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THE SUPREME COURT OF WASHINGTON

Supreme Court No. 89534-1  
(Court of Appeals No. 68528-7-I)

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CAROLINA BECERRA BECERRA, JULIO CESAR MARTINEZ  
MARTINEZ, ORLANDO VENTURA REYES, ALMA A.  
BECERRA, and ADELENE MENDOZA SOLORIO,

Respondents/Plaintiffs,

v.

EXPERT JANITORIAL, LLC, and FRED MEYER STORES, INC.,

Petitioners/Defendants.

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**PETITIONER FRED MEYER STORES, INC.'S  
SUPPLMENTAL BRIEF**

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## I. INTRODUCTION

Petitioner Fred Meyer Stores, Inc. (“Fred Meyer”) asks the Court to reverse *Becerra v. Expert*, 176 Wn. App. 694, \_\_\_ P.3d \_\_\_ (2013), reinstate the trial court’s 2011 order granting Fred Meyer summary judgment, and clarify the joint employment analysis under the Washington Minimum Wage Act (“MWA”) by adopting the Fair Labor Standards Act (“FLSA”) economic reality analysis consisting of four formal factors and a nonexclusive list of functional factors. Most federal courts now apply four formal factors originally adopted in *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), overruled on other grounds by *Garcia v. San Antonio Metro.*, 496 U.S. 528, 538 (1985). These are supplemented by nonexclusive, functional factors such as those in *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2003, amended 2004), utilizing the analytical approach in *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2d Cir. 2003), to determine joint employer liability.

In addition to utilizing the four *Bonnette* formal factors and the *Zheng* analysis to weigh and apply functional factors, this Court should reject Division I’s misreading of the trial court’s decision and

record on appeal by excluding hearsay (as to Fred Meyer), including comments in emails between plaintiff's direct employer, All Janitorial ("AJ"), and co-petitioner Expert Janitorial, LLC ("Expert").

## **II. STATEMENT OF THE CASE**

### **A. FRED MEYER DECIDED IN 1997 TO OUTSOURCE ALL STORE MAINTENANCE/CLEANING**

Fred Meyer decided in 1997 to outsource building service/maintenance functions to management companies, so its store directors could focus on its core, retail business. CP 719.

In August 2007, Fred Meyer assigned its management company contract ("Contract") to Expert to clean approximately 42 Puget Sound stores from Shelton to Bellingham. CP at 722. Expert's contract with Fred Meyer sets compliance standards for cleaning store floors and restrooms. CP 720, 738-43. Only Fred Meyer employees cleaned store shelves and food preparation areas (e.g., Deli, Seafood, Meat and Bakery departments) integral to its retail sales. CP 1667. Fred Meyer Jewelers, pharmacies, and other specialized retail areas are locked at night when the janitors clean store floors elsewhere. CP 721. Expert subcontracted this cleaning

function to “at least 9 different service providers,” including All Janitorial (“AJ”), the five plaintiffs’ direct employer. CP 68-9.

**B. ALL JANITORIAL HIRED AND FIRED JANITORS**

The plaintiff janitors were hired by AJ; four of the five were fired by AJ at least once. CP 841, 857, 876-77, 897. AJ rehired plaintiffs Reyes and Martinez. CP 876-77, 897. All American hired Reyes in January 2010 to clean Fred Meyer stores and fired him two months later.<sup>1</sup> CP 897. Plaintiff Solorio was assigned by AJ to work at two stores for 10 weeks before she resigned. CP 913.

**C. ALL JANITORIAL ASSIGNED, TRANSFERRED, AND PAID JANITORS**

Four of the plaintiff janitors were hired, trained, assigned, and transferred by All Janitorial supervisor Marcos Flores or designated “lead” janitors to clean eight of the 42 Fred Meyer stores that Expert contracted to clean. CP 838, 846, 854-55, 893-95, 902, 910-12, 915, 979-88. Solorio testified that she was hired and trained by her

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<sup>1</sup> Reyes settled and dismissed his wage claim against All American in 2012 after Fred Meyer won summary judgment. Reyes still has a claim against AJ. CP 1908-09.

husband, an AJ lead janitor.<sup>2</sup> CP 910-11. Two janitors were assigned to each of the eight stores, one of whom was the “lead” janitor. *E.g., Id.*

**D. FRED MEYER REVIEWED CLEANING AFTER IT WAS COMPLETED**

When Fred Meyer decided that an Expert subcontractor failed to meet Contract standards at a specific store, it directed Expert to change the subcontractor cleaning that store. CP 722.

None of the janitors testified that a Fred Meyer employee directed or commented on their janitorial work while working at night. CP 861, 885-86, 914. Plaintiffs testified that after they finished cleaning, one of the two janitors cleaning each store presented an Expert work order to any Fred Meyer employee willing to initial it. CP 842, 859, 885-86, 899, 905, 914. The janitors testified that their work was excellent, and Fred Meyer rarely found fault. CP 867, 905, 914. Water left on the floor by the mechanized cleaners was a safety hazard, but the subcontractors, not Fred Meyer

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<sup>2</sup> Only Solorio, who was hired, trained, and supervised by her husband, the lead janitor paired with her, did not know AJ supervisor Marcos Flores. CP 910-11.

employees, instructed the janitors how to maintain or operate the equipment correctly to avoid this safety hazard. CP 1026-27.

The janitors testified that the Fred Meyer employees who signed the Expert work orders were "managers," but they could not identify a single one by name nor did any of the janitors ever identify Fred Meyer as a prior employer or any Fred Meyer employee as a supervisor on job applications. CP 903-04, 912, 947-48, 951, 957, 960, 963-77.

**E. CONTRACT AND TESTIMONY SHOW  
SUBCONTRACTORS SUPPLIED MECHANIZED  
SCRUBBERS AND FRED MEYER PROVIDED  
SUPPLIES**

After conceding in their appellate briefing that Fred Meyer provided only janitorial supplies under the Contract, the janitors attempted to defend Division I's error in implying that Fred Meyer supplied mechanized floor cleaning equipment used by the janitors. *Compare* 176 Wn. App. at 716 with Becerra Appeal Brief at 9-10 with Becerra Opposition to Petition at 14. There is no factual dispute as to what Fred Meyer supplied and what it did not: the Contract identified the supplies that Fred Meyer must supply and Fred Meyer "tools and small equipment" such as vacuum cleaners

and mops “may” be used by plaintiffs if available.<sup>3</sup> CP 726-27, 752-54. The Contract required Expert or its subcontractors to supply the electrical and kerosene-fired cleaning “equipment necessary to perform Work” that AJ’s janitors alone were trained and qualified to operate. CP 726. Expert’s subcontractors provided the mechanized equipment to clean, strip, wax, and buff the floors while the stores were closed to customers. CP 1012, 1026-27.

There is a legal dispute as to the purpose and weight given the *Moreau/Zheng* functional factor “premises and equipment.” See § IIIA.

**F. PARTIES AGREE JANITORS STEALING WERE BARRED FROM STORES**

The parties agree that Fred Meyer asked Expert to remove janitors recorded stealing on security cameras from its stores. 176 Wn. App. at 721. There is a legal dispute whether banning

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<sup>3</sup> Fred Meyer Jewelers vacuumed their carpeted space within the larger tile or concrete-floored store. Plaintiffs could use Fred Meyer Jewelers’ vacuums to clean “Playland,” the toddler area, if Fred Meyer Jewelers did not lock them in the Fred Meyer Jewelers store. CP 721. “Playland” was the carpeted area that Expert contracted to vacuum and extract. CP 738.

janitor-thieves from stores establishes the formal "hire and fire"<sup>4</sup> factor under *Bonnette*.

**G. STORE DIRECTORS IGNORE COMPLAINTS ABOUT JANITORS SLEEPING IN THE BREAK ROOM**

As the only Fred Meyer store supervisor responsible for the entire store, the store director alone had authority over the stores while they were closed from 11 p.m. to 7 a.m., although the directors were at home asleep. CP 708, 714, 756, 761, 783, 820, 825, 998, 1003, 1007. Store directors ignored night stocker complaints about janitors sleeping on the job. CP 699, 715, 758, 784, 822, 827, 1000, 1008-09.

**H. PROCEDURAL BACKGROUND**

In September 2010, Fred Meyer appeared and answered the amended complaint, six months after plaintiffs sued Expert and AJ and AJ's owner, Sergey Chaban, without naming Fred Meyer. CP 19. On Sept. 2, 2011, Judge Mariane Spearman granted Fred

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<sup>4</sup> Plaintiffs' citation to hearsay testimony arising from compound questions at a deposition of defendant Chaban in another case at which no attorney from Fred Meyer or Expert was present cannot be used to contradict Mr. Chaban's sworn testimony in this case that Fred Meyer asked Expert to reassign subcontractors (not janitors) to correct performance issues at individual stores. Compare CP 238 with CP 1017. *See Farrow v. Flowserve*, \_\_\_ Wn. App. \_\_\_ (69917-2-1 March 3, 2014), Slip Op. at 5 (trial court erred under ER 804(b)(1) in excluding transcript excerpt as hearsay where a party with similar motive as defendant was present at the deposition).

Meyer summary judgment dismissing the five janitors' tort and statutory claims. CP 1964-70. After Expert prevailed at the trial of the janitors' contract claims in 2012, plaintiffs appealed Fred Meyer's summary judgment. CP 1939-40. The Court of Appeals reversed the trial court, and this court granted Fred Meyer's petition for review on Feb. 5, 2014. *Becerra v. Expert, supra*.

### III. ARGUMENT

#### A. **PARTIES AGREE FLSA'S ECONOMIC REALITY TEST DETERMINES JOINT EMPLOYER LIABILITY UNDER MWA**

The FLSA economic reality test should determine who is a joint employer under the MWA. *See Inniss v. Tandy Corp.*, 141 Wn. 2d 517, 523, 7 P.3d 807 (2006) (adopting FLSA fluctuating work week rule as defining MWA regular rate); 176 Wn. App. at 703. The seminal Supreme Court and Ninth Circuit cases applying the FLSA joint employer test are *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) and *Bonnette, supra*. Although the remedial nature of the FLSA and MWA are well established, Division I mischaracterized the joint employer issue as an exemption

issue. 176 Wn. App. at 705 n.23, citing *Anfinson v. Fedex Ground Package System Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012).<sup>5</sup>

Here, the issue is not whether plaintiffs are exempt; they are not. The issue is whether the janitors can bypass their direct employer Mr. Chaban, AJ's owner, and collect from Fred Meyer (or Expert) as a joint employer.<sup>6</sup>

The formal and functional factors discussed *infra seriatim* collectively show "considering the relationship in its totality," Fred Meyer should not be treated as a joint employer. *Moreau* at 953.

**B. BONNETTE'S FOUR FORMAL FACTORS ARE THE FIRST STEP OF THE JOINT EMPLOYMENT TEST**

The four formal factors of *Bonnette* constitute the first of two steps in an analytical approach followed by most circuits, at least since 2003, when the Ninth Circuit in *Moreau* and then the Second

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<sup>5</sup> Neither the United States Supreme Court nor this Court applies the statutory rule for construing exemptions when interpreting other provisions of the FLSA and MWA. *Sandifer v. United States Steel Corp.*, \_\_\_ U.S. \_\_\_ n.7, Slip Op. at 11 n.7 (2014) (citing *Christopher v. Smith Klein Beecham Corp.*, 567 U.S. \_\_\_, \_\_\_ n.21 (2012), Slip Op. at 19-20 n.21 (principles for construing exemptions should not be used to interpret other FLSA provisions); *see also Inniss v. Tandy, supra* (declining to apply *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 996 P.2d 582 (2000), principles to interpret "regular rate" despite dissent's protest). *Inniss*, 141 Wn.2d at 537 (J. Talmadge dissenting).

<sup>6</sup> The janitors' claims against Chaban were ruled nondischargeable by the bankruptcy court in 2012 (*In re Chaban*, Judgment, 11-20583-TWD (W.D. Wash. Bankr. June 8, 2012)), but Plaintiffs had not requested a trial date as of March 6.

Circuit in *Zheng* adopted similar sets of functional factors. *Bonnette*, 704 F.2d at 1470; *Moreau*, 356 F.3d at 951-52; *Zheng*, 355 F.3d at 72.

1. AJ alone hired and fired janitors.

There is no dispute that the five janitors were hired by AJ; Division I found a factual dispute as to Fred Meyer's power to fire the janitors. *Becerra*, 176 Wn. App. at 716. Fred Meyer objected in its summary judgment brief and at oral argument to hearsay evidence that Fred Meyer was involved in the termination of plaintiff Alma Becerra's employment. CP 2109; RP (Sept. 2, 2011) 11-13.<sup>7</sup>

Fred Meyer does not dispute that it banned contractor employees and customers from its stores after security cameras recorded them stealing. 176 Wn.2d at 721. Plaintiffs have cited no authority (until Division I's ruling) that a business assumes liability as a joint employer by banning thieves from its premises.

Comcast and Time Warner have repeatedly been granted summary judgment on joint employer claims brought by subcontracting cable installers even though Comcast and Time

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<sup>7</sup> Division I mistakenly said that the objection was raised first on appeal. 176 Wn. App. at 721 at n.84.

Warner require their installation contractors to conduct criminal background checks before hiring and require removal of underperforming installers from their contracts. *Jacobson v. Comcast*, 740 F. Supp. 683, 687 (D.C. Md. 2010); *Zampos v. W&E Communications*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_\_\_ (N.D. Ill. 2013) (Slip Op. at 6); *Jean-Louis v. Metropolitan Cable Comm., Inc.*, 838 F. Supp. 2d 111, 118 (S.D.N.Y. 2011).

Fred Meyer neither knew the names of AJ's janitors, nor did AJ tell Fred Meyer the janitors' store assignments. When cleaning standards at a store were unacceptable, Fred Meyer requested a new janitorial subcontractor to clean the store; the subcontractor selected the janitors. CP 1017. Other than janitors' recorded stealing on security cameras, there is no admissible evidence that Fred Meyer ever requested the removal of a specific janitor from any store.

2. AJ assigned and transferred janitors.

The second formal FLSA factor under *Bonnette* is supervision and control of the janitors' schedules and employment conditions. *Bonnette* at 1470; *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984) (adopting *Bonnette* factors).

Division I acknowledged that AJ directed the janitors' store assignments and transfers. 176 Wn. App. at 719. Nevertheless, it held that Contract compliance efforts after janitors worked unsupervised by Fred Meyer at night raised an issue of fact, directly contradicting *Moreau*: Air France set the schedules, delayed the baggage handlers' departures, and dictated their arrival times. Air France set the time for its subcontracted work without incurring joint employer liability, because "individual companies remained responsible for designating which employees would report to service the aircraft." *Moreau*, 356 F.3d at 950 n.5. Similarly, Comcast "detail[ed] the time frame in which jobs must be completed." *Jacobson*, 740 F. Supp. 2d at 687, and AT&T dictated the working times and locations of its security contractor's employees. *Greenwalt v. AT&T Mobility*, 937 F. Supp. 2d 438, 450 (S.D.N.Y. 2013). Comcast and AT&T were found, as a matter of law, not to be joint employers.

Each of these courts held that legitimate businesses' scheduling needs may not be used by plaintiffs to prove joint

employment liability as long as the subcontractors determine which employees are assigned the work.

3. Division I disregards rate and method of pay factor.

Fred Meyer was not involved directly or indirectly in the calculation or method of the janitors' pay; Division I never addressed this, the third formal factor. *Bonnette* at 1470. Fred Meyer paid Expert a per store price under the Contract. CP 64.

4. Division I and plaintiffs acknowledge AJ kept plaintiffs' employment records.

AJ kept the janitors' employment records. 176 Wn. App. at 716; *accord, Bonnette*, 740 F.2d at 1470. Fred Meyer prevails on all four formal factors.<sup>8</sup>

**C. MOREAU AND ZHENG ESTABLISH THE ANALYTICAL APPROACH FOR APPLYING FUNCTIONAL FACTORS.**

*Moreau* initially analyzed seven functional factors and *Zheng* set forth six (by consolidating two *Moreau* factors with a supervisory control factor). Because these functional factors are nonexclusive and vary depending on the industry and facts of each

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<sup>8</sup> For 30 years, other circuits have also applied the four *Bonnette* formal factors. E.g., *In re Enterprise Rent-a-Car*, 683 F.3d 462, 468 (3d Cir. 2012); *Baystate Alternative Staffing, Inc. v. Hermon*, 163 F.3d 668, 675 (1st Cir. 1998); *Carter*, 735 F.2d at 12 (2d Cir. 1984).

case, the analytical approach in the *Zheng* case is more instructive than the individual functional factors identified. Unlike the Agricultural Worker Protection Act cases relied on by the plaintiffs, federal courts applying the FLSA economic reality test consider the value of legitimate outsourcing relationships when selecting and weighing functional factors. *See Zheng*, 355 F.3d at 75-76.

1. Responsibility under the subcontractor janitorial contracts transferred from one subcontractor to another.

The specificity in the management contract between Fred Meyer and Expert which plaintiffs argue indicates control of the subcontractors' employees was found to counsel against a finding of joint employment in *Moreau* under this functional factor. 356 F.3d at 951. Although Expert did pass the janitorial subcontract from AJ to All American in 2010 employing many of the same janitors, Fred Meyer did not participate in that transfer. Any suggestion that this factor favors joint employer liability against Fred Meyer is offset by the third factor where Fred Meyer changed subcontractors, not janitors, if the subcontractor underperformed. *See III(C)(3) infra.*

2. The premises and equipment factor is not subject to factual dispute, only a legal dispute about what is "equipment."

Janitorial contracts are by necessity performed on the premises of the building owner/occupant. However, when the building is cleaned only when the business is closed, there is little reason to impute control of the janitors' employment conditions to the building owner unless the owner has supervisors on location. *See Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 776 (D. Md. 2008) ("Taking Plaintiffs' argument to its logical extreme, the very courthouse where this court resides would in effect transform into a janitorial maintenance operation.").

Plaintiffs argue that Fred Meyer's agreement to supply toilet paper, cleaning fluid, and other supplies and to allow janitors to use vacuum cleaners in stores with jewelry stores shows Fred Meyer supplied equipment. Comcast and Time Warner, however, supplied all the modems, converter boxes, and "lock box keys" for its subcontractors' technicians, while the installation companies supplied tools for installing the cable company equipment. *E.g.*, *Jacobson*, 740 F. Supp. 2d at 693; *Jean-Louis*, 838 F. Supp. 2d at 132. The technicians were not jointly employed, because these

“supplies” were deemed qualitatively different from the contractors’ tools. *See Zampos, supra*, Slip Op. at 11. The supply/equipment distinction assists courts in determining who controls the employees’ job performance.

Here, AJ, not Fred Meyer, provided the floor cleaning equipment that it, not Fred Meyer, trained its janitors to use.

3. The janitors are in a business organization that could or did shift as a unit from one worksite to another.

When Fred Meyer found the cleaning services at a specific store were not in compliance with the contract standards, it directed Expert to remove the existing subcontractor and substitute a subcontractor that could meet contract standards. CP 1017. Like the ground handling companies who contracted for Air France’s baggage handling and cleaning work, there is no question that Expert’s subcontractors had a business structure and shifted as a unit to other work sites. *Moreau*, 356 F.3d at 951.

4. The “integral” factor captures putative joint employers who contract pieces of a production line.

Apparel, agricultural, and other workers involved in producing an entity’s product are more likely to be jointly employed and their employment controlled if assigned a single task on a production line.

“We question whether or not this factor translates well outside of the production line employment situation. . . .” *Moreau* at 952.

The Ninth Circuit also “doubt[ed]” whether “functions such as food service or cargo transport” are actually ‘integral’ to a passenger airline.” *Moreau*, 56 F.3d at 952. If providing meals and carrying suitcases are not integral to a passenger airline, how could janitorial service be integral to the sale of groceries, apparel, and televisions? Plaintiffs interpret this factor so “broadly, this factor could be said to be implicated in *every* subcontracting relationship. . . .” *Zheng*, 355 F.3d at 73. “Insofar as the practice of using subcontractors to complete a particular task is widespread, it is unlikely to be a subterfuge to avoid complying with labor laws.” *Id.* AJ contracted to clean stores for Top Foods, Ross Dress for Less, TJ Maxx, Office Depot, Michaels, and Rite Aid (through Expert). CP 95. This factor favors Fred Meyer.

5. The five plaintiffs’ longevity varies; none of the janitors was permanently employed.

As in *Moreau*, the “longevity of the working relationship varied.” *Id.* at 952. Solorio worked for AJ for 10 weeks; Reyes worked for All American for two months. CP 847, 913. Four

janitors worked for AJ for 8 to 18 months, but AJ fired all four at least once, hardly a permanent relationship. “This factor does not weigh heavily in either direction.” *Moreau* at 952.

6. AJ’s supervisory control was supplied by the senior janitor in each store and Marcos Flores.

AJ supervisor Flores trained some Plaintiffs while others were trained by the “lead” AJ janitor assigned at the new employee’s initial store. CP 838, 846, 902. If the janitors had a problem at a store or needed supplies, they called Flores on their cell phones. CP 855, 875, 894. The Fred Meyer graveyard shift restocking grocery shelves could not communicate with the Spanish-speaking janitors and had no authority over their work, and when they complained about janitors sleeping in the break room, the store directors took no action. CP 699.

In *Iztep v. Target Corp.*, 543 F. Supp. 2d 646 (N.D. Texas 2008), Target conducted training sessions for the janitors, “complained when the workers were not in proper uniform,” provided “key carriers” so janitors could access the buildings, maintained and monitored janitor time records, provided Spanish-language cleaning policies and training materials, established the

number of janitors for each store, and identified the janitors to be assigned. *Id.* at 651, 653-54.

Fred Meyer did none of these things. Like Regal Theaters, Fred Meyer only inspected and reported on the janitors' final product after they had completed work. "Regal was not involved in any part of rendering the cleaning services performed by plaintiffs." *Quinteros*, 532 F. Supp. 2d at 776.

Joint employer liability is established by supervision while work is performed, not after it is completed, because every contractor is entitled to contract compliance. "Supervision with respect to contractual warranties of quality and time of delivery have no bearing on the joint employer inquiry. . . ." *Zheng*, 355 F.3d at 75. This factor does not support plaintiffs' claim.

**D. PLAINTIFFS' CASE AUTHORITY DEMONSTRATES CONTROL OF PUTATIVE EMPLOYEES DURING WORKING HOURS, NOT CONTRACT COMPLIANCE MEASURES, ESTABLISHES JOINT EMPLOYMENT**

Plaintiffs' case law in their opposition to the Petition also demonstrates that joint employment is established while the putative joint employee is working, not after the work is done. *E.g.*, *Barfield v. NYCHH*, 537 F.3d 132, 138 (2d Cir. 2008) ("regularly evaluated

the performance of [nursing aides] . . . determined that the individual had violated hospital rule”); *Schultz v. Capital*, 46 F.3d 268, 302 (4th Cir. 2006) (joint employer “handled scheduling, compensation levels, discipline and termination of security guards”).

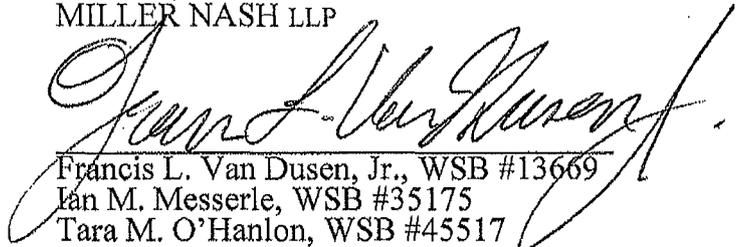
#### IV. CONCLUSION

This Court should adopt the FLSA joint employer test as the MWA test, constituting the *Bonnette* formal factors and the *Moreau/Zheng* functional factor analysis and affirm the trial court’s entry of summary judgment.

DATED this 7th day of March, 2014.

Respectfully submitted,

MILLER NASH LLP



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**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that the above and foregoing PETITIONER FRED MEYER STORES, INC.'S SUPPLMENTAL BRIEF was filed with the Court of Appeals, Division I, and copies were served on:

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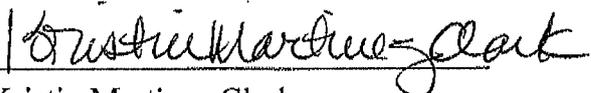
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Dear Clerk of Court:

Attached for filing today with the Washington Supreme Court is Petitioner Fred Meyer Stores, Inc.'s Supplemental Brief.

**Case Name:**  
Carolina Becerra, et al., Respondents/Plaintiffs, v. Expert Janitorial, LLC, and Fred Meyer Stores, Inc.,  
Petitioners/Defendants

**Case Number:**  
Supreme Court No. 89534-1  
(Court of Appeals No. 68528-7-1)

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