68528-7

68528-7

NO. 68528-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Appellants/Plaintiffs,

v.

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

Respondents/Defendants.

BRIEF OF RESPONDENT EXPERT JANITORIAL, LLC

Jeffrey B. Youmans
Melissa K. Mordy
Davis Wright Tremaine LLP
Attorneys for Respondent
Expert Janitorial, LLC

Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

I. INTRODUCTION

Plaintiffs are janitors who worked for two Service Providers that cleaned Fred Meyer stores under a subcontract with Expert Janitorial, LLC ("Expert"). Plaintiffs have settled their wage claims against one of these Service Providers—their actual employers who were responsible for paying them—and are still pursuing their wage claims against the other. Nevertheless, they continue to argue in this appeal that Expert was their employer, too. Their argument is contrary to the law and the undisputed facts.

Plaintiffs concede that Expert did not hire or fire them; did not supervise their work; did not determine how or how much they were paid; and did not maintain their employment records. Indeed, there is no evidence that any of the Plaintiffs ever had any contact whatsoever with anyone at Expert. The other factors considered by the courts do not support Plaintiffs' claim that Expert was their employer, either. Accordingly, the Hon. Marianne Spearman rejected Plaintiffs' "joint employer" claim and granted summary judgment in favor of Expert. Because the trial court correctly applied the legal test for joint employment, this Court should affirm.

II. ISSUE PRESENTED ON APPEAL

Did the trial court properly grant summary judgment in favor of Expert on Plaintiffs' joint employer claim, where the parties agreed on the applicable legal test for determining joint employment and the undisputed facts established that Expert was not a joint employer under the relevant factors?

III. STATEMENT OF THE CASE

A. Factual Background.

1. Expert Janitorial, LLC.

Expert Janitorial, LLC provides outsourced facility maintenance services, including floor care and janitorial services, on a contract basis to retail and grocery store customers. CP 45. Expert is headquartered in Knoxville, Tennessee, but serves customers throughout the U.S. *Id.* To meet the requirements of its customers, Expert typically contracts with independent janitorial companies, called "Service Providers," which provide, manage, and supervise the workers who clean the customers' stores. *Id.* At any given time, Expert has contracts with anywhere from 17 to 23 customers across the country, and has subcontracts with anywhere from 150 to 200 Service Providers to provide services to those customers. *Id.*

2. Expert's Contract With Fred Meyer.

In September 2007, Expert purchased the assets of another management company called Janitorial Maintenance & Supply, LLC ("JMS").[1] CP 46. As a result of that acquisition, Expert assumed a contract that JMS had with Fred Meyer Stores, Inc. ("Fred Meyer") to provide janitorial services to Fred Meyer stores in Western Washington. *Id.*; CP 94-95. Since then, Expert has entered into successive versions of the contract with Fred Meyer that do not materially differ from the contract it assumed from JMS. CP 46. Under the contract, Expert provides janitorial services to about 40 Fred Meyer stores. *Id.*; CP 69.

Fred Meyer stores are open year-round but are closed at night. CP 69. As a result, Expert's contract with Fred Meyer states that the janitorial work must be performed seven nights a week between 10:30 p.m. and 7:00 a.m. *Id.*; CP 50. The contract contains a "Scope of Work" section, which is a list of the specific janitorial services Fred Meyer is paying for and how often each of them is to be performed in the stores (*e.g.*, nightly, weekly, monthly, etc.). CP 58-63. The contract provides that in exchange for these services, Fred Meyer will pay Expert a weekly flat fee per store, which varies from store to store based on the store's size, the type of floor

[1] Plaintiffs named JMS as a defendant in this case, too, but JMS did not file an appearance. As a result, Plaintiffs obtained a default order against JMS. CP 1936.

it has (which affects how easy it is to clean), and other factors. CP 64; *see also* CP 187-89.

3. Expert's Subcontracts With Service Providers.

Expert subcontracts with a number of Service Providers to perform the janitorial and floor care work for Fred Meyer. CP 69. Between 2007 and 2010, Expert had at least nine different Service Providers working in Fred Meyer stores, four to six of which would split the work at any given time. *Id.* All of these Service Providers signed Expert's Independent Service Provider Agreement (the "ISP Agreement"). CP 69, 73-91.

Among other things, the parties to the ISP Agreement acknowledge that the Service Provider is an independent contractor and the sole employer of all persons it uses to perform the work, and that Expert is not a joint or co-employer. CP 75, 83-84. Under the ISP Agreement, Expert pays the Service Provider a flat weekly per store fee for each store that it cleans. CP 74, 82.

4. Expert's Management of the Fred Meyer Contract.

Susan Vermeer is the Regional Vice President for Expert's Western Region, which includes Washington. CP 69. Her responsibilities include managing the contract with Fred Meyer. *Id.* Since 2007, Vermeer has typically had between one and two District Managers who (like her)

are based in Washington, and who report to her and assist her with the Fred Meyer contract. CP 70.

Vermeer and her District Managers visit each Fred Meyer store approximately once every two weeks, and less frequently on an as-needed basis if a problem arises regarding a Service Provider's work. CP 70. Expert's managers usually visit the stores during the daytime, when Fred Meyer's Store Directors are at work. *Id.* During a typical visit, Expert's manager meets with the Fred Meyer Store Director, tours the store, and makes sure that the work performed meets the requirements set out in the contract's Scope of Work. *Id.* Expert's managers rarely visit the stores at night, when the janitorial work is being done, and so have little contact with Service Providers' employees. *Id.*; CP 656-62.

Expert provides Services Providers with a standard Work Order form to have someone from Fred Meyer sign at the end of each night's work to verify that the Services Providers are completing their night's cleaning. CP 70, 92-93. The Service Providers submit these completed forms along with their invoices to Expert's corporate headquarters, which uses them to process payment to the Service Providers. CP 70.

In practice, the Work Orders are used solely to ensure that the work has been completed before Expert releases payment; they are not used for communicating complaints about a Service Provider's

performance or work. CP 70. When Fred Meyer has a complaint about a Service Provider's work, Expert addresses the issue with the Service Provider. CP 70-71. But Expert focuses on the end result, *i.e.,* making sure the Service Provider does the work agreed to in the contract with Fred Meyer; Expert does not tell Service Providers how to run their business or how to supervise their employees. *Id.*; CP 102, 104-05.

5. All Janitorial, LLC.

All Janitorial, LLC ("All Janitorial") is a Service Provider that Expert subcontracted with to provide janitorial services under the contract with Fred Meyer. CP 71. All Janitorial was owned and operated by Sergey Chaban. CP 94. From 2007 to 2010, All Janitorial had a contract with Expert to clean Fred Meyer stores in Washington. CP 71, 73-79, 94-95. Initially, All Janitorial cleaned about seven or eight Fred Meyer stores, but in 2009 and 2010 that number had increased to 19 stores. CP 95, 103-04.

All Janitorial also had contracts with other management companies besides Expert, and cleaned stores for other customers besides Fred Meyer. CP 95. Under its various contracts, the company cleaned a total of 60 stores, about one-third of which were Fred Meyer stores and two-thirds of which were other types of stores under other contracts. *Id.* Only about 50% of All Janitorial's revenue came from its contract with Expert

to clean the Fred Meyer stores. *Id.* By 2008, All Janitorial had total annual income of over $1 million. *Lucio et al. v. Chaban*, U.S. Bankr., W.D. Wash. Adv. No. 11-02134-TWD, Dkt. No. 1 at 5. Its income in 2009 was $2.9 million. *Id.*, Dkt. No. 15 at 3.

All Janitorial hired all of its janitors, including all of those who worked on the contract to clean Fred Meyer stores and all of the Plaintiffs in this case. CP 95, 104. All Janitorial set their pay rates and paid them. *Id.* When All Janitorial decided to give its janitors raises, it did so without any input or direction from Expert. CP 71-72, 159. All Janitorial trained its janitors and assigned them to work in specific Fred Meyer stores. CP 95, 104, 119-20, 139-40, 142, 171. Expert was not involved in any of these things, and did not provide All Janitorial's janitors with any equipment or supplies for cleaning the stores. CP 71-72, 95, 104.

All Janitorial's janitors in the Fred Meyer stores were supervised on a day-to-day basis by Marcos Flores, an area manager for All Janitorial, not by anyone from Expert. CP 95, 103-04, 116-17, 141-42, 156-57, 172. If a janitor had a problem at work or needed new supplies or equipment, he or she would call Flores, not anyone from Expert. CP 95, 104, 118, 141, 157-58. Janitors would also call Flores, not Expert, if they wanted to take a day off and have someone else substitute for them on their shift. CP 123, 161-62.

If Fred Meyer caught a janitor stealing, it would tell Expert it wanted him or her removed from working in its stores, and Expert would communicate this to All Janitorial. CP 71, 95-96, 104-05. But Fred Meyer and Expert never told All Janitorial that it had to fire any janitor; they would simply say that the janitor could no longer work on the Fred Meyer contract. CP 71, 95-96, 104-05. Any termination decision was entirely in the hands of the Service Provider—in fact, if Sergey Chaban thought a Fred Meyer complaint about a janitor was unfair, he would move the janitor to work on another one of All Janitorial's contracts. CP 71, 95-96; *see also* CP 663-64.

All Janitorial maintained all of the personnel and pay records relating to its janitors. CP 96. Occasionally, at the request of Fred Meyer, Expert audited the I-9 forms kept by All Janitorial to ensure that its janitors were legally eligible to work in the U.S. CP 72; *see also* CP 52. But Expert did not request or keep any other records relating to All Janitorial's janitors. CP 72, 96.

All Janitorial (and in particular Flores) would only speak or e-mail with someone from Expert if there was a problem with the service at a particular Fred Meyer store. CP 104-05. Even then, Expert would only identify the problem, tell Flores that All Janitorial was not meeting the terms of the contract, and say it was expected to do so. CP 70-71. No one

at Expert ever told Flores or anyone at All Janitorial how to supervise All Janitorial's janitors. *Id.*; CP 104-05.

All Janitorial classified its janitors as independent contractors, and paid them a set amount (usually $950 or $1000) every two weeks. CP 105; *see, e.g.*, CP 138, 158-60. The company typically had the same one or two janitors work in the same Fred Meyer store seven nights a week. CP 105. All Janitorial stopped doing work under contract with Expert in January 2010, and has not done any work in Fred Meyer stores since then. CP 96.

6. All American Janitorial, LLC.

All American Janitorial, LLC ("All American") was another Service Provider that Expert subcontracted with to provide janitorial services under the contract with Fred Meyer. CP 71. All American was owned by Raul Campos. CP 100. The company began work on a contract with Expert in January 2010 to clean the 19 Fred Meyer stores that had previously been cleaned by All Janitorial. CP 69, 81-90, 101.

All American hired many, but not all, of the same janitors who had been working in Fred Meyer stores for All Janitorial. CP 69. The company also hired Flores as its area manager to supervise its janitors. CP 104. Like All Janitorial, All American hired, fired, and trained its janitors; assigned them to particular Fred Meyer stores; scheduled their work days

and hours; set their pay; and issued their paychecks. CP 102, 104. All American supervised its janitors on a day-to-day basis. CP 102, 104. Expert was not involved in any of these things, and did not provide equipment to All American or its janitors. CP 71-72, 102, 104.

All American maintained all of its janitors' personnel and pay records and, with the exception of I-9 forms, did not provide any records relating to its janitors to Expert. CP 72, 102. As was the case with All Janitorial, Expert's communications with All American focused on the end result of making sure that All American provided the services contracted for; Expert did not tell All American how to run its business or how to supervise its janitors. CP 70-71, 102, 104-05. All American stopped doing work under contract with Expert in late 2011. RP (1/17/12) at 65-66.

7. The Plaintiffs.

Plaintiffs are five individuals who worked for All Janitorial cleaning Fred Meyer stores between 2007 and January 2010. CP 1-2, 1927. They did so for varying lengths of time, some working for All Janitorial for as little as nine weeks, others for as long as 18 months. CP 107, 191-99. Some of them left All Janitorial for long stretches of time, then returned to work for the company many months later. *Id.*; *see also* CP 134-35. One of the Plaintiffs continued doing the same work for All

American for about three months in early 2010. CP 197-98, 1927. Only four of the Plaintiffs— Carolina Becerra Becerra, Julio Cesar Martinez Martinez, Alma Becerra, and Orlando Ventura Reyes—are appealing claims against Expert.[2] Appellants' Br. at 2 n. 1.

All of the Plaintiffs were hired by All Janitorial, not Expert. CP 95, 102, 104, 115, 136-37, 155, 171. Similarly, those Plaintiffs who were fired were fired by All Janitorial or All American, without any involvement by Expert. CP 102, 104, 122, 145-46, 160, 174-75.

Plaintiffs admit that they were paid by All Janitorial and All American, not by Expert, and there is no evidence that Expert played a role in setting their pay. CP 121, 142-43, 158, 173. They admit it was All Janitorial and All American that told them which stores to work at, and which days and hours to report to work. CP 119-20, 142, 171.

Plaintiffs admit that if they had a problem at work or needed new supplies or equipment, they would call Flores, not anyone from Expert. CP 102, 104, 118, 141, 157-58. They would also call Flores, not Expert, if they wanted to take a day off and have someone else cover their shift. CP 123, 161-62.

---

[2] At one point there were a total of eight Plaintiffs in the case. CP 1-2. However, one of them—Moises Santos Gonzalez—never made any claims against Expert. CP 2. And three others—Heriberto Ventura Saturnino, Jose Luis Coronado, and Adelene Mendoza Solorio—dismissed their claims against Expert prior to this appeal. CP 688-90, 1906-07, 1943.

Plaintiffs have testified that they considered All Janitorial and All American—not Expert—to be their employer. CP 127, 148, 164. They admit that no one from Expert ever directed their work or told them what to do. CP 126, 147-48, 163-64, 176-77. In fact, ***Plaintiffs have no evidence that they ever even met or spoke with anyone from Expert.*** CP 124-25, 127, 147-48, 163, 176, 200-06.

B. Procedural History.

1. The Lawsuit.

Plaintiffs filed this lawsuit in March 2010. CP 2119-30. They asserted a variety of claims against their actual employers—All Janitorial, Chaban, All American, and Campos—but primarily alleged that those defendants misclassified them as independent contractors and failed to pay them minimum wage and overtime. CP 3-5, 11.

Plaintiffs also named Expert and Fred Meyer as defendants on the theory that they were Plaintiffs' "joint employers," which Expert and Fred Meyer denied. CP 7, 10. Plaintiffs specifically claimed that (1) Expert was liable to pay them minimum wage, overtime, and double damages under the Washington Minimum Wage Act, RCW 49.46 (the "MWA"), and related Washington wage statutes; (2) Expert was liable to them as third party beneficiaries of Expert's contract with Fred Meyer; and

(3) Expert was liable to them under the theory of unjust enrichment. CP 11, 13-15.

2. The Trial Court's Summary Judgment Rulings.

In April 2011, Expert moved for summary judgment on all three of Plaintiffs' claims. CP 1975-2003. On May 27, 2011, Judge Spearman ruled as a matter of law that Expert was not Plaintiffs' employer. CP 2262-65. The trial court found based on the undisputed facts that:

> Expert was not involved in hiring or firing the plaintiffs, did not supervise their work schedules or conditions of employment, was not involved in determining the plaintiffs' rate of pay and did not maintain their employment records. Plaintiffs admit that nobody from Expert ever told them what to do or how to do their jobs. In fact, the plaintiffs could not even identify any employees who worked for Expert.

CP 2263. The trial court dismissed Plaintiffs' joint employer claim against Expert, as well as the unjust enrichment claim. CP 2263-64.

The trial court denied summary judgment, however, on Plaintiffs' claim that they were third party beneficiaries of the contract between Expert and Fred Meyer, which requires the work under the contract to comply with all applicable laws. CP 2263-64. The trial court subsequently denied Expert's motion for reconsideration on that claim, reiterating that there were disputed issues of material fact. CP 693.

On September 2, 2011, Judge Spearman ruled on summary judgment that Fred Meyer was not Plaintiffs' employer, either, and dismissed Fred Meyer completely from the case. CP 2266-69.

3. The Trial.

In January 2012, Plaintiffs and Expert tried the remaining third party contract beneficiary claim. CP 1923-24, 1943. Following a three-day bench trial, the trial court issued its Findings of Fact and Conclusions of Law on February 22, 2012. *Id.* Judge Spearman held that Expert had not assumed any obligations to Plaintiffs under its contract with Fred Meyer, and that Plaintiffs were not third party beneficiaries. *Id.*

The trial court entered Judgment in favor of Expert on March 9, 2012. CP 1942-44. Plaintiffs timely appealed. Plaintiffs challenge the trial court's dismissal of their joint employer claim against Expert on summary judgment, but not the dismissal of their unjust enrichment and third party contract beneficiary claims. Appellants' Br. at 1-2.

4. Plaintiffs' Claims Against the Service Providers.

A few days before the trial in this case began, Plaintiffs settled their wage claims against All American and Campos, and voluntarily dismissed those defendants from the lawsuit. CP 1906-07.

In September 2011, shortly after discovery in the case closed, Chaban filed for bankruptcy. CP 1674-76, 1936; *see In re Chaban*, U.S.

Bankr., W.D. Wash. No. 11-20593-TWD. Plaintiffs subsequently dismissed All Janitorial from this lawsuit, and their claims against Chaban were stayed pending the outcome of the bankruptcy proceedings. CP 1908-09, 1936.

On December 2, 2011, Plaintiffs continued to pursue their wage claims against Chaban by initiating an adversary proceeding in the bankruptcy court. CP 1936; *see Lucio et al. v. Chaban*, U.S. Bankr., W.D. Wash. Adv. No. 11-02134-TWD, Dkt. No. 1. On June 8, 2012, the bankruptcy court entered a judgment that Plaintiffs' wage claims against Chaban are non-dischargeable; lifted the bankruptcy stay; and ruled that Plaintiffs can continue pursuing their wage claims against him in this lawsuit. *Id.*, Dkt. No. 22. As a result, Plaintiffs' wage claims against Chaban are still pending in the trial court.

Chaban has disclosed that as recently as last year, he had hundreds of thousands of dollars in income from another, non-janitorial business he owns. *In re Chaban*, U.S. Bankr., W.D. Wash. No. 11-20593-TWD, Dkt. No. 1 at 10, 23.

IV. ARGUMENT

The evidence before Judge Spearman established as a matter of law that Expert was not Plaintiffs' joint employer. The parties agreed on the applicable legal test and factors for determining joint employment, and

no material facts were disputed. Plaintiffs' claim on appeal that the trial court applied the wrong test or ignored relevant factors is baseless. The Court should also reject Plaintiffs' invitation to consider irrelevant facts and non-factors that are not part of the joint employer analysis. Because the trial court properly entered summary judgment in favor of Expert, this Court should affirm.

A. Joint Employment Is a Question of Law.

Whether an entity is a joint employer for purposes of the wage and hour laws "is a question of law." *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997); *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). Accordingly, where the material facts are undisputed—as is the case here—the courts do not hesitate to grant summary judgment on this issue. *See, e.g., Moreau v. Air France*, 356 F.3d 942, 953 (9th Cir. 2004) (affirming summary judgment for defendant on joint employer issue); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 692-94 (D. Md. 2010) (granting summary judgment in favor of putative joint employer); *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1161 (C.D. Cal. 2003) (same).

B. The Parties Have Agreed All Along That the FLSA's "Economic Reality" Test Applies.

Neither the MWA nor Washington case law recognizes or discusses the concept of "joint employers." However, the MWA and the federal Fair Labor Standards Act ("FLSA") define "employer" the same way. *Compare* RCW 49.46.010(4) (defining "employer" as "any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee") *with* 29 U.S.C. § 203(d) (defining "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee"). Because the MWA and its definitions are patterned on the FLSA, Washington courts look to interpretations of comparable provisions of the FLSA as persuasive authority. *Anfinson v. FedEx Ground Package System, Inc.*, --- Wn.2d ---, 281 P.3d 289, 298 (2012).

Under the FLSA, courts determine whether a particular entity is a joint employer using the "economic reality" test described in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). In applying this test, courts consider all of those factors which are "relevant to [the] particular situation." *Moreau*, 356 F.3d at 947; *Torres-Lopez*, 111 F.3d at 639. The courts have "focused primarily," however, on four key factors identified in *Bonnette* as hallmarks of an employer-

employee relationship: "whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Moreau*, 356 F.3d at 946-47; *Bonnette*, 704 F.2d at 1470.

The courts have also identified several secondary, "non-regulatory" factors that may also be considered in deciding whether a joint employment relationship exists:

(1) whether the work was a specialty job on the production line;

(2) whether responsibility under the contracts 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 had a business organization that could or did shift as a unit from one worksite to another;

(5) whether the work was piecework and not work that required initiative, judgment or foresight;

(6) whether the employee had an opportunity for profit or loss depending upon the alleged 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.

Moreau, 356 F.3d at 947-48; *Torres-Lopez*, 111 F.3d at 640.

What is remarkable about the parties' briefing on summary judgment is how much they were in agreement that this is the applicable legal standard for joint employment under the MWA. The above three paragraphs are taken almost verbatim from Expert's motion for summary judgment. CP 1989-91. Moreover, Plaintiffs ***agreed*** in their opposition that this "Ninth Circuit test" beginning with *Bonnette* and refined by *Torres-Lopez* and *Moreau* was the test the trial court should apply. CP 2025-26. Plaintiffs then proceeded to argue the four *Bonnette* factors and the eight "non-regulatory" factors from *Torres-Lopez* and *Moreau*—just as Expert had done in its opening brief. CP 2026-33.

Thus, Plaintiffs' suggestion that there was a dispute below regarding what test to apply is simply not true. Plaintiffs embraced the Ninth Circuit test, and did not argue for any other version of the test as formulated by the other federal circuits. *See* CP 2025-33. Having agreed to apply the Ninth Circuit test, Plaintiffs cannot now fault the trial court for doing so. *See Hymas v. UAP Distribution, Inc.,* 167 Wn. App. 136, 148 (Mar. 8, 2012) ("The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal"); *State v. Studd*, 137 Wn.2d 533, 547 (1999) (invited error doctrine prevented

defendants from complaining on appeal about a jury instruction they had requested that the trial court give).[3]

C. The Trial Court Considered All of the Relevant Factors.

Plaintiffs' argument that the courts should not rely exclusively on the *Bonnette* factors is a straw man. Expert never argued that they should. On summary judgment, Expert quoted the Ninth Circuit's statement in *Moreau* that the courts have "focused primarily" on the four factors identified in *Bonnette.* CP 1990 (citing *Moreau,* 356 F.3d at 946-47). But Expert then duly argued the eight non-regulatory factors, too, and conceded that the trial court could consider them. CP 1990-91, 1995-99.

Plaintiffs' claim that the trial court did not consider the non-regulatory factors is unsupported by the record. Their reliance on the trial court's short written summary judgment order—a single paragraph of which is devoted to the joint employer issue—is patently unfair. CP 2262-65. That order does not purport to set forth a detailed rationale for the trial court's ruling, and certainly does not say that only the *Bonnette* factors were considered. CP 2263.

In fact, the trial court gave both sides ample time at oral argument to discuss the non-regulatory factors, too. RP (5/13/11) at 5-12 (Expert's

[3] In any event, there is no material difference among the various descriptions of the FLSA economic reality test by the different federal circuits. All of them boil down to the same factors, though the courts may enumerate them in somewhat different ways. All of them lead to the same legal conclusion that Expert was not a joint employer.

counsel arguing both the *Bonnette* and the non-regulatory factors); *id.* at 40-46 (Plaintiffs' counsel doing the same). Moreover, after issuing its written ruling, the trial court explained at a later hearing that it had simply "focused more" and "rel[ied] more on the *Bonnette* factors than on the *Torres-Lopez* factors"—not that it had relied on the *Bonnette* factors exclusively. RP (9/2/11) at 36-37. Plaintiffs' attempt to caricature the trial court's ruling and analysis fails.

D. Expert Is Not a Joint Employer Under the *Bonnette* Factors.

All four of the *Bonnette* factors decisively show that Expert was not Plaintiffs' joint employer:

First, Expert played no role in the hiring and firing of any of the janitors employed by All Janitorial and All American, including Plaintiffs. It is up to the Service Providers to recruit and hire janitors to do the work under their contracts; Expert is not involved in those staffing decisions. CP 71-72. Thus, it is undisputed that all of the Plaintiffs in this case were hired by Marcos Flores, the supervisor for All Janitorial and All American, and that Expert had no part in those decisions. CP 95, 102, 104, 136-37, 155, 171. Similarly, those Plaintiffs who were fired (as opposed to quitting) admit that they were fired by All Janitorial or All American, not Expert. CP 122, 145-46, 160, 174-75.

Ignoring these facts, Plaintiffs weakly argue that Expert had "indirect" power to fire janitors who were caught stealing in Fred Meyer's stores. Appellants' Br. at 40. This claim is unsupported by the evidence. On those occasions when Fred Meyer has caught a janitor stealing, it has asked Expert that the janitor no longer work in its stores. CP 71, 95-96. Expert has then communicated this request to the Service Provider who employed the janitor in question. CP 71. But Fred Meyer and Expert have never told a Service Provider that it must fire a janitor; they have only said that the janitor may no longer work on the Fred Meyer contract. CP 71, 104-05. The Service Provider is free to move the janitor to work on other contracts it has with other customers. CP 71, 95-96, 650-55, 663-64.

Thus, Sergey Chaban testified without contradiction that he would transfer All Janitorial workers to one of his other contracts—not fire them—if he thought their removal from Fred Meyer stores was unfair. CP 95-96, 670-71. The fact that Expert sometimes passed along Fred Meyer requests to remove particular workers from the contract does not come close to showing it had the power to hire and fire. *See Flores v. Albertson's Inc.,* 2003 WL 24216269 at *3 (C.D. Cal. 2003) (fact that janitorial company attempted to accommodate supermarkets' requests to

remove particular workers "does not give [the supermarkets] the power to hire or fire members of the plaintiff class").

Plaintiffs' claim that Marcos Flores "denied that [janitors] were fired by All Janitorial" is not true. Appellants' Br. at 40. They rely on a single answer in Flores' deposition where he said "it wasn't like we fired them. They stole from the store." CP 218. That answer (which Plaintiffs did not follow up on at the deposition) is at most ambiguous, and certainly does not say that Expert fired anyone. Flores may have been referring to the fact that All Janitorial sometimes decided to transfer janitors to another one of its contracts rather than fire them, just as Chaban testified. Or he could have simply meant that the janitors who stole had essentially "fired themselves" by engaging in misconduct obviously warranting termination. In any event, elsewhere Flores clearly testified—consistent with all of the other evidence—that All Janitorial "hired and fired its janitors"; that "Expert was not involved" in those decisions; and that "no one from Expert … or Fred Meyer ever told [him] that All Janitorial had to fire a janitor[.]" CP 104-05.

Because the undisputed facts show that the decisions to hire and fire janitors were made by the Service Providers, not Expert, the first *Bonnette* factor favors Expert. *See Lepowski v. Telatron Marketing Group, Inc.*, 766 F. Supp. 2d 572, 578 (W.D. Pa. 2011) ("In the absence of

any allegation that [the purported joint employer] had any control over the hiring and firing of [the direct employer's] employees, this factor cuts against joint employership").

Second, Expert did not supervise and control Plaintiffs' work schedules or conditions of employment. Plaintiffs conceded below that ***"Expert Janitorial performed little or no supervisory role for janitors***—they visited the stores about once every two weeks during the day and rarely had any contact with janitors." CP 2077 (emphasis added); *see also* CP 70. In fact, Plaintiffs admit that no one from Expert ***ever*** directed their work or told them what to do. CP 126, 147-48, 163-64, 176-77. They have no evidence that they ever even met or spoke with anyone from Expert. CP 124-25, 127, 147-48, 163, 176, 200-06.

Plaintiffs' sole example of alleged control is testimony by William Suen, a former manager for JMS, that when he would visit stores to make sure the Scope of Work was completed, "I would, you know, see the crew." Appellants' Br. at 40-41. Plaintiffs' claim that this "is direct supervision analogous to the supervision in *Rutherford* and *Torres-Lopez"* is absurd. *Id.* at 41.

In *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 726, 730 (1947), the putative joint employer's president and manager went through the employees' work area "many times a day," was "after [them]

frequently" about their work, and in general "kept close touch on [their] operation." In *Torres-Lopez,* 111 F.3d at 642, the putative joint employer "exercised a substantial degree of supervision over the work performed by the farmworkers" through his "daily presence" in the fields as the work was being done. By contrast, Suen testified that because he was responsible for 20 Fred Meyer stores, he would typically visit a given store only about once a week, and usually did so in the daytime when the janitors were not working or were about to go off shift. CP 656-62. This is consistent with the unanimous testimony from all of the Plaintiffs that no one from Expert ever directed their work or told them what to do.

Plaintiffs' reliance on the Scope of Work in Expert's contract with Fred Meyer is also misplaced. The Scope of Work was a specific list of what janitorial work Fred Meyer was paying for, which Expert in turn made sure its Service Providers met. CP 58-63. There is nothing surprising or improper about a service contract providing guidance on what services are to be performed. Moreover, the courts have uniformly held that a company does not become a joint employer by providing a service provider with detailed instructions and monitoring its compliance with quality standards. *E.g.*, *Jacobson*, 740 F. Supp. 2d at 690 ("Detailed instructions and a strict quality control mechanism will not, on their own, indicate an employment relationship"); *Moreau*, 356 F.3d at 950-51 (fact

that company was "very specific about how it wanted its work performed" and "checked to ensure that its standards were met and that the service provider's overall performance adhered to [its] specifications" did not make the company a joint employer); *Lepowski*, 766 F. Supp. 2d at 579-80 (company that directly trained plaintiffs and monitored their compliance with detailed procedures and protocols was not their joint employer).

Thus, the fact that Expert monitored All Janitorial and All American's compliance with the contract by making sure they cleaned the stores in accordance with Fred Meyer's instructions and quality standards does not make Expert the joint employer of their janitors. *See, e.g.*, *Zhao*, 247 F. Supp. 2d at 1155 (manufacturer that "actively reviewed the work product of [subcontractor's] employees for quality control purposes" was not a joint employer). Because Expert did not supervise and control Plaintiffs' work schedules or conditions of employment, the second *Bonnette* factor favors Expert.

Third, Expert did not determine Plaintiffs' rate and method of payment. Plaintiffs conceded this factor in their summary judgment briefing to the trial court. CP 2028 ("plaintiffs do not contend that Expert determined the rate and method of payment"). On appeal, however, they argue that Expert had a "right to control" Plaintiffs' wages because its

contract with Fred Meyer required the work to comply with all applicable laws, including the FLSA. Appellants' Br. at 19.

But the relevant factor is not whether Expert had some theoretical ability to affect the wages of its subcontractors' employees; it is whether Expert actually "determined the rate and method of payment[.]" *Bonnette*, 704 F.2d at 1470. It is undisputed that Expert did not, and that it was All Janitorial and All American that determined how and how much Plaintiffs were paid. CP 71-72, 102, 104. All of Plaintiffs' paychecks came from All Janitorial and All American, not Expert. CP 121, 142-43, 158, 173. When All Janitorial decided to give some of the Plaintiffs raises, it did so without any input or direction from Expert. CP 71-72, 159. As a result, the third *Bonnette* factor also favors Expert.[4]

Fourth, it is undisputed that Expert did not maintain Plaintiffs' employment records; all such records were kept by All Janitorial and All American. CP 72, 96, 102. Plaintiffs conceded this factor in their briefing to the trial court below, and continue to concede it on appeal. CP 2028 ("plaintiffs do not contend that Expert … maintained employment records"). Thus, the fourth and final *Bonnette* factor favors Expert, too.

[4] Plaintiffs' new argument based on the contract is also an improper attempt to resurrect their third party contract beneficiary claim, which the trial court dismissed after trial. The trial court held that Expert's contract with Fred Meyer did not create any obligations from Expert to Plaintiffs—including any obligation to make sure Plaintiffs were paid according to the wage and hour laws. CP 1928-32. Plaintiffs have not appealed that ruling. Appellants' Br. at 1-2.

Because all four of the key factors identified in *Bonnette* lead clearly and unmistakably to the conclusion that Expert was not Plaintiffs' joint employer, the trial court properly dismissed their joint employer claim against Expert. *See, e.g.*, *Moreau*, 356 F.3d at 950-51, 953 (granting summary judgment in favor of putative joint employer where *Bonnette* factors did not establish joint employment relationship); *Jacobson*, 740 F. Supp. 2d at 692-94 (same).

E. Expert Is Not a Joint Employer Under the Non-Regulatory Factors.

Because all of the *Bonnette* factors decisively show that Expert was not Plaintiffs' joint employer, the Court need not consider any of the non-regulatory factors. *See Jacobson*, 740 F. Supp. 2d at 689 (courts have looked at the various non-regulatory factors where the four *Bonnette* factors have been "inconclusive").[5] In any event, a review of the non-

[5] In all of the cases on which Plaintiffs rely, at least ***some*** of the *Bonnette* factors were met. *See, e.g., Torres-Lopez*, 111 F.3d at 642-43 (holding that grower was joint employer where he "controlled the overall harvest schedule and the number of workers needed," "exercised a substantial degree of supervision over the work performed by the farmworkers" through his "daily presence in the fields," and exercised control over pay rates by increasing the labor contractor's compensation "in order to allow the farmworkers to draw higher wages"); *Rutherford,* 331 U.S. at 726, 730 (holding that slaughterhouse was joint employer where its manager went through employees' work area "many times a day," was "after [them] frequently" about their work, and in general "kept close touch on [their] operation"); *Flores,* 2003 WL 24216269 at *3-*5 (denying summary judgment on joint employer issue where "day-to-day supervision over the janitorial employees came principally from the Supermarket Defendants" and there was evidence they exercised "control over the workers' pay rate").

regulatory factors only serves to confirm that Expert was not a joint employer:

First, Plaintiffs concede that they did not perform "a specialty job on the production line." *Moreau*, 356 F.3d at 947. They performed general cleaning and janitorial work in Fred Meyer stores. Because work on a production line, where a worker performs a single specialized step in a company's overall production process, has traditionally been performed by employees, the courts subject subcontracting of such work to greater scrutiny. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 73 (2d Cir. 2003) ("work on a production line occupies a special status under the FLSA"); *see also Torres-Lopez*, 111 F.3d at 643 (farmworkers' task of picking cucumbers was analogous to a "specialty job on the production line," because "[w]hat they did constituted one small step in the sequence of steps taken by [the putative joint employer] to grow the cucumbers and prepare them for processing at the cannery"). No such scrutiny applies here, where Plaintiffs' work was not specialized and is commonly outsourced. As a result, this factor favors Expert.

Second, when All American took over responsibility for the stores cleaned by All Janitorial, the contract All American signed with Expert was not materially different from the one All Janitorial had been operating under. CP 73-91. However, where "employees work for [the purported

joint employer] only to the extent that their direct employer is hired by that entity, this factor does not in any way support the determination that a joint employer relationship exists." *Zheng*, 355 F.3d at 74. That is the case here. The fact that a Service Provider takes over another Service Provider's stores does not guarantee that the first provider's workers will have a job with the second. CP 72. It is ultimately up to the new provider to decide whether it will staff the stores by hiring the former provider's workers. *Id.*

Thus, when All American signed its contract with Expert, it hired many of the workers who had been working for All Janitorial—but not all of them. CP 101. It is undisputed that All American hired only about 30 of All Janitorial's 40 janitors who had been working in Fred Meyer stores. CP 95, 101, 393-409. In other words, as approximately 10 of All Janitorial's janitors found out, their employment was tied directly to the Service Providers, not to Expert or Fred Meyer. This factor therefore favors Expert. *See Jacobson*, 740 F. Supp. 2d at 693 (where employees wishing to continue working on behalf of the putative joint employer were required to apply with and be hired by the new installation company, this factor weighed against a joint employment relationship).

Third, Plaintiffs concede that they did not perform their work on Expert's premises, and that Expert did not provide them with any of the

equipment they used to clean the stores. CP 95, 102. This factor weighs heavily in Expert's favor. *See Zhao*, 247 F. Supp. 2d at 1159-60 (fact that manufacturer did not provide premises or equipment were "[c]ritical factors" distinguishing case from joint employment situation).

Fourth, Plaintiffs concede that they were part of a business that could shift as a unit from one worksite to another and from one customer to another. It is undisputed that All Janitorial had contracts with other management companies besides Expert, and cleaned stores for other customers besides Fred Meyer. CP 95. In fact, only about one-third of the stores All Janitorial cleaned were Fred Meyer stores, and only about half of its revenues came from its contract with Expert. *Id.* Because All Janitorial was a going concern with a variety of other customers and contracts, this factor favors Expert. *See Lepowski*, 766 F. Supp. 2d at 581-82 (no joint employment relationship existed where "Plaintiffs [were] part of a business that could shift as a unit" from one customer to another); *Jacobson*, 740 F. Supp. 2d at 693 (while the absence of a broad client base is "perfectly consistent with a legitimate subcontracting relationship," this factor is relevant "because a subcontractor that seeks business from a variety of contractors is less likely to be part of a subterfuge arrangement"); *Zhao*, 247 F. Supp. 2d at 1155-56 (manufacturer was not a joint employer, even though it provided subcontractor with a majority of

its business and income, where subcontractor had contracts with other manufacturers).

Fifth, the next factor is "whether the work was piecework ***and*** not work that required initiative, judgment or foresight[.]" *Moreau*, 356 F.3d at 948 (emphasis added). The janitorial work Plaintiffs performed did not require significant initiative or judgment, but it was not piecework. *See* American Heritage Dictionary at 938 (2d College Ed. 1991) (defining "piecework" as "[w]ork paid for according to the number of products turned out"); *Torres-Lopez*, 111 F.3d at 637, 644 (picking cucumbers for pay on a piece-rate basis was "piecework"). In addition, the courts have recognized that the degree of skill and initiative required of workers is more useful for determining whether they are independent contractors as opposed to employees, and does "not bear directly on whether workers who are already employed by a primary employer are also employed by a second employer." *Zheng*, 355 F.3d at 67-68; *see also Layton v. DHL Express (USA) Inc.*, 686 F.3d 1172, 1176 (11th Cir. July 9, 2012) (explaining that degree of skill required is relevant only to distinguish independent contractors from employees, not to determine whether an entity is a joint employer). As a result, this factor is of limited use here, and in any event does not favor either side.

Sixth, while individual Plaintiffs did not have an opportunity for profit or loss, this merely tends to show that they were ***someone's*** employees (as opposed to independent contractors), not that they were ***Expert's*** employees. In other words, this is another factor that is more useful for distinguishing independent contractors from employees, not determining whether workers have joint employers. *See Zheng*, 355 F.3d at 67-68 (workers' opportunity for profit or loss was used primarily to distinguish independent contractors from employees, and did not bear directly on joint employment question); *Layton*, 686 F.3d at 1176 (same). In any event, it is undisputed that Plaintiffs were part of a business—All Janitorial and All American—that did have an opportunity for profit or loss depending on how well it was managed. CP 69, 101-02. As a result, this factor (to the limited extent it is useful here) favors Expert.

Seventh, there was no notable permanence to Plaintiffs' relationships with All Janitorial and All American. The length of time Plaintiffs worked for those two Service Providers varied widely from Plaintiff to Plaintiff, ranging from just nine weeks to 18 months, and some had lengthy gaps when they left and then returned to work many months later. CP 191-99; *see also* CP 134-35. As a result, this factor does not favor either side. *See Moreau*, 356 F.3d at 952 (where the longevity of the working relationship varied from employee to employee, "[t]his factor

does not weigh heavily in either direction"). In addition, the courts have recognized that this factor is more relevant to determining whether someone is an employee or independent contractor, not whether a particular entity is a joint employer. *Layton*, 686 F.3d at 1176 ("permanency and exclusivity of employment" is "irrelevant" to joint employment analysis).

Eighth, Expert concedes that the janitorial work done by Plaintiffs was an integral part of performing its contract with Fred Meyer. The fact that this last factor favors Plaintiffs, however, "does not outweigh the numerous significant factors discussed above, which weigh heavily against finding a joint employer relationship." *Moreau*, 356 F.3d at 952.

Thus, five of the eight non-regulatory factors favor Expert, one favors Plaintiffs, and two are inconclusive. Even Plaintiffs concede that at least three of the non-regulatory factors (the first, third, and fourth) weigh in Expert's favor. *See* Appellants' Br. at 40-46 (arguing factors). In the end, it does not matter in which column the handful of contested factors end up, because considering all of the factors as a whole—including the key *Bonnette* factors—the trial court properly held that the undisputed facts fail to establish a joint employer relationship. *See Moreau*, 356 F.3d at 953 (granting summary judgment in favor of putative joint employer where neither the *Bonnette* factors nor the non-regulatory factors

established a joint employment relationship); *Zhao*, 247 F. Supp. 2d at 1161 (same); *Gonzales v. Sterling Builders, Inc.*, 2010 WL 1875620, at *8 (D. Or. 2010) (summary judgment for defendant where "the majority of regulatory and nonregulatory factors do not support a conclusion" that defendant was joint employer).

F. Plaintiffs' Arguments Based on Non-Factors Should Be Rejected as Irrelevant.

Unable to prevail under the applicable legal test, Plaintiffs devote much of their appeal brief to arguing alleged facts and factors that are not part of the joint employer analysis. The trial court properly rejected these irrelevant arguments.

1. The Court Should Disregard John Ezzo's Declaration.

On appeal, Plaintiffs continue to try to paper over their lack of relevant evidence with a lengthy declaration by their purported "expert," John Ezzo. But they have failed to show that he even qualifies as an expert under ER 702. Ezzo is the CEO of a janitorial company that does business in the Midwest, not in Washington. CP 549-50. He has never testified as an expert before. CP 644, 672-75. He admits that for the past decade, he has "not do[ne] much retail work," and what little he does do tends to be with "smaller chains and stores," not large retail chains like Fred Meyer. CP 549-50, 561-62. His declaration is also rife with

speculation (such as "Expert had to be looking the other way") and hearsay (such as the newspaper and magazine articles he attaches). CP 566-67, 609-25. He makes no showing that other experts in the field reasonably rely on the information and materials he bases his opinions on, as required by ER 703.

More important, Ezzo's testimony simply is not helpful, because it does not "assist the trier of fact to understand the evidence" relevant to this motion. ER 702. ***None of his testimony has anything to do with the joint employment issue or the relevant factors discussed above.*** Thus, he goes on at length about the so-called Building One "business model," but presents no evidence that that company was ever adjudicated to be a joint employer. He also concedes—after considerable build-up in his declaration—that "[i]t is not illegal to use 2nd tier subcontractors or use a business model based on use of 2nd tier subcontractors." CP 562. In other words, a company that uses such a model may or may not be in compliance with the law, depending on the particular facts of the case. The Court does not need an expert to tell it that.

2. Plaintiffs' Claim That Expert Did Not Pay Service Providers Enough Is Baseless and Irrelevant.

Plaintiffs assert that the amounts Expert paid its Service Providers were "insufficient" to allow them to pay Plaintiffs minimum wage and

overtime. Appellants' Br. at 17. Even assuming this were true, it is irrelevant, because there is no law dictating payment amounts for janitorial contracts. The issue also has nothing to do with the joint employment factors. There is nothing in the Ninth Circuit's joint employment test—which Plaintiffs agreed was the standard the trial court should apply—suggesting that it is appropriate for the courts to second-guess contract prices between two business entities, or to inquire into whether the price a subcontractor voluntarily accepts is "enough" (whatever that means) to meet its independent legal obligations.[6]

Cases outside the Ninth Circuit do not support Plaintiffs' position, either. Plaintiffs' reliance on the Seventh Circuit's decision in *Reyes v. Remington*, 495 F.3d 403 (7th Cir. 2007), is misplaced. In that case, Remington (an agricultural company) contracted with Zarate (an individual) to provide agricultural workers for its corn fields. *Id.* at 404. Zarate had no business of his own, no other customers, and no liquid

---

[6] Similarly, Plaintiffs' claim that Expert knew or should have known that All Janitorial was treating its employees as independent contractors is also irrelevant. Knowledge of whether the actual employer is complying with the law is ***not*** one of the joint employment factors considered by the courts. It becomes relevant only ***after*** a court rules that an entity is an employer, to determine whether that employer has "suffered or permitted" an employee to do the work. *See, e.g.*, *Lindow v. U.S.*, 738 F.2d 1057, 1060-61 (9th Cir. 1984) ("an ***employer*** who knows or should have known that an employee is or was working overtime" is obligated to pay overtime) (emphasis added); *Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 775-76 (S.D. Md. 2008) (Regal Cinemas was not a joint employer "even if Regal did know how many hours Plaintiffs worked," because Regal did not meet the joint employment factors).

assets. *Id.* at 405, 408. After Zarate failed to pay the workers what he had promised them, the court held that Remington was a joint employer. *Id.* at 408. It did so based on the factors discussed by the Supreme Court in *Rutherford*—none of which has anything to do with how much the putative joint employer is paying the contractor. *Id.*

The *Reyes* court went on to observe, in dicta, that if an independent contractor is solvent and has a business at risk, it has a greater incentive to comply with the wage and hour laws, and is more likely to make sure that its customers pay it enough to do so. *Reyes,* 495 F.3d at 408-09. But the court did ***not*** find that Remington had in fact paid Zarate too little, or that the amount Remington paid was a factor to be considered in the joint employer test. *Id. Reyes* simply does not get Plaintiffs where they want to go.

The *Castillo* and *Mitchell* cases that Plaintiffs cite are also distinguishable, because both of those cases examined whether a party was an independent contractor versus an employee; neither had anything to do with joint employment. *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir. 1983) ("Since this Court concludes that Tonche was an employee of defendant, we do not examine the possibility of a joint employer status"); *Mitchell v. John R. Cowley & Bro. Inc.*, 292 F.2d 105, 107 (5th Cir. 1961) (issue was whether worker was an employee or an independent contractor;

no issue of joint employment). Nor does *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996), support Plaintiffs. In that case, the court denied an early motion to dismiss based on the allegation in the plaintiffs' complaint that the manufacturer defendants "directly or indirectly employed plaintiffs ... and exercised meaningful control over the work plaintiffs performed," which "alone sufficiently alleges an 'employment' relationship between the 'manufacturer' Defendants and the garment workers." *Id.* at 1468-69. The court did ***not*** deny the motion based on other allegations in the complaint that the manufacturer defendants supposedly paid their contractors too little, or hold that that was a relevant factor for determining joint employment. *See id.*

In any event, even if the amount Expert paid were relevant, Plaintiffs failed to establish that Expert paid All Janitorial too little to comply with the MWA. Their claim that "Mr. Ezzo opined" that Expert's payments to its Service Providers "would not allow the workers to be fairly paid" is false. Appellants' Br. at 46. Ezzo testified only that there was "little or no room" for All Janitorial "to make the contract ***more*** profitable." CP 567 (emphasis added). Saying that subcontracting of janitorial work has low margins is obviously worlds apart from saying it is impossible to make a profit while complying with the law. Similarly, Ezzo concluded that "the payment[s] offered by Expert are ***unlikely*** to

attract 2nd tier subcontractors whose business practice has built into it regular compliance with classification and wage and hour laws"—he did not say that the payments made it impossible to do so. CP 568 (emphasis added). Thus, Plaintiffs could not even get their own expert to endorse their "pay too little" theory.

Plaintiffs also rely on self-serving testimony from Chaban that he would have lost money if he had paid Plaintiffs as employees rather than independent contractors. CP 240-41. That testimony should be disregarded because Plaintiffs obtained it in a deposition that they did not give Expert notice of as required by CR 30(b)(1), so Expert was unable to attend and participate in the questioning. CP 2131-49. In any event, Chaban's claim that he could not afford to comply with the MWA is based on spreadsheet calculations that assumed he would assign just two janitors to each store for seven days a week. CP 96-99. This kind of short staffing guaranteed that all janitors would work at least ***16 hours of overtime every week,*** which would account for a whopping ***38% of the wages*** owed to them each week. *Id.* (calculating that each janitor would receive $342 in regular pay and $205.20 in overtime pay each week). Thus, Chaban's calculations show only that it is difficult to turn a profit without scheduling employees in a way that limits overtime. There is no evidence

that Expert's payments precluded a profit for Service Providers that intelligently managed overtime costs. *See* CP 69, 101-02.

As Plaintiffs themselves have noted, when they worked for All Janitorial the company had annual income approaching $3 million, and was making over $26,000 ***per week*** on its subcontract to clean Fred Meyer stores. *Lucio et al. v. Chaban,* U.S. Bankr., W.D. Wash. Adv. No. 11-02134-TWD, Dkt. No. 8 at 14 ("here the unpaid overtime and minimum wages were accruing while All Janitorial was receiving steady payments of over $26,000 per week from its Fred Meyer accounts and almost $3 million in annual gross income"). The claim that All Janitorial could not afford to pay its janitors properly is baseless.

3. Plaintiffs' Appeals to Sympathy Are Improper.

With both the facts and the law against them, Plaintiffs suggest that the Court should hold Expert liable simply because they may not be able to recover payment from their actual employers. *See* Appellants' Br. at 5, 25. But Plaintiffs have already succeeded in settling their wage claims against All American. CP 1906-07. In addition, the bankruptcy court has ruled that their claims against Chaban are non-dischargeable and can be pursued in the trial court. *Lucio et al. v. Chaban*, U.S. Bankr., W.D. Wash. Adv. No. 11-02134-TWD, Dkt. No. 22. Chaban has disclosed that he has substantial income from another business he owns. *In re Chaban*,

U.S. Bankr., W.D. Wash. No. 11-20593-TWD, Dkt. No. 1 at 10, 23. Thus, there is every reason to believe that Plaintiffs will be able to recover whatever they may be owed from Chaban—their actual employer.

In any event, the purpose of the joint employer doctrine is not to impose liability on non-employers with "deep pockets" when it may be difficult to collect from the actual employer; the legal test for joint employment must be satisfied. As Judge Spearman said in rejecting Plaintiffs' joint employer claim, while she was "sympathetic" to the fact that Plaintiffs might have difficulty recovering from the Service Providers, "I have to find a legal way to get there, and I can't." RP (9/2/11) at 40. Because there is no legal way to get to Expert being Plaintiffs' joint employer, this Court should affirm.

V. CONCLUSION

For all of the foregoing reasons, the Judgment of the trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 31st day of August, 2012.

Davis Wright Tremaine LLP
Attorneys for Defendant Expert
Janitorial, LLC

By _____

Jeffrey B. Youmans, WSBA #26604
Melissa K. Mordy, WSBA #41879
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: jeffreyyoumans@dwt.com
E-mail: missymordy@dwt.com

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date the above and foregoing BRIEF OF RESPONDENT EXPERT JANITORIAL, LLC was filed with the Washington Court of Appeals, Division I, and copies were served via legal messenger on:

Francis L. Van Dusen, Jr.
Ian M. Messerle
Miller Nash LLP
601 Union Street, Suite 4400
Seattle, WA 98101

Attorneys for Respondent
Fred Meyer Stores, Inc.

William Rutzick
Schroeter Goldmark & Bender
810 Third Avenue Suite 500
Seattle, WA 98104

David N. Mark
Law Office of David N. Mark
810 Third Avenue, Suite 500
Seattle, WA 98104

Attorneys for Appellants

DATED this 31st day of August, 2012.

Jeffrey B. Youmans