No. S121552

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

MIGUEL MARTINEZ, et al.,
Plaintiffs and Appellants,

vs.

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

(Rules of Court 29.1(a)(5); 45(b),(d))

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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)]

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I. INTRODUCTION

Four legal issues have been presented by the Appellants MIGUEL MARTINEZ, ANTONIO PEREZ CORTES, HILDA MARTINEZ, OTILIO CORTES, CATARINO CORTES and ASUNCION CRUZ (the "Appellants") for decision by this Court in this matter. Respondent APIO, INC. (hereafter, "APIO") hereby submits this Answer Brief in response.

The first issue submitted for determination is whether California Labor Code Sections 1194 and 1194.2 ("Sections 1194 and 1194.2") incorporate the definitions of "employ" and "employer" from Industrial Welfare Commission Order 14, Cal. Code Regs., tit. 8 § 11140(2) (hereafter "Order 14") in the context of a civil action brought by employees in state court for alleged failure to pay minimum wages and liquidated damages relating thereto.

Respondent APIO submits that such definitions are not incorporated in Sections 1194 and 1194.2, in accordance with the teachings set forth by this Court in Reynolds v. Bement (2005) 36 Cal. 4th 1075, 1087. Instead, the common law definitions of "employ" and "employer" apply to this case. Under the common law definitions, APIO did not employ the Respondents, because APIO had no right to control the Appellants' work and did not do so. Therefore, APIO was not their employer as a matter of law. If the Court agrees with APIO's conclusions on the first issue, then the second and third

issues presented for decision by Appellants become moot.

If, however, the Order 14 definitions are relevant to this case, then the second issue to be determined is the legal standard to be applied in deciding whether or not APIO employed the Appellants, when the term "employ" is defined as "engage, suffer or permit to work." APIO submits that the proper legal standard to be used in this context is the "economic reality" test which has been used by the federal courts to interpret the same words in agricultural and other cases involving alleged joint employers under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA"). See Torres-Lopez v. May (9th Cir. 1997) 111 F.3d 633, and Aimable v. Long and Scott Farms (11th Cir. 1994) 20 F. 3d 434. Under the "economic reality" test, APIO did not employ the Appellants as a matter of law.

The third issue to be determined, if the Order 14 definitions are relevant to this case, is the legal standard to be applied in deciding whether or not APIO was the employer of the Appellants, when the term "employer" is defined as "any person . . . who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." APIO submits that the teachings found in S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal.3d 341, although not directly on point, can be applied in this context, in the absence of

applicable direct precedents. The Borello case considered the common law tests of employment, and also analyzed and considered other factors. Under the teachings of Borello, APIO did not exercise "control" over the wages, hours or working conditions of Appellants, and therefore did not employ them as a matter of law.

The fourth issue submitted for determination is whether the Appellants can be considered to be third party beneficiaries of a contract between APIO and the farmer who employed them, based on boiler plate contractual provisions which required the farmer to comply with applicable labor laws and other miscellaneous arguments. APIO submits that there is no statute or case law which supports such a construction of a third party beneficiary as advocated by Appellants. APIO submits that as a matter of law the Appellants have no rights under the contract that APIO made with the farmer who employed the Appellants, or if they do, then under the facts presented to the trial court, they have no rights of recovery against APIO.

In accordance with the foregoing, APIO respectfully requests that this Court affirm the decision of the appellate court and find that summary judgment was properly granted in favor of APIO on all causes of action set forth in Appellants' First Amended Complaint.

II. STATEMENT OF FACTS

A. Appellants Worked For Isidro Munoz, A Large Independent Farmer With Multiple Farms And Multiple Business Relationships

The Appellants are agricultural laborers who worked in 2000 for Defendant ISIDRO MUNOZ, doing business as MUNOZ & SONS (hereinafter, "MUNOZ"), an individual who formerly operated a large independent farming business in San Luis Obispo County and Santa Barbara County, California for several years. In 2000, MUNOZ directly hired at least 180 workers, including the Appellants, to assist him in growing and harvesting strawberry crops for sale in the fresh market, and for sale for processed cannery/freezer product. [App. 218.][1] MUNOZ also grew and harvested squash and beans for human consumption. [App. 199, at "p. 152"; App. 1417-1418; App. 1422-1423, at "pp. 120-121".]

In 2000, MUNOZ leased at least four different properties upon which he grew and harvested strawberry crops–approximately 30 acres of the "Oceano field" located in San Luis Obispo County (also known as the Oceano Ranch, the Phelan and Taylor Ranch, or the Taylor Ranch); approximately 30

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The parties are proceeding by appendix in lieu of clerk's transcript pursuant to Rule of Court 5.1(a)(2). [App. 1526-1527]. APIO has used herein the same abbreviation form for the appendix as the Appellants, for ease of reference, which is "App."

acres of the "Zenon field" located in San Luis Obispo County (also known as the Zenon Ranch, the Mesa Ranch or the Mesa 2); approximately 40 acres of the "El Campo field" located in San Luis Obispo County (also known as the Mesa Uno or Mesa 1); and approximately 30-32 acres of the "Santa Maria field" located in Santa Barbara County. [App. 217.]

MUNOZ contracted with at least three different companies to market and sell the fresh strawberry crops that he grew and harvested–APIO (with respect to fresh strawberry crops grown on the Oceano field and Zenon field), [App. 187-188, at "pp.48-49"; App. 190, at "p. 61"; App. 218], Respondent CORKY N. COMBS AND LARRY D. COMBS, doing business as COMBS DISTRIBUTION CO. ("COMBS") (with respect to fresh strawberry crops grown on the El Campo field), [App. 189, at "p. 55"; App. 221], and the RAMIREZ BROTHERS (with respect to fresh strawberry crops grown on the Santa Maria field). [App. 223.][2] MUNOZ also contracted with FROZSUN FOODS, INC. ("FROZSUN") to sell strawberry crops grown and harvested

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The Appellants claim that although they referenced the RAMIREZ BROTHERS in their complaint as employers of Appellants, they did not name RAMIREZ BROTHERS as defendants in this proceeding because the RAMIREZ BROTHERS had each previously filed bankruptcy petitions. See Appellants' Opening Brief on the Merits ("Opening Brief"), at p. 8, ftn. 5.

from all four fields for use as processed cannery/freezer product. [App. 222.][3]

APIO, COMBS, RAMIREZ and FROZSUN are each independent fresh and/or processed produce marketing companies. APIO had no business relationship with COMBS, RAMIREZ, FROZSUN, or any other person or entity who marketed strawberries or vegetables for MUNOZ, or to whom MUNOZ sold strawberries or vegetables, in 2000. [App. 132.]

MUNOZ, and/or MUNOZ'S three hand picked foremen, Arturo Leon, Armando Munoz, and Sylvestre Alvarado, made all decisions concerning hiring and firing of the strawberry field workers, wages paid (including the piece rates, cannery rates and hourly rates paid), and work assignments (i.e. the times and dates that workers reported to work, where they worked, breaks, quality control and type of work done). [App. 199, at "pp. 152-153"; App. 212-214; App. 242, at "p. 20"; App. 243, at "p. 168".] MUNOZ's son, Isidro Munoz, Jr., and MUNOZ's employee, Virginia Sylvestre, handled all aspects of payroll for the workers. [App. 196, at "p. 130"; App. 203, at "p. 176"; App. 237-238]. MUNOZ's employees were generally organized into three crews of approximately 60 workers each, for a total of 180 workers. These crews were

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[3] The Appellants subsequently filed a separate action against FROZSUN alleging that FROZSUN was also an employer of Appellants and liable for Appellants' unpaid wages. The case against FROZSUN has been stayed, pending decision in this case. See Opening Brief at p. 11, ftn. 14.

generally assigned to particular fields, but moved around to different fields, on an "as needed" basis, by MUNOZ and his supervisors in order to service MUNOZ's needs for farm labor. [App. 218; and App. 242, at "pp.18-20".]

MUNOZ made his own decisions regarding his business operations and financing. MUNOZ used profits he had earned from farming in prior years to partially finance his farming business for the 2000 strawberry harvest season. MUNOZ invested at least $500,000 of his own money for the 2000 strawberry harvest season, and obtained at least $500,000 in credit from several different sources to finance his strawberry growing operations and equipment, including credit from John Deere and Ford Motor Credit for equipment. [App. 186, at "pp. 41-43"; App. 195, at "pp. 97-98"; App. 201, at "pp. 164-165".]

MUNOZ directly paid for the majority of the expenses relating to his business, including fumigation, pre-planting and planting costs, and purchases or leases of trucks, tractors and fuel, and provided and paid for his own equipment, plants and supplies. [App. 200, at "pp. 162-163"; App. 201, at "pp. 164-167"; App. 202, at "pp. 168-169"; App. 210-211.] APIO did not own any of the equipment required by MUNOZ to harvest strawberries or haul them to the cooler. [App. 131.] MUNOZ paid for and supplied gloves to his field workers and supplied strawberry carts to his field workers that did not have their own carts. [App. 202, at "p. 170"; App. 214.] Although MUNOZ also

obtained financing from the shippers that MUNOZ contracted with to market his crops, such as APIO, this financing amounted to only a small portion of the funds that MUNOZ needed to grow and harvest the crops. [App. 130].

B. MUNOZ Allegedly Suffered Financial Problems In 2000 And Chose Not To Pay Appellants For Farm Labor Relating Primarily To The Harvest Of Processed Strawberries Purchased By FROZSUN, For Which MUNOZ Received Substantial Sums From FROZSUN

In the late spring/early summer of 2000, MUNOZ had financial problems and allegedly stopped paying wages to his employees, which included Appellants. He subsequently went out of business, and then filed for bankruptcy and was granted a discharge from his debts. [In Re Isidro Munoz, U.S. Bankruptcy Court, Central District of California, Case No. ND 02-11142-RR.]

Appellants admit that a substantial portion of the wages owed to them arise from harvesting work done to pick strawberries which were sold to FROZSUN for processing, and not for labor done with respect to fresh market strawberries. [Opening Brief at pp. 14 and 73.] Yet, FROZSUN paid MUNOZ over $422,000 in May and June of 2000 for processed strawberries. [App. 387]. Inexplicably, MUNOZ did not use the money he obtained from FROZSUN to pay the farm workers who harvested the crops that were delivered to FROZSUN, leaving $105,256.81 allegedly left unpaid to

Appellants. [Opening Brief at p. 73.][4]

C. MUNOZ Had An Arms Length Business Relationship With APIO And Expressly Agreed To Be Responsible For Paying Wages To His Employees

Commencing in 1997, APIO entered into written agreements for MUNOZ to grow and harvest fresh-market strawberries on two fields in San Luis Obispo County leased by MUNOZ from APIO (the "Oceano field" and the "Zenon field"), and for APIO to cool, market and sell the fresh strawberries harvested from those two fields in exchange for payment of commissions by MUNOZ (hereinafter, "the Farmer Agreement"). [App. 129; App. 136-151.] MUNOZ retained full legal and beneficial title to the strawberry crops until APIO sold them to third parties. [App. 136.] APIO had marketing agreements similar to the one with MUNOZ with many other independent produce growers in 2000. [App. 132.]

Under two separate sublease agreements, APIO leased the Oceano field and the Zenon to MUNOZ. [App. 129; App. 153-164.] The subleases expired in August and September 2000, respectively, and granted to MUNOZ the

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[4] Appellants argue in their Opening Brief that APIO's exercise of its contractual rights to offset amounts owed by MUNOZ to APIO against amounts APIO owed to MUNOZ was the alleged "cause" of MUNOZ's failure to pay his workers. [Opening Brief at pp. 81-91.] Yet, the evidence shows that even when MUNOZ did receive payments for his strawberries he chose not to pay his workers.

exclusive right to occupy and farm the leased land during the period of the subleases. MUNOZ also used the Zenon field to grow beans which were not marketed by APIO. [App. 1417-1418; App. 1422-1423, at "pp. 120-121".] APIO had no involvement with the El Campo field or the Santa Maria field. [App. 132; App. 221; App. 223.]

In connection with the Farmer Agreement, APIO initially loaned MUNOZ $163,000 in 2000, which was to be repaid to APIO by deducting the loan amounts due from monies to be remitted to MUNOZ from the sale of strawberries by APIO.[App. 130 ¶ 10; App. 166-167.] Subsequently, an additional loan of $30,000 was made by APIO to MUNOZ in March of 2000, at MUNOZ's request. [App. 1049-1050.] The $193,000 of loans made by APIO were only a small part of the financing required by MUNOZ for his strawberry growing operations for just the Oceano Field and the Zenon field. Estimated farming costs for the two ranches were between $469,000 and $536,000, [App. 130 ¶ 11], not including harvest costs.[5]

Under the express terms of the Farmer Agreement, MUNOZ was responsible for providing all labor, equipment, and packing materials required

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[5] See also Opening Brief at p. 82, wherein the Appellants acknowledge that "[s]trawberry production costs in the Santa Maria Valley typically approach $21,400 per acre, . . . [of which] approximately $13,200 represent[s] field-harvest labor."

to harvest, grade and pack the berries and haul them to APIO's coolers. [App. 129 ¶ 6, - 130; App. 136; App. 138-139.] The Farmer Agreement expressly provided the following:

> All persons performing work in connection with the operations or services performed by Farmer [MUNOZ] shall be employees, contractors or agents of Farmer. Farmer shall determine the method, means, and manner of performance of work of Farmer's employees, agents or contractors. [¶] Farmer shall be solely responsible for the selection, hiring, firing, supervision, assignment, direction, setting of wages, hours, and working conditions, and adjustment of grievances of Farmer's employees. With respect to its employees, Farmer shall be solely responsible for preparing and making payroll records, preparing and issuing paychecks, paying payroll taxes, providing workers' compensation insurance, providing field sanitation facilities, providing transportation, and providing the tools, equipment and materials required for the job. Neither APIO nor any of APIO's quality control agents or employees shall have any right to direct or control those persons in any respect whatsoever, including but not limited to, hiring, firing, disciplining, directing, supervising, setting wages and working conditions, and adjusting grievances.

[App. 138-139.][Emphasis added.]

APIO never entered into any written or oral employment agreements with any of MUNOZ's employees. [App. 131-132 ¶ 18.] Moreover, APIO had no involvement whatsoever in the hiring, firing, or supervision of MUNOZ's employees; the determination or payment of wages; or the working conditions of MUNOZ's employees. [App. 138-139.]

D. APIO's Only Interactions With MUNOZ's Field Personnel Was Coordination Of The Delivery Of Harvested

Strawberries With MUNOZ's Supervisors

APIO had the right under the Farmer Agreement to send its personnel to MUNOZ's Oceano field and Zenon field in order to confirm the quantity and quality of the fresh market strawberries to be delivered to APIO, so that APIO could make appropriate arrangements to market the crops. [App. 130 ¶ 9; App. 139 ¶ 3.] However, there was no evidence that APIO's personnel ever directed or controlled the activities of MUNOZ's workers, or had the right to do so. Rather, the evidence was that APIO had no right to do so. [App. 131 ¶ 16.]

APIO's personnel had the right to consult with MUNOZ regarding his planting schedules in order to properly coordinate delivery and marketing of the strawberries. [App. 139, ¶ 3.] APIO's personnel also had the right to consult with MUNOZ concerning the quality and maturity of the harvested strawberries in order to ensure that the strawberries meet the specifications required by APIO's customers. [App. 141, ¶ 8.A.]

On harvest days, APIO's employee, Juan Toche, briefly consulted with MUNOZ or his foremen in the morning to determine how many boxes of strawberries MUNOZ intended to pick that day and to confirm quality, and then relayed the information to APIO's sales department so that sales of the strawberries could be consummated. In the afternoon, Toche would again

consult with MUNOZ regarding quantity and inspect the day's harvest to confirm quality. [App. 178 ¶¶ 3-4.]

APIO's need for such consultation and confirmation was necessary in order to ensure that the harvested strawberries – which are perishable products – would be timely marketed and sold to customers, and meet the requirements of those customers. In all other respects, MUNOZ had complete authority to grow and to "harvest, grade and pack the Crops in accordance with the standards and practices prevailing in the industry." [App. 138 ¶¶ 1.A. and B.]

The last date on which APIO received any strawberries from MUNOZ was May 16, 2000. [App. 131 ¶ 13; App. 169.][6] After that date, MUNOZ harvested strawberries used for processing (rather than the fresh market) from the Oceano field he leased from APIO, as well as from the Zenon Ranch field he leased from APIO, and delivered and sold the strawberries to FROZSUN. [App. 188, at p. 51.] APIO never received or sold any strawberries used for processing. [App. 131 ¶ 13.]

E. APIO Was Notified By DLSE That MUNOZ Was Not Paying His Employees; APIO Worked With DLSE To Verify That MUNOZ Used Funds Provided By APIO To Pay His Employees Who Harvested Strawberries Delivered to APIO; No Evidence That Appellants Are Owed Any

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Appellants state in their Opening Brief at p. 73 that the last date that MUNOZ harvested strawberries delivered to APIO was May 22, 2000, without any evidentiary support for this date.

Wages For Harvested Strawberries Delivered to APIO

In late May of 2000, after MUNOZ had stopped providing fresh strawberries to APIO for marketing and sale, the California Department of Labor Standards Enforcement ("DLSE") notified APIO that MUNOZ had failed to pay his workers. DLSE asked APIO not to make any further payments to MUNOZ under the Farmer Agreement, but instead to directly pay MUNOZ's workers. APIO declined to make payments directly to MUNOZ's employees. However, APIO subsequently entered into an agreement with the DLSE and MUNOZ whereby APIO agreed to make payments due to MUNOZ under the Farmer Agreement, and MUNOZ in turn agreed to pay various workers in early June of 2000, under the supervision of the DLSE. [App. 132 ¶¶ 24-25 - 133 ¶¶ 26-28.]

In early June of 2000, at APIO's request, MUNOZ provided APIO with a list which included all workers who had harvested strawberries which were delivered to APIO, but who had not yet been paid all wages owed by MUNOZ (the "Employee List"). [App. 132; App. 171-176; App. 228-234]. None of the Appellants' names was on this list. All wages listed as owed to the MUNOZ employees on the Employee List were subsequently paid through the DLSE supervised process referenced above. [App. 133.]

The Appellants have never produced any evidence which specifically

ties their wage claims to work they performed harvesting strawberries which were delivered to APIO for marketing and sale. The Appellants merely allege that they performed work during the "time period" when strawberries were still being harvested for APIO, without identifying the fields where the work was performed.[7]

In fact, three of the Appellants, Catarino Cortes, Otilio Cortes and Miguel Martinez, are only asserting wage claims for late May and June of 2000, after MUNOZ ceased delivering strawberries to APIO. The bulk of the wages claimed by the other three Appellants is for work done after MUNOZ ceased deliveries to APIO. [App. 124-125; App. 182 ¶ 10, - 183; App. 244-300.][8] Thus, the Appellants are seeking to be paid by APIO for farm labor work they did with respect to strawberries which they can not show were ever marketed by APIO, or sold to APIO, and to which APIO had no economic connection whatsoever.

F. APIO Owes No Money To MUNOZ Under The Contracts Between The Parties; Instead MUNOZ Owes APIO Over

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See Opening Brief at p. 73 where the Appellants claim that $18,263.46 of their wage claim was for "work done prior to May 22 - the last day MUNOZ delivered fresh-market berries to APIO." The May 22 date is incorrect. The last date that APIO received any strawberries from MUNOZ was May 16, 2000. [App. 131 ¶ 13; App. 169].

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See also the references to the declarations of the Appellants concerning their wage claims cited in the Opening Brief at p. 73.

$80,000

At the end of the 2000 fresh market strawberry season, MUNOZ owed APIO at least $80,000 for unpaid advances made to MUNOZ by APIO. No monies were owed to MUNOZ by APIO under the terms of any contracts between MUNOZ and APIO. [App. 133 ¶¶ 29-30; App. 520 ¶¶ 62-63.] Under the express terms of the contracts between APIO and MUNOZ, APIO had the right to deduct amounts advanced by APIO to MUNOZ in "money, material or services" against amounts owed by APIO to MUNOZ for strawberries sold by APIO for MUNOZ's account. [App. 146 ¶ 11; App. 166.] Despite APIO's exercise of these rights, MUNOZ still owed money to APIO at season's end, and apparently owed other persons and entities money as well, since MUNOZ subsequently filed bankruptcy, as referenced above.

III. STANDARD OF REVIEW

This Court is required to do a de novo review of the evidence considered by the trial court in its grant of summary judgment in favor of APIO. Appellants are correct that on appeal this Court assumes the role of a trial court and applies the same rules and standards as a trial court (Distefano v. Forestor (2001) 85 Cal.App.4th 1249, 1258). A summary judgment may be granted where the moving party shows that the "action has no merit . . ." (Code Civ. Proc. § 437c, subd. (a).), that "there is no triable issue as to any

material fact and that the moving party is entitled to judgment as a matter of law . . ." (Code Civ. Proc. § 437c, subd. (c).)

APIO can meet its burden of showing Appellants' remaining causes of action have no merit[9] by merely showing that either: (i) one or more elements of a cause of action, even if not separately pleaded, "cannot be established"; or (ii) there is a complete defense to a cause of action. (Code Civ. Proc. § 437c, subd. (o)(2).)

To establish that a cause of action "cannot be established", APIO may meet its burden of proof with affirmative evidence presented to the trial court which negates, as a matter of law, an essential element of each of Appellants' remaining claims (Gux v. Bechtel Nat'l, Inc. (2000) 24 Cal.4th 317, 334.) APIO's evidence is merely required to show that Appellants "cannot establish at least one element of the cause of action . . ." (Aguilar v. Atlantic Richfield Co., 25 Cal.4th 826, 853.) Once APIO has met this burden of producing evidence, then it is up to the Appellants to set forth "specific facts" which show there is a triable issue, as they cannot rely on mere allegations or denials. (Id. At 849.) APIO submits that Appellants presented no such evidence to the

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Appellants have abandoned their appeal of their third, fourth and fifth causes of action in their First Amended Complaint, and admit that their eighth and ninth causes of action are derivative and fail if their other claims fail. See Opening Brief at p. 10, ftns. 9 and 10. The seventh cause of action does not apply to APIO. [App. 24-25.]

trial court which shows a triable issue based on the applicable legal standards for each cause of action.

As discussed in detail below, this Court can determine from the evidence presented to the trial court that APIO was not the Appellants' employer under any of the possible legal definitions of "employer" which this Court might find to be applicable in this instance. Appellants presented no material facts to the trial court which would support a finding that APIO was their "employer" under any appropriate legal test. Therefore, APIO is not liable for the Appellants' wage claims presented in their first and second causes of action.

Further, Appellants presented no material facts to the trial court which would support a finding that they were third party beneficiaries of any contracts between MUNOZ and APIO. Furthermore, even if there was a potential basis on which the Appellants might be found to be third party beneficiaries of such contracts, they have no rights to collect money from APIO under the contracts, based on the facts of this case. Thus, APIO is not liable to the Appellants on their sixth cause of action for breach of contract between MUNOZ and APIO. Therefore, the entry of summary judgment should be affirmed.

IV. ARGUMENT

A. The Definitions In Order 14 Are Not Incorporated Into Sections 1194 And 1194.2; Under Common Law Definitions Of "Employ" And "Employer" APIO Did Not Employ The Appellants And Is Not Responsible For Their Unpaid Wages

There is no dispute that in California, Order 14 regulates the wages, hours and working conditions of agricultural employees, such as Appellants, who were engaged in the production and harvest of strawberry crops. What is disputed is whether the definitions set forth in Order 14 apply to a private right of action for unpaid wages asserted in state court, rather than in an administrative proceeding before the Labor Commissioner.

Section 1194 provides that "any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage..." Section 1194.2 provides that liquidated damages may also be recovered in an action brought under Section 1194 to obtain unpaid wages.

Appellants contend that two definitions which are set forth in Order 14, specifically the definition of "employ", which "means to engage, suffer or permit to work" [Cal. Code Regs., tit. 8 § 11140(2)(C)], and the definition of "employer", which "means any person...who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages,

hours, or working conditions of any person" [Cal. Code Regs., tit. 8 § 11140(2)(F)], are applicable to an analysis of the validity of the Appellants' claims for unpaid wages brought in a civil action against Respondent APIO pursuant to Sections 1194 and 1194.2. The trial court and court of appeal both assumed that the above definitions of "employ" and "employer" were incorporated into Sections 1194 and 1194.2, without analysis of their applicability to civil litigation in state court, and then proceeded to analyze the import of such terms and their application to the facts presented herein.

However, under the teachings of Reynolds, there is a preliminary analysis which was not done by the lower courts, but which first must be made, before it can be determined whether or not the above referenced definitions in Order 14 apply to civil actions brought under Sections 1194 and 1194.2, such as this one. First, Reynolds states that you must look to the intent of the Industrial Welfare Commission ("IWC") in promulgating the two definitions, with "[t]he best indicator of that intent [constituting]...the language of the provision itself." Reynolds v. Bement, *supra*, 36 Cal. 4th, at 1086.

Here, as in Reynolds [which concerned Order 9 relating to employees engaged in auto painting], there is nothing specific in Order 14 which expressly imposes liability under Sections 1194 and 1194.2 on persons who "employ" agricultural workers [as defined in Order 14], or on persons who are

"employers" [as defined in Order 14]. Appellants admit that Order 14 does not expressly refer to Section 1194. [Opening Brief at p. 17.]

Second, Reynolds requires that you look to the intent of the Legislature in promulgating Sections 1194 and 1194.2 to determine whether or not the Legislature intended to incorporate the definitions from Order 14 into its statutes. Reynolds stated that Sections 1194 and 1194.2 should "be construed in light of the common law unless the Legislature 'clearly and unequivocally' indicates otherwise." *Id.* at 1086. As noted in Reynolds, nothing in Section 1194 contains any reference at all to the definitions of "employ" or "employer" from Order 14. [*Id.* at 1087.] Similarly, Section 1194.2 contains no such reference either. Appellants concede that this is the case. [Opening Brief at p. 17.]

In fact, if the California Legislature had wanted to use the Order 14 definitions in Sections 1194 and 1194.2 they certainly knew how to use those words in a statute, by Appellants' own admission. In their Opening Brief, Appellants acknowledge that the Legislature began using the words "employed, permitted or suffered to work" in child labor laws, commencing in 1919, "imitating the IWC's employer definitions." [Opening Brief at p. 34.]

In Reynolds, this Court determined that there was no clear and

unequivocal legislative intent that the Order 9 definitions applied to Section 1194 civil actions; and therefore concluded that the common law definition of employment was applicable to such cases. [*Id.* at 1087.] As discussed in detail below, the Appellants have produced no authorities which would support a different conclusion with respect to Order 14. There is no legislative history, case law or any other authorities which support the Appellants' conclusions.

Under the common law, APIO did not "employ" the Appellants, as established by the facts in the record because APIO had no right to control the Appellants' work and did not do so. Under the common law, APIO does not meet the definition of "employer" of the Appellants, as established by the facts in the record. Therefore, it is appropriate for this Court to affirm the grant of summary judgment in favor of APIO.

1. Appellants Have Cited No Legislative History Which Supports Their Position That Either The Legislature Or The IWC Intended To Incorporate The Order 14 Definitions Into Sections 1194 and 1194.2

After extensive review of the authorities cited by Appellants, it is clear that nothing in the legislative history relating to the adoption of Sections 1194 and 1194.2, and nothing in any of the IWC proceedings, or other historical documents relating to the adoption of Order 14, evidence any intent by either the Legislature or the IWC to incorporate the definitions from Order 14 into

Sections 1194 and 1194.2. Furthermore, there is also no prior case law which supports the Appellants' position. Therefore the common law definitions of employment must be applied.

In this case, the Appellants have made similar arguments to those made by the plaintiff in Reynolds.[10] In Reynolds, the plaintiff contended that it could be inferred that the IWC had authority to specify the persons who are subject to Section 1194 liability because of the broad powers that the IWC has been given to "fix a minimum wage and to provide safeguards to ensure employees receive the minimum and overtime wages due them." [*Id.* at 1086.]

Similarly, the Appellants have argued here that because the California Legislature (i) departed from the common law when it created the IWC, (ii) gave the IWC broad powers to regulate wages and conditions of employment, and (iii) then adopted Section 1194; this Court should infer that the Legislature intended to incorporate the definitions from Order 14 in Sections 1194 and 1194.2, since the IWC is the entity which determines minimum wages and working conditions in the first instance. [Opening Brief at p. 20.] In effect, the Appellants are once again asking this Court to determine that the IWC has the authority to specify the persons who are subject to civil liability under Sections 1194 and 1194.2, through the expanded definitions of Order 14.

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Reynolds v. Bement, *supra*, 36 Cal. 4th, at 1086.

No specific legislative history, case law or other authorities have been cited by the Appellants in support of their argument. Thus, the Appellants have not met the test set forth in Reynolds which requires that the Appellants show clear legislative intent to depart from common law principles prior to asking a court to graft definitions into a statute that were adopted by an administrative agency in regulations applicable to administrative proceedings. [*Id.* at 1086- 1087.]

a. The Wage Laws And Orders Adopted In The Early 1900's To Prevent Harm To Women And Children Have Never Been Interpreted To Cover Situations Such As The Case At Bar; Nor Does The Early Case Law Support Appellants' Position

The ancient statutes and case law which Appellants have cited do not support their position. Appellants have provided a massive amount of historical information which demonstrates that around the turn of the 19th century, California, as well as many other states, adopted legislation that was meant to address specific ills of that time relating to the employment of women and children. These laws were enacted to prevent employers from evading liability for wages and working conditions of children and women who did work on their premises and for their economic benefit.

"The 'suffer or permit' standard [was used] to prohibit child labor in certain occupations, to limit the number of hours minors could work, to

prohibit women from holding certain jobs, and to prevent companies from working women beyond certain times of the evening." 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, 1016 (hereafter, "Goldstein, *et al.*"). "[I]t served as a key element of 'a police regulation, intended for the protection of the public health." *Id.* at 1019.

For example, the Appellants cite an early New York law that held a factory owner directly responsible for an underage child working in his factory. The evil which this law was meant to address was the situation where the employer avoided liability by claiming that the child had just "wandered in" the factory, and had never been directly hired by the factory. Hence, the New York law provided that "no child under fourteen could be 'employed, permitted, or suffer to work' in a factory." [Opening Brief at p. 26, *citing* Felt, HOSTAGES OF FORTUNE: CHILD LABOR REFORM IN NEW YORK STATE (1965), at 52.][11]

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Appellants cite a case, City of New York v. Chelsea Jute Mills (1904) 88 N.Y.S. 1085, as allegedly interpreting the terms "suffer or permit" used in the early New York statute. However, City of New York does not cite or discuss the import of these terms. The court found no knowledge or intent was required to hold a factory owner liable for directly employing an underage child, as the statute made it unlawful "to employ any child under fourteen years of age."

None of the early wage and hour laws were enacted to cover a situation like the case at bar. Here, the Appellants have asked this Court to adopt a standard whereby APIO could be held strictly liable for all of Appellants' unpaid wages by a mere showing that the Appellants, at some point in time, did work on land that MUNOZ, an independent business person, leased from APIO[12], and from which MUNOZ harvested some strawberries which were marketed and sold by APIO, without any analysis of the "economic benefits" to APIO of the wages that have been left unpaid.

Appellants ignore or gloss over the fact that even when Appellants were working on land that MUNOZ leased from APIO, they did work from which APIO derived no economic benefit, such as harvesting strawberries which were sold by MUNOZ to FROZSUN for processing. The Appellants also ignore or gloss over the fact that Appellants worked on other agricultural fields, which were not leased by APIO to MUNOZ, and which had no connection whatsoever with any of APIO's operations.

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Appellants call it "APIO's land", even though Appellants *never* worked on APIO's land, but rather on land APIO subleased to MUNOZ, who had the exclusive right to possess the land, as sublessee. See Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 972: "The distinguishing characteristics of a leasehold estate are that the lease gives the lessee the exclusive possession of the premises against all the world, including the owner ... ." (Emphasis added.) The Appellants presented no evidence that APIO exercised any control over the subleased premises while MUNOZ occupied them.

Similarly, the old state law cases from other jurisdictions which have been cited by Appellants do not support their arguments. These cases generally involved children. In these cases, the court imposed liability on the "employer" for injuries to the child or for child labor law violations, based on the strong public policy requiring the prevention of harm to children. Any findings of joint employment in these cases was based on a court's determination that the defendant had directly benefitted from the child's work, because such work directly furthered the defendant's business operations.

For example, in Lehigh Valley Coal Co. v. Yennsavage (2nd Cir. 1914) 218 F. 547, the court found that a child helper of a miner employed by the defendant was also an employee of the defendant when the child helper was working in the defendant's coal mine, and was injured in an explosion.

Likewise, in Purtell v. Philadelphia & Reading Coal & Iron Co. (Ill. 1912) 99 N.E. 899, the court found that a underage water boy, hired by the coal loaders employed by the coal mining company, was an employee of the coal mining company, and that the coal mining company was liable for crippling injuries that the boy suffered at work. The court noted that it was the custom and practice of coal loaders to employ water boys to provide them with water and assist them in efficiently performing their coal loading duties. It found the coal mining company was liable for violating the child labor laws

because it "permitted or suffered to work" the underage boy on its premises in furtherance of its own pecuniary interest. *Id.* at 901-902.

Again, in Curtis & Gartside Co. v. Pigg (Okla. 1913) 134 P. 1125, a manufacturing company was found liable for violating the child labor laws. In that case an underage child was allegedly employed only to load materials and clean-up. The child injured his hand while oiling machinery at the employer's factory, which type of job only persons at least 16 years of age were legally authorized to do. The court found that the manufacturer "permitted or suffered" the child to oil its machinery in violation of the law, even though the employer had not allegedly authorized that type of work by the child.

In Gorczynski v. Nugent (Ill. Sup.Ct. 1948) 83 N.E.2d 495, the court found that the defendant owner-operator of a horse racing track was liable for a child's injuries when the child was kicked by a horse while the child was employed to cool out the horses after workouts or races, even though the child was employed by the horse owners rather than the defendant. Again, the child was directly involved in the defendant's business operations.

In Commonwealth v. Hong (Mass. 1927) 158 N.E. 759, the court found that underage girls working at the defendant's restaurant were the defendant's employees even though they were hired by an independent contractor. The

girls were working in the defendant's establishment as entertainers, and thus, directly involved in the business of the defendant.

The facts in Daly v. Swift & Co. (Mont. 1931) 300 P.265, exemplifies the distinctions between the line of cases that the Appellants purportedly rely upon, and the instant case. In Daly, the court found that the child's direct employer and Swift – on whose premises the child was working and was fatally injured – were both "'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. (Emphasis added.)] Further, Daly, as well as many other decisions cited by the Appellants, involved catastrophic injuries to women or children working on the employer's premises.

The obvious logic that can be derived from all of the decisions discussed above is that an employer should be charged with knowledge of, and hence responsibility for, conditions occurring: (1) on its premises, or (2) in the direct conduct of its business, and (3) from which it derives a direct economic benefit.

By contrast, there is no evidence that Appellants' wage claims had anything to do with the business of APIO. Although Appellants have testified that they did work on some of the fields from which strawberries were

harvested and marketed by APIO, they have not testified that they were not paid wages for this work. In fact, as noted above, the bulk of Appellants' wage claims arose after fresh market harvest of strawberries for APIO ceased, when MUNOZ was harvesting strawberries to be sold for processing to FROZSUN. [App. 124-125; App. 182 ¶ 10 - 183; App. 244-300.][13] Thus, Appellants seek to hold APIO responsible for their unpaid wages simply because at one time they did some work on fields from which APIO received fresh strawberries for marketing and sale, even though the Appellants were never directly employed by APIO. Clearly, the terms "suffer or permit" to work were never intended to cover circumstances such as this one.

Here, Appellants' unpaid work was done solely and entirely to further the independent business of MUNOZ in growing and harvesting strawberries which MUNOZ chose to sell to FROZSUN as processed strawberries, or to various third parties as fresh strawberries. The Appellants were not working on APIO's premises or on land controlled or occupied by APIO. MUNOZ, as lessee, had the exclusive right to possess any land he leased from APIO, during

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Wage claims for work done prior to the end of the fresh market season may relate to strawberries which MUNOZ harvested for sale or marketing by other third parties, such as COMBS, RAMIREZ or others with whom MUNOZ may have been doing business with. Appellants did not submit any evidence to the trial court that specifically tied any of their wage claims to work done harvesting strawberries which were delivered to APIO for marketing.

the term of the subleases, so any work done by Appellants on such leased land was on MUNOZ's land, not on APIO's land. Further, the Appellants also worked on land which was not leased from APIO, and which was used to grow crops which were not marketed by APIO, sold to APIO, or with which APIO had any economic connection.

In sum, the Appellants' situation is in no way analogous to those of the plaintiffs in the old state law cases that they argue and cite, and therefore, such cases are not precedents which support the Appellants' claims.

b. Recent State Law Cases From Other Jurisdictions Which Have Interpreted The "Suffer Or Permit" Language Have Adopted "Economic Reality" Tests

If modern opinions from other state courts are examined which interpret the definition of "employer" using the "suffer or permit" standard in the context of allegations of joint employment, these state decisions lend further support to a finding that APIO should not be held responsible for the Appellants' unpaid wages. The more recent state law cases from other jurisdictions use tests which consider various factors in determining whether, as a matter of "economic reality," a third party was a joint employer.

For example, in Garcia v. American Furniture (N.M. 1984)101 N.M. 785, 789, the court considered the question of whether the plaintiff coach of a softball team that was financially supported by the defendant furniture store

was an employee of the furniture store and entitled to the minimum wage. In finding that the plaintiff was not an employee, the Court interpreted a state statute that defined "employ" to include "suffer or permit to work," and stated:

> The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. ... If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. In determining whether a person is an employee under the Minimum Wage Act "the ultimate issue is whether as a matter of 'economic reality' the particular worker is an employee." [Citation omitted] This ultimate issue is a question of fact which requires consideration of the "total employment situation." [Citation omitted] Facts such as pay, contract, control and voluntary action are part of the total employment situation which disclose the economic reality.

Similarly, in Laborers' Int'l Union of North America, AFL-CIO v. Case Farms (N.C. 1997) 127 N.C.App. 312, the Court interpreted the term "suffer or permit to work" in the definition of "employ" in the North Carolina Wage and Hour Act to provide protection to those persons "who, as a matter of economic reality, are dependent upon the business to which they render service." [*Id.* at 314.] The factors considered by the court in making such a decision included: "(1) whether the alleged employee performs services for the employer; (2) 'the degree of control exerted by the alleged employer' over the individual or entity; and (3) the alleged employee's 'opportunity for profit

or loss' derived from its relationship with the employer." [*Id.* at 314.]

Again, under this modern line of cases APIO does not qualify as Appellants' joint employer. The Appellants performed no services for APIO, were not controlled by APIO, did not contract with APIO, were not paid by APIO and did not earn their pay, or derive any opportunity for profit or loss based on any relationship with APIO.

c. Agricultural Employees Were Expressly Excluded From The Early Wage Orders and Labor Laws Both In California And Elsewhere

Appellants point to no specific legislative findings or intent by the IWC that a particular construction of the words "suffer or permit to work" was meant to be used in connection with the definition of the term "employ," as applied to agricultural labor. In fact, agricultural labor was generally excluded from the early labor laws and wage orders discussed above.

In New York State, child labor laws were not enforced in agriculture until the late 1940s. [Felt, *supra* at 185-187.] In 1937, the New York State Attorney-General ruled that the Labor Department "had no legal authority to check farm work." [*Id.* at 179.] In their Opening Brief, the Appellants claim that New York's child labor laws constituted one of the models used by the IWC in adopting their early wage orders using the "suffer or permit to work" language. [Opening Brief at 29].

Further, the Appellants admit that the agricultural industry in California was not regulated by any wage orders until 1961, except for a brief period between 1920 and 1922. [Opening Brief at p. 55-56.][14] Thus, at the time that the modern Order 14 went into effect, the FLSA, and the cases interpreting that statute using the "suffer or permit to work" language, had already been in effect for over 20 years.

d. The FLSA Adopted The Suffer Or Permit To Work Language From The Same Child Labor Law Legislation That Appellants Reference

In Rutherford Food Corp. v. McComb (1947) 331 U.S. 722, the U.S. Supreme Court discussed the origin of the definition of "employ"(which includes "suffer or permit to work") used in the FLSA, which statute was first enacted in 1938. [*Id.* at 723.] The Supreme Court noted that the definition used for "employ" in the FLSA was meant to be "broad", and was patterned on the definitions used in the child labor statutes that had previously been adopted in 32 states and the District of Columbia, and the Uniform Child Labor Laws recommended in 1911 and 1930. [*Id.* at 728, ft. 7.] The Supreme Court stated that the purpose of the FLSA was to eliminate subnormal labor

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Order No. 14 originally adopted in 1920, was rescinded on February 24, 1922, "because of the impracticability of enforcing a guaranteed wage for field occupations in which close record-keeping are impossible." [App. 611.]

conditions for goods distributed in commerce by enacting minimum pay and maximum hour provisions. [*Id.* at 727.]

More recently, in Nationwide Mutual Insurance Company v. Darden (1992) 503 U.S. 318, the Supreme Court further discussed the broad parameters of FLSA's definition of "employ," derived from child labor statutes, which "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." [*Id.* at 326.]

Appellants argue that the IWC's definition of "suffer or permit to work" in its original California wage orders was "not patterned... on then non-existent and unanticipated federal law," noting that the original wage orders were adopted 22 years before the FLSA. [Opening Brief at p. 67.] However, Appellants fail to acknowledge that both the FLSA and the California wage orders were patterned on the same state child labor law definitions of "suffer or permit to work", which have been discussed above.

In fact, both the FLSA and Wage Order 14 use nearly identical language to define "employer."[15] Thus, both the federal government and the IWC were borrowing language from the same authorities when they adopted

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Compare Cal. Code Regs., tit. 8, §11140(2)(D) & (F) *with* 29 U.S.C. §203(d), (e)(1) & (g).

their wage and hour laws/regulations. Therefore, any legislative intent which can be imputed in California based on the historical context and purpose of the child labor statutes, as Appellants have argued, should certainly also be imputed to Congress with respect to the adoption of the FLSA.

e. Order 14 Was Adopted In California After The FLSA, Not Before, And Therefore It Is Reasonable to Assume That It Incorporated Definitions As Used In The FLSA

The language used to define the terms "employer" and "employ" is substantially identical under both state and federal law. A comparative analysis of FLSA and California's Order 14 indicates the policy underlying both laws is sufficiently similar that federal authorities should serve as persuasive guidance in interpreting Order 14's "suffer or permit to work" and "control" standards. This is consistent with the policy of liberal construction accorded to California's labor law. Morillion v. Royal Packing Co. (2000) 22 Cal. 4th 575, 592.

Appellants' argument that California created the "suffer or permit to work" definition before Congress adopted the FLSA also is disingenuous. The present Order 14 was not adopted until 1961, *23 years after* the FLSA became law, and the current format of the IWC wage orders was not adopted until 1972 and 1973 [App. 1310-1311.] These facts weaken if not gut the appellants' assertion that Order 14 should not be interpreted in light of federal

statutory law and federal case law.

In Morillion v. Royal Packing Co., *supra*, 22 Cal. 4th, at 585, this Court interpreted the terms "suffer or permit to work" in Section 2(G) of Order 14 ("Hours worked" section) with respect to an issue regarding the payment of travel time wages to agricultural employees who were required to travel to work on an employer provided bus. In Morillion, this Court noted that although other state cases have not interpreted the phrase, these same words are used in the FLSA, and have been interpreted to mean "with the knowledge of the employer." [*Id.* at 585.] "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift...The employer knows or has reason to believe that he is continuing to work and the time is working time....In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed." [*Id.* at 585.]

In addition, it is useful to note that in Reynolds, the DLSE, the entity that currently administratively enforces the wage orders in California through its chief officer, the Labor Commissioner, advised the Court that the DLSE had a policy and practice of determining who qualifies as an "employer", on the basis of the "economic reality" test developed under federal case law with respect to FLSA. [Reynolds v. Bement, *supra*, 36 Cal. 4th, at 1088.]

f. The IWC's Authority To Adopt Regulations Is Not At Issue Here; There Is No Evidence That The IWC Intended To Incorporate Its Definitions From Order 14 Into Sections 1194 and 1194.2

APIO does not challenge the IWC's authority to adopt wage orders which govern the administrative proceedings brought before the DLSE. Certainly, the IWC has the authority to adopt and promulgate wage orders. However, the Appellants have cited no authority to support their position that the IWC intended to change the provisions of Sections 1194 and 1194.2 of the Labor Code, which govern litigation proceedings brought in state court, through the definition sections set forth in Order 14. In fact, the Appellants have admitted that Order 14 does not expressly refer to Section 1194. [Opening Brief at p. 17.]

In Reynolds, this Court instructed that when it makes a determination as to whether or not the definition sections of a wage order should be deemed to be incorporated into the Labor Code, it first looks to the IWC's intent in promulgating the definitions. "The best indicator of that intent is the language of the provision itself." [Reynolds v. Bement, *supra*, 36 Cal. 4th, at 1086.] Here, as in Reynolds, the plain language of Order 14 defining "employ" and "employer" is not expressly incorporated into the provisions of Section 1194 and 1194.2. The Appellants have cited to no legislative history, or other

authorities, which evidence any intent whatsoever of the IWC to so incorporate the pertinent definitions from Order 14 into Section 1194 and 1194.2.

Appellants have requested that this Court consider various historical documents pursuant to Appellants' Consolidated Compendium of Uncommon Authorities and Request for Judicial Notice ("Request for Judicial Notice"). However, the documents referenced in the Request for Judicial Notice do not support Appellants' position. Moreover, as noted below, Appellants have improperly requested that this Court take judicial notice of certain alleged facts in these materials, for the truth of the matters asserted.

For example, the excerpts of the early reports of the IWC submitted by the Appellants[16] merely explain that the legislated mission of the IWC was to investigate the wages paid to women and minors, and promulgate orders or regulations to provide for minimum wages for these workers for their "comfort, health, safety and general welfare." Further, these reports can not be used for the purpose of establishing the truth of any factual matters which are described in the reports or may be deduced therefrom, as opposed to the mere fact of the existence of these public records of the IWC. See Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 1063-1064. Appellants,

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January 18, 1923, Request for Judicial Notice, Ex. 1; January 4, 1915, Request for Judicial Notice, Ex. 6; and October 15, 1940, Request for Judicial Notice, Ex. 8.

however, appear to try to do so in their Opening Brief. They argue that it should be presumed that members of the legislature read the IWC reports and considered them when adopting legislation. [Opening Brief at p. 33].

The letters from the California Attorney General which the Appellants have submitted also provide no support for their position. For example, the June 23, 1936 letter [Request for Judicial Notice, Ex. 2] , states the Attorney General's opinion that the IWC has no power to define the term "minor" in their wage orders in a manner which conflicts with the definition of "minor" set forth in statutes adopted by the Legislature amending the authority of the IWC. The opinion did not state, however, that any definitions which the IWC has authority to use in their wage orders are automatically incorporated by reference into statutes adopted by the Legislature.

Again, the May 7, 1934 letter [Request for Judicial Notice, Ex.3], states only the Attorney General's Opinion that the IWC had the authority to define the standard week in a particular industry, for purposes of setting the minimum wage, and to change such definition of a standard week as working conditions changed. Similarly, the September 2, 1939 letter [Request for Judicial Notice, Ex. 5], discusses the Attorney General's Opinion that the IWC has the authority to define which industries are governed by the IWC's wage orders. Again, nothing is stated regarding incorporation of such wage order definitions

into statutes adopted by the Legislature.

The August 21, 1940 letter [Request for Judicial Notice, Ex. 4], notes that the IWC had the power to set lifting requirements for women lower than the limits set by statute, in the absence of express legislative authority prohibiting the adoption of such orders by the IWC. Again, this letter deals with the power of the IWC to adopt its own orders, and not the imposition of IWC definitions into legislation created by statute.

g. The Legislature Has Taken No Actions To Incorporate The Definitions From Order 14 Into Sections 1194 And 1194.2

In addition, the Appellants have cited no legislative history to support their position that the Legislature intended to incorporate the definitions from Order 14 into Sections 1194 and 1194.2. In Reynolds, this Court instructed that one can not infer or imply that the Legislature intended to incorporate definitions from a wage order, merely because the pertinent sections of the Labor Code had been amended several times after the adoption of the wage order at issue. Reynolds v. Bement, *supra*, 36 Cal. 4th, at 1086.

The Appellants have requested judicial notice of an article by George A. Van Smith, *Proposed Legislation, Bills Now Under Consideration Impartially Analyzed by the Call for the Layman's Benefit*, SAN FRANCISCO CALL (February 12, 1913) [Request for Judicial Notice, Ex. 7], in a poor

attempt to bolster their arguments that the Legislature somehow intended to give the IWC broad authority to impose its wage order definitions into Labor Code provisions which apply to civil litigation.

The cited article does not support the propositions argued by the Appellants. Rather, the article merely discusses proposed bills which would give the IWC authority to hold hearings to determine minimum wages to protect the health and welfare of women and children, and to adopt appropriate wage orders once the information is gathered. Further, the article can not be used for the purpose of establishing the truth of any factual matters which are described therein or may be deduced therefrom, as opposed to the mere fact of the existence of the published article. See Mangini v. R.J. Reynolds Tobacco Co., *supra*, 7 Cal. 4th 1063-1064.

2. APIO Was Not The Employer Of Appellants Under The Common Law Definition Of "Employer" And "Employee"

a. General Discussion Of The Common Law Test

In summary, based on the teachings of Reynolds, it is not appropriate to incorporate the definitions of "employ" and "employer" from Order 14 into Sections 1194 and 1194.2. Therefore, Reynolds requires that when a statute refers to employees without definition, the common law test of employment is the appropriate test to use. Reynolds v. Bement, *supra*, 36 Cal. 4th, at 1087,

citing Rest.2d Agency, § 220; Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943.

In determining whether or not an employment relationship exists under the common law, the most important factor that is considered is "whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired. [Citation omitted.] If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established." Tieberg v. Unemployment Ins. App. Bd. *supra*, 2 Cal. 3d, at 946-947. The facts here establish that MUNOZ had the sole and complete control over the Appellants' work, both contractually and in actual fact, and that APIO had no such right to control the Appellants' work, and did not do so. Numerous cases which discuss the issue of control are instructive on this point.

In Crooks v. Glen Falls Indemnity Co. (1954) 124 Cal. App.2d 113, 121, an "employee" was defined as "one who is subject to the absolute control and direction of his employer in regard to any act, labor or work to be done in the course and scope of his employment." In Sudduth v. California Employment Stabilization Comm'n (1955) 130 Cal. App.2d 304, 311-12, the court held that "[i]f the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an

employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause." Empire Star Mines Co. v. California Employment Comm'n (1946) 28 Cal.2d 33, 43. See also Key Insurance Exchange v. Washington (1970) 7 Cal. App.3d 209, 212, wherein the court stated that if "a person performing work for another is subject to the order, control and direction of such other and is liable to be discharged for disobedience, he is ... an employee."

In Empire Star Mines, *supra*, 28 Cal.2d, at 692, the court discussed various "secondary factors" for determining employee status including: (a) whether or not the one performing the services is engaged in a distinct occupation or business, (b) whether, in the locality, the work is usually done under the direction of a principal, (c) the skill required for the work, (d) whether the alleged employer supplies the instrumentalities, tools and the place of work, (e) the length of time for which the services are to be performed, (f) the method of payment, whether by time or by the job, (g) whether the work is part of the regular business of the alleged employer, and (h) whether the parties believe they are creating an employer-employee relationship.

In Toyota Motor Sales v. Superior Court (Lee) (1990) 220 Cal. App.3d 864, 875, the court discussed the same secondary factors, but cautioned that employer control is clearly the most important and the others merely constitute

"secondary elements." The Toyota court went on to say that "no single circumstance is more conclusive to show the relationship of an employee than the right of an employer to end the service whenever he sees fit to do so. [Citations omitted.] Indeed, the unlimited right to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment."

In Rinaldi v. Workers' Compensation Appeals Board (1991) 227 Cal.App.3d 756, 761-762, the court considered whether a farm labor contractor's employee was an "employee" of a grower, and noted that because the grower in that case had the absolute power to fire the farm labor contractor's employees, as well as the farm labor contractor, the contractor and his employees were actually employees of the grower. The Rinaldi court relied upon the decision in S.G. Borello & Sons, Inc. v. Department of Industrial Relations, *supra*, 48 Cal.3d, 350-351 wherein the California Supreme Court stated that the critical factor to look at in determining employee status is the right to discharge the alleged employee.

It is quite clear that APIO had no power to hire and fire Appellants. Only MUNOZ had that right. [App. 139 ¶ 2.]

b. Application Of The Factors In The Rest.2d Agency, § 220

The various factors which have been considered by the courts in

determining common law employment have been set forth in the Rest.2d Agency, § 220. These factors are individually set forth below, with a discussion as to their application to the facts of this case.

> **Rest.2d Agency, § 220 Text: (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.**

Here, APIO had no right to direct or control MUNOZ's employees. [App. 131 ¶ 16.] It is undisputed that MUNOZ exercised exclusive and complete control over all aspects of his employees' employment. The Farmer Agreement gave MUNOZ sole responsibility for hiring, firing, and determining working conditions and assignments, and MUNOZ in fact exercised full control on these matters. [App. 138-139 ¶2; App. 199, at "pp. 152-153"; App. 212-214; App. 242, at "p. 20"; App. 243, at "p. 168".] MUNOZ, not APIO, decided when and from which fields the Appellants would harvest strawberries; determined which fields the Appellants would work on, when the Appellants could take lunch breaks and when the Appellants could stop working; and assigned other tasks, including weeding the fields. [App.194, at "p. 19"; App. 213-214]. MUNOZ, not APIO, made all decisions concerning the Appellants' hiring and firing, and wages paid, and handled all aspects of payroll. [App. 199, at "pp. 152-153"; App. 196, at "p. 130"; App. 203, at p. 176; App. 212-214; App. 237-238; App. 242, at "p. 20";

App. 243, at "p. 168".] MUNOZ, not APIO, provided field sanitation facilities, transportation, and the tools, equipment and material required for the Appellants to harvest the strawberries. [App. 131; App. 214-215.]

In contrast, APIO never hired, fired or set any of the wages, hours or other working conditions for MUNOZ's employees. APIO did not prepare or make payroll records, pay payroll taxes or workers' compensation for the Appellants, or provide field sanitation facilities, transportation, or tools, equipment or materials for the Appellants. [App. 131 ¶ 15.]

> **Rest.2d Agency, § 220 Text: (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work;**

Under the express terms of the Farmer Agreement, MUNOZ and APIO were independent contractors, who exercised full control over their own separate businesses. [App. 145 ¶ 10.] MUNOZ consulted with APIO concerning its planting schedules, and allowed APIO's quality control persons to inspect the strawberries, in order to properly coordinate the deliveries, marketing and sale of the strawberries. [App. 145 ¶ 3.] Otherwise, the undisputed evidence showed that MUNOZ, not APIO, hired the persons who supervised and directed the workers how to pick fruit and how to pack the boxes, including training new workers. [App. 214; App. 428-429.] APIO did

not direct the workers; it simply specified the quality standards for the strawberries and confirmed with MUNOZ the quantities of fruit picked and degree of ripeness of each day's harvest, in order to properly coordinate its marketing activities. [App. 178 ¶¶4- 5; App. 194, at "p. 91".]

Rest.2d Agency, § 220 Text: (2)(b) whether or not the one employed is engaged in a distinct occupation or business;

The Farmer Agreement stated the following regarding the occupations of the parties to the agreement:

> Farmer, as an independent contractor, is engaged in the business of growing or arranging for the growing, harvesting, grading, packing, and/or shipping of fresh produce. Apio, as an independent contractor, purchases, markets and/or sells fresh produce.

[App. 138.]

The Appellants were employed by MUNOZ to assist him in his work and to engage in a separate and distinct business from the business of APIO. Farming and harvesting strawberries is a distinct occupation, which requires extensive knowledge regarding soils, plant varieties, plant pests, agricultural chemicals, agricultural equipment, planting techniques, harvesting techniques, etc. Thus, MUNOZ's business, and the business of his workers, the Appellants, required a set of skills which were quite different from the business of cooling, marketing, selling and shipping strawberries and other produce, which was the business that APIO was involved with.

Rest.2d Agency, § 220 Text: (2)(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

Here, the type of work done by Appellants, farm labor work and harvesting work, normally is done under someone's supervision. In this case, such supervision was provided by MUNOZ and his supervisors, and not by APIO, as set forth in the undisputed evidence described above. However, as also noted above, MUNOZ's farming business was separate and distinct from APIO's marketing and sales business, and therefore MUNOZ's business would ordinarily not be supervised by the marketing and sales company. In this case, APIO only coordinated quality control to ensure orderly marketing and sale of the strawberries. [App. 130 ¶ 9; App. ¶ 3.]

Rest.2d Agency, § 220 Text: (2)(d) the skill required in the particular occupation;

Appellants' farm labor work and harvesting work does not require any special skills, although as noted above, the business of MUNOZ did require specialized skills.

Rest.2d Agency, § 220 Text: (2)(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

As noted above, MUNOZ supplied all of the tools and equipment required for the Appellants to do their work. APIO supplied none. The Appellants worked at the fields that MUNOZ leased from several parties, and

not at APIO's premises.

Rest.2d Agency, § 220 Text: (2)(f) the length of time for which the person is employed;

The Appellants were employed by MUNOZ on a seasonal basis, for the 2000 strawberry season. The Appellants certainly lacked any type of long term connection with APIO.

Rest.2d Agency, § 220 Text: (2)(g) the method of payment, whether by the time or by the job;

The Appellants were paid both by the hour and/or on a piece-work basis, depending upon what type of work they were performing for MUNOZ, and as determined by MUNOZ, as discussed above. This factor does not seem to be relevant to this case.

Rest.2d Agency, § 220 Text: (2)(h) whether or not the work is a part of the regular business of the employer;

The work done by the Appellants was part of the regular work of MUNOZ of farming and harvesting strawberry crops, and not part of APIO's business of cooling, marketing, selling and delivering the crops to third party purchasers.

Rest.2d Agency, § 220 Text: (2)(i) whether or not the parties believe they are creating the relation of master and servant;

There was no evidence submitted that the Appellants ever believed that they were APIO's employees. The Appellants reported to MUNOZ for work,

not to APIO.

Rest.2d Agency, § 220 Text: (2)(j) whether the principal is or is not in business.

MUNOZ was a separate and distinct business from APIO, and in a different line of work. The only reason that this case is before this Court is that MUNOZ ultimately had a downturn in his business and eventually filed for bankruptcy. However, when the Appellants were employed by MUNOZ, which was the critical time period, MUNOZ was an independent business, solely operated and controlled by MUNOZ. MUNOZ directly paid for the majority of his farming expenses and personally invested at least $500,000 in the strawberry crops he farmed during the 2000 agricultural season. [App. 186, at "pp. 41-43"; App. 195, at "pp. 97-98"; App. 200, at "pp. 162-163"; App. 201, at "pp. 164-167"; App. 202, at "pp. 168-169"; App. 210-211.]

In summary, almost all of the common law factors discussed above demonstrate that Appellants were not APIO's employees. Appellants have no basis to argue otherwise.

B. If The Terms "Suffer Or Permit to Work" Are Deemed To Be Incorporated Into Sections 1194 And 1194.2, Then The Proper Test To Be Used For Application Of These Terms Is The "Economic Reality Test" As Applied Under the FLSA

1. Under The "Economic Reality Test" APIO Was Not The Employer Of Appellants

The FLSA's definition of "employ" is "to suffer or permit to work",

which is the same definition that is used in Order 14. Under federal law, the term "employ" has been construed broadly, using the "economic Reality test". In Nationwide Mut. Ins. Co. v. Darden (1992) 503 U.S. 318, 326, the U.S. Supreme Court noted the expansiveness and "striking breadth" of the term "employ" as used in the FLSA. In Torres-Lopez v. May, *supra*, 111 F.3d, at 638, the Ninth Circuit called the definition of "employer" under the FLSA "the broadest definition that has ever been included in any one act."

Appellants argue that California should judicially adopt and incorporate into Section 1194 and 1194.2 an even broader definition of "employer" than in the FLSA, which would in effect, establish strict liability for the wages of the employees of a third party contractor. Appellants also contend that extensive federal case law interpreting "suffer or permit to work" in the context of the federal Migrant and Seasonal Agricultural Worker Protection Act 29 U.S.C. §§1801 *et seq.* ("MSAWPA") is inapplicable, even though MSAWPA specifically relates to agricultural workers and uses a similar definition of "employ". [MSAWPA, §1802 subd. (5).] Appellants have not provided any valid authority to support their position.

The reason that the Appellants have had to resort to these specious arguments is that even if the broad tests are used for determining employment status which have been established in federal cases interpreting "suffer or

permit to work" under both the FLSA and MSAWPA, Appellants cannot demonstrate any triable issue relating to the determination of whether or not APIO was their employer. Both lower courts agreed in this case.

1. The FLSA And The Torres-Lopez Factors

In Torres-Lopez, *supra*, 111 F.3d, at 639, the Ninth Circuit examined the factors to be considered in making a determination concerning alleged joint employment of farm workers under the FLSA's and the MSAWPA's definition of "suffer or permit to work, and in evaluating the "economic reality" of the alleged joint employment relationship. In this regard, the court identified five regulatory factors, and eight non-regulatory or common-law factors, for determining employment status as a matter of economic reality. [*Id* at pp. 639-640.]

a. Regulatory Factors

The regulatory factors analyzed in Torres-Lopez are as follows, and demonstrate that APIO was not the employer of Appellants:

(1) **Nature and degree of control of workers**: APIO exercised no control whatsoever over MUNOZ's employees. The Farmer Agreement gave MUNOZ sole responsibility for hiring, firing, and determining working conditions and assignments, and MUNOZ in fact exercised full control on these matters. [App. 138-139 ¶2; App. 199, at "pp.

152-153"; App. 212-214; App. 242, at "p. 20"; App. 243, at "p. 168".] MUNOZ, not APIO, decided when and from which fields to harvest strawberries; determined which fields the workers would work on; when the workers could take lunch breaks and when they could stop working; and assigned other tasks, including weeding the fields. [App.194, at "p. 19"; App. 213-214]. MUNOZ, not APIO, provided field sanitation facilities, transportation, and the tools, equipment and material required for the employees to harvest the strawberries. [App. 131; App. 214-215.]

(2) **Degree of direct or indirect supervision of the work:** The undisputed evidence showed that MUNOZ, not APIO, hired the persons who supervised and directed the workers how to pick fruit and how to pack the boxes, including training new workers. [App. 214; App. 428-429.] APIO did not direct the workers; it simply specified the quality standards for the strawberries and confirmed with MUNOZ the quantities of fruit picked and degree of ripeness of each day's harvest, in order to properly coordinate its marketing activities. [App. 178 ¶¶4- 5; App. 194, at "p. 91".]

(3) **Power to determine pay rates and methods:** MUNOZ, not APIO, determined the piece, cannery and hourly rates the workers were to be paid. [App. 212, at "p. 427".]

(4) **Right to hire, fire, or modify employment**

conditions: MUNOZ, not APIO, had the sole right to hire or fire workers, and to assign them to specific fields and tasks. [App. 131 ¶¶15- 16; App. 138-139 ¶2; App. 213-214.]

(5) **Preparation of payroll and payment of wages:** MUNOZ, not APIO, prepared payroll records, paid payroll taxes, and provided workers' compensation insurance. [App. 227; App. 237.]

b. Non-regulatory factors

(1) **Whether the work was a "specialty job on the production line":** This factor does not apply in an agricultural setting.

(2) **Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without "material changes":** APIO was not a labor contractor. Rather, APIO and MUNOZ had an arm's-length contractual relationship whereby APIO marketed and sold the strawberries which were grown and harvested by MUNOZ as a separate business. This factor also appears not to apply.

(3) **Whether the employer's premises and equipment were used for the work:** MUNOZ had exclusive occupancy and control over all the fields where the Appellants picked strawberries. Under the terms of the subleases with APIO, MUNOZ, not APIO, had the exclusive right

to possess and occupy the fields that MUNOZ subleased from APIO. [App. 129 ¶¶4-5; App. 153-164.] Work by Appellants on premises subleased from APIO was work done on MUNOZ's premises. Appellants also worked on fields which were not leased from APIO, but instead were leased by MUNOZ from third parties. Work done on these third party leased premises was also work done on MUNOZ's premises. [App. 217.] MUNOZ did not use APIO exclusively to market and sell MUNOZ's fresh strawberries, but also arranged for the fresh fruit to be marketed and sold by third parties, and arranged to sell strawberries for processed products to FROZSUN. [App. 189, at "p. 55"; App. 221-223.]

MUNOZ at his expense provided the gloves and carts the Appellants' used in harvesting strawberries, and furnished his own equipment required to harvest or haul the strawberries. [App. 131; App. 202, at "p. 170"; App.214.]

Thus, neither APIO's premises nor APIO's equipment were used for the Appellants' work, and many of the products produced through Appellants' work were marketed or sold by third parties, not APIO.

(4) Whether the employees had a "business organization that could or did shift as a unit" from one job site to another: MUNOZ assembled the workers into crews who he transported to work sites determined by him, not by APIO. The composition of the crews was fluid and

was determined by MUNOZ or his foremen. [App. 218.]

(5) **Whether the work was "piecework" not requiring "initiative, judgment or foresight"**: This factor does not appear to apply to the present situation. Cases focusing on this factor examined whether the workers were employees versus independent contractors; see, e.g., Aimable v. Long and Scott Farms, Inc., *supra*, 20 F.3d, at 443; see also Antenor v. D & S Farms (11th Cir. 1996) 88 F.3d 925, 932, n.9. Here, there is no issue whether Appellants were employees of MUNOZ versus independent contractors.

(6) **Whether the employee had an opportunity for profit or loss depending on managerial skill"**: This factor also does not appear to apply to the present situation.

(7) **Whether there was "permanence [in] the working relationship"**: There was no permanence with respect to the work done by the Appellants for APIO, let alone a working relationship, between APIO and the Appellants. MUNOZ assigned Appellants to work at four different fields, on an "as needed" basis, to service MUNOZ's needs for labor. [App. 218; and App. 242, at "pp. 18-20]. Only two of the fields upon which Appellants worked even had strawberries on them that were harvested for APIO, but only the fresh market strawberries from these two fields were

harvested and delivered to APIO for marketing and sale, while the strawberries harvested for processing were sold to FROZSUN.

(8) **Whether the employees' services were an integral part of the alleged employer's business:** The services of Appellants were integral to MUNOZ's business of growing and harvesting strawberry crops, and not to the marketing and sales activities of APIO. APIO was in the business of selling crops, not growing and harvesting crops. APIO contracted with independent third parties for the production of the crops it marketed, just as many other sales companies contract with independent third parties to be supplied with the products that they market and sell.

c. Other Case Law Interpreting the FLSA Similarly Supports The Conclusion That APIO Did Not Employ The Appellants

In Charles v. Burton (11th Cir. 1999) 169 F.3d 1322, the court made a substantially similar analysis in considering whether or not a defendant produce packer and shipper should be held responsible for the injuries suffered by plaintiff farm workers who were employed by a third-party labor contractor to work for a defendant vegetable grower. In Charles, the packer made a loan to the grower (similar to APIO), but unlike APIO, the packer also provided seed and equipment to the grower, subsidized the grower's operations, and provided a trailer to haul the crop. Even so, the Charles court found the packer

was *not* a joint employer.

In Aimable v. Long and Scott Farms, *supra*, 20 F. 3d 434, the court considered whether or not a farm, Long and Scott, which contracted with a farm labor contractor, Miller, to provide laborers to harvest the farm's crops, was a joint employer of the laborers, under FLSA and MSAWPA. In Aimable, the court found that Long and Scott was not a joint employer, based on the "economic reality" test.

Factors that the court found persuasive in Aimable included the following: Long and Scott did not control the number of workers hired to do the work, Long and Scott did not demand that Miller fire specific individuals, and Long and Scott did not select specific workers to do specific jobs. The court further determined that even though Long and Scott gave Miller general instructions as to which crops Miller should harvest, such instructions were not sufficient exercise of control. "Control arises, we believe, when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers or to take an overly active role in the oversight of the work." *Id.* at 441.

In Aimable, t he court also noted that although Long and Scott had field representatives which regularly came out to the fields while Miller's crew were harvesting, these Long and Scott employees left supervision and oversight of

the harvesting workers entirely to Miller and his crew, and therefore did not control Miller's employees. The court also found that Miller had the sole right to control and determine the wages paid to his employees. The court did not find persuasive the employees' arguments that Long and Scott's determination as to how much they paid Miller meant that Long and Scott also determined the compensation for Miller's employees. Rather, the court found that Miller used the revenues he earned from Long and Scott, and the revenues he earned from other customers of Miller, and then made his own decision as to how much of that revenue would be spent on paying his employees. Similarly, MUNOZ made his own decisions on how much he paid his employees, and how he used the revenues he received from the sale of his crops.

2. None Of The Facts Cited By Appellants Relating to APIO Would Support A Ruling That APIO Was The Employer Under Any Applicable Precedents

The Appellants have argued that the following evidence creates a material issue of fact as to whether or not APIO "suffered or permitted" Appellants' work for MUNOZ, and that such evidence is sufficient to preclude the grant of summary judgment in favor of APIO:

1. APIO knew that MUNOZ employed workers to grow and harvest strawberries on properties which were subleased from APIO. APIO's representatives physically saw the MUNOZ employees working out in the

fields subleased from APIO. [Opening Brief at p. 71.]

2. APIO marketed and sold strawberries in its business which were grown and harvested through the work of MUNOZ's employees. [Opening Brief at p. 71].

3. APIO allegedly controlled the property on which the Appellants worked, based solely on the fact that APIO subleased to MUNOZ two of the four properties on which MUNOZ farmed. [Opening Brief at p. 71.][17]

4. The Appellants were not paid wages for work done for MUNOZ, and some of this work was done during a time period when APIO was still marketing and selling fresh market strawberries harvested by MUNOZ. [Opening Brief at p. 73–Appellants claim that $18,263.46 of unpaid wages, out of an unpaid wage total of $105,256.81, was accrued during a time period when strawberries were being delivered to APIO by MUNOZ.][18]

The Appellants further argue that the following evidence should not be

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This fact is not supported by applicable law. A sublessee has the right to possess the real property that it subleases for the term of the sublease, and has an estate for years. Civil Code §761. A leasehold estate "gives the lessee the exclusive possession of the premises against all the world, including the owner" during the term of the lease. Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 972.

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Appellants use the wrong date with respect to the termination of harvest of strawberries for APIO, stating that it was May 22, 2000, without any factual support, when the last date of harvest was in fact May 16, 2000. [App. 131 ¶ 13; App. 169.]

taken into consideration when making a legal determination as to whether or not APIO should be liable for the Appellants' unpaid wages:

1. APIO contractually required MUNOZ to comply with applicable wage laws. [Opening Brief at p. 72].

2. APIO did not have an employment agreement with Appellants. [Opening Brief at pp. 72-73.]

3. APIO 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, or providing the tools, equipment or material required for the employees of MUNOZ to grow and harvest the strawberry crops. [Opening Brief at pp. 72-73.]

There is no statutory or case law which supports the unfounded conclusions which have been argued by the Appellants. Virtually every business which sells products needs workers to produce the goods or services that it markets and sells. Taken to its logical extreme, Appellants' position that APIO was a joint employer, merely because it knew that MUNOZ could not grow and harvest the strawberries without laborers, would impose wage responsibility on virtually everyone in the chain of distribution of a product.

Pursuant to this rationale, a Ralph's supermarket that purchased strawberries from APIO, which were grown and harvested by MUNOZ, could also be held responsible for unpaid wages to Appellants, since Ralph's also knew (or should have known) that labor would have to be used to produce and harvest the strawberries. This result is not supported by existing law.

The trial court did not find these factors persuasive, holding that "[t]he economic reality of the relationship between APIO and MUNOZ does not support a finding that APIO was an employer." [App. 1503.] This conclusion should be affirmed, if this Court determines that the "suffer or permit to work" test must be applied in the instant case.

C. If The Terms "Directly Or Indirectly Exercises Control" Are Deemed To Be Incorporated Into Sections 1194 And 1194.2, Then The Teachings of Borello Can Be Instructive In Interpreting These Terms

1. Under The Teachings Of Borello APIO Was Not The Employer Of Appellants

Appellants note that the exercise of control language, as precisely used in Order 14,[19] has not been interpreted by the California courts. [Opening Brief at p. 76.] However, they argue that the teachings of Borello, a workers' compensation case, are instructive, and should be applied to the instant matter.

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Order 14 defines an "employer" as "any person ... who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."

APIO does not agree that a workers' compensation case is on all fours with the case at issue here, because the workers' compensation laws have special remedial purposes, and "must be liberally construed to extend benefits to persons injured in their employment. S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations, *supra*, 48 Cal.3d, at 349. Further, the statutory language which was construed in Borello is different from the language in Order 14 which is being construed here. In Borello, the court was construing the definition of an independent contractor, which was defined 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 his work only and not as to the means by which such result is accomplished." *Id.*

However, even if the principles of Borello are applied to this case, the Appellants do not prevail. Many of the factors discussed in Borello as being useful in evaluating the employment relationship are the very same common law employment tests discussed above, which clearly show that APIO was not the employer of Appellants. Additional factors considered in Borello, when applied to the facts of this case, also reach the same results.

Borello notes that one of the key factors in determining the employment relationship under the statutes which use the "control-of-work" test is "whether the person to whom the service is rendered has the right to control the manner

and means of accomplishing the result desired." *Id.* at 350, *citing, inter alia,* Tieberg v. Unemployment Ins. App. Bd. *supra*, 2 Cal. 3d, at 946, and Empire Star Mines Co. v. California Employment Comm'n, *supra*, 28 Cal.2d, at 43-44,which are discussed in detail above. Borello also instructs that due consideration should be given to the secondary factors discussed in Tieberg and Empire Star Mines Co. and also set forth in the Rest.2d Agency, §220. All of these factors have already been discussed in great detail above, and when applied to the facts of this case, demonstrate that APIO was not the employer of the Appellants.

Borello also discusses additional factors which should be considered in the workers compensation context (given the applicable statutory language), which include due consideration of whether the "independent contractor status is bona fide and not a subterfuge to avoid employment status." S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations, *supra*, 48 Cal.3d, at 351. The court instructed that the test of "bona fide" independent contractor status should take into account the following factors:

> [the licensee's] substantial investment other than personal services in [his] business, holding out to be in business for [himself], bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not

> ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent of the parties that the work relationship is of an independent contractors status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

Id.

Many of the elements of the "bona fide" independent contractor test have been already applied to the facts of this case and discussed above, in the context of other tests applied to determine employment status and joint employment liability. However, if these elements are again reconsidered, in the context of the Borello test, it is clear that the Appellants were not employees of APIO, because MUNOZ was a bona fide independent contractor.

MUNOZ had a substantial investment in his business, spending at least $500,000 of his own personal money for the 2000 strawberry season, and obtaining personal credit of at least $500,0000 more, without including loans from sales companies, such as APIO. [App. 186, at "pp. 41-43"; App. 195, at "pp. 97-98"; App. 201, at "pp. 164-165".]

MUNOZ had his own independent farming business, and entered into contracts with several different marketing companies for the sale of strawberries he grew and harvested in the 2000 season, other than APIO, including COMBS, RAMIREZ, and FROZSUN. [App. 189, at "p.55"; App.

221-223.]

MUNOZ was in complete charge of his farming business, and paid for or leased the equipment and tools used in his business. [App. 200, at "pp. 162-163"; App. 201, at "pp. 164-167"; App. 202, at "pp. 168-169"; App. 210-211.]

MUNOZ hired and paid his own employees. [App. 196, at "p. 130"; App. 199, at "pp. 152-153; App. 203, at "p. 176"; App. 212-214; App. 237-238; App. 242, at "p. 20"; App. 243, at "p. 168".]

MUNOZ was in a different business than APIO, with MUNOZ growing and harvesting strawberries, and APIO cooling, marketing, selling and delivering strawberries. [App. 138.] MUNOZ's business required special skills for farming and harvesting. The parties contract, the Farmer Agreement, specified that the parties were independent contractors. [App.145 ¶ 10.]

The relationship between MUNOZ and APIO was not at will, but required the parties to exclusively deal with each other with respect to strawberries grown and harvested by MUNOZ from particular fields, during the course of the 2000 agricultural season. [App. 136-137.]

2. None Of The Facts Cited By Appellants Relating to APIO Would Support A Ruling That APIO Was The Employer Under Any Applicable Precedents

Appellants argue that any third party "control" of employee wages, hours and/or working conditions gives rise to liability of the third party for the

employees' wages, no matter how indirect or incidental such "control" may be. Appellants seek to advance the notion that anyone exercising even a scintilla of "control" over *any* aspect of an independent contractor's business, which might have an effect on the independent contractor's employees (no matter how tangential), creates an employer-employee relationship under a strict liability test. [See Opening Brief at p. 76.] Appellants have no authority for such a position.

As noted above, Borello does not support Appellants position, although Appellants claim it does. [Opening Brief at pp. 77-78.] Under the teachings of Borello, APIO was not the employer of Appellants.

Appellants cite to Metropolitan Water Dist v. Superior Court (2004) 32 Cal.4th 491, 504, fn. 9, for the proposition that the mere fact that MUNOZ issued paychecks to Appellants is not conclusive concerning the issue of control. [Opening Brief at p. 88]. Obviously it is not conclusive, but it is still an important factor which militates against finding an employment relationship.

Appellants further strain the facts when they try to draw a parallel between APIO's business and a turn of the century coal mining company, citing the case of Purtell v. Philadelphia & Reading Coal & Iron Co., *supra*, 99 N.E. 899. Appellants argue that APIO's deduction of its loan amounts from

strawberry proceeds due to MUNOZ (thus leaving MUNOZ with less money to cover payroll), was tantamount to a coal mining company allowing underage boys to provide water and other services to coal workers in unsafe conditions. [Opening Brief at p. 87.] Using Appellants' logic, any company which is owed money from another company, and collects it, leaving the debtor company with less money in its coffers, would be liable to pay the debtor company's wages to workers, if the debtor company otherwise falls short of cash flow when it is doing its payroll. This is not the law.

Appellants try to make much of the fact that the Farmer Agreement gave APIO the right to ask MUNOZ to cease picking strawberries if there was insufficient market demand for the crop, and the right to reject poor quality strawberries. [Opening Brief at p. 78.] Such rights of "control" are inherent in any marketing arrangement for profit. A sales company does not want to carry products in its inventory that will not sell, either because there is no demand for the product, or because the product is inferior in quality (especially perishable agricultural commodities, such as strawberries, that quickly rot if they are not promptly sent to their destination for sale to consumers), or take excess product which the company has no room to store in inventory.

In fact, other than making assessments concerning market demand, and coordinating the deliveries of strawberries, APIO had no right to "control" any

of MUNOZ's growing or harvesting operations. [App. 138 ¶¶ 1.A. and B.] APIO only made limited, enumerated inspections for the sole purpose of obtaining information about the quantity and quality of the strawberries MUNOZ provided to APIO for marketing and sale to its customers. [App. 139 ¶ 3; App. 141 ¶ 8.A.; App. 178 ¶¶ 3-4.] Such information was essential, because without knowledge of the quality or quantity of strawberries available for sale, APIO could not make the necessary arrangements to sell and ship this highly perishable product.

The businesses of APIO and MUNOZ were separate and distinct. MUNOZ was in the business of growing and harvesting strawberries, while APIO was in the business of marketing and selling strawberries. MUNOZ alone, and not APIO, made each crucial decision regarding the financing and operation of his strawberry growing business. MUNOZ alone, and not APIO, provided all of the equipment, materials, and supplies necessary for the Appellants' to perform their work. MUNOZ, and not APIO, performed all payroll functions and directly paid his workers. APIO had no right to hire, fire, or control any of the working conditions of appellants, nor did it ever do so. MUNOZ alone determined the composition of work crews, where the crews would work, what tasks to assign, how much to pay, and when to stop picking fresh market strawberries and when to start picking strawberries for

processed products. Taken in context, none of APIO's limited quality assurance activities rises to the level of "control" necessary to find that APIO was Appellants' employer.

Appellants also argue that APIO exerted some type of direct or indirect financial "control" over the operations of MUNOZ. Appellants' argument is partly based on the fact that APIO made two small loans to MUNOZ (totaling $193,000) to assist in financing growing costs for the strawberries that were the subject of the Farmer Agreement, and then deducted the loan amounts from the sales proceeds derived from selling the strawberries. [Opening Brief at pp.89-91.] Appellants note that the loan payments were used to cover such essential items as land rent (to the third party landlord who owned the fields leased to APIO, and then subleased to MUNOZ) and for production costs. Appellants then go on to argue that because APIO assisted in directing the loan funds to cover these essential strawberry production costs, it should be "reasonably" inferred that APIO interfered with MUNOZ's ability to meet his payroll. [Opening Brief at p. 90.]

Appellants' arguments have no logical basis or support in legal precedent. APIO assisted MUNOZ in financing his operations, not hindered him. Without APIO's loans, MUNOZ would have had even less money to cover payroll costs. Further, there is no evidence that APIO's advances were

anything other than an arm's length transaction, evidenced by a promissory note. Most importantly, APIO's loans were only a small part of the financing needed by MUNOZ to finance his strawberry growing operations.[20] If MUNOZ fell short of funds to pay his workers, it was due to his own poor financial planning and lack of cash reserves to cover potential low market prices for strawberries. The demise of MUNOZ's business had nothing to do with APIO.

Appellants also argue at length that the system of "Pick and Pack" advances made by APIO to MUNOZ also establish APIO's financial "control" over MUNOZ. [Opening Brief at pp. 81-89.] "Pick and Pack" advances constituted payments made by APIO to MUNOZ for packed strawberries delivered to APIO, in advance of APIO's receipt of funds from the buyer for payment for the strawberries, in order to facilitate MUNOZ's cash flow. [App. 1008-1009; App. 1020.] Of course, once the actual proceeds from the sales of the strawberries were received by APIO from the buyers of the crops, these "Pick and Pack" advance amounts were deducted from proceeds, in the same manner as loans for growing costs were deducted.

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Estimated farming costs for the two farms which were the subject of the Farming Agreement was between $469,000 and $536,000, not including harvest costs. [App. 130 ¶ 11.] See also Opening Brief at p. 82, which states that production costs in the Santa Maria Valley approach $21,400 per acre.

Appellants contend that APIO did not pay MUNOZ the full amount of the "Pick and Pack" advances due under the Farmer Agreement, arguing that while the Farmer Agreement specified a $2.00 per carton "Pick and Pack" advance [App. 136 ¶ 4], APIO at times exceeded the contractual requirement and made a $2.50 per carton "Pick and Pack" advance, and at other times made a "Pick and Pack" advance which was less than $2.00 per carton. [Opening Brief at pp. 84-85.]

Appellants' allegations that APIO failed to make payments due to MUNOZ are unsupported, as Appellants have previously admitted that APIO did not owe MUNOZ any money. [See App. 520, ¶ 62.] Further, any alleged failure by APIO to pay the full amount of the "Pick and Pack" advances that were due to MUNOZ simply raises a breach of contract issue between MUNOZ and APIO. It does not create a triable issue as to whether APIO had the right to "control" MUNOZ's strawberry growing business.

APIO's alleged knowledge of "MUNOZ' liabilities, and that their magnitude during the 2000 season was increasing", [Opening Brief at p. 85,] or APIO's alleged knowledge that MUNOZ was losing money by marketing strawberries through APIO, [Opening Brief at pp.80-82,] is also insufficient as a matter of law to create any inference that APIO exerted any type of "control" over MUNOZ's operations sufficient to justify imposing liability on

APIO for Appellants' wages. MUNOZ had the freedom to contract with APIO under any mutually agreed terms, or to not contract with APIO at all. The fact that MUNOZ lost money during the 2000 agricultural season is not a legal basis to hold APIO responsible for MUNOZ's unpaid labor expenses. That is not how our legal system works.

Appellants final "control" argument is based on the circumstances surrounding the DLSE's notification to APIO that MUNOZ had not paid wages due to his workers, and APIO's involvement in providing contractually owed funds to MUNOZ, for his use in preparing checks for workers which were distributed by the DLSE on June 10, 2000. [Opening Brief at pp. 91-93.]

Even if this Court accepted as true the Appellants' argument that APIO, on a single occasion, directly paid MUNOZ's workers and determined who to pay (which is, in fact, untrue, as MUNOZ and the DLSE made those determinations), that is insufficient to create a triable issue of material fact regarding employer status. Under the case law, this one time facilitation of payment to the workers by APIO (which should be commended by the Appellants, rather than used against Apio), is insufficient as a matter of law to show that APIO exercised sufficient "control" to be liable for the Appellants' wages.

D. Appellants Were Not Third Party Beneficiaries Of The Contracts Between MUNOZ and APIO

1. There Is No Contract Language Which Identifies The Appellants As Beneficiaries Of Any Of The Contracts

Appellants argue that because APIO knew that MUNOZ would have to hire workers to harvest the strawberries to be marketed, the Farmer Agreement was expressly intended to benefit those workers. In short, Appellants urge this Court to adopt a rule that contracting with a business known to require the expenditure of labor to fulfill contractual obligations creates a duty to those employees by the third party contractor. If Appellants' position is adopted by this Court, it would have a widespread chilling effect on commercial dealings of all description, because nearly every contract could then be converted into a de facto agreement to be responsible for the wages of the employees of a third party contractor. That is not the law.

It is axiomatic that a third party has standing to enforce a contract only if the parties to the contract expressly intended to benefit such party, or the class of persons to whom he or she belongs. See Civil Code §1559. "Expressly" as used in §1559 means "in an express manner, in direct or unmistakable terms, explicitly, definitely, or directly." Shell v. Schmidt (1954) 126 Cal. App.2d 279, 290. An incidental beneficiary of a contract is not entitled to enforce its terms. *Id.* See also Eastern Aviation Group, Inc. v. Airborne Express, Inc. (1992) 6 Cal. App.4th 1448, 1452.

Further, even if the contract, when carried out according to its terms,

would inure to an incidental beneficiary's benefit, this is not sufficient to entitle him to enforce it. It must appear to have been the intention of the parties to secure to him personally the benefit of the contract provisions. Walters v. Marler (1978) 83 Cal. App. 3d 1, 31, 33.

If the contract is simply a sales contract, when a purchaser [here APIO] meets its obligation to pay the seller [here MUNOZ], the purchaser is normally not concerned with the seller's disposition of the proceeds or with the claims that the creditors of the seller [here Appellants] may have to those proceeds. See Steinberg v. Buchman (1946) 73 Cal. App. 2d 605, 608 (purchaser of real property not concerned with seller's obligations to pay seller's broker). There is nothing in body of the Farmer Agreement which shows that APIO had any type of specified intent to benefit the Appellants by making contractual payments to MUNOZ for strawberries.

2. An Agreement By A Contractor To Comply With Wage Laws Does Not Make His Employees Beneficiaries Of His Contract

Appellants argue that the Farmer Agreement was made expressly for their benefit because it "facially acknowledged that MUNOZ would hire employees to cultivate, harvest and deliver the berries to APIO" [Opening Brief at p. 102,] or because MUNOZ promised in the Farmer Agreement to comply with applicable labor laws. [Opening Brief at p. 101.] However, the

mere fact that the class of persons to which Appellants belong is mentioned in the Agreement is insufficient to confer enforceable rights under the Agreement. See Bancomer, S.A. v. Superior Court (1996) 44 Cal. App.4th 1450, 1458.

Appellants cite the case of Tippet v. Terich (1995) 37 Cal. App. 4th 1517, 1533, as supporting precedent for their cause. However, the facts in Tippet are clearly distinguishable. The court in Tippet held that if a public agency has a contract with a third party contractor requiring the contractor to pay his employees prevailing wages when working on public works, then the employees would be entitled to enforce the agreement for prevailing wages against their own employer, the third party contractor, as the intended beneficiaries of such a provision.[21] The case of Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc. (2002) 102 Cal. App. 4th 765 [22], also cited by the Appellants, similarly related to the enforcement of prevailing wages in the context of a public works contract.

Here, the Farmer Agreement did not specify the wages that MUNOZ

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In Tippet, the court nevertheless ruled against the employees, since they did not prove their case that a prevailing wage agreement had been entered into between their employer and the public agency.

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Cited by Appellants in the Opening Brief as The Union v. G & G Fire Sprinklers.

was to pay his workers. Quite, the opposite, the Farmer Agreement allowed MUNOZ to exercise his sole discretion in making decisions on wage rates. [App. 139 ¶ 2.]

Furthermore, a promise to perform an existing legal duty is inadequate consideration and does not create an enforceable obligation. See Capitelli v. Sawamura (1954) 123 Cal. App.2d 169, 174; and Alhino v. Starr (1980) 112 Cal. App.3d 158, 168. Because MUNOZ already was legally obligated to comply with state and federal labor laws, Appellants, as purported third-party beneficiaries, cannot enforce his gratuitous promise to do so. Appellants citation to Martin v. World Savings and Loan Association (2001) 92 Cal. App. 4th 803, 809 (where a gratuitous promise was enforced to name a lender as a beneficiary on an earthquake policy) is distinguishable, because in Martin the requirement to name a lender to an insurance policy is ordinarily an enforceable obligation.

Obviously, APIO knew that without a labor force to assist MUNOZ in growing and harvesting the strawberries, MUNOZ would be unable to perform his duties under the Farmer Agreement, and there would be no strawberries for APIO to market. However, that knowledge is not enough either to create an employment relationship between Appellants and APIO, or to make Appellants express beneficiaries of the Farmer Agreement.

To the contrary, APIO actually was the intended beneficiary of MUNOZ's promise to comply with applicable labor laws, because performance of that promise by MUNOZ made it more likely that MUNOZ would perform his contractual obligations, and would not have to cease harvesting strawberries due to legal enforcement problems. It should also be noted that the Farmer Agreement expressly states that both MUNOZ and APIO were "acting for [their] own individual account and profit." [App. 145 ¶ 10.] "A contract made solely for the benefit of the contracting parties cannot be enforced by a stranger or one who stands to benefit merely incidentally by its performance." Gordon Bldg. Corp. v. Gibraltar Sav. & Loan Assoc. (1966) 247 Cal. App.2d 1, 9-10.

Appellants' attempted inference that "APIO took special concern for the benefit of the MUNOZ workers that it surely does not for other service-providing contractors" [Opening Brief at p. 108], referring to APIO's involvement in the DLSE distribution of wages on June 10, 2000, is not supported by any evidence. Appellants have no factual basis upon which to make arguments concerning how APIO administers its third party contracts, or what actions APIO may have previously taken. The only facts that are before this Court are that APIO promptly acted to assist the DLSE to collect wages in one isolated instance, when APIO was informed by DLSE that

MUNOZ was not complying with his obligations to pay wages. Such actions have no bearing on the contractual rights of the parties under the Farmer Agreement.

3. Even If Appellants Were Found To Be Third Party Beneficiaries Under the Farmer Agreement, They Have No Rights of Recovery, Because It is Undisputed that MUNOZ Owed APIO Money Under the Terms of the Farmer Agreement

Even if the Appellants had any legal basis to support their arguments that they were the intended beneficiaries under the Farmer Agreement (which they do not), Appellants would still have no legal rights to recover against APIO, because it is undisputed that APIO has no outstanding obligations to MUNOZ under the Farmer Agreement. [See App. 520, ¶ 62.] It is also undisputed that MUNOZ still owes money to APIO under the Farmer Agreement. [See App. 520, ¶ 63].[23] See Zahn V. Canadian Indem. Co. (1976) 57 Cal. App.3d 509, 513, wherein the court stated that a "third party beneficiary[,] can gain no greater rights under the contract than the contracting parties."

The Appellants apparently have tried to get around this impediment to their claims by simply alleging in their sixth cause of action in their First

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23 APIO claims MUNOZ owes APIO $80,000, while Appellants claim that MUNOZ owes APIO $90,000.

Amended Complaint that APIO "stopped paying MUNOZ for the strawberries produced by MUNOZ for APIO, INC." [App. 24 ¶ 44.] Certainly, if MUNOZ owed money to APIO, as Appellants admit, then APIO had the contractual right to offset the amounts owed by MUNOZ to APIO, against strawberry proceeds due to MUNOZ from Apio. [App. 146 ¶ 11 and App. 166.] Thus, there would be good legal cause for APIO to stop paying MUNOZ, in order to collect monies owed to APIO, and no basis for Appellants to challenge the alleged stoppage in payments.

Therefore, there is no triable issue regarding this alleged breach of the Farmer Agreement. Judgment in favor of APIO is proper as to the sixth cause of action for breach of contract.

V. CONCLUSION

APIO is not liable for the Appellants' unpaid wages under any recognized legal theories or precedents.

If this Court determines that the common law test of employment should be applied to interpret Appellants' rights to collect wages from APIO, then this Court should find that APIO did not employ Appellants because APIO had no right to control their work and did not do so. If this Court determines that the Order 14 definitions are relevant to this case, then this Court should find that APIO did not "employ" Appellants, based on the

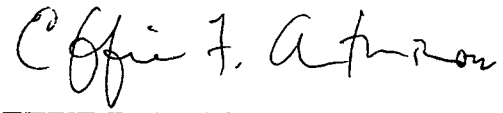
"economic reality" test discussed in Torres-Lopez, and that APIO was not the "employer" of the Appellants, based on the teachings of Borello concerning the "control" tests.

Finally, this Court should find that Appellants were not third party beneficiaries under the Farmer Agreement as a matter of law. In the alternative, even if this Court finds that there is a possible argument that could be made that the Appellants might be third party beneficiaries, this Court should find that the Appellants have no contractual rights, as a matter of law, to recover any money from APIO, based on the facts presented to this Court.

In conclusion, the Appellants have not cited any persuasive authority to support their arguments that there are any disputed issues of material fact which are relevant to this case, either because the context or facts have no application to the instant case. Therefore, this Court should affirm the summary judgment in favor of Respondent APIO that was entered by the trial court, and affirmed by the appellate court.

DATED: April 14, 2006

Respectfully Submitted,



EFFIE F. ANASTASSIOU
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ATTORNEYS FOR RESPONDENT AND
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RULE 14 (c)(1) CERTIFICATION

I, EFFIE F. ANASTASSIOU, certify that I am appellate counsel for Respondent APIO, INC. in the instance matter; that I have prepared the foregoing Respondent's Answer Brief on the Merits in this matter using WordPerfect version 11.0, and that the word count for this brief including footnotes is 19,016, as generated by the appropriate word-count command to the WordPerfect program.

DATED: April 14, 2006

EFFIE F. ANASTASSIOU

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

I, SANDRA LEE DIVENS, declare that I am employed by Anastassiou & Associates at 242 Capitol Street, Salinas, California 93901. I am over the age of 18 years and not a party to the within action or appeal.

On April 15, 2006, I served the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS by Federal Express Overnight Delivery upon the parties listed below by placing true copies in cartons provided 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 at Kinkos, 501 South Main Street, Salinas, California, before 3:30 p.m., the scheduled pick-up time:

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I am also readily familiar with Anastassiou & Associates' 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 Salinas, 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 April 15, 2006, I served the attached RESPONDENT'S ANSWER 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
Second Appellate District, Division Six
200 E. Santa Clara Street
Ventura, California 93001

(4 copies)

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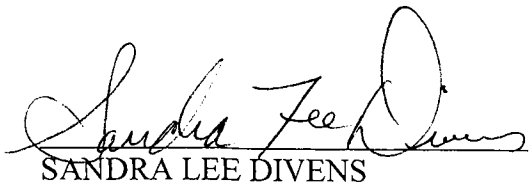
I declare under penalty of perjury under laws of the State of California that the foregoing is true and correct, and that this declaration is executed on April 15, 2006, in the City of Salinas, County of Monterey, California.



SANDRA LEE DIVENS