NO. 89534-1

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' ANSWER TO **FRED MEYER STORES, INC.'S** PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

Plaintiffs Carolina Becerra Becerra, Julio Martinez Martinez, Orlando Ventura Reyes, Adelene Mendoza Solorio and Alma Becerra ("plaintiffs") are the responding parties.

II. DECISION OF THE COURT OF APPEALS

A copy of the Court of Appeals decision at issue was attached to Fred Meyer's Petition for Review ("Petition" or "Pet.").

III. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to RAP 13.4(b)(4), the Supreme Court should reject review of this case, because:

1. The Court of Appeals set forth the applicable "economic realities" test for deciding MWA "joint employment" issues consistent with Fair Labor Standards Act ("FLSA") authority and in conformity with the related "economic realities" test adopted in *Anfinson v. FEDEX Ground Package System, Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012).

2. The present case involves a wide array of disputed factual issues pertinent to multiple "economic reality" factors. Summary judgment in favor of Fred Meyer was erroneous.

3. Fred Meyer repeatedly mischaracterizes the Court of Appeal's Opinion and the record below in its effort to obtain review. Correctly characterized, these are not errors.

IV. COUNTERSTATEMENT OF THE CASE

A. Fred Meyer's Contracts Establish Janitor Working Terms And Conditions.

Up until mid-2004 Fred Meyer used its own janitorial workforce to clean its Pacific Northwest stores. CP 719.[1] Between 2004 and 2009, Fred Meyer entered into almost identical janitorial service contracts with Expert Janitorial LLC and its two predecessors. CP 1428-1446, 1447-48 and 1334-1352. These contracts controlled in detail virtually all aspects of the work that would be performed by janitors in the Fred Meyer stores.[2]

Paragraph 4 of the contract provided that Fred Meyer managers would conduct a daily inspection in each store, with the janitors required to correct "all deficiencies." CP 1430; CP1336.[3] Fred Meyer managers walked the stores with janitors, often keeping the plaintiffs in the stores well after the 7:00 a.m. end of shift – sometimes as late as 9:30 a.m. CP 1032, 1034-35, 1039-40, 1051-52, 1194-96, 1202-03, 1227 & 1235.

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[1] Fred Meyer janitors were paid union wages and were not scheduled to work overtime. CP 790-91. As discussed, *infra*, that changed drastically for the janitor plaintiffs and their fellow janitors.

[2] The "Schedule A" Scope of Service to the contract listed 66 nightly tasks, plus a few dozen less-frequent tasks. CP 1065, CP 1428 & 1440-45 and 1334 & 1343-48; see Slip Op. at 2-3. The "Schedule A" task list "is far more prescriptive tha[n] performance based" and "reads like a procedural manual." CP 1055 (Ezzo ¶ 4). Under "Schedule C" to the contract Fred Meyer selected and supplied chemicals, tools and all but one piece of equipment to be used by the janitors. CP 1055-56; CP 1324 & 1350-52. The Schedule C items comprised a monthly expense in excess of $2,500 at a 100,000 square foot store. CP 1055-56; CP 719 (few stores less than 100,000 sq. ft.). Paragraph 2 limits the work hours to between 10:30 p.m. to 7:00 a.m. (CP 1335 & 1429), although, as is discussed *infra*, Fred Meyer managers kept the janitors past 7:00 a.m. on a regular basis pursuant to their right to control the end of the shift under ¶ 4.

[3] The contracts define Schedule A as the "Work" (CP 1334 & 1428) and it is this "Work" that supervisors reviewed in their daily ¶4 inspections. CP 1336 & 1430.

Under ¶ 9.2, Fred Meyer had the right to require that janitors be paid in compliance with the FLSA and other governmental laws. CP 1432-33; CP 1338-39. Expert had virtually no janitorial employees of its own, getting janitors from local companies who are known as 2nd tier subcontractors. CP 1314 & 1330.[4]

By 2004, when this outsourcing occurred, Fred Meyer was aware that use of 2nd tier janitorial subcontractors often led to the abuses that occurred herein – misclassification as independent contractors, 7-night workweeks and non-payment of overtime and minimum wage. CP 1061-63. In the late 1990s and early 2000s a Fred Meyer subsidiary, Ralphs, was one three large Southern California supermarket chain defendants in a widely-publicized janitorial wage and hour class action involving 2nd tier janitorial subcontractors. The supermarkets were denied summary judgment on the janitors' "joint employer" claims. CP 1061-63, 1139-42 & 1179-81.[5]

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[4] The multi-tiered system used by Fred Meyer and Expert herein was developed in the Southern California retail market in the mid-1990s by a 1st-tier subcontractor, Building One, and is known as "layering." CP 1072-82 & 1136-37. The retail market for janitorial services is price sensitive. CP 1072-82. The retail chains subcontract to 1st tier national janitorial companies who hire no janitors. The 1st tier companies achieve substantial savings by subcontracting to local 2nd tier providers who are paid very little. *Id.* Many 2nd tier companies then achieve an immediate 20% cost savings by misclassifying janitors as independent contractors. *Id.* The 2nd tier subcontractors often achieve additional savings by working the janitors 7 full shifts per week and not paying overtime and, often, not paying the minimum wage. *Id.* This system depends upon a pool of workers who are willing to work under these conditions and, therefore, it originated and spread with the influx of available immigrant labor in the 1990s and 2000s. CP 1077 (Ezzo ¶ 33).

[5] Fred Meyer, at Pet., p. 3, argues its decision to outsource the janitorial work in 2004 was to enable "store directors [to] concentrate on Fred Meyer's core retail business."

B. All Janitorial ("AJ") and All American Janitorial ("AAJ").

AJ achieved success as a 2nd tier subcontractor, expanding from 1 to 19 Fred Meyer stores between 2006 and January 2010.[6] It misclassified janitors as independent contractor because otherwise it would have lost money on its contract with Expert. CP 1245-46.[7] By August 2011, AJ had stopped all operations and had no assets. CP 1060 & 1316. Meanwhile, in January 2010, AAJ was created to take over AJ's19 Fred Meyer stores. CP 1040 & 1269-78. It was a "baby company," using AJ's janitors and supervisor (Marcos Flores). CP 1269-78; CP 1285-86. It had no contracts other than Fred Meyer stores and never made a profit. CP 1269-78; CP 1285.[8]

CP 719. However, that is in dispute. Store directors were told that the 2004 subcontracting was to save money. CP 1053. Moreover, the decision gave *more work* to store management, because they were given the *new* responsibility of performing daily inspections and there was thinner staffing with the immigrant janitors. *Id.*

Under the Fred Meyer – Expert contracts, 2nd tier subcontractors did "little if anything beyond supplying the janitors and engaging in the kind of illegal business practices that are characteristic" of the layering system in major retail stores. CP 1058-59. They were "not deciding what cleaning needed to be done, how to do it, how often to perform various tasks, what chemicals, tools or equipment to use or how to supervise a staff of janitors." CP 1058-59. AJ and AAJ did not have a meaningful supervision plan for the janitors. CP 1056. Other than a ½ shift of training for one plaintiff, AJ and AAJ did **no** in-store supervision of plaintiffs. CP 1039-40, 1192 & 1200, 1210-1211, 1222, 1227, 1231-33. Instead, Fred Meyer was the **only** source of in-store supervision – the daily walkthrough and eventual signing-out. CP 910, 1032, 1034-1036, 1039-40, 1050-53, 1056-57 & 1203.

[6] CP 1015 & 1250 (1 to 19 stores).

[7] The store prices were set by Expert on a take-it-or-leave basis. CP 1245. The amounts Expert offered were unlikely to attract a 2nd tier subcontractor who complied with labor laws. CP 1085 (Ezzo ¶ 59).

[8] Second tier subcontractors commonly cease business when their wage/hour violations come to light. CP 1060-61. Their lack of assets is what enables them to risk a business model with egregious wage and hour abuses for relatively little in compensation. *Id.*, *accord, Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 409 (7th Cir. 2007)(Judge Posner stating: "when a contractor has no business or personal wealth at risk, he may be

C. Plaintiffs' Fred Meyer Store Work, Misclassification, 7-Day Workweeks and Wage/Hour Law Violations.

Plaintiffs worked only in Fred Meyer stores.[9] They and the other janitors worked 7 full-night-shifts per week, [10] were classified as independent contractors,[11] were not paid overtime[12] and often were not paid minimum wage.[13] AJ and AAJ janitors spoke Spanish and did not speak English. CP 703.[14]

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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."). Fred Meyer, at Pet., p. 7, seems to criticize plaintiffs for not proceeding rapidly to a separate trial against AJ's owner, Sergey Chaban. Plaintiffs, however, prefer to have one trial with all defendants.

[9] CP 1031-32; CP 1193; CP 1039; CP 1201; CP 1233.

[10] CP 1031-32, 1039, 1192, , 1200 & 1234; *see* CP 1303-04 (AJ work schedule with every janitor at 19 Fred Meyer stores working 31 days that month) & CP 1296-97 (explanation of schedule). *See* Slip Op. at 3. Giving new meaning to the term "paid sick leave", three plaintiffs took rare sick days but they were required to find a suitable person to cover **and had to pay their replacement.** CP 1194; CP 1201; CP 1215.

[11] CP 1244 (AJ was not paid enough by Expert to classify janitors as employees).

[12] CP 1244-45; *see* CP 1032 &1039. Plaintiff Alma Becerra and her co-workers at the Fred Meyer Sumner store also worked 7 nights a week without overtime pay in 2006 under a different 2nd tier subcontractor – not AJ or AAJ. CP 1031-32.

[13] CP 194-198.

[14] According to plaintiffs' industry expert, John Ezzo, "[t]he events in this case are not aberrant or due to unusual behavior by All Janitorial or All American Janitorial." CP 1063-64 (Ezzo ¶ 24). Rather, the layering business model is the root of the problem, because it meets the financial interests of the retailer and 1st tier subcontractor. Retailers get janitors at the lowest possible price while being able to maintain tight control over what is done and how it is done. 1st tier subcontractors win bids by engaging 2nd tier subcontractors who are willing to violate laws and tap into a pool of easily-exploited immigrant laborers.

V. ARGUMENT

A. The Court Of Appeals Appropriately Surveyed And Applied FLSA Case Law And *Anfinson*, Finding Sufficient Material Disputes Of Fact To Preclude Summary Judgment.

1. The Court Properly Set Forth the FLSA/MWA "Economic Reality" Analysis For Resolving Joint Employer Disputes.

The Court of Appeals agreed with Fred Meyer and plaintiffs that the FLSA "economic reality" authority provides useful guidance in apply the "joint employer" test under the MWA. E.g., Slip Op. at 1 – 2 & n. 1. The Court of Appeals expressly adopted the "economic reality" test, noting the similarities between the MWA and FLSA and citing *Anfinson*. *Id.* at 6-7. It relied on cases starting with the "seminal" case of *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), and continuing with United States Court of Appeals authority for the propositions that "economic reality" is the touchstone and that multi-factor tests (in their various formulations) are non-exclusive. Slip Op. at 1-2, n. 1, 9-16 & nn. 25-58.[15]

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[15] This Court in *Anfinson* explained that because the Washington Minimum Wage Act ("MWA") was adopted from the Fair Labor Standards Act ("FLSA") in 1959, the Legislature intended to adopt the federal construction of the FLSA as of 1959:

> The legislature's nearly verbatim adoption in the MWA of the FLSA language with respect to the definition of "employee" evidences legislative intent to adopt the federal standards in effect at the time.

In re Heidari, 174 Wn.2d 288, 298, 274 P.3d 366 (2012) (emphasis added). That means that the pre-1959 FLSA Supreme Court interpretation of joint employment in *Rutherford* is more significant on this issue for purposes of the MWA then post-1959 federal opinions.

Essentially, Fred Meyer is asking this Court to accept review to review a detailed factual record in order to determine whether there are disputes of fact in this particular case. It attempts to buttress its petition by mischaracterizing the Court of Appeal's opinion and the record and making inferences – reasonable and unreasonable – in its favor.

2. The Court Of Appeals Applied The Economic Reality Test In This Summary Judgment Motion Consistently With Washington Summary Judgment Law And With Summary Judgments Under The FLSA.

The Court of Appeals' decision appropriately relied on MWA and FLSA authority in deciding this summary judgment. *See, e.g.*, Slip Op., pp. 5-8. The Court well supported its holding that:

> There are genuine issues of material fact regarding the existence and degree of some of the relevant economic reality factors determinative of joint employment that should have precluded the trial court's dismissal."

Id. at 5. After citing cases from the U.S. Supreme Court, and the Second, Third, Ninth and Eleventh Circuits as well as several district court cases (*id.* at 10-20) and explaining, *inter alia*, that no court has held that there is an exclusive list of factors (*id.* at 10-11), the Court of Appeals indicated that it had considered all of the various factors, *e.g.*,

> While they conceded that Fred Meyer did not maintain the janitors' employment records, they argue that there were genuine issues of material fact with respect to all other factors. We substantially agree.

Id. at 21 (emphasis added).

The opinion goes on to specifically discuss the following factors regarding the janitors: Fred Meyer's "supervisorial control of their work;" its "control of their employment conditions;" the janitors use of Fred Meyer "premises and equipment" (*id* at 21-23); "firing or modifying the janitors' employment;" "permanence of the janitors' employment;" "whether the janitors' work required initiative, judgment or foresight" (*id.* at 23-24); and whether:

> [T]he evidence presented by the janitors supports their assertion that the system of employment adopted here is a "subterfuge or sham structure [meant] to avoid FLSA obligations."

(*id.* at 25), or was a "legitimate type of subcontracting arrangement." *Id.* at 29.

While Fred Meyer cites *Moreau v. Air France,* 356 F.3d 942 (9th Cir. 2004) for the proposition that the ultimate question of joint employment "is a legal question," the Court of Appeals in *Anfinson v. FedEx Ground*, 159 Wn. App. 35, 72, 244 P.3d 32 (2010), citing both Washington and FLSA cases, properly held that "[w]here the facts are disputed, the determination of employment status is properly a question for the trier of facts." (Footnote omitted.) Even though as discussed above, the Court of Appeals stated it considered all the factors included in Fred Meyer's joint employment status, and discussed them extensively at pages 21-29 of the Slip Opinion, Fred Meyer argues that it did not explicitly discuss and weigh every factor. Pet., p. 9. However, there is no

rule that it is not good enough for appellate courts to state that it has considered all of the factors and specifically and extensively discuss many, but not all, of the factors in a multi-factor test (*see, e.g., Stewart v. Estate of Steiner*, 122 Wn. App. 258, 274, 93 P.3d 919 (2004), *Jackvony v. RIHT Financial Corp.*, 873 F.2d 411, 416-17 (1st Cir. 1989)), where the Court discussed "some, but not all, factors."

3. Fred Meyer's Criticisms Regarding The "Supervision" And "Control" Factors Misread The Court's Opinion And The Record.

Fred Meyer's Petition, at 10-12, sharply criticizes the Court of Appeals and argues that "no federal case holds that 'coming close' to supervision is the same as supervising. Slip Op., p. 22." Fred Meyer ignores the court's flat statement at page 22 that the janitors "were supervised by Fred Meyer employees" and mischaracterized the statement it purports to quote, which actually was "Fred Meyer was the organization that came closest to supervising the janitors on a day-to-day basis." Slip. Op. at 22 (emphasis added). Fred Meyer's Schedule A required janitors to perform 66 daily tasks, and Fred Meyer did a daily inspection to assure compliance as a condition of janitors being able to end their shifts. The Court of Appeals summarized the record at Slip. Op., pp. 25-26 and conservatively concluded "it is a genuine issue of material fact whether the janitors were, in the end, supervised by Fred Meyer." *Id.* Furthermore, plaintiff's expert, Ezzo, opined that sole day-to-day supervision "correlates with affecting discipline." CP 1058 (¶ 13). AJ's

Chaban testified that Expert told him "there should be personnel changes as a result of dissatisfaction" with performance on Fred Meyer's part, with AJ's "practice" being to let the janitor go. CP 1242, *see* Slip Op., p. 24. There is ample evidence creating an issue of fact regarding Fred Meyer indirect control over both supervision and firing or modifying employment.[16]

4. Fred Meyer's Service Industry Case Law Discussion Misreads The Law.

Fred Meyer's analysis of "service industry" law concerning joint employment at pages 11-14 of its Petition misinterprets (a) the Court of Appeals' treatment of that law, and (b) FLSA joint employment case law.

(a) According to Fred Meyer, the Court of Appeals "state[ed] that special treatment should be given to "service-providing sectors" because they are the economy's "'fasting growing.' App. 18." Pet., p. 11. That is the opposite of what the Court of Appeals actually said. The Opinion rejects the trial court's effort to narrow the focus in the service sector to the *Bonnette* factors "in part because [the trial court] felt that the other [non-*Bonnette*] factors applied more to 'production line' type jobs." Slip Op., p. 17 (emphasis added). The Court of Appeals was not saying that

[16] Fred Meyer also criticizes the Court of Appeals for concluding that Fred Meyer supplied "equipment." *See* Pet., pp. 4-5 and 15-16. In fact, Fred Meyer supplied each store with approximately $2,500 per month in Schedule C chemicals, tools and equipment. *Supra* at n. 2. By way of contrast, AJ spent approximately $50/month per store to supply and maintain a mechanized scrubber/waxer machine – that means 98% came from Fred Meyer and 2% came from AJ. CP 1017 & 1023-24. (Chaban estimated $750 per month for "Equipment Replace or Repairs" at a time when AJ had 15 Fred Meyer stores).

service jobs should be given special consideration; rather, it was saying that service type jobs should be treated similarly to other jobs.

(b) Fred Meyer's claim that "service industry case law overwhelmingly supports" its position is also incorrect. It is incorrect in part because Fred Meyer omitted from the cases it cites at pages 12-13 of its Petition, almost every service industry case finding joint employment. Perhaps most significantly, it failed to cite *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir. 2008), in which the Second Circuit characterized the plaintiff nurse as a service worker and held Bellevue Hospital to be a joint employer using an analysis very similar to the Court of Appeals in this case. The Court of Appeals opinion in this case repeatedly cited to *Barfield.* Slip Op., p. 11, n. 22, 19, n. 34, 25, n. 82.[17] Furthermore Fred Meyer also failed to mention in this context *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006) another

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[17] In *Barfield,* 537 F.3d at 143, the Second Circuit well explained how different factors may be applicable in different circumstances such as whether the issue involves "formal control" or "functional control":

> From this precedent, we conclude that the various factors relied upon by this court (1) to examine the degree of formal control exercised over a worker, *see Carter v. Dutchess Cmty. Coll.*, 735 F.2d at 12; (2) to distinguish between independent contractors and employees, *see Brock v. Superior Care, Inc.*, 840 F.2d at 1058–59; and (3) to assess whether an entity that lacked formal control nevertheless exercised functional control over a worker, *see Zheng v. Liberty Apparel Co.*, 355 F.3d at 72, state no rigid rule for the identification of an FLSA employer. To the contrary, as we noted in *Zheng*, they provide "a nonexclusive and overlapping set of factors" to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA. *Id.* at 75-76. With this in mind, we turn to the facts of the case before us.

In the present case, as in *Barfield*, both formal and functional control are present.

service industry case involving security personnel, which also found joint employment.[18]

Much of Fred Meyer's discussion of the cases it does cite at pages 12-13 of its Petition is also wrong. For example, Fred Meyer criticizes the Court of Appeals for not mentioning *Itzep v. Target Corp.*, 543 F. Supp. 2d 646 (W.D. Texas 2008) which, according to Fred Meyer is a "'janitorial contracting" case with "highly relevant analysis." Pet., p. 12. However, the Court of Appeals quoted from *Itzep* at page 11 of its opinion relating to its conclusion that "any one list of factors is not exclusive, but rather "depends upon the circumstances of the whole activity." The *Itzep* court not only denied summary judgment on joint employment but did so with much less discussion of the relevant factors than does the Court of Appeals in this case. *See* 543 F. Supp. 2d at 655. *Itzep* thus directly supports the Court of Appeals' decision here.

Fred Meyer also repeatedly cites *Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762 (D. Md 2008). *See* Pet., pp. 12, 13, 18, 19. Significantly, the Court there not only granted the motion to dismiss on the basis of facts very different from those in this case, as discussed, *infra,*

[18] Nor did Fred Meyer mention district court cases such as *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005) (denying motion to dismiss FLSA claim against Wal-Mart involving janitors alleging joint employment); *Vega v. Contract Cleaning Maintenance, Inc.*, 2004 WL 2358274 (N.D. Ill) (denying motion to dismiss joint employment claims against UPS involving janitors); *Ansoumana v. Gristede's Operating Corp.*, 255 F.Supp. 2d 184, 193-96 (S.D.N.Y. 2003) (grocery delivery workers); and *Glatt v. Fox Searchlight Pictures Inc.*, --- F.R.D. ---, 2013 WL 2495140 (S.D.N.Y) (interns at movie studio).

but did so after denying plaintiffs effort to submit three additional affidavits "showing the likelihood that a joint employment relationship may have existed." *Id.* at 775-76. The utility of *Quinteros* to this case is thus doubtful.[19]

B. The Court of Appeals Did Not Make "Numerous And Significant Errors Regarding The Trial Court Record."

None of the four errors claimed by Fred Meyer are errors of the court. Rather, Fred Meyer's claims of error are clouded by its misreading what the Court of Appeals said, misunderstanding the common definitions of words used by the Court, or misreading the record.

1. The Court of Appeals Correctly Characterized The Trial Court's Focus On The *Bonnette* Factors.

According to Fred Meyer "the panel is mistaken in its assertion that Judge Spearman considered only the *Bonnette* factors." Pet., p. 14.

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[19] Other errors by Fred Meyer in its discussion at pages 11-12 include characterizing as "service industry cases" three cases involving "cable technicians" who installed equipment in a customer's home. *See, e.g.*, Jacobson v. Comcast Corp., 740 F. Supp. 2d 683 (D. Md. 2010), *Jean-Louis v. Metropolitan Cable Communications, Inc.*, 838 F. Supp. 2d 111 (S.D.N.Y. 2011), *Zampos v. W&E Comm., Inc.*, --- F. Supp. 2d ---, 2013 WL 4782152 (N.D. Ill. 2013). Workers installing cable equipment seem a lot more like skilled workers such as electricians than like the janitors in this case who do not speak English and require essentially no training at all for their jobs. In that same section, Fred Meyer also claims that *Torres-Lopez*, 111 F.3d 633 (9th Cir. 1997) was decided under the "Agricultural Protection Act (not FLSA)." *Id.* at n. 3. That is contrary, *inter alia*, to the first paragraph of the opinion in *Torres-Lopez*. Moreover, given that *Torres-Lopez* states the law in the Ninth Circuit which includes Washington, it seems odd that Fred Meyer – which is also subject to the FLSA – criticizes the Court of Appeals' use of Ninth Circuit FLSA precedent. Finally, Fred Meyer complained that the Court of Appeals "failed to credit the holdings of service industry cases such as "...*Grenawalt [v. AT&T Mobility LLC*, --- F. Supp. 2d ---, 2013 WL 1311165 (S.D.N.Y. 2013)] ..., *Jean-Louis* ..., [and] *Godlewska* [v. HAD, 916 F. Supp. 2d 246 (E.D.N.Y. 2013)]." Since Fred Meyer never cited those cases to the Court of Appeals, it seems inappropriate to criticize the Court of Appeals for failing to "credit" them. . These cases arose in the Second Circuit and therefore are controlled by the *Barfield* and *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) decisions addressed in the Court of Appeals' opinion.

What the Court of Appeals actually said regarding the trial court's analysis in connection with the Fred Meyer motion at page 16 was:

> In its order granting Fred Meyer's motion for summary judgment, the trial court acknowledged that it focused on only the *Bonnette* factors, rather than also examining those enunciated in *Torres-Lopez*. (Emphasis added.)

"Focus" in this context means "**4.** close or narrow attention; concentration." AMERICAN HERITAGE DICTIONARY (3d Ed), p. 703. The record quoted by the Court of Appeals fairly indicates that the trial court "focused" or "concentrated" on the *Bonnette* factors. The Court also correctly concluded that the trial court's focus on the *Bonnette* factors "limit[ed] its analysis." *Id.* at 17. While the trial court mentioned other factors, the Court of Appeals fairly concluded that those factors were subordinate in the trial court's analysis and that cases such as *Rutherford, Barfield*, and *Torres-Lopez* were inconsistent with the trial court's focus.

2. The Record Contains Substantial Evidence That Fred Meyer Provided Equipment Used By The Janitors.

The Court of Appeals correctly stated at page 22 of the Slip Opinion that the janitors used Fred Meyer equipment. CP 1688-89 and 1350-51. Fred Meyer supplied janitors in the typical store with approximately $2,500 per month of Schedule C cleaning supplies, including mops, dust pans, scrapers, pads, gloves, brushes and cleaners. CP 1055-56 (Ezzo ¶ 5); CP 1324 & 1350-52. The AMERICAN HERITAGE DICTIONARY (3d Ed.) at page 622, defines "equipment" as "something with which a person, an organization, or a thing is equipped." That same

dictionary defines "equipped" as "to supply with necessities such as tools or provisions." Under that definition, Fred Meyer supplied janitors with an abundance of "equipment" including the mops, dust pans, pads, gloves, scrapters, brushes and cleaning supplies. Fred Meyer seems to be limiting its definition of equipment to a mechanized waxer/scrubber machine. *See* Pet., p. 15. A waxer/scrubber is a machine that comprises "a minor part of the business of a janitorial service provider company." CP 1059. AJ's equipment budget was only $50/month per Fred Meyer store[20] – 1/50 of Fred Meyer's per store Schedule C expense. Moreover, Fred Meyer ignores AAJ's testimony that Fred Meyer supplied AAJ with waxer/scrubbers in about five stores. CP 1269. Fred Meyer supplied 98% of the materials, including much equipment, used by the janitors.

3. The Record Supports The Court Of Appeals' Conclusion That "Employment Changes Were Required By Fred Meyer."

Fred Meyer at page 16 of its Petition admits that as to janitors who Fred Meyer considered shoplifters, it "directed Expert to remove them from the store." It is pretty obvious that a janitor who is removed from the store cannot function as a janitor at that store. A janitor being removed from Fred Meyer stores is like a nurse being removed from Bellevue Hospital in *Barfield.* In *Barfield*, at page 144, the Second Circuit held that the ability of Bellevue to exclude a nurse from working at that hospital meant that "Bellevue had the undisputed power to hire and fire at will

[20] CP 1017 & 1023-24 ($750/month for 15 stores).

agency employees referred to work on hospital premises." That is precisely what the Court of Appeals concluded in this case.[21]

4. Fred Meyer Never Objected to Alma Becerra's Testimony Regarding Fred Meyer's Role In Her Termination.

At Slip Op. 28, the Opinion states that Fred Meyer failed to object below to "the **testimony** of one of the janitors, Alma Becerra, regarding her termination." (Emphasis added.) Ms. Becerra testified at CP 1224 that she was told when she and her co-worker were discharged that a Fred Meyer manager "didn't want us there anymore." Fred Meyer did not object to this testimony.

Fred Meyer, at CP 775 and 781, introduced similar statements in Fred Meyer emails. Fred Meyer then objected to the emails that it put into evidence, but never objected to Alma Becerra's testimony. CP 2109; RP 11-13. The Court's Opinion at page 28 is correct, and Fred Meyer's argument is quite misleading.

C. The Court Of Appeals Decision Is Consistent With The Remedial Purposes Of The MWA, While Allowing Businesses To Leave The "Economic Realities" Of Janitorial Work To Subcontractors.

Fred Meyer argues at pages 18-19 that the "economic reality" test applied below is unworkable and will make every business entity that has

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[21] The record here also contains additional evidence that goes beyond the evidence in *Barfield*. Notably, the email exchange at CP 1395-96 and Mr. Chaban's testimony at CP 1242 provides ample support for the Court of Appeals discussion at page 24 of the Slip Opinion. The only case cited by Fred Meyer on this argument was *Jean-Louis v. Metropolitan Cable Communications, Inc.*, 838 F. Supp. 2d 111 (S.D.N.Y. 2011), a district court case within the Second Circuit. Fred Meyer ignored *Barfield*.

janitorial services performed on its premises into a joint employer. That is not so. While 66 years under *Rutherford* gives courts the flexibility to consider a non-exclusive set of factors in deciding the "economic realities," the opinion herein guides Washington businesses as to many of the factors that would support finding janitors are jointly employed and which therefore should be avoided if one wishes to avoid being a joint employer:

- All work is done on your premises and you are largely the only source of on-site supervision;
- You review the work and decide when the janitors are free to leave each day;
- You provide almost all of the cleaning supplies and equipment;
- Your evaluations of performance fill a void in on-site supervision and therefore indirectly result in janitor discipline or alteration of working conditions;
- The same janitors work full-time-plus on your premises exclusively for a period of months or years;
- The work is performed pursuant to extremely detailed lists of specific work tasks that you provide;
- You allow use of 2nd tier subcontractors who do little more than place vulnerable workers in your stores with you having constructive knowledge that wage and hour law violations are likely.

See Slip Op. at 2 & 22-24. This is a non-exhaustive list. *Id.*

At 18-19, Fred Meyer relies on *Quinteros* as support that the Court of Appeals herein opened up all users of janitorial services to joint employer claims. However, the *Quinteros* record demonstrates that Fred Meyer's subcontracting was very different than the Regal Cinema's subcontracting:

- Sparkle Cleaning supplied the cleaning materials and equipment – not Regal Cinemas (*id.* at 770),
- Sparkle trained employees on the equipment (*id.*),
- Sparkle transported the janitors to the theaters in Sparkle-owned vehicles (*id.*), and
- Janitors made only a "conclusory statement" that their work was "overseen" by Regal – no employee of Regal "supervises ... or instructs" the janitors.

532 F. Supp. 2d at 770 & 775-76. The present case is not *Quinteros.* Washington businesses will be able to hire janitorial service providers and allow them onto their premises to have their employees perform cleaning without ipso facto becoming subject to "joint employer" claims.

Equally important, the FLSA and MWA are remedial legislation designed to protect employees from substandard wages. *E.g.,* Slip Op. at 22 (citing *Anfinson*). The standards exist to protect workers, not to guide employers on how to avoid liability particularly when they are principally purchasing cheap labor.[22] The Court of Appeals opinion provides sufficient guidance on the issue of MWA "joint liability" such that Supreme Court review is not necessary.

[22] Treating the principal firm as a joint employer "is essential to assuring workers' rights are honored" where a principal relies on a "fly-by-night" or dishonest labor suppliers. *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 409 (7th Cir. 2007). The principal can protect itself by dealing with reputable firms and paying enough to cover proper wage payment. *Id.* Here, Fred Meyer exerted great control over these janitors and their work. Its contracts with Expert provided in ¶ 9.2 that Expert would assure FLSA compliance and further provided in ¶ 6 that Expert would indemnify it for attorney fees and damages. The missing piece is the workers' rights which can only be protected by using the MWA to scrutinize the "economic realities" presented herein.

VI. CONCLUSION

For the foregoing reasons, this Court should deny Fred Meyer's Petition for Review.

RESPECTFULLY SUBMITTED this 15th day of November, 2013

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Attached please find Respondents' Answer To Fred Meyer's Petition For Review, Respondents' Answer to Expert Janitorial, LLC's Petition for Review and Affidavit of Service for filing today in Becerra v. Expert Janitorial, et al., Division I, Cause # 89534-1.

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