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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

EXPERT JANITORIAL, LLC, dba Expert JMS, and
FRED MEYER STORES, INC.,

Petitioners.

RESPONDENTS' SUPPLEMENTAL BRIEF

WILLIAM RUTZICK, WSBA #11533
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 622-8000
Counsel for Respondents

DAVID N. MARK, WSBA #13908
LAW OFFICE OF DAVID N. MARK
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 340-1840
Counsel for Respondents

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I. INTRODUCTION

The goals of the Washington Minimum Wage Act (“MWA”) and the Fair Labor Standards Act (“FLSA”) are to insure that employees be paid (a) no less than a “minimum wage”, and (b) a 50% premium for hours over 40 in a week. RCW 49.46.020 & .130; 29 U.S.C. §§ 206-207. The minimum wage is a non-waivable income floor. See RCW 49.46.090(1); see *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). The overtime provisions – also non-waivable -- have the dual purposes of fairly compensating workers for the burden of extended hours and spreading employment by placing financial incentives for employers to hire more workers. E.g., *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 65 S.Ct. 11, 89 L.Ed. 29 (1944).

Some wage and hour cases turn on relatively subtle issues of what constitutes compensable work and relatively small amounts of time. E.g., *Sandifer v. U.S. Steel Corp.*, -- U.S. --, 134 S. Ct. 870, -- L.Ed.2d -- (2014) (clothes changing); *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (9th Cir. 2013), *cert. granted*, -- U.S.-- (March 3, 2014)(post-shift theft screening). This is not one of those cases. Up until mid-2004 Fred Meyer Stores, Inc. (“Fred Meyer”) used its own janitorial workforce to clean its Puget Sound stores. CP 719. Fred Meyer janitors were paid union wages and were not scheduled to work overtime. CP 790-91. Between 2004 and

2010, Fred Meyer entered into almost identical janitorial service contracts with Expert Janitorial LLC (“Expert”) and its two predecessors. CP 1428-45; 1447-48 & 1334-1352. These contracts controlled in detail virtually all aspects of the work that would be performed by janitors in the Fred Meyer stores. Expert’s business model used 2nd tier subcontractors to supply the janitors. CP 45.

Respondents were hired by All Janitorial and/or All American Janitorial, each of which successively staffed up to 19 Fred Meyer Puget Sound stores. *See* CP 71. All of these subcontractors’ janitors spoke Spanish and did not speak English. CP 703. They were treated as independent contractors, not employees. CP 240-41, 1059-60 & 1161-74. All Janitorial’s janitors worked 7 nights a week. CP 1297 & 1303-05. None were paid overtime. CP 241 & 1245. The five janitor-respondents worked shifts of eight to nine hours and worked seven nights a week for months at a time. CP 1031-32; 1039; 1192-93; 1201. They not only failed to receive overtime premium pay (CP 1032, 1039, 1245), they often did not even receive the minimum wage (CP 194-198; *see* CP 2075, summarizing CP 1039 & 1264-65). Expert payments to All Janitorial were on a take-it-or-leave-it basis at amounts so low that the subcontractor would lose money if it treated the janitors as employees. CP 240-41.

Many wage and hour cases, including joint employment cases, involve unique individual events or local conditions. This also is not one of those cases. Plaintiffs presented substantial evidence against Fred Meyer and Expert that what happened to plaintiffs is common when retailers contract with national janitorial companies who staff stores with 2nd tier subcontractors. This system started in California in the late 1990s by a company named Building One and spread nationwide, relying on an easily-exploited immigrant workforce. CP 1072-77. Plaintiffs' expert, John Ezzo, described Fred Meyer's use of this "Building One Model":

24. The Building One model has continued in retail because it meets the needs of the participants. The retailers get janitorial services at the lowest price possible. It is the cheapest way to supply services. The retailers assure quality by maintaining tight control over what is done, how it is done and whether the service is satisfactory. The 1st tier subcontractors win bids because they can underbid companies that have their own janitors, treat them as employees, pay industrial insurance premiums, etc. The 1st tier subcontractors can win bids by attracting 2nd tier companies who are willing to try to make a profit by misclassification, 7-night shifts, no overtime pay and, often, minimum wage violations. The model depends on a pool of laborers who are willing to work 7-nights a week and long hours without overtime pay or, even, minimum wage. That is why the model developed in Southern California and has expanded with the exploitable labor pool. The events in this case are not aberrant or due to unusual behavior by All Janitorial or All American Janitorial. It is how too much of janitorial work is performed in the retail industry.

CP 1063 (emphasis added). Mr. Ezzo explained that "Expert was operating in a Building One Model" with respect to the plaintiffs and that:

56. Seven day workweeks and non-payment of overtime is another defining characteristic of the model.

57. The above factors lead toward putting Expert and All Janitorial in a model that encourages and leads to janitorial misclassification and, as a typical consequence, wage and hour violations. (Emphasis added.)

CP 567-68. Neither defendant presented any contrary expert opinion.

In *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 409 (7th Cir. 2007), the Seventh Circuit explained that the economic reality test can induce potential joint employers to choose reputable subcontractors:

[W]hen a contractor has no business or personal wealth at risk, he may be tempted to stiff the workers (as Zarate did), and then treating the principal firm as a separate employer is essential to ensure that the workers' rights are honored.

....

If everyone abides by the law, treating a firm such as Remington as a joint employer will not increase its costs. Recall that it must pay any labor contractor enough to cover the workers' legal entitlements. Only when it hires a fly-by-night operator, such as Zarate, or one who plans to spurn the FLSA (as Zarate may have thought he could do), is Remington exposed to the risk of liability on top of the amount it has agreed to pay the contractor.

Id. at 409 (emphasis added.) Here, Expert – as part of its business model – made take-it-or-leave-it deals with fly-by-night operators, not paying enough to cover the workers' legal entitlements. CP 240-41; *see* CP 568. Not surprising, at the time of Fred Meyer's summary judgment motion, All Janitorial was defunct and its owner, Sergey Chaban, was headed in bankruptcy. CP 1060 &

1176-1177. In addition, All American Janitorial had yet to make a profit. CP 1059-60 & 1167. This is a risk inherent in Expert's Building One business model. *Id.*¹

The Court of Appeals, below, properly relied on *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1792 (1947), leading federal appeals court opinions,² and a Secretary of Labor opinion letter.³ In so doing, the court explicitly discussed thirteen factors, *see infra* §§ II.B.1 & II.C.1, while also emphasizing that “all of the federal courts as well as the federal Department of Labor agree that any one list of factors is not exclusive.” *Becerra v. All Janitorial*, 176 Wn. App. 694, 706-07, 309 P.3d 711 (2013) (emphasis added). Each of the factors discussed by the Court of Appeals is relevant to the facts of this case and supported by multiple sources. *See infra* §§ II.B.1 & II.C.1.

The Court of Appeals also correctly acknowledges from this same precedent that ultimately these factors should be used to “evaluate the economic reality of the alleged employment relationship.” 176 Wn. App.

¹ Fred Meyer has contractual protection, getting Expert's promise of wage/hour compliance (§ 9.2) along with indemnification rights (§ 6.3). CP 1431-33 & 1337-39.

² *E.g.*, *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983); *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003); *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008); *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012).

³ Opinion Letter Fair Labor Standards Act (FLSA), 2001 WL 1558966. As explained in *Barfield* at page 149, the Second Circuit has “often relied on DOL opinion letters for their persuasive value.”

at 699 n. 1. Similarly, these factors and the economic reality should be evaluated to determine the alleged employees' dependence on the alleged employer. *See, e.g., Antenor*, 88 F.3d at 937, *citing Rutherford; Torres-Lopez*, 111 F.3d at 641. In short, the test requires an evaluation of all relevant factors, economic reality, and the workers dependence on the alleged employer.

On review of summary judgment, the non-moving party should be given the benefit of the evidence and all reasonable inferences therefrom. *E.g., Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787 108 P.3d 1220 (2005).

II. ARGUMENT

A. **Beginning With *Rutherford* And Continuing Through The Court Of Appeals' Decision Here, Joint Employment for Wage and Hour Purposes Is Determined Based On An Analysis Of All Relevant Factors.**

Rutherford is particularly relevant to joint employment under the MWA because it predated adoption of the MWA.⁴ *Rutherford* demonstrates how joint employment exists even when the putative employer has limited formal control over the workers. *Id.* at 724-25 (slaughterhouse was joint employer, even though meat boners' immediate

⁴ *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 868-69, 281 P.3d 289 (2012).

employers hired and fired them, managed their work and paid them).⁵ The court in *Rutherford* at 730, nevertheless, held that:

Viewed in this way, [1] the workers did a specialty job on the production line. [2] The responsibility under the boning contracts without material changes passed from one boner to another. [3] The premises and equipment of Kaiser were used for the work. [4] The group had no business organization that could or did shift as a unit from one slaughter-house to another. [5] The managing official of the plant kept close touch on the operation. [6] While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

The Ninth Circuit in *Torrez-Lopez* at 639-40 (an FLSA as well as AWPAs case), relied heavily on *Rutherford* in setting forth 13 factors that were important in determining joint employment.⁶ *Moreau*, a subsequent

⁵ See also *Zheng v. Liberty Apparel Co.*, 355 F.3d at 70, which reversed summary judgment granted to a defendant which had limited formal control.

⁶ The first five factors were:

- (A) The nature and degree of control of the workers;
- (B) The degree of supervision, direct or indirect, of the work;
- (C) The power to determine the pay rates or the methods of payment of the workers;
- (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; [and]
- (E) Preparation of payroll and the payment of wages.

The remaining eight factors outlined in *Torres-Lopez* were:

- (1) whether the work was a "specialty job on the production line"; (2) whether responsibility between a labor contractor and an employer pass from one labor contractor to another without material changes; (3) whether the "premises and equipment of the employer are used for the work"; (4) whether the employees

Ninth Circuit opinion, largely utilized the same factors while noting that the first five *Torres-Lopez* factors were “roughly equivalent” to the four factors previously discussed in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

The Second Circuit in *Zheng* and *Barfield* adopted a similar set of 10 factors to be used in determining joint employment based upon both formal (4 factors) and functional (6 factors) control over workers. As explained in *Barfield*, 537 F.3d at 144, the four factor test looks to “formal control” and is taken from *Carter v. Dutchess Comm. College*, 735 F.2d 8, 12 (2d Cir. 1984). It is similar to the four *Bonnette* factors and the first five *Torres-Lopez* factors. The six factors which apply to determine functional control were first set forth in *Zheng* and also used as follows in *Barfield*:

- (1) Barfield worked on Bellevue's premises using Bellevue equipment;
- (2) no referral agency shifted its employees as a unit from one hospital to another, but instead each assigned health care workers, including Barfield, to the same facility whenever possible to ensure continuity of care;
- (3) Barfield performed work integral to Bellevue's operation;
- (4) Barfield's work responsibilities at Bellevue remained the same regardless of which agency referred her for a

had a "business organization that could or did shift as a unit from one [worksite] to another"; (5) whether the work was "piecework" as opposed to work that required "initiative, judgment or foresight"; (6) whether the employee had an "opportunity for profit or loss depending upon [the employee's] managerial skill"; (7) whether there was “permanence [in] the working relationship”; and (8) whether “the service rendered is an integral part of the alleged employer’s business ...”.

particular assignment; (5) Bellevue effectively controlled the on-site terms and conditions of Barfield's employment; and (6) Barfield worked exclusively for Bellevue.

537 F.3d at 145.⁷

In its Opinion Letter Fair Labor Standards Act (FLSA), 2001 WL 1558966, *2, the Secretary of Labor explained that:

Factors that are relevant to the determination of whether an entity is a joint employer include, but are not limited to: [1] the power to control or supervise the workers or [2] the work performed; [3] the power, whether alone or jointly or directly or indirectly, to hire or fire or modify the employment conditions of the individual; [4] the degree of permanency and duration of the relationship; [5] the level of skill involved; [6] whether the activities the workers perform are an integral part of the overall business operations; [7] where the work is performed and [8] whose

⁷ *Barfield* also explained at pages 145-46 that courts also must consider whether an economic arrangement is a subterfuge or sham, but functional control issues are not limited to such sham operations:

[Defendants] assert that the *Zheng* factors are relevant only to determining whether the employment arrangement at issue constituted a “subterfuge or sham arrangement[] designed to subvert the purposes of the FLSA.” Defendants’ Br. at 22; see also Defendants’ Reply Br. at 9–10. This misreads *Zheng*. In that case, the court certainly recognized that courts could identify circumstances where situations generally not indicative of joint employment, such as typical outsourcing relationships, were, in fact, a subterfuge or sham structured to avoid FLSA obligations. See *Zheng v. Liberty Apparel Co.*, 355 F.3d at 72, 76. But nothing in *Zheng* suggests, as defendants urge, that functional control factors are relevant only to identifying subterfuge. (Emphasis added.)

See also *Castillo v. Givens*, 704 F.2d 181, 192 (5th Cir. 1983), where the court explained:

Of particular importance is the fact that defendant did not pay Tonche enough for Tonche himself to pay the workers minimum wage; it was therefore impossible for Tonche to comply with the FLSA. See *Mitchell*, 292 F.2d at 109. The economic reality of the situation was that the workers were dependent upon defendant—not Tonche—to pay them the minimum wage. They were dependent upon defendant's cotton growing business—not any “business” of Tonche's. (emphasis added).

equipment is used; and [9] who performs payroll and similar functions. None of the factors standing alone is dispositive. Moreover, because the ultimate question is one of economic dependence, the factors are not to be applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis. (Emphasis added.)

Those factors are also similar to those adopted by the Second, Ninth and Eleventh Circuits as well as other circuits.⁸

B. Many Factors Support Joint Employer Status for Fred Meyer.

1. The Court Of Appeals Correctly Identified Seven Factors Supporting Fred Meyer Joint Employer Status

The Court of Appeals, 176 Wn. App. at 716-23, identified the following seven factors as supporting a finding that Fred Meyer jointly employed plaintiffs.⁹

⁸ See, e.g., *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996) and *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 306, n.2 (4th Cir 2006), which also explained:

² In some cases it may be useful for a court to consider factors such as those listed in *Bonnette*, 704 F.2d at 1469–70, and *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 71–72 (2d Cir.2003), in determining whether there are joint employers within the meaning of the Act and the regulation.

The Third Circuit in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462, 469 (3d Cir. 2012), adopted a four-factor test, but emphasized that:

[D]istrict courts should not be confined to “narrow legalistic definitions” and must instead consider all the relevant evidence, including evidence that does not fall neatly within one of the above factors. *Zheng v. Liberty Apparel Co.*, *supra*, 355 F.3d at 71. (Emphasis added.)

⁹ It opined that an eighth factor – maintenance of janitor employment records – supported Fred Meyer’s position. 176 Wn. App. at 716 (¶ 52).

Factor	Opinion ¶ number	Authority
1 <u>Indirect supervision</u> ¹⁰ and <u>control of plaintiffs' work</u>	¶¶ 53, 55, 57, & 61-66	- <i>Rutherford</i> , at 730 - <i>Torres-Lopez</i> , at 642 - <i>Layton</i> , at 1176 - <i>Reyes</i> , at 408 - <i>Antenor</i> , at 934 - <i>Moreau</i> , at 951 -DOL opinion letter
2 <u>Control of plaintiffs' employment conditions</u> ¹¹	¶¶ 53 & 56	- <i>Rutherford</i> , at 730 - <i>Torres-Lopez</i> , at 642 - <i>Layton</i> , at 1176 - <i>Reyes</i> , at 408 - <i>Antenor</i> , at 935 - <i>Hodgson</i> , at 237 - <i>Lemus</i> at *10 -DOL opinion letter

¹⁰ Here, the record is far stronger than *indirect* supervision and control. As per ¶ 4.1 of Fred Meyer's contract with Expert (CP 1336; 1430), Fred Meyer managers walked the stores with the janitors every morning. CP 1039-40; 1204-05. Janitors were not free to leave work until their Fred Meyer supervisors approved of the work and signed them out. CP 1032, 1039, 1195; 1203-04; 1235-36. Plaintiffs received virtually no in-store supervision from the 2nd tier subcontractors. (CP 1232; 1039-40; 1192; 1227; accord, CP 1200 (only exception was Martinez who was trained by All Janitorial's Marcos Flores on 1st day "but never saw him again after the first day except for when I was going to pick up my check"); see CP 1034-36 (Fred Meyer manager opining that Fred Meyer provided only inspection of janitor work); CP 1051-52 (same); CP 1056-57 (Ezzo re in-store supervision).

Fred Meyer argues that this day-to-day supervised inspection/sign-out procedure is mere quality control. In fact, Expert and Fred Meyer had a quality control procedure. Approximately once every two weeks, an Expert manager conducted a daytime walkthrough of each Fred Meyer store with its Store Director (top official) to "make sure that the work performed me[t] the requirements set out in the contract[]." CP 70.

¹¹ Fred Meyer's contract with Expert listed sixty-six nightly cleaning tasks, in addition to a few dozen less-frequent tasks (CP 58-63), a list that, according to plaintiffs' expert, was "far more prescriptive than performance based ... read[ing] like a procedure manual." CP 1055 & 1057 ("minutiae of janitors' work was negotiated by Fred Meyer in Schedule A"). Under the contracts work would be performed between 10:30 p.m. (CP 1335 & 1429, ¶ 2) and the time that the Fred Meyer manager determined the shift had ended (see CP 1336 & 1430, § 4.1). These provisions left the 2nd tier subcontractors with little to decide relative to the janitors' activities. CP 1058-59.

3 Plaintiffs' use of Fred Meyer's premises and equipment ¹²	¶ 54	- <i>Rutherford</i> , at 730 - <i>Hodgson</i> , at 237 - <i>Torres-Lopez</i> , at 644 - <i>Reyes</i> , at 408 - <i>Barfield</i> , at 145 - <i>Antenor</i> , at 936-37 - <i>Moreau</i> , at 951 -DOL opinion letter
4 Indirect control over firing or modifying the janitors employment ¹³	¶¶ 58, 67-71 & 76-78.	- <i>Torres-Lopez</i> , at 640 - <i>Layton</i> , at 1176 - <i>Antenor</i> , at 932 -DOL opinion letter
5 Permanence of employment at Fred Meyer ¹⁴	¶ 59 & 87	- <i>Moreau</i> , at 952 - <i>Torres-Lopez</i> , at 644 - <i>Barfield</i> , at 145 - <i>Zheng</i> , at 67-68 -DOL opinion letter
6 Degree of initiative, judgment or foresight required by work	¶ 60	- <i>Rutherford</i> , at 730 - <i>Torres-Lopez</i> , at 644 - <i>Reyes</i> , at 408 -DOL opinion letter

¹² Under its contract with Expert, Fred Meyer dictated all of the chemicals, tools and supplies, with great specificity (CP 1350-52), and agreed to pay the approximately \$2500/store monthly expense for these items. CP 1055-56 (cost for 100,000 sq.ft. store); CP 719 (store size). Fred Meyer emphasizes that the 2nd tier subcontractors supplied a waxer/scrubber machine. However, that cost was relatively trivial – about \$50/month/store. CP 1023-24 (Chaban Dec. Exhibit showing 15 stores and \$750 budgeted/month for equipment replace or repairs). Moreover, Fred Meyer provided All American Janitorial with five waxer/scrubbers when it was a “baby company” taking over 19 Fred Meyer stores from All Janitorial in early 2010. CP 1269-70.

¹³ The Court of Appeals extensively discussed this evidence at ¶¶ 58, 67-71 & 76-78. Moreover, since Fred Meyer was the only entity that provide in-store supervision of janitor work – which it did on a daily basis – it was the Fred Meyer janitor supervisors who determined when there were performance issues, whether the issues could be handled in-store or whether to go out-of-store to Expert or a 2nd tier subcontractor. CP 1058, CP 1035 & 1052-53.

¹⁴ The Court of Appeals held that permanence depends upon how long it was possible for a worker to stay in employment, rather than an individual's tenure. 176 Wn. App. at 728. Four of the five plaintiffs worked between 9 and 26 months in Fred Meyer stores (CP 1031-32; 1039, 1191, 1199), which is a remarkably long tenure considering the job was 364 full-night-shifts a year with egregious wage and hour violations.

7 Evidence that Fred Meyer's activities were <u>subterfuge or sham</u> to avoid MWA obligations ¹⁵	¶ 72	- <i>Castillo</i> , at 192 - <i>Barfield</i> , at 146 - <i>Zheng</i> , at 73-74 - <i>Reyes</i> , at 408-09
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2. An Additional Five Factors Support Fred Meyer Joint Employer Status

The Court of Appeals recognized the factors it specifically addressed were “a non-exhaustive list” and that the trial court may examine other factors. 176 Wn. App. at 718-19. There are five additional factors which also support a finding of Fred Meyer joint-employer status.

First, multiple cases recognize that joint employment is supported where a putative employer has power to determine rate and method of pay. *Bonnette* at 704 F.2d at 469-70, *Torres-Lopez*, 111 F.3d at 640-44, *Barfield*, 537 F.3d at 142; *Antenor* 88 F.3d at 932. Paragraph 9.2 of Fred Meyer's contract with Expert provides that the janitors be paid in conformity with the FLSA and state law. CP 1432-33; CP 1447-48; CP

¹⁵ Fred Meyer contracted to be part of a Building One model of layering, which, left unchecked, achieves substantial savings because the bottom layer is immigrant workers employed by entities who can and often will egregiously violate wage/hour laws:

“The problem [is] for the workers at the bottom: Each middleman takes a cut. ‘By [working at the stores that are] creating these layers to protect themselves, the workers are really getting screwed’ says a federal official who spent years investigating the industry.”

(CP 1074, Ezzo quoting 2003 Forbes article, SEE NO EVIL HEAR NO EVIL). Fred Meyer was familiar with Building One – its California subsidiary Ralph's was a defendant in a widely-discussed multi-chain class action involving Building One customers, in which the trial court found disputed issues of fact re retailer joint employment status, *Flores v. Albertson*, 2003 WL 24216269. CP 1061-63. Yet, in 2004, when Fred Meyer went from employee union-member janitors to 2nd tier immigrant janitors, it used a reverse auction bidding process that emphasized price over everything else. CP 1063. Its subcontracting practices resulted in exactly what could be predicted. CP 1063-64.

1338-39. This provision factors into Fred Meyer's economic relationship with the janitors. Fred Meyer made a minimal, ineffective effort to enforce its right. CP 1407-08 (2008 email to Expert requiring general confirmation of janitor overtime pay); CP 770-781 (Fred Meyer and Expert emails discussing 2008 report by janitor of 365/days/year and 8/hour/night schedule without overtime pay). Fred Meyer's efforts to control overtime pay are crucial to wage/hour compliance where 2nd tier subcontractors are used in the retail janitorial market. Mr. Ezzo and Sergey Chaban of All Janitorial explained that retailer and 1st tier janitor subcontractor emphasis on wage/hour compliance largely determines whether 2nd tier janitorial subcontractors will comply with wage/hour law. CP 1058 & 1079-80, 1082-84; CP 1251 (All Janitorial treated janitors as employees only twice when retailers and 1st tier contractors required doing so and paid enough for it to comply). Moreover, it is easy for a retailer (or its 1st tier subcontractor) to uncover violations. CP 1079-80 & 1083-84.

Second, plaintiffs not only worked in Fred Meyer stores, but they never worked anywhere else for All Janitorial or All American Janitorial. CP 1031-32, 1039, 1191, 1201, 1231. That factor was relevant in *Rutherford* and has been repeatedly used in circuit court decisions

including *Zheng*, 355 F.3d at 75¹⁶; *Antenor*, 88 F.3d at 927 (putative employees worked only for grower). Indeed, plaintiffs likely worked more hours per week in their Fred Meyer stores than anyone except perhaps some managers.

Third, a company is more likely to be a joint employer where it has another company's employees perform work that is an integral part of its business operations. *E.g.*, *Torres-Lopes*, 111 F.3^d at 640. Work is "integral" where it forms an "essential part" of a business' operations. *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985). At Fred Meyer, keeping a clean grocery/department store was one of the Store Director's "essential responsibilities." CP 1051; CP 1034-35. By any account, daily cleaning in a grocery and retail setting is a very important aspect of operations, e.g., the stereotype of a shopkeeper is a proud owner with broom in hand. One cannot operate a 100,000 sq. ft. grocery/retail operation with a full-time staff of janitors. That is why Fred Meyer used its own full-time workforce until 2004 when the savings from cheap immigrant labor proved too tempting. That is why Fred Meyer employees use the same "cleaning supplies, restroom supplies and mops"

¹⁶ As also explained in *Zheng*, "the *Rutherford* court considered whether the purported joint employees worked exclusively or predominantly for the putative joint employer." 355 F.3d at 75.

to clean up messes that could not wait until the janitors reported to work. See CP 721 (Jones ¶ 12).

Fourth, a traditional joint employment claim is strengthened when a contract passes from one subcontractor to another without change. This factor was recognized by the Court of Appeals in relation to the Expert subcontract passing seamlessly from All Janitorial to All American Janitorial. 176 Wn. App. at 725, discussed *infra*. Here, Fred Meyer's contract provisions passed unchanged from Expert's various predecessors from 2004 through 2009. CP 1432-33 (2004 contract); CP 1447-48 (2007 assumption of contract); CP 1338-39 (2009 contract). This meant Fred Meyer had a continuous right to control overtime pay, the minutiae of janitor work, daily inspections, janitor supplies, tools and equipment, and other aspects of both the 1st tier and 2nd tier operations without change during the entire period of its outsourcing, regardless of the corporate identity or business practices or preferences of 1st tier or 2nd tier entities.

Fifth, joint employment is supported where the employee "had little opportunity for profit or loss," a factor set forth in *Rutherford*, 331 U.S. at 730, *Torres-Lopez*, 111 F.3d at 640, 644 & 646, and *Moreau*, 356 F.3d at 948. This factor was discussed by the Court of Appeals with respect to Expert, 176 Wn. App. at 710 & 722, but not explicitly with respect to the Fred Meyer. This factor applies equally to Fred Meyer. The

Supreme Court in *Rutherford* recognized that employees with greater skill sets and earning capacities are less likely to be economically dependent upon multiple joint employers. Plaintiffs are not in that group.

C. Many Factors Support Joint Employer Status for Expert.

1. The Court Of Appeals Correctly Identified Six Factors Supporting A Finding That Expert Was A Joint Employer Of Plaintiffs

The Court of Appeals, 176 Wn. App. at 723-27, identified the following six relevant factors as supporting a finding that Expert was plaintiffs’ joint employer:¹⁷

Factor	Opinion ¶ number	Authority
1 “Expert concedes the existence of several factors, one of which is that the janitors’ work was an <u>integral</u> part of its janitorial business”	¶ 74	- <i>Antenor</i> , at 937 - <i>Barfield</i> , at 145 - <i>Zheng</i> , at 72 - <i>Reyes</i> , at 408 - <i>Layton</i> , at 1176 - <i>Torrez-Lopez</i> , at 640 - <i>Moreau</i> , at 952 -DOL Opinion Letter
2 Expert also acknowledged that the janitors’ work “required <u>little initiative, judgment, or foresight</u> ”	¶ 75	- <i>Rutherford</i> , at 730 - <i>Torrez-Lopez</i> , at 644 - <i>Reyes</i> , at 408 -DOL Opinion Letter
3 The janitors had “ <u>little opportunity for profit or loss</u> ”	¶ 75	- <i>Rutherford</i> , at 730 - <i>Torrez-Lopez</i> , at 644 - <i>Moreau</i> , at 952
4 There is a genuine issue of material fact whether Expert had the power to <u>fire or alter the employment conditions</u> of All Janitorial and All American workers	¶¶ 76-78 & 82	- <i>Torres-Lopez</i> , at 642 - <i>Antenor</i> , at 935 - <i>Hodgson</i> , at 237 -DOL opinion letter

¹⁷ It identified two factors supporting Expert – (1) maintenance of employment records and (2) determining janitors’ rate and method of payment. 176 Wn. App. at 723 (¶ 73).

5	There was a genuine issue of material fact whether the janitors' employment was "permanent"	¶ 79 -Torres-Lopez, at 644 -Moreau, at 952 -DOL opinion letter
6	The Expert contract passed "from one subcontractor to another without material changes" when All American Janitorial replaced All Janitorial ¹⁸	¶ 80 -Rutherford, at 730 -Torres-Lopez, at 644 -Zheng, at 72 -Reyes, at 408 -Barfield, at 145

2. An Additional Four Factors Support Expert Joint Employer Status

The Court of Appeal's list of joint employer factors for Expert, while extensive, is not exhaustive. First, a failure to pay a subcontractor enough for wage hour compliance is itself a factor supporting a finding of joint employer status. *Castillo*, 704 F.2d at 192; *Reyes*, 495 F.3d at 409; *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1468 (C.D. Cal. 1996); *see also Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 685 (D. Md. 2010)(conditioned denial of joint employment status on "fees paid by the company to the direct employers of the workers [that] are sufficient to pay the workers the wages they are due."). Here, All Janitorial would have lost money if it complied with Washington State's minimum wage and overtime laws. CP 240-42 & 246-47; *see also* CP 1085 (money offered by Expert unlikely to attract 2nd tier subcontractors who complied with labor laws).

¹⁸ See CP 71 & 74-91.

Second, the Court of Appeals recognized that joint employer status as to Fred Meyer could be supported by evidence that contracting activities were a subterfuge or sham to avoid MWA obligations. 176 Wn. App. at 719 & n. 82 (citing *Barfield*, 537 F.3d at 145–46). The same is true as to Expert. Its business model relying on 2nd tier subcontractors was well-known in the industry as conducive to egregious abuses of immigrant janitors, especially without 1st tier subcontractor oversight. CP 555-58 & 564. Expert knew of violations. CP 682-86 & 774-75 (2008 emails involving All Janitorial); CP 247; CP 391 (other subs); CP 364-65 (same). But, it but did nothing to stop these violations. *See* CP 72.

Third, Expert had the right and ¶ 9.2 contract obligation to assure that janitors received overtime pay. Like Fred Meyer, it had the power to control what the 2nd tier subcontractors paid the janitors. This makes Expert more closely related to the janitors, than would be true in a typical arm's length subcontracting relationship. Indeed, the violations herein depended on Expert's failure to encourage MWA compliance.¹⁹ Expert conducted monthly audits of janitor I-9 employment records²⁰, but showed

¹⁹ CP 562-65; CP 1058 & 1079-80, 1082-84; CP 1251.

²⁰ CP 72; CP 774.

“indifference” regarding All Janitorial’s wage and hour compliance; it failed to take simple steps to easily uncover the wage/hour violations.²¹

Fourth, control over employment conditions supports a finding of joint employment. *See, e.g., Torres-Lopez*, 111 F3d. at 639-40; 176 Wn. App. at 717 (re Fred Meyer, *citing Lemus*). Here, Expert (and its predecessors) entered into a contract with Fred Meyer that governed what plaintiffs would do, how they would do it, daily inspections of their work, when and how they could end their shifts, their chemicals, tools and equipment, and other aspects of their employment. The definition of “employer” under the MWA and FLSA include companies “acting directly or indirectly in the interest of an employer in relation to an employee.” RCW 49.46.010(4); 29 U.S.C. § 203(d). Expert, in its contracts with Fred Meyer, played a major part in making the 2nd tier subcontractors into little more than labor suppliers who could risk egregious wage/hour law violations with Expert’s permission or, at least, tacit approval. CP 1082. Expert bears significant responsibility, along with Fred Meyer, for the conditions affecting plaintiffs.

²¹ CP 72; CP 566-68.

D. Summary Judgment Was Improperly Given Because (1) There Were Disputed Issues Of Material Fact And (2) Because Multiple Factors Pointed In Different Directions.

(1) Fred Meyer’s Petition for Review, p. 9, asserts that “the record before the trial court demonstrated that the facts relating to the critical factors were not in dispute.” The Court of Appeals, however, properly reviewed the record and concluded otherwise. For example, Plaintiffs’ Opening Brief in the Court of Appeals, at page 17, summarized some material disputed issues relating to Fred Meyer’s control or supervision of janitors, as follows:

FM’s Evidence	Plaintiffs’ (“P”) Evidence
1. Ps’ worked only when the FM store was closed to public – 9:00 pm – 7:00 am. (CP 721, 727)	1. “Impossible” to finish work by 7 am (CP 841) and often worked until 7:30-8 or later (CP 1032, 1035, 1051, 1039-40)
2. No FM managers in store from 11 pm – 7 am (CP 820, 998, 1007; <i>see</i> FM Brief, p. 38)	2. FM managers in store beginning at 5 a.m. (CP 705, 756, 841, 761, 904, 1003)
3. Janitors only speak Spanish and FM managers did not speak Spanish so no effective means of communication (CP 703-04, 759, 763, 785)	3. FM Managers could and did communicate with janitors regarding need for further work (CP 842, 861, 1035, 1039, 1052)
4. Contact between FM managers and plaintiffs was limited to signing work sheets (CP 842, 861, 722; <i>see</i> FM Brief, p. 39)	4. FM Managers walked the store with janitors and had corrections made <u>before</u> signing off (CP 855, 885, 913, 1032, 1040, 1051)
5. Marcos Flores supervised janitors (CP 793, 795; <i>see</i> FM Brief, p. 39)	5. Janitors rarely communicated with Flores; who, after a time, rarely if ever supervised them (CP 704, 855, 910, 1040)

That is why the Court of Appeals not only held there was a genuine issue of material fact with respect to its “indirect supervision and control of

[plaintiffs'] work," 176 Wn. App. at 716-18, but discussed the conflicting testimony. *Id.* at 719-20.²²

Expert similarly claimed in its Petition for Review that there was no material dispute about its indirect power to fire janitors even though the Court of Appeals quoted the disputed evidence at 176 Wn. App. at 723-25. Similarly Expert relies on its preferred version of Mr. Chaban's contradictory sworn statements, e.g., preferring CP 96 that "[t]o the best of my recollection, I never spoke with Ms. Vermeer about All Janitorial's janitors working seven days a week" to his sworn testimony five months earlier agreeing that he talked with Ms. Vermeer about "janitors working seven days a week." CP 247.

(2) Contrary to defendants' arguments, nothing in the Court of Appeals' decision is contrary to the proposition that summary judgment

²² Similarly, Fred Meyer's Petition for Review, p. 15, asserts: "Subcontractors, not Fred Meyer, provide the equipment used by the janitors." However, Fred Meyer's contribution of chemicals, tools and equipment dwarfs any contribution by the 2nd tier subcontractors. Under its contract with Expert, Fred Meyer dictated all of the chemicals, tools and supplies, with great specificity (CP 1350-52), and agreed to pay the approximately \$2,500 monthly expense for these items. CP 1055-56 (estimated monthly cost for 100,000 sq. ft. store); CP 719 (stores tend to be over 100,000 sq. ft.) In contrast, the cost of supplying a waxer/scrubber machine is relatively trivial – about \$50/month/store. CP 1023-24 (Chaban Dec. Exhibit showing 15 stores and \$750 budgeted/month for equipment replacement or repairs). Moreover, Fred Meyer provided All American Janitorial with five waxer/scrubbers when it was a "baby company" taking over 19 Fred Meyer stores from All Janitorial in early 2010. CP 1269-70.

Fred Meyer also argues that it outsourced its janitorial work because it wanted its store directors to focus more on selling merchandise. However, even that fact is in dispute. Store directors were told that the outsourcing was to save money. CP 1053. The outsourcing created more work for the store directors due to daily inspection responsibilities and lower staffing levels with the immigrant janitors. CP 1053.

may be appropriate even if not all of the factors favor one side. In this case, however, giving plaintiffs as non-moving parties the benefit of the inferences, there are multiple factors for each defendant that supports joint employment. Moreover, the test here is a qualitative analysis looking at plaintiffs' dependence on those defendants as a matter of economic reality. The trier of fact could, for example, give significant weight to the fact that janitors only worked at Fred Meyer stores, to the power, directly or indirectly, to require janitors to stay after their shift to fix problems to Fred Meyer's satisfaction. The trier of fact could credit evidence that it was the practice of All Janitorial to discharge janitors when Fred Meyer or Expert complained, including complaints about quality of service. CP 238.

Similarly, the trier of fact could give significant weight to evidence that both Fred Meyer and Expert, in Mr. Ezzo's opinion and from the evidence, appeared to be participating in a model created to take advantage of unskilled recent immigrants and have them work seven night a week without overtime pay and, often, at less than minimum wage. Or, with respect to Expert, the trier of fact could find particularly significant that there was evidence that Expert was paying the 2nd tier contractor so little that they could not treat the janitors as employees and pay them overtime and that the janitors' work was both unskilled and absolutely integral to Expert's business. For purposes of summary judgment, the

possibility that the trier of fact could make different findings or find those factors of less significance or disbelieve the janitors' evidence is not material since the non-moving parties are entitled to the benefit of all reasonable inferences. *Owen*, 153 Wn.2d at 787

E. A Factfinder Could Reasonably Determine that Fred Meyer and Expert Jointly Employed Plaintiffs Under the Economic Reality Test.

The "economic reality" test is applied not by adding up factors, but by the evaluation of whether an employment relationship involving one or more joint employers exists based "upon the circumstances of the whole activity." *Rutherford*, 331 U.S. at 730. The ultimate question is whether a worker is economically dependent on the alleged joint employer, which is derived from the economic reality of entire working relationship. *Torres-Lopez*, 111 F.3d at 641.

As for Fred Meyer, the janitors worked in the Fred Meyer Stores. They worked only in the Fred Meyer stores. They worked an extraordinary number of hours in the Fred Meyer stores. Fred Meyer's contract with Expert dictated the sixty-six nightly tasks which the janitors were required to perform, along with several dozen less frequent tasks. It was in effect a procedure manual. (CP 1055) Fred Meyer's contract with Expert decided the chemicals, supplies, tools and all-but-one piece of equipment. Fred Meyer directly bore 98% of the cost for these items.

Fred Meyer managers provided plaintiffs' daily supervision – their only in-store supervision. Fred Meyer managers decided when plaintiffs could leave the store each morning. Fred Meyer managers decided if there were performance problems and, once identified, whether and how to bring Expert in to deal with the problem. Fred Meyer security decided whether the janitors would be “trespassed” from the store due to Fred Meyer suspicion of theft. All Janitorial had a practice of terminating janitors that Fred Meyer or Expert wanted terminated. CP 238. Fred Meyer also held the right to require Expert and its 2nd tier subcontractor to pay minimum wages and overtime. Fred Meyer, by the way it structured its contract with Expert and operated under that contract, purposefully engaged 2nd tier subcontractors who were little more than a supplier of cheap labor and a provider of a first level of thin supervision. The issue here is not whether the 2nd tier subcontractors had a greater connection with the janitors than did Fred Meyer, but rather whether Fred Meyer's connection was sufficient to make it a joint employer under economic reality principles.

On top of all of these factors, Fred Meyer in 2004 contracted in a price sensitive retail janitor market in which use of 2nd tier subcontractors and immigrant labor raised red flags of egregious wage/hour abuses. Fred Meyer's then subsidiary, Ralph's, was a customer of Building One, which developed this model of layering, under which national 1st tier

subcontractors could achieve substantial price savings by hiring 2nd tier subcontractor who would misclassify janitors and work them 7 full shifts a week without overtime or even minimum wages. Ralph's found itself among five supermarket chain defendants in a case where summary judgment was denied on this joint employment issue. *Flores v. Albertson*, 2003 WL 24216269. The "economic realities" should include use of a business model that is notorious for egregious abuse of worker rights. In this system, janitors are entirely dependent upon retailers and 1st tier subcontractors requiring the 2nd tier subcontractors to properly classify and pay them – otherwise there will be violations. The janitors were very much dependent on Fred Meyer as a matter of economic reality.

As to Expert, the most important economic factor is that janitors were not only integral to its business, but use of 2nd tier subcontractors employing immigrant labor was integral to its business model. Expert could win contracts only by achieving substantial savings with its use of 2nd tier subcontractors. Moreover, Expert, in its contracts with Fred Meyer, essentially emasculated the 2nd tier subcontractors, making them little more than labor suppliers. Fred Meyer neither needed nor wanted a 2nd tier supplier that acted as a janitorial services company. Expert gave Fred Meyer control over all aspects of the janitors' working tasks and conditions. Expert likewise knew that egregious wage/hour violations

were likely unless it met its ¶ 9.2 contract obligation to assure compliance with wage/hour laws. It had abundant notice of violations, but did nothing. See CP 245 & 247 (Chaban told Expert's Vermeer about misclassification and 7 nights per week schedules). As was seen with All Janitorial and All American Janitorial, it made little difference to the janitors who occupied the 2nd tier subcontractor position. Under Expert's business model the violations that plaintiffs experienced were normal, rather than aberrational or unusual.

All Janitorial and All American Janitorial supplied the bodies to the stores, working them 7 full-shift-nights a week, which is a common feature of the post-2000 retail janitorial layering business model. Their principal value was achieving economic savings by engaging in wage/hour violations that neither Fred Meyer nor Expert could directly engage in. CR 564-65. That too is a common feature of 2nd tier subcontractors under Expert's business model. CP 564-65. The 2nd tier subcontractors can take these risks – commit these violations – because they have little capital investment and can simply go out of business. *Id.*²³

Under the Fred Meyer's and Expert's business practices in this case the 2nd tier subcontractors were every bit as fungible as the janitors

²³ As noted *supra*, at the time of the summary judgment hearings, All Janitorial was defunct and its owner, Sergey Chaban, was headed in bankruptcy. CP 1060 & 1176-1177. All American Janitorial had yet to make a profit. CP 1061 & 1167.

themselves.²⁴ A trier of fact could reasonably conclude that Fred Meyer and Expert jointly employed plaintiffs under the MWA's expansive definition of "employer" and the "economic reality" test.

The issue in the present case is not whether the janitors are more dependent on Fred Meyer, Expert or the 2nd tier subcontractor – with the winner avoiding employer responsibility. *E.g., Torres-Lopez*, 111 F.3d at 641. It is a fundamental principle that an individual may have more than one employer under the broad FLSA/MWA definition of "employer." *See id.* (FLSA). Rather, the focus is on whether there are significant-enough relationships between the janitors and Fred Meyer and/or Expert as a matter of "economic realities." The evidence herein would allow a reasonable finder of fact to answer "yes" as to both defendants.

III. THE COURT OF APPEAL'S OPINION DOES NOT PORTEND JOINT EMPLOYER STATUS FOR ALL OUTSOURCERS

Respondents have argued that the Court of Appeals' opinion is too unstructured and could lead to unnecessary trials. However, there are steps companies can take to avoid that risk. Retailers' concerns should be raised where they bring unskilled workers into their stores full time, decide what they will do and how they will do it, provide virtually all the materials, provide the only meaningful supervision, involve suspect

²⁴ See CP 364-65 (DLI agent reporting similar problems for other Expert 2nd tier subcontractors in 2009).

entities in an environment where egregious wage/hour abuses are known to exist and ignore violations. First-tier subcontractors who operate in labor-intensive industries relying on outsourced labor where wage/hour violations are commonplace need to be concerned where they don't pay enough for wage/hour compliance and allow these egregious violations to occur. *Accord Reyes*, 495 F.3d at 409 (avoid "fly-by-night operators" who "plan to spurn" wage/hour laws). The Fred Meyer/Expert "economic realities" with these janitors, in the retail industry are, hopefully, somewhat out of the mainstream of common third-party contracting.

While companies might prefer a quantitative test or bright-line algorithm to decide "joint employer" issues, the wage hour laws exist to protect workers and their compensation. If a court provided a definitive list of factors and scorecard, the next Building One model could add an additional couple of layers or restructure in a way that would attempt to avoid liability but would not alter the underlying economic realities. *Rutherford* requires a flexible holistic approach which has served wage and hour jurisprudence and workers well for over sixty-five years.

IV. CONCLUSION

Plaintiffs respectfully request that the Court of Appeals decision be affirmed and the case remanded for trial.

Dated this 7th day of March, 2014.

A handwritten signature in black ink, appearing to read "David N. Mark", written over a horizontal line.

DAVID N. MARK, WSBA #13908
LAW OFFICE OF DAVID N. MARK

WILLIAM RUTZICK, WSBA #11533
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 622-8000

Counsel for Respondents

OFFICE RECEPTIONIST, CLERK

From: Farley, Nona <farley@sgb-law.com>
Sent: Friday, March 07, 2014 3:07 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Becerra v. Expert Janitorial, et. Al., Case No. # 89534-1
Attachments: Respondents'SupplementalBrief.pdf; Respondents'MxforOverlengthSupplementalBrief.pdf; AffidavitofService-20140307.pdf

Attached please find Supplemental Brief, Respondents' Motion to File Overlength Supplemental Brief, and Affidavit of Service for filing today in Becerra v. Expert Janitorial, et. Al., Case No. # 89534-1.

These documents are filed by:

WILLIAM RUTZICK, WSBA #11533
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, WA 98104
Rutzick@sgb-law.com
jones@sgb-law.com
Counsel for Plaintiffs/Respondents

DAVID N. MARK, WSBA #13908
LAW OFFICE OF DAVID N. MARK
810 Third Avenue, Suite 500
Seattle, WA 98104
david@marklawoffice.com
Counsel for Respondents

Nona Farley
Legal Assistant
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104
206-622-8000 Main
206-682-2305 Fax
farley@sgb-law.com

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