No. S121552

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

MIGUEL MARTINEZ, et al.,
Plaintiffs and Appellants,

vs.

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

Appeal from the Second Appellate District, Div. Six
Case No. B1611773
Superior Court for San Luis Obispo County No. CV001029

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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REGULATIONS

I. STATEMENT OF ISSUES PRESENTED

The ultimate issue in this case is whether the Legislature in its various Labor Code enactments intended to create an elastic definition of "employer" which would hold any person or entity which directly or indirectly benefits from the work of another individual strictly liable for the wages owed for that work.

Secondary issues are as follows:

1. Must the Plaintiffs' private right of action for unpaid wages under Labor Code section 1194 be decided under the common law definition of employer in the absence of special policy considerations, after this Court's decision in *Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 116 P. 3d 1162 (hereafter *Reynolds*)?

2. Whether the meaning of "suffer and permit to work," included by the Industrial Welfare Commission ("IWC") in the Agricultural Wage Order in 1961 must be determined in light of the same phrase adopted in 1938 in the Fair Labor Standards Act and as interpreted by the federal courts for the last seventy years?

3. Whether the Court of Appeal's application of the broad "economic realities" test of employer status to the facts of this case was appropriate and its conclusion that Combs Distribution Company was not the Plaintiffs' employer correct?

II. INTRODUCTION

Appellants Miguel Martinez, Antonio Perez Cortes, Hilda Martinez, Otilio Cortes, Catarino Cortes and Asuncion Cruz ("Appellants") advance essentially three issues before the Court.

The first issue, although the last identified, is whether Appellants in a private action for unpaid wages under Labor Code sections 1194 and 1194.2 can extrapolate from the IWC Wage Orders a definition of "employer" which so far exceeds the common law definition as to be a form of strict liability. Related to the first issue is Appellants' contention that the IWC, by using the phrase "suffer and permit to work" to protect the health of women and children from dangerous working conditions, intended to create a strict liability standard. In Appellants' words, does the term "employer" include anyone who "benefits" from the work of others. [1]

Appellants' third issue identifies another phrase from the IWC Wage Orders asking whether Respondent Combs Distributing Co. ("COMBS")[2] exercised "control over the wages, hours and working conditions" of Appellants.

Appellants argue that the Legislature by creating the Industrial Welfare Commission ("IWC") to regulate the minimum wage and insure safe working conditions, granted the IWC "Co-equal legislative powers."

[1] Appellants' Opening Brief ("AOB") p. 1.
[2] Respondents Corky N. Combs and Larry D. Combs and Combs Distributing Co. will be collectively referred to as "COMBS" or "CDC."

(AOB p. 34) Appellants contend the IWC used this power to adopt a "suffer and permit to work" definition of employer which Appellants contend requires anyone who benefits directly or indirectly from the labor of others to be liable for the unpaid wages of such individuals. Appellants further argue that the Legislature, in all of its subsequent Labor Code enactments, has impliedly adopted this "strict liability" standard.

Appellants attempt to expand the definition of employer by use of an exhausting exploration of the phrase "suffer and permit to work" as applied to employees. However, Appellants ignore the fact that that term had a generally accepted meaning before the IWC adopted it in 1916, it continued to have that meaning as other states adopted it. Furthermore, this phrase had the same meaning when Congress adopted it in the Fair Labor Standards Act in 1938. (Fair Labor Standards Act ("FLSA") 29 U.S.C. sections 201 *et seq.*)

Congress and other states' legislatures adopted this broad language in order to prevent children and women from working in hazardous occupations. There is no evidence that the California legislature and the IWC in 1916 intended to use this language to define the scope of "employer" liability in private lawsuits.

There simply is no evidence of legislative intent, no case, no attorney general opinion and no administrative regulation or decision that

supports Appellants' strict liability interpretation of the phrase "suffer and permit to work."

This Court decided in *Reynolds v. Bement, supra* that private litigants, like Appellants, seeking to recover wages and penalties under Labor Code sections 1194 and 1194.2 are subject to the common law definition of employer because the Legislature did not clearly and unequivocally set a different standard.[3]

In *Reynolds*, this Court distinguished its decision in *S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 Cal 3d 341 which had applied an "economic realities" test of employment in a workers' compensation case. Like the *Reynolds* case, the instant case is a private civil action for unpaid wages wherein the employees seek to broaden the definition of "employer" beyond the common law definition with no evidence that the Legislature intended to do so.

III. STANDARD OF REVIEW

When reviewing an appeal from a summary judgment, the Court reviews the evidence *de novo*. A summary judgment must be upheld where the moving party has demonstrated that there are no triable issues of

[3] Appellants here filed an amicus brief in *Reynolds* in which Appellants made the same arguments as here: That statutory history of the "suffer and permit" language reveals an intent by the IWC to define employer in a vastly broader way than under the common law. In *Reynolds*, this Court impliedly found that such statutory history cited by Appellants as *amicis* did not warrant the application of employer liability to corporate officers let alone independent contractors.

material fact or where the action has no merit. (Code Civ. Proc. 437c(c))

Two of the three remaining causes of action require Appellants to establish that they are employees of COMBS.[4] Appellants in the first and second causes of action seek to collect the minimum wage set by the IWC under Labor Code section 1182.11 in a private civil action brought under Labor Code section 1194 and liquidated damages under Labor Code section 1194.2 (App. 21-27)

COMBS need only prove that a single essential element in each remaining cause of action is absent to prevail in its motion for summary judgment. (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269) Here, as in the trial court below, COMBS will demonstrate that Appellants' claims for wages cannot be sustained because COMBS was not their employer.

Appellants have abandoned the "economic realities" test under which the lower courts dismissed their claims. (AOB p. 64) Appellants dare not argue that they were employed under the common law definition of employer which requires they show COMBS "controlled" their wages, hours and working conditions. Finally, Appellants' argument that their labor benefited COMBS and therefore COMBS 'suffered and permitted'

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[4] Appellants have abandoned the third, fourth and fifth causes of action. (AOB p. 10 FN 10) Appellants apparently acknowledge the appropriateness of the dismissal of the eighth and ninth causes of action (*Ibid.* FN 9) The sixth cause of action does not apply to COMBS.

them to work would expand the definition of "employer" far beyond any previous legal standard.

IV. STATEMENT OF FACTS

In 2000 Appellants were agricultural employees who worked for Defendant ISIDRO MUNOZ doing business as ISIDRO MUNOZ & SONS (collectively "MUNOZ"). For several years prior to 2000, MUNOZ had grown and harvested strawberries and various other crops in multiple locations in San Luis Obispo County and Santa Barbara County. At the end of 1999 MUNOZ signed a contract with Respondent Larry Combs, doing business as Combs Distribution Co. By this contract, MUNOZ engaged COMBS to sell some of MUNOZ' strawberries.

A. COMBS RESPONDENTS

In 2000 Respondents Larry and Corky Combs, husband and wife, operated a small produce marketing company, Combs Distribution Company. During the harvest season from the late spring through the fall, COMBS employed a field representative, Defendant JUAN RUIZ and a part-time sales person. (App. 342) These were the only employees of COMBS.[5]

Neither the Combs nor CDC has ever owned, leased or controlled

[5] All references are to 2000 unless otherwise noted.

any agricultural land or agricultural equipment. (App. 342; 347-8)[6] Neither the Combs nor CDC has ever grown or harvested agricultural products. (*Ibid.*) COMBS acts as a commission merchant or sales representative for independent farmers. Its sole function is to sell agricultural products owned and produced by its client farmers to various buyers throughout the country. During 2000, COMBS marketed fresh produce for over fifty different growers, including Defendant ISIDRO MUNOZ. (App. 343)

Field representative JUAN RUIZ officially began work for COMBS in June 2000, however, he did check fields for COMBS during the strawberry season which began in March. (App. 343) Mr. Ruiz transmitted information about the amount being harvested and market conditions between COMBS and his growers. (App. 343; 395) RUIZ would tell COMBS the quantity and quality of the product and inform growers if there were quality problems reported by COMBS' customers. (*Ibid.*)

B. DEFENDANT ISIDRO MUNOZ

ISIDRO MUNOZ, doing business as MUNIZ & SONS, was a large strawberry grower growing over 132 acres of strawberries on four separate ranches in Santa Maria and Oceano. (App. 406-411) The approximate cost to grow and harvest strawberries in Santa Maria was between $21,000.00

[6] Appellants' Opening Brief incorrectly alleges that Combs Defendants were "broker/dealers" who owned "fields." (AOB, p. 1)

and $23,000.00 per acre. (App. 367 *et seq.*: U.C. Cooperative Extension "2001 Sample Costs to Produce Strawberries." Hence MUNOZ had over $2.5 million in potential investment in his crops in 2000.

Prior to the 2000 season, MUNOZ engaged COMBS to sell his strawberries on a forty acre ranch known as "El Campo." (MUNOZ had leased this property for several years and continued to farm it in 2001 after the events herein.) In late 1999 COMBS and MUNOZ executed a seven sentence sales agreement. (App. 385) Under this agreement, COMBS loaned MUNOZ $2,000.00 per acre for the exclusive right to sell the fresh market berries from the El Campo Ranch. (App. 346) Under the agreement, COMBS was to "sell, collect for and remit to grower proceeds from the sales in approximately 21 days less 30% for loan deduction."[7] (*Ibid.*)

In 2000 MUNOZ also had strawberry marketing agreements with two other fresh market shippers, APIO, INC. and RAMIREZ BROTHERS. (App. 406; 408-410) He grew and harvested strawberries on four separate fields, including over 90 acres for RAMIREZ and APIO. (App. 405)

Once the fresh market season is over, the berries are harvested for freezer. MUNOZ had a separate contract with FROZSUN, a company that

[7] COMBS did not "unilaterally decide" to reimburse itself for this loan. (AOB, p. 2) Furthermore, there is not a shred of evidence to suggest that COMBS did not remit MUNOZ' all of the sales returns for his strawberries.

purchased his freezer berries. (App. 426)[8] Appellants conceded that 83 percent of their unpaid wages was for work harvesting freezer berries sold by MUNOZ to FROZSUN. (AOB, p. 75)

Pursuant to the COMBS marketing agreement, MUNOZ planted, grew and harvested fresh market berries on the El Campo field and delivered them to a cooling facility designated by COMBS. (App. 342) COMBS sold the fresh market fruit to various customers throughout the country on behalf of MUNOZ. (*Ibid.*) COMBS collected the sales returns and remitted them to MUNOZ after deducting an 8% sales commission, carton costs and repayment of the loan. (*Ibid.*) These sales returns were generally remitted within 21 days of harvest, the period required for the product to reach the customer, invoice those customers and collect sales returns. (App. 342)

MUNOZ and his foremen hired and supervised Appellants and approximately one hundred and seventy Munoz & Sons' employees. (App. 411-412; 461) MUNOZ set his employees' wage rates and paid hourly and piece rate compensation as well as any other benefits. (App. 420) MUNOZ' foremen kept track of the hours worked and the boxes harvested by Appellants and other workers. (App. 420-21)

MUNOZ decided which crops to grow on the El Campo ranch

[8] Under the FROZSUN agreement, MUNOZ sold 3.6 million pounds of fruit to FROZSUN and was paid almost $477,000.00 in the Spring of 2000. (App. 387)

including strawberries and other crops. MUNOZ decided which fields to pick and when to pick them. (App. 413; 416) The shippers did not tell him how much product to harvest. (*Ibid.*)

MUNOZ provided his employees with tools, trucks, tractors and all other equipment needed for the planting, growing, harvesting and hauling of his crops to the cooler. (App. 416-19) MUNOZ employed tractor drivers, truck drivers, foremen, irrigators, weeders and harvesters and paid all of their wages. He also paid all of the expenses of growing and harvesting, including strawberry plants, fumigation, pre-planting work, planting, irrigation, utilities, tractors, trucks and fuel. (App. 416-17; 420; 435) MUNOZ leased the El Campo ranch in his own name: COMBS had nothing to do with the lease. (App. 428)

MUNOZ' supervisors directed the work: they told employees when to start each day, which area to pick, when to take breaks, how to pick and pack the fruit. (App. 434-5)

Most importantly, MUNOZ decided whether to pick his fruit for the fresh market or for the freezer. (App. 343) He decided whether the fruit from the El Campo field was sold by COMBS or bought by FROZSUN.

C. END OF FRESH MARKET HARVESTING AND WORK STOPPAGE

MUNOZ' crews stopped harvesting the fresh market berries on the

El Campo field on May 18, 2000. (App. 342) Thereafter all of the fruit from that field went to FROZSUN.

On May 27, MUNOZ employees were picking freezer berries for FROZSUN. JUAN RUIZ, COMBS' grower representative, went to the El Campo field to deliver a sales return check to MUNOZ. (App. 460) MUNOZ' employees had stopped working and were meeting with JOSE SERRANO, a community worker, about MUNOZ' failure to pay them. App. 440-442) MUNOZ and his foreman ARTURO LEON had asked SERRANO to convince the workers to return to work. (App. 441-442)

RUIZ approached SERRANO and told him that he had brought a check for MUNOZ. (App. 400) (The check was for sales proceeds from previously harvested fruit.) RUIZ told the workers that, if they stopped working, the fruit would go to waste, and MUNOZ would not be able to pay them. (App. 459)

SERRANO and RUIZ convinced some of the employees to return to work. (App. 460) The group of workers agreed to return to work and give MUNOZ until the following Tuesday to pay them. (App. 448-449) RUIZ was in the field for about seven or eight minutes. (App. 447)

MUNOZ received a check from FROZSUN for his freezer strawberries for $149,000.00 on May 27. (App. 350; 387)

D. APPELLANTS MIGUEL MARTINEZ, ANTONIO PEREZ CORTES, ET AL.

Appellants are agricultural workers who were hired by MUNOZ in the Spring of 2000 to grow and harvest his strawberries. (App. 218) Appellants Catarina Cortes, Otilio Cortes and Miguel Martinez claim they were not paid for work harvesting strawberries for MUNOZ in late May and June of 2000. (App. 298; App. 352; App. 358) This work was performed after May 18 when MUNOZ ceased harvesting fresh market berries on the El Campo filed for delivery to COMBS. (App. 342)

V. ARGUMENT I

APPELLANTS' LABOR CODE SECTION 1194 AND 1194.2 CLAIMS MUST FAIL BECAUSE RESPONDENTS DID NOT EMPLOY APPELLANTS UNDER THE COMMON LAW DEFINITION OF EMPLOYER WHICH MUST BE APPLIED WHEN EMPLOYEES SEEK UNPAID WAGES IN A CIVIL ACTION.

In *Reynolds v. Bement* (2005) 36 Cal. 4th 1075, this Court decided that private litigants suing for overtime wages under Labor Code section 1194 cannot rely upon the Industrial Welfare Commission's definition of employment. Defendants in *Reynolds*, corporate officers and directors of the plaintiff's employer, demurred to his claims for overtime against them as individuals. Mr. Reynolds argued that the IWC's broad Wage Order

definition of employer[9] should be grafted onto Labor Code sections 510 and 1194.2 under which he sought overtime pay and penalties respectively. (*Reynolds*, *supra* at 1085-86) This Court held that IWC definitions of employer cannot be grafted onto Labor Code sections 1194 and 510 by implication. (*Reynolds*, *supra* at 1086)

As will be shown below, Appellants here fail to distinguish their situation from *Reynolds* and thus cannot use the broad IWC definition of employer in their private action under section 1194.

A. APPELLANTS' CLAIM FOR UNPAID WAGES IS NOT DISTINGUISHABLE FROM *REYNOLD'S* CLAIM FOR OVERTIME UNDER LABOR CODE SECTION 1194.

Appellants claim they are not rearguing *Reynolds*. (AOB, p. 19) However, they fail to adequately distinguish that case either. The fundamental issue in *Reynolds* was who can be liable as an employer for an employee's overtime wages in a civil action as brought under Labor Code section 1194. The second cause of action in the instant case also seeks wages under Labor Code section 1194. (App. 4; AOB, 16) Overtime premiums are generally considered "wages" under the Labor Code. (See, e.g. Labor Code section 510; 8 CCR section 13656; *Holtville Alfalfa Mills, Inc. v. Wyatt* (9th Cir. 1955) 230 F2d 398, 401)

Thus *Reynolds* cannot be distinguished from the instant case because

[9] "any person who directly or indirectly, or through an agent ... employs or exercises control over the wages, hours or working conditions of any person." (Title 8 Cal.Code Reg. section 11140(F)

Reynolds sought unpaid overtime wages and the Appellants here seek unpaid minimum wages.

1. THE *REYNOLDS* DECISION DOES NOT TURN ON THE DEFENDANTS' STATUS AS CORPORATE OFFICERS.

MARTINEZ Appellants infer that the *Reynolds* decision is a narrow one applying the common law definition of employer only because the defendants were corporate agents. (AOB, p. 6) Appellants ignore the logical progression of the *Reynolds* decision in their effort to limit its application to corporate agents.

In *Reynolds*, the Court first addressed the more fundamental issue of whether the IWC's Wage Order definitions of "employer" could be used in a private right of action under Labor Code section 1194. The Court noted that the plain language of the IWC order does not expressly impose liability on corporate officers. (*Reynolds, supra* at 1169) Wage Order 14, like Wage Order 9 at issue in *Reynolds*, defines employer broadly, if vaguely, as "any person ... who directly or indirectly, or through an agent or any other person ... exercises control over the wages, hours or working conditions of any person ..." (Title 8 Cal. Code Reg. section 11140(F), hereinafter "Order 14")

The Court noted that the plain language of the wage order does not expressly impose liability under section 1194 on individual corporate

agents.[10]

Likewise, the plain language of Order 14 covering agriculture does not expressly impose liability under Labor Code section 1194 on shippers or other independent contractors who sell produce harvested by employees of farmers like ISIDRO MUNOZ.

Having found that neither the statute nor the IWC Order expressly applied to corporate agents, the *Reynolds* court considered the argument (repeated by Appellants herein) that the IWC definition could be *inferred* to be incorporated in section 1194 because the Legislature amended that section after the IWC promulgated its wage orders. (*Reynolds* at 1069, FN7) However, this Court concluded:

> "Nor can we infer that the Legislature, simply by amending sections 510 and 1194 several times after the IWC adopted its employer definition, impliedly intended to incorporate that definition into a unified remedial scheme comprised of those statutes and the regulations." (*Ibid.* at 1069)

Since section 1194 does not include a definition of "employer" which includes independent contractors or persons who "directly or indirectly ... exercise control over the wages, hours, or working conditions..." (CCR Title 8 section 11140, "Order 14"), one cannot *infer* such a definition from subsequent amendments of those sections by the

[10] The *Reynolds* appellants, (including *amici Martinez, et al.*), argued at length that the broad language of the IWC definition should include all who benefit from employees' labor including corporate agents.

Legislature.

B. THE CONCURRENT CREATION OF THE IWC AND A PRIVATE RIGHT OF ACTION FOR WAGES DOES NOT LEAD TO AN INFERENCE THAT THE LEGISLATURE INTENDED TO DEPART FROM THE COMMON LAW DEFINITION OF "EMPLOYER."

Appellants suggest that, despite this Court's finding in *Reynolds*, they have been "invited" by the Court to revisit the legislative history of section 1194 in the context of a broad remedial scheme to protect workers. (AOB, p. 19) Appellants further argue that simultaneous creation of the predecessor to section 1194 and the Industrial Welfare Commission Act indicates an intent to abandon the common law definition of employer.

As will be demonstrated below, there was no such "invitation." The Legislature could not have *intended* a broader definition of employer in this new private right of action (section13) because the IWC, created at the same time, had not yet adopted either the "suffer or permit to work" definition or the "exercises control" definition of employer. Those broader definitions did not exist in California when section 13 of the Minimum Wage Act of 1913 (the predecessor of section 1194) became law. (Minimum Wage Act of 1913, *Stats,* 1913, Ch. 324)

Furthermore, at no point in the subsequent history of this private right of action, did the Legislature expressly or impliedly adopt these broader IWC definitions.

1. APPELLANTS PRESENT NO COMPELLING REASON RO DEPART FROM THE COMMON LAW DEFINITION OF EMPLOYER IN LABOR CODE SECTION 1194.

In the absence of a definition of employer in section 1194, the Courts have applied the common law test of employment. *Reynolds, supra* at 1087, citing *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500. As a general rule, when "employee" is used in a statute without definition, the Legislature intended to adopt the common law definition and to exclude independent contractors. (*People v. Palman* (1995) 40 Cal.App.4th 1559, 1565-6)

Appellants seek to avoid the ruling *Metropolitan Water Dist.* by arguing that applying the common law definition in this case implies a repeal of the IWC orders. (AOB, p. 20) However, this Court in *Reynolds* had no trouble applying the common law definition of employer to corporate agents in a section 1194 action without disturbing the IWC's authority to issue and enforce wage orders:

> "...[W]e are (not) persuaded that our narrow holding that plaintiffs cannot employ the IWC employer definition to state a section 1194 cause of action against individual defendants will have the sweeping effect the DLSE fears." (*Reynolds, supra* at 1170)

The Court went on to conclude that nothing in its ruling would preclude the DLSE from using IWC definitions in administrative actions. (*Ibid.*)

Reynolds clearly does not invalidate any portion of the IWC orders.

2. APPELLANTS' INVOCATION OF THE *BORELLO'S* DECISION TO APPLY THE IWC'S DEFINITION OF EMPLOYER IN PRIVATE ACTIONS UNDER LABOR CODE SECTION 1194 IS MISPLACED AFTER *REYNOLDS*.

Appellants repeatedly invoke this Court's ruling in *S.G. Borello & Sons v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 to link the IWC definition of employer and Section 1194. Appellants argue that the same broad remedial statutory scheme to protect workers found in *Borello* applies here. (AOB, p. 21, 31) This same argument was raised by the plaintiff in *Reynolds*. (*Reynolds, supra* at 1087, FN 8)

First of all, Appellants' claim that the grafting of the Wage Order onto section 1194 is necessary to further the remedial purposes of the wage and hour laws does not avoid the general principle of applying the common law definition of employer where the statute has no express definition. (*Jones v. Gregory* (2006) 40 Cal.Rptr. 3d 581, 585) Even in the over all remedial context of the statute, an administrative regulation extending the scope of liability beyond that established by the Legislature is void where such liability is not authorized by the statute. (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269-70)

Borello addressed whether workers qualified as employees or independent contractors for the purpose of entitlement to workers'

compensation benefits. (*S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341) Nevertheless, this Court noted that *Borello* and the invocation of broad remedial purposes was not useful for a litigant attempting to graft the IWC's definition of employer onto section 1194. (*Reynolds, supra*, at 1087, FN 8)

Borello examined the definition of employer in light of the Workers' Compensation Act. The definition of employee under that Act is far broader than the common law definition. (*Borello, supra*, at 352) It is because the distinction between employees and independent contractors under the common law is substantially different from the line which divides the two in the Workers' Compensation context, that the *Borello* court considered the underlying remedial purpose and history of the Workers' Compensation Act.[11] (*Reynolds, supra* at FN 8)

There is no reason to consider the impact of broad remedial purposes where, as in *Reynolds*, Appellants seek unpaid wages in a private action and not to determine whether Appellants are employees entitled to other protections.

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[11] *Borello* is also distinguishable on a more fundamental level. The 'workers' in that case had a direct relationship with the putative employer Borello. In this case there is no dispute that MUNOZ, not Respondents, hired, set the wages, directed the work and controlled all benefits, hours and working conditions of Appellants. (App. 337, 338)

3. THE LEGISLATIVE HISTORY OF SECTION 1194 DOES NOT SUPPORT USE OF THE IWC DEFINITION OF EMPLOYER.

Appellants argue that since the private right of action (Section 13) was promulgated as part of the 1913 Minimum Wage law creating the IWC, the IWC's subsequent broad definitions of "employer" should apply to private litigants in section 1194 actions. (AOB, 41-48) Appellants' argument can be summarized as follows:

1. The IWC and section 13 were enacted together in the same Act;
2. The Act gave the IWC broad enforcement powers;
3. In 1947, thirty-four years later, the IWC adopted a broad definition of employer.
4. Therefore, the Legislature intended the liability of employers in a private right of action to be determined by the IWC definition.

Appellants' syllogism is unsupported by a single case, or any evidence in the legislative history of section 1194.

One cannot infer from the simultaneous creation of the private right of action under section 13 (Labor Code 1194) of the Act and the delegation of authority to the IWC, that the IWC thereby had the power to redefine the term "employer" in private actions. In fact the converse is true.

Had plaintiffs brought their action under section 13 in 1913, the court would have been *required* to apply the common law definition of employer because the statute did not define the term in any other way. (*Metropolitan Water District v. Superior Court, supra,* 32 Cal. 4th 491)

The result would have been the same between 1913 and 1947 when the IWC adopted its definition of "employer" under its administrative authority. Since 1947 neither the Legislature nor the IWC has suggested that the IWC definition should apply to section 1194.

As this Court has noted, the Legislature by silently amending section 1194 did not manifest such an intent to adopt the IWC definition. *Reynolds, supra* at 1087. Yet Appellants attempt to relitigate this point by arguing that the Legislature's addition of the term "employee" to "woman or minor" in 1972 is evidence for implying that the Legislature was adopting IWC employer definitions. (AOB, p. 46) This 1972 amendment merely served to include men in the class of persons who could bring suit. This fact is evidenced by the amendment in 1973 where the Legislature dropped women and minors in favor of the term "employee." (*Stats.* 1973, Ch. 1007, section 8, pp. 2004) These two amendments neither adopted the IWC definition nor abandoned the original common law definition implicit in the original 1913 enactment of the Act.

C. RESPONDENTS ARE NOT APPELLANTS' EMPLOYERS UNDER THE COMMON LAW DEFINITION OF EMPLOYER.

Various California courts have delineated the elements required to establish an employer-employee relationship where the statute being construed does not contain a specific definition of "employer." In general,

California courts have required that the putative employer have the "right to control" the would-be employee. In addition to this crucial element, courts have identified secondary factors which are indicative of an employment relationship such as the right to discharge, the right to direct the activities of the person, payment of wages, etc. (See, e.g. *Service Employees International Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 770.)

Other "secondary factors" which demonstrate the requisite right of control were identified by the court in *Empire Star Mines, Ltd. v. Cal. Employment Comm.* (1946) 28 Cal.2d 33. These include *inter alia* whether or not the one performing services is in a distinct occupation, whether the alleged employer supplies the instrumentalities, tools and the place of work, whether the work is part of the regular business of the employer, and whether the parties believe they are creating an employer-employee relationship. (*Empire Star Mines, Ltd. v. Cal. Employment Comm., supra*, 28 Cal.2d at 43-44)

1. COMBS DID NOT HAVE THE RIGHT TO CONTROL APPELLANTS.

The most important factor in determining whether persons performing services which benefit another is an employee or independent contractor, is the right to control the manner and means of accomplishing

the desired result. (*Suddeth v. Cal. Employment Stabilization Commission* (1955) 130 Cal.App.2d 304, 311) If the putative employer has 'complete control', whether or not that right is exercised with respect to all details, an employer-employee relationship exists. (*Ibid.* at p. 311-312, cites omitted.)

ISIDRO MUNOZ held and exercised complete control over his employees including Appellants. MUNOZ' foremen hired all of the employees and told them which fields to go to on a daily basis. (App. 411-412) MUNOZ' foremen also acknowledged their personal control over Appellants. (App. 243) MUNOZ' foremen told Appellants what time to start work each day, how to pick the fruit and how to pack the boxes of strawberries. (App. 434-435)

MUNOZ or his foremen decided when each field was ready to be picked. (App. 413) There is no evidence that COMBS Respondents were aware of which areas needed to be harvested, let alone directed the employees to those areas.

MUNOZ leased the El Campo field and the other fields where Appellants worked. (App. 428) COMBS did not own or control any agricultural land. (App. 342) MUNOZ purchased or leased all of the equipment necessary to plant and grow the crop. (App. 417) MUNOZ provided Appellants and his other employees with harvesting carts and gloves to harvest the fruit. (App. 419, 435) Putative employer COMBS did

not supply Appellants with their tools or a place to work. (*Empire Star Mines, Ltd., supra,* 28 Cal.2d at 43-44)

MUNOZ determined what rate to pay Appellants and whether he would pay on an hourly basis or a piece rate. (App. 433) He decided the amount of the piece rate for fresh strawberries and the per pound rate for freezer berries. MUNOZ and his son tabulated the amount of boxes picked and hours Appellants worked and how much they were owed in wages. (App. 420)

MUNOZ decided when to start harvesting and he made the fundamental decision of when to stop harvesting for the fresh market and begin harvesting for freezer. (App. 457-458) Thus MUNOZ decided when CDC would stop selling MUNOZ' fresh market strawberries and that production was shifted to FROZSUN.

On the other hand, COMBS Respondents had neither the right to hire nor the right to terminate Appellants. (App. 344) COMBS did not supply any equipment necessary to plant, cultivate or harvest the crop. (App. 343)[12]

The COMBS Respondents had no right to control what time daily harvest began or ended. (App. 343) They did not tell Appellants what days to pick, when to start or stop picking or when to take meal breaks. (App.

[12] COMBS did supply 'Combs Distribution Co.' cartons for marketing purposes.

344) Only MUNOZ could decide whether the "Mesa" crew would work in the El Campo field or in the Zenon Road field marketed by APIO, INC.

COMBS was in the distinct business of marketing various agricultural products for a large number of growers. Appellants, on the other hand, were engaged in the "business" of harvesting strawberries. These are distinct operations. Harvesting strawberries was not a part of the regular business of COMBS: it did not grow or harvest commodities, it merely marketed such commodities for the farmers who produced them.

Unlike the producer in *Borello*, COMBS did *not* prepare the land, plant the crop, cultivate, spray, and fertilize the crop, or pay all costs of the crop. (*Borello, supra,* 48 Cal.3d at 346) The Appellants' and MUNOZ' work was not merely a single interim step in a long process which was subject to the overall control of COMBS. (*Rutherford Food Corp. v. McComb.*(1947) 331 U.S. 722) In sum, MUNOZ testified without opposition, that the COMBS Respondents had no say whatsoever in his business decisions. (App. 215)

Thus COMBS did not have the control over Appellants sufficient to meet the common law definition of employer.

VI. ARGUMENT II

THE TERM "SUFFER AND PERMIT TO WORK" AS ADOPTED BY OTHER STATES, CONGRESS AND THE IWC DOES NOT EXPAND THE DEFINITION OF "EMPLOYER" TO ANY WORK WHICH BENEFITS ANOTHER.

In their Opening Brief, Appellants embark on an exhaustive (and exhausting) review of the etiology of the phrase "suffer and permit to work" as part of the concept of what it means to be an employer. (AOB p. 23, *et seq.*) Appellants cite a variety of cases from other states in which the language was intended to prevent children from working in hazardous work places, not to insure that those children are paid minimum wages.

Appellants fail to acknowledge that Congress's adoption of the same phrase in the Fair Labor Standards Act ("FLSA") after thirty-two states had already adopted the language, presents a common history and context for interpreting the phrase. The logical implication from this common history, is that federal cases interpreting "suffer and permit to work" under the FLSA are also useful in determining its meaning under state law.

A. APPELLANTS' OUT OF STATE CASES DO NOT SUPPORT A "STRICT LIABILITY" DEFINITION OF EMPLOYER BASED ON THE PHRASE 'SUFFER AND PERMIT TO WORK.'

Appellants state the issue as whether the suffer and permit language "encompass[es] work that the *owner* reasonably knows if being performed for its benefit..." (AOB p. 1) Appellants' out of state cases involve

children injured while working *on* the putative employer's premises.[13]

COMBS neither owned nor controlled the premises where Appellants worked. It is undisputed that MUNOZ leased and controlled the El Campo ranch from which the strawberries sold by COMBS were harvested. (App. 428) Furthermore, COMBS did not own the strawberries which it sold for MUNOZ. (App. 342)

The other common theme of these cases which distinguish them from the present case is that they involve the prevention of physical harm to children, not an attempt to insure the payment of the minimum wage. None of the putative employers in these cases was the subject of a minimum wage claim: They were generally trying to avoid liability for injuries to minors. Appellants cite no cases where the phrase is used so expansively to guarantee the payment of the minimum wage.

The mere presence of the children in these places of employment or near such equipment was forbidden. The employer was liable for injury as a result of the child's performance of work or his or her presence in the

[13] For example: *Smith v. V.F. Felman* (1934) 509 S.W. 2d 229, boy injured mowing defendant's lawn; *Curtis & Gartside Co. v. Pigg* (Okla. 1913) 39 Okla. 31, 134 p. 1125, boy lost hand in defendant's mill; *Daly v. Swift* (Mont. 1931) 300 P. 265, working in Swift's cellar; *Commonwealth v. Hong* (Mass. 1927) 158 N.E. 759, girls singing in defendant's restaurant; *City of New York v. Chelsea Jute Mills* (Mun. Ct. 1904) 88 NYS 1085, girl working in defendant employer's mill; *Vida Lumber Co. v. Courson* (Ala. 1926) 112 So. 737, child killed at defendant employer's lumber mill; *Nichols v. Smith's Bakery* (Ala. 1929) 119 So. 638, boy fell through skylight at top of defendant employer's bakery; *Gorczynski v. Nugent* (Ill. 1948) 83 NE 2d 495, boy kicked by horse at employer's racetrack premises; *Purtell v. Philadelphia & Reading Coal & Iron Co.* (Ill. 1912) 99 N.E. 899, 11 year-old boy hurt acting as water boy in defendant's coal yard.

unlawful environment. (*Nichols v. Smith's Bakery, Inc.* (ALA. 1929) 119 So 638, 640) The dangers arising from these work environment cases led the courts interpreting the protective purposes of 'suffer and permit to work' to be expansive. (See *Gabin v. Skyline Cabana Club,* (N.J. 1969) 54 N.J. 550; 258 A. 2d 6, 10)

Simply stated, the objective of insuring the payment of the minimum wage, while important, pales in comparison to the legislative purpose of protecting children from being maimed or killed in hazardous work places.

B. APPELLANTS OFFER NO EVIDENCE THAT THE "SUFFER AND PERMIT TO WORK" STANDARD ADOPTED BY THE IWC AFFORDS BROADER PROTECTIONS TO EMPLOYEES THAN THE ECONOMIC REALITIES TEST UNDER THE FLSA.

Appellants contend that the IWC's 'suffer and permit' standard must be different form the identical language in the FLSA act because it was not patterned on the federal law. (AOB, 65 *et seq.*) The converse is true: The federal law was ostensibly based on the existing state laws because it contains the same 'suffer and permit' language. Thus federal precedent can be helpful when interpreting the meaning of 'suffer and permit.'

1. CONGRESS WAS AWARE OF THE "SUFFER AND PERMIT" DEFINITION OF EMPLOY WHEN IT ADOPTED THE FLSA.

As Appellants point out, the phrase "suffer and permit to work" was well established in state laws by 1938 when Congress promulgated the Fair

Labor Standards Act. (AOB p. 66-67) However, Appellants have offered no legislative history indicating that Congress meant something different when it inserted this well known phrase into the FLSA. Indeed, a legislative body is deemed to be aware of statutes and interpretations already in existence and to have enacted new legislation in light thereof. (*Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal.App. 4th 23)

The U.S. Supreme Court recognized that the definition of "employ" in the Fair Labor Standards Act had its origin in the earlier child labor statutes of states like California. "The definition of 'employ' is broad. It evidently derives from the child labor statutes..." (*Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722,728) Indeed, the word "employ" under the FLSA has the nearly identical definition of 'employ' under Wage Order 14.[14]

Furthermore, the Supreme Court has previously found that the definitions of employer and employee under the FLSA are extremely broad. (*U.S. v. Rosenwasser* (1945) 323 U.S. 360, 362-3) In that case, the Supreme Court cited legislative history which indicated that Congress had intended the term "employee" to be given the broadest definition that had ever been included in any one act. (*Rosenwasser, supra,* 323 U.S. 360, 363 at FN 3, cites omitted)

[14] Compare '"employ includes to suffer or permit to work.' 29 U.S.C.A. 203(g) with "'employ' means to engage, suffer or permit to work. Wage Order 14.

The *Rutherford* court also noted that at the time of the enactment of the FLSA, the phrase "permitted or suffered" to work was contained in the child labor statutes of thirty-two states and the District of Columbia. (*Rutherford v. McComb, supra*, 331 U.S. at 729, FN 7) So clearly the Court was aware of the parameters of that phrase.

In another case construing the meaning of employer under the FLSA, the Supreme Court noted that the definition of employer extended far beyond the ordinary classification to many persons and working relationships which prior to the FLSA were not deemed to be an employer-employee relationship. (*Walling v. Portland Terminal Co.* (1947) 330 U.S. 148, 150-1) However, that Court recognized that the definition of "employ" as suffer and permit to work was not unlimited as Appellants suggest. "The definition of 'suffer and permit to work' was obviously not intended to stamp all persons who, without any express or implied compensation agreement, might work to their own advantage on the premises of another." (*Walling v. Portland Terminal Co., supra*, 330 U.S. at 152)

In sum, merely because the IWC's adoption of the 'suffer and permit' definition preceded the adoption of that phrase in the FLSA, does not establish a lesser standard of protection for employees. Appellants cannot point to a single California case in the last ninety years which gives

employees seeking wages in a civil action greater protection than the "economic realities" test promulgated by *Rutherford* and applied by the Court of Appeal below.

C. IF THE COURT IS DISPOSED TO INCORPORATE THE IWC SUFFER AND PERMIT LANGUAGE IT SHOULD LOOK TO FEDERAL PRECEDENTS INTERPRETING SIMILAR WAGE PROTECTION STATUTES.

Since *Rutherford*, federal courts have been applying the 'economic realities' test to wage cases arising under the "suffer and permit to work"/"direct and indirect" control language of the FLSA. Some of these cases have arisen under the Migrant and Seasonal Worker Act ("MSPA") 29 U.S.C. section 1801 *et seq.* in the unique contractual and employment situations in agriculture. Respondents contend that the limitless definition of "suffer and permit to work" urged by Appellants should be viewed in the light of these federal precedents if this Court is going to go beyond the common law definition of employment.

MSPA has the same definition of "employ" as the FLSA: "to suffer and permit to work." (29 U.S.C. 1802(5)) Federal courts and the U.S. Department of Labor regulations delineating MSPA, apply a "totality of circumstances," also known as "economic realities," approach to whether a worker is so economically dependent on a grower as to be considered its employee. (See 29 Code Fed. Reg. section 500.20 (h)(5)(iii)) Lacking

California precedent to define this common phrase, federal decisions are worthy of consideration.

In *Charles v. Burton* (1994) 857 F. Supp. 1574, the issue was whether a shipper was the joint employer of farmworkers hired by a grower through a farm labor contractor. The grower, Burton, had an agreement with the shipper, Little Rock, whereby the shipper supplied seeds, boxes and a trailer in return for a promise to market beans through Little Rock. The grower harvested the crop with workers provided by a farm labor contractor. (*Charles v. Burton, supra* at 1576) At one point, the grower asked for and received an advance from the shipper in order to pay labor costs. (*Ibid.*)

Under MSPA, injured workers sued the grower and shipper for their injuries arguing that the grower and shipper were "joint employers" with the farm labor contractor, their actual employer. The court cited seven factors in determining plaintiffs' employment status:

> "(1) The nature and degree of control of the workers;
> (2) The degree of supervision, direct or indirect, of the work;
> (3) The power to determine the pay rates or the methods of payment of the workers;
> (4) The right to hire, fire, or modify the employment conditions of the workers;
> (5) Preparation of payroll and payment of wages;
> (6) Ownership of facilities where work occurred; and
> (7) Whether the employee performs a specialty job integral to the business." (*Charles v. Burton, supra*, 857 F. Supp at 1579)

These same factors have been considered in other similar joint employment cases, e.g. *Aimable v. Long and Scott Farms*, (11th Cir. 1994) 20 F3d 434, 440, cert denied, 513 U.S. 943.

On appeal the Eleventh Circuit in *Burton* noted that both MSPA (or "AWPA") and the FLSA had the same definition of "employ" as suffer and permit to work. (*Charles v. Burton* (11th Cir. 1999) 169 F3d 1322, 1328) The court also added an eighth employment factor, the "duration and permanency of the relationship." (*Charles v. Burton* (11th Cir. 1999) 169 F3d 1322, 1331) An application of these factors to the present case demonstrate that CDC did not have sufficient economic control to be Appellants' employer.

1. NATURE AND DEGREE OF CONTROL.

The *Burton* court identified certain management decisions as evidence of control: who and how many to hire, whom to assign specific tasks, when work should begin and end, whether employees should be disciplined, which fields to harvest or cultivate, etc. (*Charles v. Burton* (11th Cir. 1999) 169 F3d 1322, 1329-30) The trial court had found that a loan by the shipper to the grower and the shipper's provision of boxes, seed and equipment to the grower did *not* make the shipper a joint employer. *Burton, supra*, 857 F. Supp. at 1580. In the present case neither the use of boxes with CDC's label nor the loan to MUNOZ to be collected from the

proceeds demonstrate the type of economic control needed to meet this first factor because MUNOZ made all of the hiring and work decisions.

2. DEGREE OF SUPERVISION OF WORK.

In another grower-farm labor contractor case the court noted that supervisory "control arises when the farmer goes beyond general instructions, such as how many acres to pick in a day, and begins to assign specific tasks, to assign specific workers, or to take an overly active roll in the oversight..." (*Aimable v. Long and Scott Farms* (11th Cir. 1994) 20 F3d 434, 440-1) Appellants assert Juan Ruiz' inspection of the fruit after it had been picked constitutes sufficient "supervision" to constitute economic dependence and a joint employer relationship.

a. Juan Ruiz' Post Harvest Inspection Was Part Of Marketing Function Allowable Under MSPA Regulations.

MSPA regulation 29 Code Fed. Reg. 500.20(h)(5)(iv) discusses control issues with the important caveat that such control determinations must "take into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties..." (29 Code Fed. Reg. 500.20(h)(5)(iv)) COMBS' role in marketing the berries required some coordination and oversight between the sales office and MUNOZ' field. The sales office must know the amount and quality of the fruit being picked. In its role of marketer,

COMBS had to have field man RUIZ visit the field to determine quantity and quality of the produce. It is also incumbent on the sales agent to point out quality problems which may affect its ability to get the best price for the grower's fruit. A sales agent should not have to turn over marketing and produce quality decisions to a grower just to avoid the contentions that such decisions are tantamount to direct or indirect control over the grower's workers.

3. THE POWER TO DETERMINE PAY RATES AND METHODS OF PAYMENT.

Appellants admit that MUNOZ set all of the piece rates and hourly rates for harvesters at the El Campo field. (App. 538) MUNOZ also clearly determined whether he would pay workers by cash or by check. COMBS had no control over the amount or method of pay.

4. THE RIGHT TO HIRE, FIRE OR MODIFY THE EMPLOYMENT CONDITIONS OF WORKERS.

Appellants also admit that MUNOZ and his foreman LEON had the *exclusive* right to hire and fire workers. (App. 539) MUNOZ alone decided which job to assign workers, what time to start work each day, what part of the field to harvest, when to take breaks or lunch and when to stop work each day, how to pick berries and how to pack them. With the exception of the aforementioned "inspections" by RUIZ, Appellants do not dispute that these rights and the exercise of these rights belonged

exclusively to MUNOZ and his supervisors. This factor weighs against a finding that Appellants were economically dependent on COMBS. (*Charles v. Burton, supra*, 857 F. Supp. 1574, 1581) MUNOZ alone modified employment conditions such as the decision to pick fresh or freezer berries.[15] This is further evidence that Appellants were *not* economically dependent on COMBS. (*Charles v. Burton* (11th Cir. 1999) 169 F.3d 1322, 1331)

5. THE PREPARATION OF PAYROLL AND PAYMENT OF WAGES.

Under MSPA this factor has also been broadened to include providing workers compensation insurance, field sanitation facilities, tools and equipment required for the job. (See 29 Code Fed. Reg. 500.20(h)(5)(iv)(G)) Appellants admit that MUNOZ, not COMBS, "prepared the payroll and made all payment of wages." (App. 539) Appellants also admit that on the El Campo ranch MUNOZ purchased all equipment, plants, and harvesting carts. (*Ibid.*) COMBS provided none of these things.

6. OWNERSHIP OF THE FACILITIES WHERE WORK PERFORMED.

This factor is especially probative of joint employment because "without the land, the worker might not have work, and because a business

[15] When picking for the freezer, harvesters seek the ripest fruit and remove the calyx from the berries.

that owns or controls the worksite will likely be able to prevent labor law violations." (*Antenor v. D & S Farms*, 88 F.3d 925, 937) By virtue of his long term leasehold of the El Campo Ranch, it is clear that MUNOZ owned or controlled the facilities where Appellants worked. This factor, in particular, demonstrates that Appellants were not economically dependent on COMBS.

7. WHETHER EMPLOYEES PERFORMED WORK INTEGRAL TO THE OVERALL BUSINESS OPERATION.

It would appear that this factor is present because COMBS cannot make a sales commission if someone does not harvest a product. For example, in *Burton*, the court of appeal did find harvesting integral to the business of the producer Little Rock. (*Burton, supra.*, 169 F3d at 1332-3) However, there are some important distinctions in the instant case.

Little Rock was a produce packing house who contracted with the grower "to subsidize these...crops and to advance money for labor costs. Both (grower and packer) were to *share* in the profits..." (*Burton, supra* at 1325-6, *emphasis added*) The crops went to Little Rock's packing house. (*Ibid.*) In this case COMBS had *no* interest in the crop because COMBS was solely a marketing agent not a producer or a packing house. There was no sharing of profit or loss with MUNOZ. COMBS' advance was only a small portion of the $20,000.00 per acre cost of production. This advance

was *not* earmarked for labor costs. COMBS did not advance for specific items like seeds or a trailer.

8. THE DEGREE OF PERMANENCY AND DURATION OF THE RELATIONSHIP.

Another control factor considered by the federal courts and enumerated in the MSPA regulations is the degree of permanency of the relationship of the parties during the season. (*Burton, supra.*, 169 F.3d at 1331 FN. 12; 29 Code Fed. Reg. 500.20(h)(5)(iv)(C)) Where a contractor and the workers are obligated to work exclusively for the agricultural employer at its discretion, that fact bears directly on the workers' economic dependence. The *Burton* court of appeal found that since the contractor and the workers worked for another farm during the relevant harvest period, this permanency factor was absent, weighing against a finding of economic dependence. (*Ibid.* at 1332)

It is undisputed that some of the Appellants here worked on four different ranches, harvesting product that went to APIO, COMBS, RAMIREZ BROTHERS and FROZSUN. (App. 773, 776) Additionally, the crew that harvested fruit on the El Campo ranch, marketed by COMBS, alternated *during each week* working at the Mesa 2 ranch marketed by APIO. (*Ibid.*) Finally, these workers picked market berries sold by COMBS and freezer berries that went to FROZSUN in the same week on

the El Campo ranch. This lack of permanency of connection with the shipper even within a single workweek proves Appellants were not economically dependent on COMBS.

As a matter of law, Appellants cannot establish their economic dependence on COMBS because only one of the eight factors is present here: RUIZ' minimal inspection of harvested boxes was part of the necessary coordination between marketing agent and shipper. MUNOZ hired, fired and paid the employees, set all of their work conditions, controlled the land where they worked and invested $500,000.00 in these crops.

VII. ARGUMENT III

COMBS DID NOT EXERCISE SUFFICIENT DIRECT OR INDIRECT CONTROL OVER APPELLANTS' WAGE, HOURS OR WORKING CONDITIONS TO ESTABLISH COMBS' LIABILITY IN A SECTION 1194 ACTION.

Appellants argue for an expansive reading of the "exercises control" language in the Wage Order definition of employer. (AOB, 76 *et seq.*) Appellants suggest that if Respondents "indirectly" through an "agent" exercised *any* control over either "wages," "hours," or *any* "working condition," Respondents can be liable for unpaid wages in a suit under Labor Code section 1194.

Appellants' broad reading of this IWC is unsupported by legislative history or case law. Indeed, the legislative history indicates that the

"exercises control" language was not even intended to expand the field of potential defendants in an action for unpaid wages.

A. THE IWC'S "EXERCISES CONTROL" LANGUAGE WAS NOT INTENDED TO EXPAND THE DEFINITION OF "EMPLOYER" FOR LIABILITY PURPOSES BUT TO EXTEND THE DEFINITION OF "HOURS WORKED" FOR COMPENSATION PURPOSES.

Appellants argue that the IWC's definition in Paragraph 2(F) of Wage Order 14 covers Respondents because the definition includes anyone "... who directly or indirectly ... *exercises control* over the wages, hours, or working conditions of any person." (AOB, p. 76, *emphasis added*) Appellants note that the phrase "exercises control" as first used in Wage Order 1 in 1947 represents a change from the previous Wage Order of 1942 which did not contain the "exercises control" language. (See App. 637, ¶ 2(e))

1. THE ADDITION OF "EXERCISES CONTROL" WAS NOT INTENDED TO EXPAND THE DEFINITION OF "EMPLOYER."

Appellants fail to note another significant and related change in the 1947 Wage Orders. In 1947 the IWC redefined "Hours Employed" as "Hours Worked." The 1942 Wage Order defined "Hours Employed" as

> "...all time during which:
> (1.) an employee is required to be on the employer's premises; or to be on duty or to be at a prescribed work place; or
> (2.) an employee is suffered or permitted to work whether or not required to do so. Such

time includes, but shall not be limited to waiting time." (App. 628)

In 1947, Congress passed the Portal-to-Portal Act. (29 U.S.C. section 251, *et seq.*) Under this law, employee time spent traveling, waiting or engaging in certain preliminary activities, need not be compensated because the time was not "hours worked." (29 U.S.C. section 254(a))

In reaction to the Portal-to-Portal Act, the IWC sought to ensure that California employees *would* be compensated for such time as a matter of state policy. Accordingly, in 1947 the IWC modified the definition of the term "hours worked" to clarify that it included "the time during which an employee is subject to the control of an employer." (App. 635) Having modified the "hours worked" provision, the IWC reconciled the definition of "employer" by adding the phrase "exercises control" to that definition in subsection (2)(F). (Compare App. 635 (1947 Order) to App. 628 (1942 Order).)

In *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, this Court recognized that the IWC apparently amended the definition of "hours worked" in reaction to the Portal-to-Portal Act. (*Morillion, supra* at 591) The *Morillion* Court rejected the notion that the IWC had revised the wage orders to correspond to the federal law. (*Ibid.*) The Court ruled that the IWC also added the phrase "the time during which an employee is subject

to the control of an employer" to the 'hours worked' definition. (*Ibid.*) It is only logical that the IWC added this "exercises control" language to its definition of "employer" in order to reconcile that section with its change of the "hours worked" section. Both changes served to distinguish the IWC's California rules from the new federal law.

Thus the addition of "exercises control" to the definition of employer in 1947 was not to expand the field of persons to be designated "employers" for liability purposes. It was merely to ensure that definition was consistent with the new definition of "hours worked" covering periods when employees were "subject to the control of an employer."

B. THE FACTS DO NOT SUPPORT EVEN "INDIRECT" CONTROL OF APPELLANTS BY COMBS.

Purportedly freed from the common law definition of employer with its primary and secondary factors, Appellants seek to assert liability under section 1194 for anyone, including agents, who even *indirectly* 'exercise control' over a single factor of an individual's wages, hours and working conditions. (AOB, 76) Neither the marketing agreement between COMBS and MUNOZ nor JUAN RUIZ' quality control activities establish the requisite control to permit Appellants to bring an action under section 1194 against COMBS.

1. THE MARKETING AGREEMENT DID NOT PLACE COMBS IN "CONTROL" OF APPELLANTS.

Appellants contend that COMBS had control over MUNOZ' activities as a result of the contract under which MUNOZ hired COMBS to sell his fruit. (AOB, 94) They further contend that MUNOZ could not sell the fruit to other dealers at possibly higher prices. (*Ibid.*)

Not only is this conjecture speculative, it is not true. Larry Combs testified without contradiction that it is not uncommon for growers to fire their sales agent during the season and take their produce to another sales agent. (App. 342, ¶ 7)[16]

2. ISIDRO MUNOZ EXCLUSIVELY HELD AND EXERCISED COMPLETE CONTROL OVER APPELLANT'S WAGES, HOURS AND WORKING CONDITIONS.

MUNOZ' own testimony in deposition subject to cross-examination indicates who had control over the wages, hours and working conditions of Appellants and other employees:

> "Q. ... You were the one that set the fresh-market piece rate at $1.35 per box. Is that correct?
> A.(MUNOZ) Yes.
> Q. And you also set the cannery rate, and we've discussed that.
> A. Yes.

[16] Indeed, during discovery Appellants produced a photograph of a truckload of strawberries in non-Combs labeled cartons apparently headed for a different sales agent.

Q. And you also decided what rate to pay the hourly workers.
A. Yes.
Q. And your foreman, from previous testimony, Arturo Leon, Armando Munoz and Sylvestre Alvarado, were they not in the fields every day, most of the day with the workers?
A. Yes.
Q. You also had in these crews surqueros who – you also had in these crews surqueros – and that's, well, s-u-c-e-r-o-s (sic) – who followed behind the workers to make sure they were picking all the fruit?
A. Yes.
Q. And they were there all day?
A. Yes.
Q. And you hired the – and you hired these foreman and surqueros, and you also decided what their wages would be?
A. Yes.
Q. Now, do you recall that [Plaintiff] Antonio Perez Cortes was a surquero on the Santa Maria ranch?
A. Yes.
Q. And the foreman, in general, the foreman's job was to give certain instructions to the workers, for example, what time they should start work?
A. Yes.
Q. When to – which parts of the field to pick?
A. Yes.
Q. When to take a lunch break?
A. Yes.
Q. When to stop picking at the end of the day?
A. Yes.
Q. And they were also there to tell the workers how to pick quality fruit?
A. Yes.
Q. How to pack the boxes?

A. Yes.
Q. Now, your company, you or your company purchased the gloves that the workers used?
A. Yes.
Q. And the carts that they used?
A. Many of them bring their own.
Q. Did you also supply some of the workers with carts?
A. Yes. The ones that did not bring their own, I would give them.
Q. Now, did most of the workers that you hired in 2000 have a general knowledge on how to pick strawberries when they start to work?
A. Many did not know, and many we taught them there.
Q. Okay. So if they did not know, you would train them?
A. Yes. (App. 433-435)

This testimony establishes that MUNOZ and his foremen and other supervisors had complete control over Appellants' wages, i.e., how much they would be paid by piece rate, by the hour, and the rates for different tasks. It proves that MUNOZ controlled their hours of work: when to start, when to stop and when to take a break.

Finally, it established that MUNOZ trained new employees how to do the job, how to pick quality fruit, how to pack the boxes, provided equipment and supplies for his employees.

3. JUAN RUIZ' ROLE AS CONDUIT OF SALES AND QUALITY INFORMATION DOES NOT ESTABLISH INDIRECT CONTROL OVER APPELLANTS.

Appellants contend that JUAN RUIZ' "daily" visits to the field

constitute the requisite control over Appellants. RUIZ acted as a conduit of information between the sales office and the field. To the grower he would relay current daily market conditions and quality issues. These market conditions could, of course, affect the amount of fruit the grower decided to harvest. RUIZ would also inspect the fruit that had been packed and ask the grower or his representatives how much fruit would be available. (App. 395)

Appellants cite no case law to support the contention that JUAN RUIZ' quality control duties gave him sufficient control over their wages, hours and working conditions. (AOB 95) Yet there is case authority that such quality control work does not make the shipper liable for wages or benefits for the employees of a third party. In *Aimable v. Long & Scott Farms* (11th Cir. 1994) 20 F 3d 434, the court decided whether the farmer had sufficient control over the harvesting employees of a farm labor contractor engaged to harvest the farmer's crop. The court noted that true supervisory control "... arises when the [putative employer] goes beyond general instructions, such as how many acres to pick in a day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight ..." (*Aimable v. Long & Scott Farms*, *supra*, 20 F 3d 434, 440-441, cert denied 513 U.S. 943 discussed *supra* at p. 34)

There is no evidence that RUIZ took an "overly active role" in the

work of Appellants or any other of MUNOZ' employees while they were harvesting fruit to be sold by COMBS. He simply inspected the fruit to determine its marketability.

COMBS' role in marketing MUNOZ' fruit required a degree of coordination and oversight between the sales office and the field. The sales office must know the amount and quality of fruit being picked. RUIZ performed this function by visiting the field for a half an hour or an hour to determine the quantity and quality of the strawberries.

On the other hand, the sales office has a legal obligation to notify a grower of quality problems or market conditions which are affecting the shipper's ability to get the best price for the product or which require price adjustments. (See generally Cal. Food & Ag. Code section 56280: Commission Merchant's obligation to Consignors.)

The frangible nature of fresh produce and the speed with which the harvesting and shipping process takes place (often in the same day), requires some minimal degree of oversight by the shipper: one half to one hour a couple of times a week in this case.

Finally, RUIZ was not in the field long enough to exercise any significant control.[17] RUIZ did not have the opportunity to inspect any significant percentage of the total boxes. Appellants testified that their

[17] Appellants contend RUIZ was there "daily." (AOB, p. 94) However, ARTURO LEON, whose testimony Appellants cite on this point stated that RUIZ was in the field "maybe two or three times a week." (App, 956)

crew of sixty or more employees, working an average of eleven hours per day, were each picking as many as one hundred boxes daily. (App. 748) RUIZ could only have inspected a tiny percentage of these boxes and there is no evidence that he ever inspected Appellants' work.

C. THE EFFORTS OF RUIZ TO ENCOURAGE WORKERS TO RETURN TO WORK FOR MUNOZ DOES NOT ESTABLISH COMBS' CONTROL OVER APPELLANTS.

Appellants contend that JUAN RUIZ' delivery of a sales return check to MUNOZ and his words to the striking workers encouraging them to return to work was an "offer of employment" and thus an exercise of control over the employees. (AOB, 95) the undisputed facts prove that no reasonable person could conclude that RUIZ "offered work" to Appellants.

1. APPELLANTS DO NOT BELIEVE RUIZ OFFERED THEM EMPLOYMENT.

Ruiz encouraged the workers to return to work for MUNOZ, not for COMBS. Appellant OTILIO CORTEZ stated "[RUIZ] told us to *keep* working and help MUNOZ." (App. 775) See *identical* testimony from ASUNCION CRUZ (App. 793:20) and FIDEL LOPEZ (App. 811:20).

Even if oral contracts are common in field situations, RUIZ was not offering employment on behalf of COMBS, he was encouraging the employees to "keep" working for MUNOZ.

2. APPELLANTS NEW ARGUMENT THAT RUIZ BEARS INDIVIDUAL LIABILITY AS AN EMPLOYER MUST BE DISREGARDED BECAUSE IT IS A NEW THEORY NOT RAISED IN THE COURTS BELOW.

Theories not raised in the courts below cannot be asserted for the first time on appeal. (*People ex rel. Dept. of Transportation v. Superior Ct.* (2003) 105 Cal.App. 4th 39, 46) Plaintiff-Appellant cannot assert a new theory of liability in the appellate court. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App. 3d 869, 874)

Appellants herein, for the first time, propound the theory that JUAN RUIZ might be individually liable as Appellants' employer. (AOB, p. 96) This new theory of liability should be disregarded, because Appellants have never previously asserted it. For example, the complaint asserts that "...at times material to this action, RUIZ, was an agent and/or employee of COMBS defendants..." (App. 19) Later the complaint alleges "... RUIZ, [was] acting in his capacity as an agent for [COMBS] ..." when he induced MUNOZ' employees to return to work. There is no mention in the complaint or any pleadings below, suggesting that RUIZ was acting as an individual employer with respect to MUNOZ employees. This court should disregard all such arguments.

VIII. CONCLUSION

Appellants are farm workers who were victimized in the spring of

2000 when they were not paid all of their wages for harvesting ISIDRO MUNOZ' strawberries. However, Appellants were not the victims of the shippers who marketed MUNOZ' fruit. They were victimized by ISIDRO MUNOZ, who during the course of the 2000 harvest received hundreds of thousands of dollars for his fruit, yet failed to pay Appellants and other employees for their work.

Appellants argue that the shippers, APIO, COMBS, RAMIREZ BROTHERS and FROZSUN "benefited" from Appellants' labor and therefore are liable for their unpaid wages. It could also be said that the supermarkets, wholesalers and produce brokers who bought the fruit, as well as the store customers who enjoyed these strawberries "benefited" from Appellants' labors.

MUNOZ directly benefited from Appellant's labor. The coolers, shippers, supermarkets and consumers of strawberries indirectly benefited as well. There is no more compelling reason to hold COMBS responsible for Appellant's unpaid wages than to hold supermarkets or consumers liable: all "indirectly" benefited.

On the other hand, MUNOZ owned the crop, took the risk of loss, and was paid hundreds of thousands of dollars for the fruit that Appellants harvested. MUNOZ alone was responsible for hiring, supervising, looking out for Appellants' safety and, ultimately making sure Appellants were paid

their wages.

For all of the above reasons, Respondent COMBS respectfully requests that this Court affirm the decision of the Court of Appeal below.

Dated: April 14, 2006

Respectfully submitted,

NOLAND, HAMERLY, ETIENNE & HOSS
A Professional Corporation

By _____
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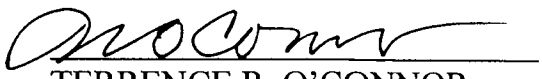
RULE 14(c)(1) CERTIFICATION

I, TERRENCE R. O'CONNOR, certify that I am Defendants/Respondents CORKY N. COMBS, LARRY D. COMBS, COMBS DISTRIBUTION CO. and JUAN RUIZ, JR.'s counsel in the instant matter; that I have prepared the foregoing Respondents' Answer Brief on the Merits in this matter using Microsoft Office Word 2003, and that the word count for this brief, including footnotes is 12,494 as generated by the appropriate word-count command to the Microsoft Office Word program.

Dated: April 14, 2006



TERRENCE R. O'CONNOR

PROOF OF SERVICE
(Code Civ. Proc. §§ 1013(a), 2015.5)

STATE OF CALIFORNIA)
)
COUNTY OF MONTEREY)

I am a citizen of the United States and a resident of Monterey County. I am over the age of 18 years and not a party to the within entitled action; my business address is: 333 Salinas Street, Post Office Box 2510, Salinas, CA 93902-2510.

On the date below, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS**, on the following named person(s) in said action at:

SEE ATTACHED SERVICE LIST

☒ by personal service on the person(s) at the stated address(es) and identified on the attached service list.

☒ by placing said copy(ies) in a sealed envelope(s), postage thereon fully prepaid, and placed for collection and processing for mailing following the business's ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Salinas, California, addressed as stated and identified on the attached service list.

☒ by overnight delivery on the above named party(ies) in said action, by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing, same-day pickup by United Parcel Service at the offices of Stewart Title for overnight delivery, billed to Noland, Hamerly, Etienne & Hoss, and addressed as set forth and identified on the attached service list.

I declare, under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 14, 2006, at Salinas, California.

Barbara A. Creelman

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