of the Labor Commissioner (Labor Code, § 98(a); *see*, Cuadra v. Millan (1998) 17 Cal.4th 855). Indeed, the Labor Commissioner has historically declined to accept claims asserted jointly and severally against multiple employers due to lack of investigation resources and a policy that such claims are too complex to be processed in the Section 98 hearing process. No public enforcement agency has the resources to prosecute joint and several liability under the multi-factor balancing test. Indeed, to Petitioners' knowledge, the California Division of Labor Standards Enforcement has never prosecuted a case under Labor Code Section 98.3 against multiple employers under "suffer or permit to work". Private counsel find the costs of litigating the complex multi-factor balancing test disproportionate to recoveries for low-wage employees. Indeed, the enforcement history for low-wage workers demonstrates that only those workers sufficiently fortunate to locate a legal services program that specializes in farmworker and/or low-wage employment issues *and* that coincidentally has the resources available to take on the case, pursue and prevail in joint-employer cases requiring application of the multi-factor balancing test.

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[8]A recent and thorough review of application of the multi-factor balancing test applied under FLSA to determine multiple-employer liability is found in Torres-Lopez v. May, *supra*, 111 F.3d 633.

The multi-factor balancing approach imposes employer responsibility far more restrictively than the historic application of "suffer or permit to work". Indeed, determination that a "genuine" "independent contractor" relationship exists cuts short imposition of liability against the principal for the unpaid wages of the contractor's workers. In sharp contrast, "suffer or permit" was adopted to defeat the imposition of even genuine contractual relationships that severed liability. Indeed, if the multi-factor test set forth in Torres-Lopez, *supra*, had been applied to the reported state court decisions upholding employer liability under state "suffer or permit" standards in the first half of the Twentieth Century, it is doubtful that any would have found employer relationships. (*See, e.g.*, Gorzynski v. Nugent (Ill. 1948) 83 N.E.2d 495; Daly v. Swift & Co. (Mont. 1931) 300 P. 265; Commonwealth v. Hong (Mass 1927) 158 N.E. 759; *cf.*, Torres-Lopez v. May, *supra*, 111 F.3d 633.)

As a practical matter, enforcement of "suffer or permit to work" results in principals undertaking the obligation of ensuring that their contractors comply with the law. "Suffer or permit to work" "casts a duty upon the owner or proprietor to prevent the unlawful condition", which duty is not satisfied merely by a company rule prohibiting the conduct. (People ex rel. Price v. Sheffield Farms-Slawson-Decker Co. (N.Y. App. Div. 1917) 167 N.Y.S. 958, *aff'd*, (N.Y.Ct.Appls. 1918) 225 N.Y. 25 [121 N.E. 474] ("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 (Ill. 1948) 83 N.E.2d 495, 499 ("appellants . . . could have known by the exercise of reasonable care . . .").)

This case does not pose the question whether to apply or reject "economic reality"–an expression at least as difficult to disparage as

"motherhood"–as the marker for California's wage order definitions. The many promulgators of "suffer or permit to work" were fully convinced that they were applying economic reality in their approach to fix liability. The question is whether the laborious multi-factor, balancing approach to economic reality–only one of several approaches–controls responsibility for wages in California.

Grant of review is essential not merely to ensure that Isidro Munoz' 180-some former workers receive their long-overdue wages but to begin to provide credence to the "special status" that wages purport to enjoy.

II. THIS PETITION PRESENTS AN APPROPRIATE RECORD FOR THIS COURT TO SETTLE IMPORTANT QUESTIONS OF LAW

It is doubtful that any other case presented to this Court involving the authority of the Industrial Welfare Commission has provided the Court a greater wealth of original research into not only the Commission's archives but those of other state bodies as well as other contemporaneous and retrospective research. The Commission's understanding and intent are manifested in nearly 200 pages of its early minutes, orders, and reports to the legislature, plus reviews of secondary materials that examine the early efforts to establish the Commission and that examine contemporaneous model codes and enactments in other states.

Moreover, the differing relationships between the three respondents and petitioners' employer, Isidro Munoz, provide an opportunity for the Court to understand an array of arrangements that are encountered daily in California agriculture (and in other low-wage, contingent employment) and to evaluate on a broad palette how the wage order employer definitions may and should address these numerous relationships.

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III. THE PETITION TIMELY PLACES BEFORE THE COURT ISSUES THAT ARE CLOSELY RELATED, AND/OR PROVIDE GREATER CONTEXT, TO QUESTIONS NOW PENDING IN THIS AND THE COURTS OF APPEAL

This private-party action to enforce wage provisions of the Labor Code turns upon the employer definitions promulgated in the IWC wage orders. Two other divisions of the Court of Appeal for the Second Appellate District have recently rejected private-party actions which assert that, under certain facts, the "exercises control" definition extends employer liability for wages to officers or directors of nominally-employing corporations. Those courts affirmed demurrers on the dual grounds that public policy is inconsistent with the asserted liability against corporation principals, and that the IWC definitions do not define or establish employer liability for private enforcement of the Labor Code. This Court has granted review in one case, *Reynolds*, *supra*, and the unpublished decision in the otherhas not yet become final. (*Arakelian, et al. v. Conquest, et al.* , No. B161037, opinion (unpublished) filed Dec. 2, 2003.) A third case, also asserting individual corporate officer liability for wages as an employer has been brought by the Labor Commissioner who has obtained judgment in the trial court. The defendant officer has appealed the issue of liability and although briefing has long been completed, the court of appeal has indicated that it will delay hearing until this Court decides *Reynolds*. (*Lujan v. Gregory*, No. G030347 (Fourth Appellate District, Div. Three, *continued to May 2004 calendar*).

In the instant petition the parties and courts have assumed that the wage order definitions (whatever texts they may incorporate) do define the employer for purposes of private enforcement of the Labor Code's wage provisions. Unlike *Reynolds* (and *Arakelian* should review be sought

therein) this petition arises out of summary judgment rather than demurrer and presents an extensive factual record. While all three of the other pending appeals address whether "exercises control" may reach corporate principals, a question that conceivably may be resolved on independent public policy considerations, this petition presents a broader question of general principles of interpretation and application. None of the three other cases raise the "suffer or permit to work" definition.

CONCLUSION

The Petition for Review should be granted to resolve the fundamental question: who is liable as an employer for wages under California's Labor Code.

DATED: Dec. 29, 2003 Respectfully submitted:

TALAMANTES & VILLEGAS

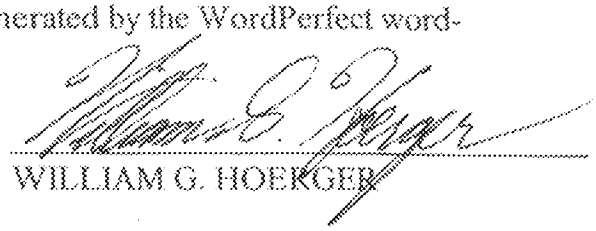
CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

By: WILLIAM G. HOERGER
Attorneys for Petitioners

RULE 14(c)(1) CERTIFICATION

I, WILLIAM G. HOERGER, certify that I am appellate counsel for Petitioners in the instant Petition; that I have prepared the foregoing Petition for Review using WordPerfect 9.0, and that the word count for this petition, including footnotes, is 8369, as generated by the WordPerfect word-counting feature.

DATED: Dec. 29, 2003



WILLIAM G. HOERGER

Filed 11/18/03 Martinez v. Combs CA2/6

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MIGUEL MARTINEZ et al.,

Plaintiffs and Appellants,

v.

CORKY N. COMBS et al.,

Defendants and Respondents.

2d Civil No. B161773
(Super. Ct. No. CV001029)
(San Luis Obispo County)

Miguel Martinez, Antonio Perez Cortes, Hilda Martinez, Otilio Cortes, Catarino Cortez and Asuncion Cruz (workers) appeal a judgment of dismissal after the court granted summary judgment on their causes of action for wages against Corky N. Combs, Larry D. Combs, Combs Distribution Co. (collectively Combs), Juan Ruiz, Jr., and Apio, Inc. (Apio).

We conclude, among other things, that the trial court properly granted summary judgment in favor of Combs, Apio and Ruiz because they did not exercise sufficient control over the workers and the agricultural operation to be joint employers. It properly dismissed the workers' sixth cause of action because they did not show that they were third party beneficiaries to a contract between Apio and Isidro Munoz. But

federal, state and local laws applicable to its farming operations, including, without limitation, labor, health and safety, industrial hygiene, environmental protection, land use and hazardous substances, and that it possesses all required licenses, authorizations, and permits to operate the same."

Munoz said in his declaration that he did not understand the Farmer Agreement because it was in English and he speaks Spanish. Apio prepared it but did not translate it for him. He subleased the agricultural land from Apio and it provided him money so he could grow strawberries. He harvested and delivered strawberries exclusively to Apio. Apio staff supervised him. They told him what crop to pick and how to pack it. The crop had to be packed in boxes with Apio's label. Munoz relied on Apio to pay him and calculate how much it owed him. He and the workers delivered 40,000 boxes of strawberries to Apio in a 6-week period. Apio did not pay him, and he could not pay the workers.

Department of Labor Standards Enforcement

(DLSE) Investigation of Unpaid Wages

Paul Rodriguez, a DLSE investigator, contacted Tim Murphy, Apio's vice-president, about the unpaid wages. Murphy provided DLSE a list of the workers and said he was "'holding the money'" to pay them. He wrote checks, but Rodriguez determined that "the checks . . . did not cover all the wages owed[.]"

Combs' Contract With Munoz

Combs loaned Munoz $80,000 to harvest strawberries on a 40-acre field. Combs and Munoz signed a contract which gave Combs exclusive title to the crops produced on that field for the year 2000 "or until [the] loan is paid off." Munoz said Ruiz, Combs' field representative, supervised the "quality of the produce." During April and May of 2000, Ruiz came to the field on a daily basis. He told Munoz "how much to pick, which fruit to pack, which fruit to discard, and how to pack the fruit[.]"

We review all the evidence and "'all' of the 'inferences' reasonably drawn therefrom . . . in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

IWC wage order No. 14 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.*" (Cal. Code Regs., tit. 8, § 11140, subd. 2(G), italics added.) These regulations are remedial and must be liberally construed. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592.) IWC regulations ("wage orders") often "parallel language within" the federal Fair Labor Standards Act of 1938 (FLSA), 29 United States Code section 201 et seq. (*Morillion*, at p. 586.)

There is no California case law interpreting this wage order. We may look to FLSA cases for guidance where they are consistent with the remedial purposes of California law. (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 354-355.) "'Federal law does not control unless it is more beneficial to employees than state law.'" (*Morillion v. Royal Packing Co.*, *supra*, 22 Cal.4th at p. 594.)

A.) *FLSA Employer Definitions*

FLSA is a remedial statute which allows workers to sue for unpaid wages. (29 U.S.C. §§ 201-219; *Torres-Lopez v. May* (9th Cir. 1997) 111 F.3d 633, 638.) It defines an employer broadly and includes "'any person acting directly or indirectly in the interest of an employer in relation to an employee[.]'" (*Bureerong v. Uvawas* (1996 C.D. Cal.) 922 F. Supp. 1450, 1470; 29 U.S.C. § 203(d).) "Regulations promulgated under the FLSA recognized that an employee may have more than one employer . . . ." (*Torres-Lopez*, at p. 638.) "When more than one entity is an employer . . . the entities are termed 'joint employers.'" (*Ibid.*)

Under FLSA, individuals or entities that hire and fire the workers are employers. But others who do not have direct contact with the workers may also be

The workers contend that Munoz's declaration states Apio exercised substantial control over the harvest. They argue that it leased the lands and sub-leased them to Munoz and that the workers used boxes with Apio labels and packed strawberries in cartons that Apio provided. Munoz's declaration says Apio staff controlled how many "boxes to pick, which fruit to pack, which fruit to discard, and how to pack the fruit[.]"

But a crop marketing company may send its employees to supervise aspects of the harvest for quality control purposes. That does not make it a joint employer. (***Aimable v. Long and Scott Farms*** (11th Cir. 1994) 20 F.3d 434, 441.) Here the workers did not show that the supervision was so extensive that it amounted to control. (***Ibid.***) It only occurred a couple hours a day during the part of the season when the crops were packed and harvested.

Apio did not control the number of workers, the hiring or firing of specific individuals, or the selection of the crews. It therefore lacked sufficient control over the workforce to be classified as a joint employer. (***Aimable v. Long and Scott Farms, supra***, 20 F.3d at p. 440.) Munoz had the exclusive control over the workforce, the tools used by the workers, the power to hire and fire and to set wage rates and hours of work. He trained his workers, selected his crews and employed foremen to supervise them on a full time basis.

The workers contend that the Farmer Agreement gave Apio the option to run Munoz's harvesting operations. But that only applied if Munoz's performance was deficient, and Apio did not exercise that option.

The workers argue that Apio had the financial control over Munoz's business which determined whether they would be paid. They claim that Munoz had a small operation and became insolvent. But Munoz had a substantial business. He provided harvesting services for four companies and received $500,000 to run these operations on four ranches. Apio loaned Munoz money, but it did not own the land and was not an owner, a partner or an investor in Munoz's business. The reasonable

supervise them. The workers did not meet their burden to show a reasonable inference that Combs or Ruiz were joint employers.

II. *The Suffer or Permit to Work Standard*

The workers contend that Apio, Combs and Ruiz met IWC wage order No. 14's alternative definition of employer as one who engages, *suffers or permits* others to work. (Cal. Code Regs., tit. 8, § 11140, subd. (2)(C).). They argue: 1) that the original IWC wage orders which used this phrase arose out of child labor cases in the early part of the twentieth century, 2) that California has continued to use this *suffer or permit to work* language in current wage orders involving adult workers, 3) that we must interpret this standard using California law, 4) that neither FLSA nor its economic reality test applies, and 5) that under the suffer or permit to work standard, APIO, Combs and Ruiz are liable for the unpaid wages because they did business with Munoz and knew or should have known that he was not paying his workers. We disagree.

This is not a child labor case, and the workers cite no California authority to support their strict liability theory. As Apio correctly notes, other states which have the "suffer or permit to work" standard apply an economic reality test and look to the control of the purported joint employer over the business or the employees. (***Laborers' Intern. Union of North America v. Case Farms, Inc.*** (1997) 127 N.C.App. 312, 314 [488 S.E.2d 632, 634]; ***Garcia v. American Furniture Co.*** (1984) 101 N.M. 785, 789 [689 P.2d 934, 938].) We find these cases to be persuasive. The trial court did not err.

III. *Combs' Liability for Ruiz's Oral Promise to Pay Wages*

The workers contend the court erred because their evidence supported reasonable inferences that Ruiz was Combs' agent who promised to pay their wages and they reasonably and detrimentally relied on that, making Combs liable. We agree.

A principal is liable for the acts of an agent who has "actual" authority to act for the principal or "ostensible" authority. (*Yanchor v. Kagan* (1971) 22

Munoz's employees.]" Moreover, the compliance provision is broad. It required Munoz to comply with "all provisions of federal, state and local laws applicable to its farming operations," land use, permits and "all required licenses." There was also an indemnity provision where Munoz agreed to hold Apio harmless from liability. A reasonable inference is that Apio intended to protect itself from litigation stemming from Munoz's activities and the workers were only incidental beneficiaries. The workers did not meet their burden to present evidence showing it was "more likely than" not that Murphy was wrong. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 857.)

The portion of the judgment which dismissed the seventh cause of action is reversed. In all other respects, the judgment is affirmed. Costs to appellants.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

PROOF OF SERVICE

I, GLADYS BRISCOE, declare as follows:

I am employed with the law offices of CALIFORNIA RURAL LEGAL ASSISTANCE, INC. My business address is 631 Howard Street, Suite 300, San Francisco, California 94105. I am over the age of 18 years of age, and not a party to this action

On December 29, 2003, I served the foregoing document entitled

PETITION FOR REVIEW

on all parties to this action addressed as follows:

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SUPERIOR COURT OF CALIFORNIA
SAN LUIS OBISPO COUNTY
HON. E. JEFFREY BURKE, JUDGE
1035 Palm Street, Room 385
San Luis Obispo, CA 93408
(1 copy)

[XX] **OFFICE MAIL:** By placing said document in sealed envelopes with postage provided for, which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing; such correspondence is deposited with the U.S. Postal Service the same day in the ordinary course of business.

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 was executed on December 29, 2003, at San Francisco, California.

GLADYS BRISCOE