UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12-2540 & 12-2541

SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO

Appellants

v.

SLEEPY'S, LLC

Appellee

v.

I STEALTH, LLC, EUSEBIO'S TRUCKING CORP., and CURVA TRUCKING, LLC

Third-party defendants

Appeal from the United States District Court
for the District of New Jersey
No. 3-10-cv-01138
The Honorable Peter G. Sheridan

Argued: April 23, 2013

Before: SLOVITER, JORDAN, and NYGAARD, *Circuit Judges*

Anthony L. Marchetti, Jr. (Argued)
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Attorney for Appellants

Matthew J. Hank (Argued)
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Attorneys for Appellee

Harold L. Lichten (Argued)
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Attorneys for Amicus Party – National Employment Law Project.

PETITION FOR CERTIFICATION OF QUESTION OF LAW

To the Honorable Justices of the New Jersey Supreme Court:

This matter came before the United States Court of Appeals for the Third Circuit on appeal from an order entered by the United States District Court for the District of

New Jersey. Having reviewed the briefs and record of the case, the panel (Sloviter, Nygaard, Jordan, JJ.) has unanimously voted to petition for certification to the New Jersey Supreme Court pursuant to Third Circuit L.A.R. Misc. 110 and the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit 10.9. We believe that this case raises an important issue of New Jersey law that is both determinative and novel. *See* N.J. Ct. R. 2:12A-1 (providing for certification when the answer to a question of state law "may be determinative of an issue in litigation pending in the Third Circuit and there is no controlling appellate decision, constitutional provision, or statute in [New Jersey]"). We respectfully request that the New Jersey Supreme Court accept this certification and thereby afford this court guidance in resolving an important issue under New Jersey law. What test should be applied to determine an individual's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, *et seq.*, and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, *et seq.*?

I. Background

Sleepy's, LLC is a New York-based mattress and bedding retailer with six distribution centers, including one in Robbinsville, New Jersey. Sleepy's contracts with individuals and delivery companies (collectively, "deliverers") to provide delivery services to its customers. Each deliverer enters into a substantially similar contract with Sleepy's, known as an Independent Driver Agreement ("IDA"). The IDAs state that the deliverers are "independent contractors" and that they are "not employees of Sleepy's." App. at 127.

Marco Eusebio, Andre Hall, and Sam Hargrove each entered into IDAs with Sleepy's, either on behalf of business entities they controlled or on behalf of themselves. Eusebio created Eusebio's Trucking Corp. ("ETC") in September 2003 and was listed as its president. ETC entered into two separate IDAs with Sleepy's, one in 2003 and one in 2005. Marco Eusebio also helped create and partially owned Curva Trucking, LLC, which entered into an IDA with Sleepy's in 2008. Andre Hall entered into an IDA with Sleepy's in 2005. Sam Hargrove formed I Stealth, LLC ("Stealth") in 2005 as a trucking firm. In 2008, Stealth entered into an IDA with Sleepy's.

In 2010, Eusebio, Hall, and Hargrove filed a complaint in the United States District Court for the District of New Jersey on behalf of a putative class alleging that Sleepy's misclassified them as independent contractors rather than employees and thus denied them protections and benefits under, *inter alia*, the Employee Retirement and Income Security Act, the Family Medical Leave Act, and the New Jersey Wage Payment Law. Plaintiffs specifically alleged that Sleepy's withheld and diverted money from their wages in violation of the New Jersey Wage Payment Law. Plaintiffs also alleged that they were not paid overtime for their work, a claim that would arise under the New Jersey Wage and Hour Law.

After the parties filed cross-motions for summary judgment, the District Court entered an order granting Sleepy's motion for summary judgment and denying Plaintiffs' motion. Applying the "right to control" test set forth by the United States Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the District Court held that Plaintiffs were independent contractors and not employees and thus concluded

that all of Plaintiffs' claims failed. Plaintiffs appealed, and the National Employment Law Project joined the appeal as amicus counsel on Plaintiffs' behalf.

II. Analysis

Neither the New Jersey Supreme Court nor any other New Jersey appellate court has previously determined which employment test applies to claims that arise under the New Jersey Wage Payment Law or the New Jersey Wage and Hour Law. There are at least four distinct employment tests that have been applied under New Jersey law in other contexts. Plaintiffs argue that New Jersey courts "have specifically rejected the traditional 'right to control' test as the exclusive test for employment status," and that *Darden* should not apply to their claims. Appellants' Br. at 18. Plaintiffs, instead, encourage this court to apply the "hybrid test" set forth in *Pukowski v. Caruso*, 711 A.2d 398 (N.J. Super. Ct. App. Div. 1998), or the ABC test, which has been applied almost exclusively to claims arising under New Jersey's Unemployment Compensation Act. *See* N.J.S.A. § 43:21-19(i)(6).

In arguing that New Jersey courts have rejected the right to control test as the exclusive test for employment status, Plaintiffs rely primarily on two cases: *Lowe v. Zarghami*, 731 A.2d 14 (N.J. 1999), and *D'Annunzio v. Prudential Insurance Co. of America*, 927 A.2d 113 (N.J. 2007). In *Lowe*, the New Jersey Supreme Court applied the relative nature of the work test to a claim arising under the New Jersey Tort Claims Act. 731 A.2d at 22. However, the Court stated that in the usual case, if it "determines that a person is an employee under the control test, then the inquiry ends there." *Id.* at 21.

Only if "the control test is inconclusive" must the court "determine whether it is appropriate to apply the relative nature of the work test." *Id.*

In *D'Annunzio*, the New Jersey Supreme Court concluded that the *Pukowsky* test is the appropriate test to determine employment status under New Jersey's Conscientious Employee Protection Act ("CEPA"), which "protects workers who blow the whistle on their employer's illegal, fraudulent, or otherwise improper activities." 927 A.2d at 114. "[New Jersey] courts have long recognized that, in certain settings, exclusive reliance on a traditional right-to-control test to identify who is an 'employee' does not necessarily result in the identification of all those workers that social legislation seeks to reach." *Id.* at 119.

In this case, the District Court did not explain its application of the *Darden* test, rather than another employment test, to determine Plaintiffs' employment status for purposes of their New Jersey law claims. Amicus counsel suggested, both in their brief and at oral argument, that the question of which employment test applies to Plaintiffs' New Jersey law claims should be certified to the New Jersey Supreme Court. We recognize that the determination of whether individuals are employees or independent contractors for purposes of New Jersey law may well have a significant impact on the tax revenues collected by the State of New Jersey. Given the importance of the legal questions at issue in this case, we now submit this Petition for Certification to the New Jersey Supreme Court.

III. Question for Consideration[1]

In light of the foregoing, we are persuaded that this dispute is most appropriately resolved by seeking the guidance of the New Jersey Supreme Court. Accordingly, the following question of law is certified to the New Jersey Supreme Court for disposition:

Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq.?

This court shall retain jurisdiction of the appeal pending resolution of this certification.

Circuit Judge

/s/ Dolores K. Sloviter

A True Copy:

Marcia M. Waldron

Marcia M. Waldron, Clerk

[1] The panel acknowledges that, pursuant to New Jersey Court Rule 2:12A-4, the New Jersey Supreme Court may reformulate this question.

SUPREME COURT OF NEW JERSEY
R-11 September Term 2012
072742

SAM HARGROVE, ANDRE HALL AND MARCO EUSEBIO, individually and on behalf of all others similarly situated,

PLAINTIFFS-APPELLANTS,

v.

SLEEPY'S, LLC,

DEFENDANT-RESPONDENT,

v.

I STEALTH, LLC, EUSEBIO'S TRUCKING CORP., AND CURVA TRUCKING, LLC,

THIRD-PARTY DEFENDANTS.

ORDER

FILED
JUL 10 2013
CLERK

The United States Court of Appeals for the Third Circuit having certified to the Supreme Court the following question of law pursuant to Rule 2:12A:

Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq.?;

And the Court having determined to accept the question as certified:

It is ORDERED that appellants shall file an original and eight copies and serve a brief addressing the certified question within thirty days after the filing date of this Order, respondent shall file and serve a like number of copies of its brief within twenty-one days after the filing of appellants' brief, and appellants shall file and serve their reply brief, if any, within seven days after the filing of respondent's brief; and it is further

ORDERED that the parties shall file nine copies of a joint appendix containing the portions of the record relevant to the Court's determination of the question presented; and it is further

ORDERED that the Clerk of the Court shall set the matter down for oral argument in due course.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 9th day of July, 2013.

CLERK OF THE SUPREME COURT

R-11-12 072742

General Docket
Third Circuit Court of Appeals

Court of Appeals Docket #: 12-2540 **Docketed:** 06/05/2012
Nature of Suit: 3790 Other Labor Litigation
Sam Hargrove, et al v. Sleepys's, et al
Appeal From: United States District Court for the District of New Jersey
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) Federal question

Originating Court Information:
District: 0312-3 : 3-10-cv-01138
Court Reporter: Frank Gable, Court Reporter
Court Reporter: Michelle Stortini, Court Reporter Supervisor
Trial Judge: Peter G. Sheridan, U.S. District Judge
Date Filed: 03/04/2010

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:
03/29/2012	03/29/2012	05/25/2012

Current Cases:

	Lead	Member	Start	End
Cross-appeal	12-2540	12-2541	06/05/2012	

SAM HARGROVE, individually and on behalf of all others similarly situation Plaintiff - Appellant	Anthony L. Marchetti, Jr., Esq. Direct: 856-414-1800 Email: amarchetti@marchettilawfirm.com Fax: 856-219-4838 [COR NTC Retained] 900 North Kings Highway Cherry Hill, NJ 08034
ANDRE HALL, individually and on behalf of all others similarly situated Plaintiff - Appellant	Anthony L. Marchetti, Jr., Esq. Direct: 856-414-1800 [COR NTC Retained] (see above)
MARCO EUSEBIO, individually and on behalf of all others similarly situated Plaintiff - Appellant	Anthony L. Marchetti, Jr., Esq. Direct: 856-414-1800 [COR NTC Retained] (see above)
v.	
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	[Retained] Greenberg Traurig 2001 Market Street Suite 2700 Two Commerce Square Philadelphia, PA 19103
v.	
I STEALTH Defendant - Appellee	
EUSEBIOS TRUCKING CORP Defendant - Appellee	
CURVA TRUCKING Defendant - Appellee	

NATIONAL EMPLOYMENT LAW PROJECT Not Party - Amicus Appellant	Harold L. Lichten, Esq. Direct: 617-994-5800 Email: hlichten@llrlaw.com Fax: 617-994-5801 [COR NTC Retained] Lichten & Liss-Riordan 100 Cambridge Street 20th Floor Boston, MA 02114 Shannon Liss-Riordan, Esq. Direct: 617-994-5800 Email: sliss@llrlaw.com Fax: 617-994-5801 [COR NTC Retained] Lichten & Liss-Riordan 100 Cambridge Street 20th Floor Boston, MA 02114

SAM HARGROVE; ANDRE HALL; MARCO EUSEBIO, individually and on behalf of all others similarly situated. Appellants
v.
SLEEPYS'S LLC
v.
I STEALTH, LLC; EUSEBIO'S TRUCKING CORP;

CURVA TRUCKING, LLC

06/05/2012	☐	CIVIL CASE DOCKETED. Notice filed by Appellants Marco Eusebio, Andre Hall and Sam Hargrove in District Court No. 3-10-cv-01138. (CJG)
06/05/2012		RECORD available on District Court CM/ECF. (CJG)
06/05/2012	☐	ORDER (Clerk) The orders appealed to not dismiss all claims as to all parties and have not been certified under Fed. R. Civ. P. 54(b). It appears that cross-claims may still be pending in the District Court. All parties must file written responses addressing this issued, with a certificate of service attached, within fourteen (14) days from the date of this order, filed. [12-2540, 12-2541] (CJG)
06/19/2012	☐	ECF FILER: ENTRY OF APPEARANCE from Kimberly J. Gost on behalf of Appellee/Cross-Appellant Sleepy's, LLC. [12-2541, 12-2540]--[Edited 06/20/2012 by CJG] (KJG)
06/19/2012	☐	ECF FILER: ENTRY OF APPEARANCE from Elizabeth Tempio Clement on behalf of Appellee/Cross-Appellant Sleepy's, LLC. [12-2541, 12-2540]--[Edited 06/20/2012 by CJG] (ETC)
06/19/2012	☐	ECF FILER: DISCLOSURE STATEMENT on behalf of behalf of Appellees'/Cross-Appellants Sleepys's in 12-2541, filed. [12-2541, 12-2540]--[Edited 06/20/2012 by CJG] (ETC)
06/19/2012	☐	ECF FILER: Response filed by Appellee/Cross-Appellant Sleepy's's to clerk order entered 06/05/12 advising of possible dismissal. Certificate of Service dated 06/19/2012. [12-2541, 12-2540]--[Edited 06/20/2012 by CJG] (ETC)
06/19/2012	☐	ECF FILER: Response filed by Appellants'/Cross-Appellees' Marco Eusebio, Andre Hall and Sam Hargrove to clerk order entered 06/05/12 advising of possible dismissal. Certificate of Service dated 06/19/2012. [12-2541, 12-2540]--[Edited 06/20/2012 by CJG] (ALM)
06/19/2012	☐	ECF FILER: ENTRY OF APPEARANCE from Anthony L. Marchetti, Jr. on behalf of Appellants'/Cross Appellees' Sam Hargrove, Andre Hall, Marco Eusebio. [12-2540, 12-2541]--[Edited 06/20/2012 by CJG] (ALM)
06/19/2012	☐	ECF FILER: Concise Summary of the Case filed by Appellants Marco Eusebio, Andre Hall and Sam Hargrove in 12-2540, Appellees Marco Eusebio, Andre Hall and Sam Hargrove in 12-2541, received. [12-2540, 12-2541] (ALM)
06/19/2012		ECF FILER: CIVIL INFORMATION STATEMENT on behalf of Appellants Marco Eusebio, Andre Hall and Sam Hargrove, filed. [Corrected document filed. Document has been removed from the entry.]--[Edited 06/20/2012 by CJG] (ALM)
06/19/2012	☐	ECF FILER: CORRECTED CIVIL INFORMATION STATEMENT on behalf of Appellants Marco Eusebio, Andre Hall and Sam

		Hargrove, filed.--[Edited 06/20/2012 by CJG] (ALM)
06/19/2012	☐	ECF FILER: Transcript Purchase Order Form (Part 1) filed by Appellants Marco Eusebio, Andre Hall and Sam Hargrove advising this court that transcripts are needed. Requested date(s) are: 2/16/2012 Oral Argument, to be filed by Francis J. Gable, C.S.R..--[Edited 06/20/2012 by CJG] (ALM)
06/20/2012	☐	ORDER to Court Reporter Mr. Frank Gable directing transcripts, ordered on 06/19/2012, to be filed by 07/23/2012. (CJG)
06/20/2012	☐	ECF FILER: ENTRY OF APPEARANCE from Matthew J. Hank on behalf of Appellee/Cross-Appellant SLEEPY'S LLC. [12-2540, 12-2541] --[Edited 06/20/2012 by CJG] (MJH)
07/10/2012	☐	BRIEFING NOTICE ISSUED. 1st Brief on behalf of Brief on behalf of Appellants/Cross Appellees Marco Eusebio, Andre Hall and Sam Hargrove due on or before 08/20/2012. Appendix due on or before 08/20/2012. [12-2540, 12-2541] (CJG)
08/01/2012		CLERK EVENT transcript by Court Reporter Mr. Frank Gable filed in District Court on 07/27/2012. (CJG)
08/17/2012		Appellants/Cross AppelleesMarco Eusebio, Andre Hall and Sam Hargrove verbally granted an extension of time to file brief & appendix until 09/04/2012, pursuant to Third Cir. LAR 31.4. [12-2540, 12-2541] (SLC)
08/31/2012	☐	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellee Sleepys's in 12-2540, Appellant Sleepys's in 12-2541, filed. Certificate of service dated 08/31/2012 by ECF, 3rd party. [12-2540, 12-2541] (FTC)
09/04/2012		HARD COPY RECEIVED from Appellee Sleepys's in 12-2540, Appellant Sleepys's in 12-2541 - Joint Appendix. Copies: 4, Volumes: 5 [12-2540, 12-2541]--[Edited 10/05/2012 by MS] (MS)
09/04/2012	☐	ECF FILER: ELECTRONIC BRIEF on behalf of Appellants Marco Eusebio, Andre Hall and Sam Hargrove in 12-2540, Appellees Marco Eusebio, Andre Hall and Sam Hargrove in 12-2541, filed. Certificate of Service dated 09/04/2012 by 3rd party, ECF. [12-2540, 12-2541] (ALM)
09/05/2012		HARD COPY RECEIVED from Appellants Marco Eusebio, Andre Hall and Sam Hargrove in 12-2540, Appellees Marco Eusebio, Andre Hall and Sam Hargrove in 12-2541 - Brief. Copies: 10. [12-2540, 12-2541] (SJB)
10/08/2012	☐	ECF FILER: ELECTRONIC BRIEF on behalf of Appellant Sleepys's in 12-2541, Appellee Sleepys's in 12-2540, filed. Certificate of Service dated 10/08/2012 by 3rd party, US mail, ECF. [12-2541, 12-2540] (MJH)
10/09/2012		HARD COPY RECEIVED from Appellant Sleepys's in 12-2541, Appellee Sleepys's in 12-2540 - Brief. Copies: 10. [12-2541, 12-2540]

		(KEL)
11/13/2012	☐	ECF FILER: LETTER MOTION filed by Appellants/Cross-Appellees Sam Hargrove, Andre Hall and Marco Eusebio for an Extension of Time to File Brief until November 19, 2012. Certificate of Service dated 11/13/2012. [12-2540, 12-2541]--[Edited 11/14/2012 by CJG] (ALM)
11/19/2012	☐	ECF FILER: ELECTRONIC THIRD STEP BRIEF on behalf of Appellants/Cross-Appellees Marco Eusebio, Andre Hall and Sam Hargrove in 12-2540 and 12-2541, filed. Certificate of Service dated 11/19/2012 by ECF. [Event modified to "Response Brief", party filers added in 12-2541 and text edited] [12-2540, 12-2541]--[Edited 11/26/2012 by EAF] (ALM)
11/21/2012		HARD COPY RECEIVED from Appellants Marco Eusebio, Andre Hall and Sam Hargrove in 12-2540, Appellees Marco Eusebio, Andre Hall and Sam Hargrove in 12-2541 - 3rd Step Reply Brief. Copies: 10. [Text edited] [12-2540, 12-2541]--[Edited 11/26/2012 by EAF] (RM)
11/26/2012		Verbally granted Appellee Sleepys's in 12-2540 verbally granted a one week extension of time to file fourth step brief until 12/10/2012 pursuant to Third Cir. LAR 31.4. [12-2540, 12-2541] (CJG)
12/10/2012	☐	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellee Sleepys's in 12-2540, Appellant Sleepys's in 12-2541, filed. Certificate of Service dated 12/10/2012 by 3rd party, US mail, ECF. [12-2540, 12-2541] (MJH)
12/11/2012		HARD COPY RECEIVED from Appellee Sleepys's in 12-2540, Appellant Sleepys's in 12-2541 - Reply Brief. Copies: 10. [12-2540, 12-2541] [NONCOMPLIANT]--[Edited 12/18/2012 by EAF] (KEL)
12/18/2012		HARD COPY RECEIVED from Appellee Sleepys's in 12-2540, Appellant Sleepys's in 12-2541 - Amended Reply Brief. Copies: 10 [12-2540, 12-2541] (KEL)
12/19/2012		ECF FILER: LETTER from Elizabeth T. Clement, Esq. for Appellant Sleepys's, Kimberly J. Gost, Esq. for Appellant Sleepys's and Matthew J. Hank, Esq. for Appellant Sleepys's in 12-2541, Elizabeth T. Clement, Esq. for Appellee Sleepys's, Kimberly J. Gost, Esq. for Appellee Sleepys's and Matthew J. Hank, Esq. for Appellee Sleepys's in 12-2540. Counsel is unavailable for the following dates: 04/18/2013, 04/19/2013. [12-2541, 12-2540] (MJH)
01/04/2013	☐	Calendared for Tuesday, 04/23/2013. [12-2540, 12-2541] (TLW)
01/08/2013	☐	ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Matthew J. Hank, Esq. for Appellee Sleepys's in 12-2540, Attorney Matthew J. Hank, Esq. for Appellant Sleepys's in 12-2541. Certificate of Service dated 01/08/2013. [12-2540, 12-2541] (MJH)
02/20/2013	☐	ECF FILER: ENTRY OF APPEARANCE from Shannon Liss-Riordan on behalf of Amicus Curiae National Employment Law Project. [12-

		2540, 12-2541] (SL)
02/20/2013	☐	ECF FILER: DISCLOSURE STATEMENT on behalf of National Employment Labor Project. filed. [12-2540, 12-2541] (SL)
02/20/2013	☐	ECF FILER: Motion filed by National Employment Labor Project to proceed as Amicus Curiae in support of Appellant and to File Late Brief. Certificate of Service dated 02/20/2013. [Text edited to reflect additional relief] [12-2540, 12-2541]--[Edited 02/26/2013 by EAF] (SL)
02/20/2013	☐	ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of National Employment Labor Project in support of Appellant/Petitioner. filed. Certificate of Service dated 02/20/2013 by ECF. [12-2540, 12-2541] (SL)
02/25/2013		HARD COPY RECEIVED from Proposed Amicus-Appellant National Employment Law Project in 12-2540, 12-2541 - Amicus Brief. Copies: 10. [12-2540, 12-2541] (KEL)
02/26/2013	☐	NON COMPLIANCE Order issued to Proposed Amicus-Appellant National Employment Law Project in 12-2540, 12-2541 regarding the amicus brief filed on 02/20/2013. Please open the attachment for the full text of the Order. Compliance due by 03/01/2013. This Order does not change the deadline for filing the next brief. [12-2540, 12-2541] (EAF)
02/26/2013	☐	ECF FILER: ELECTRONIC ADDENDUM to BRIEF on behalf of Proposed Amicus-Appellant National Employment Law Project in 12-2540, 12-2541 , filed. Certificate of Service dated 02/26/2013 by ECF. [12-2540, 12-2541] (SL)
02/26/2013		COMPLIANCE RECEIVED. Addendum to Brief received from Proposed Amicus-Appellant National Employment Law Project in 12-2540, 12-2541. [12-2540, 12-2541] (EAF)
02/27/2013	☐	ECF FILER: Response filed by Appellee Sleepys's in 12-2540. Appellant Sleepys's in 12-2541 in Opposition to Motion to Proceed as Amicus and for Leave to File Late Brief. Certificate of Service dated 02/27/2013. [Text edited] [12-2540, 12-2541]--[Edited 02/28/2013 by EAF] (MJH)
03/01/2013		HARD COPY RECEIVED from Proposed Amicus-Appellant National Employment Law Project in 12-2540, 12-2541 - Addendum to Brief. Copies: 10. [12-2540, 12-2541] (KEL)
03/04/2013	☐	ORDER (SLOVITER, JORDAN and NYGAARD, Circuit Judges) granting the foregoing Motion filed by National Employment Labor Project to proceed as Amicus in support of Appellant and to File Late Brief, filed. Dolores K. Sloviter, Authoring Judge. [12-2540, 12-2541] (EAF)
03/20/2013	☐	ECF FILER: ENTRY OF APPEARANCE from Holly E. Rich on behalf of Appellant(s) Sleepy's, LLC. [12-2540, 12-2541] (HER)

03/27/2013	☐	ECF FILER: Motion filed by Appellee Cross-Appellant Sleepys LLC to File Supplemental Brief in Response to Brief of Amicus Curiae with Brief Attached. Certificate of Service dated 03/27/2013. [12-2540, 12-2541]--[Edited 03/28/2013 by CJG] (HER)
03/28/2013		HARD COPY RECEIVED from Appellee Sleepys LLC in 12-2540, Appellant Sleepys LLC in 12-2541 - Supplemental Brief. Copies: 10. [12-2540, 12-2541] (RM)
03/28/2013	☐	ECF FILER: Motion filed by Amicus Appellant National Employment Law Project For Leave to Participate in Oral Argument. Certificate of Service dated 03/28/2013. [12-2540, 12-2541] - [Edited 04/03/2013 by TLW] (SL)
03/28/2013	☐	ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Anthony L. Marchetti, Jr., Esq. for Appellants Sam Hargrove, Andre Hall and Marco Eusebio in 12-2540, Attorney Anthony L. Marchetti, Jr., Esq. for Appellees Sam Hargrove, Andre Hall and Marco Eusebio in 12-2541. Certificate of Service dated 03/28/2013. [12-2540, 12-2541] (ALM)
04/02/2013	☐	ORDER (SLOVITER, JORDAN and NYGAARD, Circuit Judges) granting Motion by Amicus Appellant National Employment Law Project for Leave to Participate in Oral Argument, filed. Dolores K. Sloviter, Authoring Judge. [12-2540, 12-2541] (TLW)
04/04/2013	☐	ORDER (SLOVITER, JORDAN and NYGAARD, Circuit Judges) the Motion for Leave to File Supplemental Brief in Response to Brief of Amicus filed by Appellee/Cross-Appellant Sleepys LLC is Denied, filed. Sloviter, Authoring Judge. [12-2540, 12-2541] (CJG)
04/10/2013	☐	Oral Argument Notification for Tuesday, 04/23/2013. [12-2540, 12-2541] (TLW)
04/12/2013	☐	ECF FILER: Letter dated 04/12/2013 , filed pursuant to Rule 28(j) from counsel for Appellee/Cross-Appellant Sleepys LLC. This document will be SENT TO THE MERITS PANEL, if/when applicable. [12-2540, 12-2541] (MJH)
04/17/2013	☐	ECF FILER: DIVISION OF TIME FORM filed by Attorney Anthony L. Marchetti, Jr., Esq. for Appellants Sam Hargrove, Andre Hall and Marco Eusebio in 12-2540, Attorney Anthony L. Marchetti, Jr., Esq. for Appellees Sam Hargrove, Andre Hall and Marco Eusebio in 12-2541. Certificate of Service dated 04/17/2013. [12-2540, 12-2541] (ALM)
04/19/2013	☐	ECF FILER: ENTRY OF APPEARANCE from Harold Lichten, Esq. on behalf of Amicus Curiae Amicus, National Employment Law Project. [12-2540, 12-2541] (ALM)
04/19/2013	☐	ECF FILER: ARGUMENT ACKNOWLEDGMENT filed by Attorney Anthony L. Marchetti, Jr., Esq. for Appellants Sam Hargrove, Andre Hall and Marco Eusebio in 12-2540, Attorney Anthony L. Marchetti, Jr., Esq. for Appellees Sam Hargrove, Andre Hall and Marco Eusebio

		in 12-2541. Certificate of Service dated 04/19/2013. [12-2540, 12-2541] (ALM)
04/22/2013	☐	ECF FILER: Response filed by Appellants/Cross-Appellees Marco Eusebio, Andre Hall and Sam Hargrove to Rule 28(j) letter. Certificate of Service dated 04/22/2013. This document will be SENT TO THE MERITS PANEL, if/when applicable. [12-2540, 12-2541]--[Edited 04/23/2013 by CJG] (ALM)
04/23/2013		ARGUED on Tuesday, April 23, 2013. Panel: *SLOVITER, JORDAN and NYGAARD, Circuit Judges. Matthew J. Hank arguing for Appellee/Cross-Appellant Sleepys LLC; Harold L. Lichten arguing for Amicus Appellant National Employment Law Project; Anthony L. Marchetti, Jr. arguing for Appellants/Cross-Appellees Marco Eusebio and Andre Hall. *Participated by Video Conference. [12-2540, 12-2541] (TLW)
04/30/2013	☐	ECF FILER: Letter dated 04/30/2013 , filed pursuant to Rule 28(j) from counsel for Appellant/Cross-Appellee Sleepys LLC. This document will be SENT TO THE MERITS PANEL, if/when applicable. [12-2541, 12-2540]--[Edited 04/30/2013 by CJG] (MJH)
05/03/2013	☐	ECF FILER: Response filed by Appellants/Cross Appellees Marco Eusebio, Andre Hall and Sam Hargrove to Rule 28(j) letter. Certificate of Service dated 05/03/2013. This document will be SENT TO THE MERITS PANEL, if/when applicable. [12-2540, 12-2541]--[Edited 05/06/2013 by TYW] (ALM)
05/22/2013	☐	ORDER (SLOVITER, JORDAN and NYGAARD, Circuit Judges) requesting Certification of State Law to New Jersey Supreme Court pursuant to Third Circuit LAR Misc. 110. Sloviter, Authoring Judge. [12-2540, 12-2541] (CJG)
05/22/2013	☐	CLERK'S LETTER to New Jersey Supreme Court requesting certification of state law. [12-2540, 12-2541] (CJG)

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SUPREME COURT OF NEW JERSEY

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SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO, Plaintiffs-Appellants/Cross-Appellees, v. SLEEPY'S, LLC, Defendant-Appellee/Cross-Appellant v. I STEALTH, EUSEBIO'S TRUCKING CORP., and CURVA, Third-Party Defendants-Appellees.	DOCKET NO. 072-742 CIVIL ACTION ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

BRIEF OF PLAINTIFFS-APPELLANTS

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Dated: August 9, 2013

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I. QUESTION PRESENTED

The question certified by the United States Court of Appeals for the Third Circuit, and accepted and reformulated by this Court, pursuant to New Jersey Court Rule 2:12A is:

> Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq.?

II. PRELIMINARY STATEMENT

As Plaintiffs and amicus argued to the Third Circuit, while it is not crystal clear what test for employment status applies to claims arising under the New Jersey Wage Payment and Wage and Hour Law, it is certain that this Court would not adopt the common law test applied by the federal District Court in this case. Indeed, the decision to certify the question to this Court indicates that the Third Circuit likely understood that the test applied was erroneous.

This case was brought by individuals who (for years at a time) worked exclusively as delivery drivers for Sleepy's, picking up Sleepy's beds at Sleepy's warehouse facilities, and delivering and installing them at customers' premises. Their trucks bore Sleepy's signage, and their uniforms indicated that they were associated with Sleepy's. See Complaint, Hargrove v. Sleepy's, LLC, Civ. A. 3:10-cv-01138-PGS-LHG (Docket No. 1). They brought claims under the New Jersey Wage and Hour Law, N.J.S.A., §§ 34:11-56a-56a38, for failure to pay overtime, and under the New Jersey Wage Payment Law, N.J.S.A. §§ 34:11-4.1-4.14, for improper paycheck deductions for things such as damage and insurance. The District Court granted summary judgment to Sleepy's, concluding that the drivers are not employees under the common law employment relationship test as laid out in

Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992). Hargrove v. Sleepy's LLC, Civil Action No. 10-1138 PGS, 2012 WL 1067729, *5 (D.N.J. Mar. 29, 2012) (attached in Addendum). In Darden, the Supreme Court held that, where a federal statute does not define "employee," the general common law "right-to-control" test should be used. But in doing so, the District Court failed to consider that the New Jersey wage laws both define employment and that this Court has applied a much broader employment relationship test to remedial state statutes.

This Court now has the opportunity to clarify an extremely important employment law issue in this state - what is the proper test for employment status under the New Jersey Wage and Hour Law and the Wage Payment Law. As this Court has recognized, both statutes serve the important public policy function of insuring the fair and prompt payment of wages and overtime to workers within the state of New Jersey.

As set forth herein, a fair reading of recent decisions by this Court, the lower New Jersey courts, and New Jersey federal district courts, reflects that this Court is most likely to adopt the hybrid "relative nature of the work" test which this Court has applied both to the New Jersey Whistleblowers Statute and the New Jersey Tort Claims Act, statutes which serve similar public functions. See Lowe v. Zarghami, 158 N.J. 606 (1999) and D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110

(2007). Indeed, a test at least as broad as this "relative nature of the work" test is compelled by the very broad definition of employee in both the NJWHL and WPL, which define "employee" as anyone who is "suffered or permitted to work." New Jersey courts have recently affirmed that this test, which looks at three primary factors: (1) the right to control, (2) how integral the work is to the operations of the company, and (3) the degree of economic dependence of the individual on the company for his livelihood, meets the need to construe the remedial statutes broadly and to strike a fair balance between alternative tests which lay on the extremes.

As discussed below, Plaintiffs believe that the D'Annunzio "relative nature of the work" test is the one that this Court will adopt in this case. In fact, because the wage laws in question use broader language to define "employee" than CEPA, the test under these statutes should be at least this hybrid test. However, in the interest of fairness, Plaintiffs point out that the New Jersey Department of Labor has applied a much stricter (far more favorable to the Plaintiffs) test drawn from the Unemployment Compensation statute to the Wage and Hour Law. N.J. Admin. Code § 12:56-16.1. Since the Department of Labor's statutory interpretation is entitled to deference, this Court may adopt the ABC test. Finally, this Court could adopt the so-called "economic realities" test utilized under the Fair

Labor Standards Act, based upon the similarity of the language used to define employee between the FLSA and the NJ wage laws. Harris v. Scriptfleet, Inc., Civ. A. 11-4561, 2011 WL 6072020, *1 (D.N.J. Dec. 6, 2011). This test too is much broader in scope than the right to control test. Nevertheless, as demonstrated below, it appears virtually certain that this Court should not adopt the test which will be advocated by Sleepy's - the common law right-to-control test - as it would be contrary to this Court's past decisions to provide broad coverage to workers under remedial state statutes and would ignore the broad language used in the statutes - an employee is one who an employer suffers or permits to work.

III. PROCEDURAL HISTORY

A. NATURE OF THE PROCEEDINGS

This Court granted a petition seeking the certification of a question of law from the United States Court of Appeals for the Third Circuit. Because the nature of the question certified was "what test applies" as opposed to "what is the answer in this case," Plaintiffs do not, in this brief, address the facts beyond the summary provided by the Third Circuit in its decision.

B. PRIOR PROCEEDINGS

On Mach 4, 2010, Plaintiffs filed a complaint in the United States District Court for the District of New Jersey on behalf

The Third Circuit found that "[n]either the New Jersey Supreme Court nor any other New Jersey appellate court has previously determined which employment test applies to claims that arise under the New Jersey Wage Payment Law or the New Jersey Wage and Hour Law." See Petition for Certification of Question of Law at 5 (attached in Addendum). The court went to on state, "[w]e recognize that the determination of whether individuals are employees or independent contractors for purposes of New Jersey law may well have a significant impact on the tax revenues collected by the State of New Jersey." Id. at 6. The panel concluded that, "[g]iven the importance of the legal questions at issue in this case," it should certify the question as to what test applies to this Court. Id. On July 10, 2013, this Court accepted the certified question and called for briefs.

IV. ARGUMENT

A. THE NEW JERSEY WAGE LAWS ARE REMEDIAL STATUTES THAT REQUIRE THE APPLICATION OF AT LEAST THE RELATIVE NATURE OF THE WORK TEST FOR DETEMINING WHETHER INDIVIDUALS ARE EMPLOYEES.

1. New Jersey Courts Apply a Three-Prong Employment Relationship Test Focusing on the Relative Nature of the Work Under Remedial Statutes.

This Court has repeatedly held that courts should apply the hybrid relative nature of the work test when weighing whether an individual was an employee under remedial legislation. In Lowe v. Zarghami, a doctor being sued for malpractice claimed

immunity under the Tort Claims Act ("TCA") as a public employee. 158 N.J. 606, 613-15 (1999). The TCA defined "employee" as "an officer, employee or servant, whether or not compensated or part-time, who is authorized to perform any act or service; provided, however, that the term does not include an independent contractor." N.J.S.A. § 59:1-3.

This Court looked at two different employment relationship tests: the control test and the relative nature of the work test. Lowe, 158 N.J. 615-18. This Court held that "[i]f a working relationship was created by social legislation under which public policy concerns dictate a more liberal standard, then a court may apply the relative nature of the work test rather than the control test."[3] Id. at 618 (citations omitted).[4] Based on the TCA's goal of limiting the liability of public entities and their employees, this Court applied a hybrid employment relationship test, including both the control test

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[3] This Court noted that "if the working relationship involves professional services where an employer cannot exercise control over the methods used to provide those services, the relative nature of the work test may provide a more accurate assessment of the working relationship." Id. (citing Dullen v. F. Montecalvo Contracting Co., 273 N.J. Super. 23, 23-30 (App. Div. 1994)).

[4] This echoes statements made by the Supreme Court. Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (in applying "social legislation," coverage of workers may be broader, extending to "those who as a matter of economic reality are dependent upon the business to which they render service.").

and the relative nature of the work test in finding that Dr. Zarghami was a public employee. Id. at 618-24.

This Court revisited the issue of what employment relationship test to apply under remedial legislation in D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110 (2007). In 2000, George D'Annunzio was hired by an insurance company as a medical director to review and approve treatment plans of doctors treating patients covered by the company. D'Annunzio, 192 N.J. at 115. The agreement between D'Annunzio and the insurance company purported to classify D'Annunzio as an independent contractor. Id. at 116. D'Annunzio objected to insurance violations he believed were being perpetrated by the company and he was terminated soon after. Id. at 117. D'Annunzio filed a complaint alleging a violation of New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. § 34:19-1 to -8.

CEPA prohibits an employer from taking adverse action against an "employee" who exposes fraud or otherwise corrupt activities. N.J.S.A. § 34:19-3. CEPA defines "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. § 34:19-2(b).

In determining what employment relationship test applies under CEPA, this Court noted that "[o]ur courts have long

recognized that, in certain settings, exclusive reliance on a traditional right-to-control test to identify who is an 'employee' does not necessarily result in the identification of all those workers that social legislation seeks to reach." D'Annunzio, 192 N.J. at 119. Indeed, courts must "look to the goals underlying [the applicable statute] and focus not on labels but on the reality of plaintiff's relationship with the [putative employer]." Id. at 119 (quoting Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 239 (2006); citing MacDougall v. Weichert, 144 N.J. 380, 388 (1996) (same applies for Pierce wrongful discharge claim)).

This Court concluded that, when considering who is an employee under "CEPA or other social legislation [t]he considerations that must come into play are three: (1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue."[3] Id. at 120 (emphasis added) (citing Lowe, 158 N.J. at 615-18); see also Stomel v. City of Camden, 192 N.J. 137, 155 (2007) ("traditional right-to-

[3] Prongs 2 and 3 are both derived from the relative nature of the work test. See Lowe, 158 N.J. at 616 ("The relative nature of the work test requires a court to examine the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.") (quotation marks and citation omitted).

control test should not be the exclusive determiner of whether a professional is an employee" under New Jersey whistleblower statute).

Under the hybrid test, workers who "may be an essential aspect of the employer's regular business," even though the employer does not exert day to day control over the worker's specialized services, are considered employees. Id. To gauge "functional integration," a court should consider whether the worker is one of the "cogs" in the employer's enterprise; whether the work is continuous and directly required, as opposed to intermittent; and whether the worker is regularly at the disposal of the employer, as opposed to being available to the public. Id.; see also Stomel, 192 N.J. at 155 (to determine whether a worker is functionally integrated into a putative employer's business, the court should examine "whether the work is continuous and directly required for the employer's operations, as opposed to intermittent and peripheral" and "whether the professional must be routinely or regularly at the disposal of the employer as opposed to being available to the public for professional services on his or her own terms") (citing D'Annunzio, 192 N.J. at 123). "If so, an employer-employee relationship more likely has been established." Id.

Other courts have followed suit. In Hoag v. Brown, the Appellate Division highlighted the need to look beyond labels

when addressing whether an individual is an employee under New Jersey's Law Against Discrimination ("LAD").[4] 397 N.J. Super. 34, 47-53 (App. Div. 2007) ("To determine whether plaintiff should be considered an employee of the State under the LAD, we are guided in our analysis by the LAD's purpose."). Based on the LAD's remedial purpose, the Appellate Division focused on the three-prong hybrid test laid out in D'Annunzio.[5] Id. at 48. Furthermore, other states have adopted the relative nature of the work test under their wage payment laws. See, e.g., Scovil

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[4] See also Bouder v. Prudential Financial, Inc., Slip Op., Civil Action No. 2:06-04359, 2013 WL 246848, *4 (Cavanaugh, J.) (D.N.J. Jan. 18, 2013) ("more needs to be considered under New Jersey wage law than an employers perceived "right to control"); Scafuri v. Sisley Cosmetics USA, Inc., A-3871-08T3, 2009 WL 4251861 (N.J. Super. Ct. App. Div. Nov. 25, 2009) (this Court refined the Pukowsky test in D'Annunzio to "emphasize[] the need to look beyond labels to the substance of the relationship between the individual and the organization").

[5] The Pukowsky test included 12 factors. Pukowsky v. Caruso, 312 N.J.Super. 171, 182-83 (App.Div. 1998) (quoting Franz v. Raymond Eisenhardt & Sons, Inc., 732 F. Supp. 521, 528 (D.N.J. 1990)). In D'Annunzio, however, this Court refined the Pukowsky test to emphasize the three factors identified above. See Hoag, 397 N.J. Super. at 48; Scafuri v. Sisley Cosmetics USA, Inc., A-3871-08T3, 2009 WL 4251861, *2 (N.J. Super. Ct. App. Div. Nov. 25, 2009). This Court should clarify that only the hybrid test as defined in D'Annunzio should apply. Otherwise, the twelve-factor test from Pukowsky could cause inconsistent results. For example, under factor 12, a court is supposed to examine the "intention of the parties," which might result, in the instant case, in a ruling against the drivers who were required to sign contracts designating themselves as independent contractors. Under D'Annunzio, however, courts "must look beyond the label attached to the [employer/employee] relationship." 192 N.J. at 122. Furthermore, even lower courts using all of the Pukowsky factors have acknowledged that they must be weighed "qualitatively rather than quantitatively." Hoag, 397 N.J. Super. at 48 (citation omitted).

v. FedEx Ground Package Sys., Inc., 886 F. Supp. 2d 45, 53 (D. Me. 2012), reconsideration denied (Oct. 10, 2012) (finding that this is the proper test to apply to the Maine wage payment law).

2. The New Jersey Wage Laws are Remedial and Require at Least the Application of the D'Annunzio Hybrid Test.

This Court accepted Certification to decide which employment relationship test applies to the New Jersey Wage Payment Law, N.J.S.A. §§ 34:11-4.1-4.14, which requires the timely payment of wages owed and forbids withholding or diverting of those wages by employers, and the New Jersey Wage and Hour Law, N.J.S.A. §§ 34:11-56a-56a38, which requires employers to pay minimum wage and overtime premium pay.

When interpreting a statute, this Court's goal is to "determine the Legislature's intent." D'Annunzio, 192 N.J. at 118 (citing Wollen v. Borough of Fort Lee, 27 N.J. 408, 418 (1958)). A statute's plain language "is generally the best indicator of the Legislature's intent." Donelson v. DuPont Chambers Works, 206 N.J. 243, 256 (2011) (citation omitted). The Court should give "statutory words their ordinary meaning and significance, and read them in context with the related provisions so as to give sense to the legislation as a whole." DiProspero v. Penn, 183 N.J. 477, 492 (2005). However, "[w]hen the plain language of a statute is susceptible to multiple interpretations," this Court should "resort to extrinsic tools

to determine the Legislature's likely intent." D'Annunzio, 192 N.J. at 118 (citations omitted).

The purpose of the Wage and Hour Law is "[t]o safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." N.J.S.A. § 34:11-56a; see also Keeley v. Loomis Fargo & Co., 183 F.3d 257, 259 (3d Cir. 1999) (the purpose of the Wage and Hour Law is to "protect employees from unfair wages and excessive hours"). The purpose of the Wage Payment Law is "primarily to protect employees." Vengurlekar v. Silverline Technologies, Ltd., 220 F.R.D. 222, 231 (S.D.N.Y. 2003) (citing Mulford v. Computer Leasing, Inc., 334 N.J. Super. 385, 394 (Law. Div. 1999); Winslow v. Corporate Express, Inc., 364 N.J. Super. 128 (App. Div. 2003)). Overall, the wage laws are "social legislation designed to correct abuses in employment." New Jersey State Hotel-Motel Ass'n v. Male, 106 N.J. Super. 174, 177 (App. Div. 1969); Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 564 (App. Div. 2009). Due to their remedial and humanitarian purpose, the New Jersey wage laws are applied broadly and may even extend their "protection to a greater number of employees [than the FLSA] by narrowing the group of employees excluded from the law." Marx v. Friendly Ice Cream

Corp., 380 N.J. Super. 302, 309-10 (App. Div. 2005) (citing the FLSA, 29 U.S.C. § 218(a)); see also Yellow Cab Co. of Camden v. State Through Dir. of Wage & Hour Bureau, 126 N.J. Super. 81, 86 (App. Div. 1973) (citing A. H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945)) ("humanitarian and remedial nature of [Wage and Hour Law] requires that any exemption therefrom be narrowly construed"). The remedial purpose of the wage laws overwhelmingly augurs in favor of the application of at least the D'Annunzio test.

An application of the D'Annunzio test is further supported by the statutory definitions of employment in the New Jersey wage laws. The Wage and Hour law defines "employ" as to "suffer or permit to work." N.J.S.A. § 34:11-56a1(f). The Wage Payment Law, meanwhile, provides that an "employee" is any person "suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees."[6] N.J.S.A. § 34:11-4.1.

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[6] The added language excluding independent contracts and subcontractors in the Wage Payment Law does not require the application of a different test. As explained below, under D'Annunzio, a broad employment relationship test must apply to remedial legislation such as the Wage Payment Law. Moreover, the same broad test was applied to the plaintiffs in Lowe even though the TCA expressly excluded independent contractors. N.J.S.A. § 59:1-3.

The definitional section of the Wage Payment Law has been in place since 1965, with the only change being the deletion of a comma after "subcontractors" in 1991. See L.1965, c. 173, § 1; amended by L.1991, c. 205, § 1, eff. July 12, 1991. The

The "suffer or permit" standard derives from child labor law and "stretches the meaning of employee" to include work relationships that were not within the traditional common-law definition of "employee."[7] Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947); see also Darden, 503 U.S. at 326; Bruce Goldstein et al., Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment, 46 U.C.L.A. L. Rev. 983, 1015-18, 1039-40 (1999). "A broader or more comprehensive coverage of employees . . . would be difficult to frame." United States v. Rosenwasser, 323 U.S. 360, 362 (1945).

Moreover, this Court has applied the broad "relative nature of the work" test under statutes that has narrower definition of employment. Under the CEPA, an "employee" is defined as "any individual who performs services for and under the control and

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added words simply clarify that once the proper employment relationship test is applied, independent contractors and subcontractors are excused from compliance with the law.

[7] In the child labor context, to "suffer or permit" meant that an individual "shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." Curtis & Cartside Co. v. Pigg, 134 P. 1125, 1129 (Okla. 1913) (emphasis added). The language thus "cast[ ] a duty upon the owner or proprietor to prevent the unlawful condition, and the liability rest[ed] upon principles wholly distinct from those relating to master and servant. The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist." People v. Sheffield Farms-Slawson Decker Co., 180 A.D. at 619(the omission to discover and prevent was a sufferance of the work)).

direction of an employer." N.J.S.A. § 34:19-2(b) (emphasis added). Despite the control language, this Court applied the broader hybrid test in D'Annunzio. 192 N.J. at 120. Similarly, this Court applied the relative nature of the work test under the Tort Claims Act despite a statutory definition that expressly excluded independent contractors. Lowe, 158 N.J. at 618-24; N.J.S.A. § 59:1-3. The Appellate Division did the same despite having no helpful definition in the New Jersey Law Against Discrimination. Hoag, 397 N.J.Super. at 47-48; N.J.S.A. § 10:5-5a. In light of the long history of using the "suffer or permit" standard to proactively curb workplace abuses, this Court should apply, at the very least, the D'Annunzio test to the New Jersey wage laws.

B. IN THE ALTERNATIVE, THIS COURT SHOULD FOLLOW THE NJDOL WHICH APPLIES THE ABC EMPLOYMENT RELATIONSHIP TEST.

In the alternative, if the Court does not follow D'Annunzio, it should defer to the New Jersey Department of Labor ("NJDOL"), which has interpreted the Wage and Hour Law's definitions to incorporate the broad "ABC" employment relationship test. Pursuant to N.J. Admin. Code § 12:56-16.1, the NJDOL has declared that "[t]he criteria identified in the Unemployment Compensation Law at N.J.S.A. § 43:21-19(i)(6)(A)(B)(C) and interpreting case law will be used to

determine whether an individual is an employee or independent contractor for purposes of the Wage and Hour Law."

Under this so-called "ABC test" an individual who renders services for remuneration is presumed to be an employee unless the employer can show: a) the provider of service was free from control; b) that the service was provided outside the usual course of business of the employer; and c) that the service provider was customarily engaged in an independently-established trade. N.J.S.A. § 43:21-19(i)(6)(A)-(C). Under this test, an employer must meet all three prongs to be exempt from coverage. Provident Inst. for Sav. in Jersey City v. Div. of Employment Sec., Dep't of Labor & Indus., 32 N.J. 585, 591 (1960).

An agency's interpretation of a statute it is charged with enforcing is entitled to substantial deference and will prevail unless it is "not plainly reasonable." Merin v. Maglaki, 126 N.J. 430, 436-37 (1992). If this Court does not adopt the D'Annunzio test, therefore, it should defer to the NJDOL and apply the ABC test to the Wage and Hour Law.

Similarly, the ABC test should apply to the Wage Payment Law. It arises out of the same remedial purpose as the Wage and Hour Law and contains a virtually identical definition of employment. Vengurlekar, 220 F.R.D. at 231 (citing Mulford, 334 N.J. Super. at 394; Winslow, 364 N.J. Super. 128). As a result,

there is no reason not to apply the same employment relationship standard.

This bright-line ABC test would prevent gamesmanship by businesses trying to avoid basic worker protections by requiring that a contractor both work outside the regular business of the employer and have a business that exists independently of the that putative employer.[3] By placing the burden of excluding a worker from the wage laws squarely upon the employer, the use of the ABC test comports with the historical purpose of the "suffer or permit" standard - to combat workplace abuses by placing the burden of compliance with remedial employment legislation on the employer. People, on Complaint of Price v. Sheffield Farms-Slawson-Decker Co., 180 A.D. 615, 619 (N.Y.App.Div. 1917) aff'd sub nom., 121 N.E. 474 (N.Y. 1918) (the "suffer or permit" standard casts "a duty upon the owner or proprietor to prevent the unlawful condition, and the liability rests upon principles wholly distinct from those relating to master and servant. The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist."). The use of the ABC test would also comport with the three-part definition of an independent contractor set forth in Balagsarre, v. Butler, 132 N.J. 278, 291 (1993) (*quoting* W. Page Keeton, Prosser & Keeton on the Law of Torts § 71 (5th ed. 1984)):

> The important difference between an employee and an independent contractor is that one who hires

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[3] The requirement of the statute that an individual must be "customarily engaged" in a business that is "independently established," calls for a business that "exists and can continue to exist independently of and apart from the particular service relationship" with the putative employer. Gilchrist v. Div. of Employment Sec., 48 N.J. Super. 147, 158 (App. Div. 1957). The determination is fact-sensitive and requires an evaluation of the substance, not the form, of the relationship. See Provident, 32 N.J. at 591.

> an independent contractor "has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it."

Therefore, the DOL regulation and the public policy behind the statutes would support a finding by this Court that the ABC test should apply.

C. IF THIS COURT DOES NOT ADOPT THE D'ANNUNZIO TEST OR THE ABC TEST, IT SHOULD ADOPT THE ECONOMIC REALITY TEST AS APPLIED UNDER THE FLSA

This Court may also look to federal law interpreting the FLSA for guidance in interpreting the "suffer or permit" standard in New Jersey. Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, (App. Div. 2005); Harris v. Scriptfleet, Inc., Civil Action No. 11-4561, 2011 WL 6072020, *4 (D.N.J. Dec. 6, 2011). The Third Circuit has found that the "suffer or permit" standard in the FLSA is "the broadest definition of 'employee.'" Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3d Cir.1985). Under the "suffer or permit" standard, therefore, a court "should examine the circumstances of the whole activity and should consider whether, as a matter of economic reality, the individuals are dependent upon the business to which they render service."[9] DialAmerica, 757 F.2d 1382 (quotation marks

[9] Under the economic reality test applied under the FLSA, a court examines the following factors: 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his

and citation omitted) (emphasis added); Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1544-45 (7th Cir. 1987) ("The FLSA is designed to defeat rather than implement contractual arrangements.").

Furthermore, some federal courts, when dealing with claims under both the FLSA and the New Jersey wage laws, have applied the FLSA's "economic reality" test to both federal and state statutes. See, e.g., Harris v. Scriptfleet, Inc., Civil Action No. 11-4561, 2011 WL 6072020, *4 (D.N.J. Dec. 6, 2011) (Chesler, J.) ("Because the NJWHL overtime compensation and minimum wage requirements are modeled after and nearly identical to their analogous Fair Labor Standards Act regulations, judicial interpretations construing the FLSA are applicable."); Li v. Renewable Energy Solutions, Inc., Civil Action No. 11-3589, 2012 WL 589567 (D.N.J. Feb. 22, 2012) (Wolfson, J.) (attached in Addendum). Because of the similarities between the statutory definitions of employment in the FLSA and the New Jersey wage

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task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.

Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 328 (D.N.J. 2005) aff'd sub nom., 691 F.3d 527 (3d Cir. 2012).

laws, the Court could understandably apply the "economic reality" test here.[10]

D. REGARDLESS OF WHAT TEST THIS COURT ADOPTS, THE COMMON LAW CONTROL TEST SHOULD NOT APPLY.

The inclusion of the "suffer or permit" standard in the New Jersey wage laws demonstrates that the laws are meant to cover workers more broadly than the common law test.[11] The child labor laws used "suffer or permit" to create liability for "[a]ny person in control of the business or business premises where the work was performed." Zavala v. Wal Mart Stores, Inc., 393 F. Supp. 2d 295, 326 (D.N.J. 2005) aff'd, 691 F.3d 527 (3d Cir. 2012) (quoting Goldstein, supra, 46 U.C.L.A. L. Rev. at 1039-40).

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[10] Some courts, however, have found that the economic reality test fails to effectuate the purpose of the "suffer or permit" standard. "A reference to 'economic reality' tells the court to disregard economic fantasy but does not say which aspects of 'reality' have what legal consequences." Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403, 407 (7th Cir. 2007); Lauritzen, 835 F.2d at 1543 (Easterbrook, C.J. concurring) ("We should abandon these unfocused "factors" and start again."); see also Goldstein, 46 UCLA L. Rev. at 1106-09 (the "economic reality" test as developed by the federal courts, while extending coverage of the FLSA "far beyond what the common law control test would have created, [] is flawed by virtue of its neglect of the [historically strict liability standard embodied in] the 'suffer or permit to work' definition").

[11] New Jersey was a pioneer in the use of the "suffer or permit" standard. See Goldstein, 46 U.C.L.A. L. Rev. at 1036, 1092. By 1907, New Jersey used "suffer or permit" in its child labor laws and, in 1924, New Jersey became just the third state to include "suffer or permit" in its workers' compensation statute. Id. (citing 1924 N.J. Laws ch. 159, § 1 at 359-60).

Furthermore, under the "suffer or permit" standard, courts have held businesses accountable for child labor violations even when none of the common-law control factors were present.[12] Accordingly, when asked to interpret the "suffer or permit" standard under its state minimum wage law, the Supreme Court of California found that "the historical meaning continues to be highly relevant today: A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." Martinez v. Combs, 231 P.3d 259, 281 (Cal. 2010).

In contrast, the common law definition of master-servant was developed for a different purpose and is necessarily narrower that the relative nature of the work standard. The control test was not developed to offer protection to employees, but rather, to determine whether a master was liable to third parties for a servant's negligent acts. Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987); Goldstein, 46 UCLA L. Rev. at 1028-29. Thus, the common-law test for

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[12] Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969) ("If the Legislature intended to limit this section to cases where a minor was 'employed,' it would not have included the phrase 'permitted or suffered to work.'"); Bernal v. Baptist Fresh Air Home Society, 275 A.D. 88, 95 (N.Y. App. Div. 1949) aff'd, 88 N.E.2d 720 (1949); Com. v. Wallace Y. Hong, 158 N.E. 759 (Mass. 1927).

employment - and accordingly for tort responsibility - was whether the alleged employer had the "right to control the manner and means by which the product is accomplished." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989); Darden, 530 U.S. at 321. Where the alleged master had the right to control details of the servant's work and the work was performed negligently, it was fair to hold the master accountable.

Certain factors were considered at common law to determine the existence of this narrow employment relationship. These factors include 1) the degree of control exercised by the employer; 2) the method of payment; 3) who furnishes the equipment; and 4) right of termination. Wright v. State, 169 N.J. 422, 437 (2001) (quotation marks and citations omitted). Other common law factors include the duration of the work and the skill required for the job. Reid, 490 U.S. at 751-52. While the common law test and the economic reality test may look to similar factors, "the nub of the distinction between them is this: Whereas control focuses on personal work site subordination, the economic reality of dependence embraces those who are economically dependent on a firm even in the absence of control."[13] Marc Linder, The Joint Employment Doctrine:

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[13] Aside from the District Court in the instant matter, only one other court has applied the common law test to a claim under

Clarifying Joint Legislative-Judicial Confusion, 10 Hamline J. Pub. L. & Pol'y 321, 324 (1989). As a result, at the very least, this Court should find that the hybrid test as described in D'Annunzio under both the Wage Payment Law and the Wage and Hour Law.

B. INDEPENDENT CONTRACTING MISCLASSIFICATION BY SLEEPY'S AND OTHER EMPLOYERS IMPOSES SIGNIFICANT SOCIETAL COSTS, INCLUDING BILLIONS OF DOLLARS IN LOST STATE AND FEDERAL GOVERNMENT FUNDS.

Misclassification of workers has become a serious problem for states. See Craig v. FedEx Ground Package Sys., Inc., 686 F.3d 423, 430 (7th Cir. 2012) (misclassification presents an issue "of great importance not just to this case but to the structure of the American workplace"). Accordingly, former New

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the Wage Payment Law. See In re FedEx Ground Package Sys., Inc., Employment Practices Litig., 758 F. Supp. 2d 638, 699 (N.D. Ind. 2010). The District Court, however, ignored the Wage Payment Law's statutory language. Furthermore, the issue had previously been determined when the Court had decided class certification in that case, and there had not been a challenge to the applicability of the right to control test. Moreover, the Indiana District Court improperly relied on three New Jersey tort cases. See Carter v. Reynolds, 175 N.J. 402, 405 (2003) (applying the doctrine of respondeat superior to determine whether an employer could be held vicariously liable for the tortious conduct of an employee); Mavrikidis v. Petullo, 153 N.J. 117, 124 (1998) (determining whether service center was vicariously liability for automobile accident caused by its truck driver); MacDougall v. Weichert, 144 N.J. 380, 385 (1996) (applying common law standard to claim for wrongful discharge and tortious interference). As set forth above, it is well-settled that New Jersey Courts use a more inclusive test in determining who is an employee for purposes of worker protection statutes, which by their very language, use the broadest terms to define who is an employee.

Jersey Governor Jon Corzine declared that "the practice of misclassifying workers as alleged independent contractors, rather than in accordance with their actual status as employees, causes serious negative repercussions to our State's economy." N.J.A.C. Executive Order No. 96 (2008). Employers increasingly misclassify employees as independent contractors, denying them protection of workplace laws, robbing unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reducing federal, state, and local tax withholding and revenues. This problem is growing. Between February 1999 and February 2005, the number of workers classified as independent contractors in the United States grew by 25.4 percent.[14] A 2000 study commissioned by the U.S. Department of Labor found that up to 30 percent of audited employers misclassified workers.[15] As the United States Government Accountability Office (GAO) has concluded, "employers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain

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[14] U.S. General Accounting Office, Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification, GAO-06-656, App. III. Tbl.4 (2006) (showing changes in size of contingent workforce), available at http://www.gao.gov/assets/260/250806.pdf.

[15] Lalith de Silva et al., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs iii (2000), available at http://wdr.doleta.gov/owsdrr/00-3/00-3.pdf.

taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans."[16] See also FedEx Ground Package Sys., 686 F.3d at 431 (per curiam panel noting increase in independent contractor abuses and costs to states and law-abiding businesses).

Federal and state governments suffer significant loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. Between 1996 and 2004, $34.7 billion of federal tax revenues went uncollected due to the misclassification of workers."[17] The Internal Revenue Service's (IRS) most recent estimates of misclassification costs are a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid FICA taxes and unemployment insurance taxes.[18] Misclassification of this magnitude exacts an enormous toll: researchers found that

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[16] U.S. General Accounting Office, Employment Arrangements, supra note 14, at 25.

[17] 156 Cong. Rec. S7135-01, S7136 (daily ed. Sept. 15, 2010).

[18] Treasury Inspector General for Tax Administration, While Actions Have Been Taken to Address Worker Misclassification, an Agency-Wide Employment Tax Program and Better Data Are Needed, 2009-30-035 (2009), available at http://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf.

misclassifying just one percent of workers as independent contractors would cost unemployment insurance trust funds $198 million annually.[19]

State governments also lose hundreds of millions of dollars in unemployment insurance, workers' compensation, and general income tax revenues due to independent contractor misclassification.[20] A growing number of states have thus called attention to independent contractor abuses by creating interagency task forces and committees to study the magnitude of the problem. California, for example, found that 29 percent of audited employers had misclassified workers, a figure amounting to $337 million in lost income taxes.[21] A 2009 report by the Ohio Attorney General found that the state lost between $12 million and $100 million in unemployment payments, between $60 million and $510 million in workers' compensation premiums, and

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[19] De Silva, supra note 15, at iv.

[20] Sarah Leberstein, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (2011), available at http://www.nelp.org/page/Justice/2010/IndependentContractorCosts.pdf?nocdn=1.

[21] Tax audits conducted by California's Employment Development Department (EDD) from 2006 to 2008 identified 39,494 previously unreported employees. During this 3-year period, EDD recovered $137,563,940 in payroll tax assessments. California Employment Development Department, Annual Report: Fraud Deterrence and Detection Activities 20 (2009), available at http://www.edd.ca.gov/pdf_pub_ctr/report2009.pdf.

between $21 million and $248 million in foregone state income tax revenues.[22]

Florida also launched an investigation into a scheme by construction firms who seek to evade payment of workers' compensation premiums by placing a false subcontractor, or "shell company" between the construction firm and the worker.[23] The cost of employee misclassification to a state's unemployment insurance, workers' compensation, and general income tax revenue, is likely significant. In New York, for example, misclassification of workers resulted in over $175 million of unpaid unemployment taxes per year.[24]

Assuming a similar rate of misclassification in New Jersey, a state with a population nearly half the size of New York, would result in roughly $80 million in unpaid unemployment taxes per year. The NJDOL, meanwhile, audited only two percent of

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[22] Richard Cordray, Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio (2009), available at http://www.faircontracting.org/PDFs/prevailing wage/Ohio on Misclassification.pdf.

[23] Press Release, Jeff Atwater, Chief Financial Officer, Florida Department of Financial Services, CEO Jeff Atwater Calls for Review of Check Cashing Services Aiding in Workers' Comp Fraud (August 3, 2011), available at http://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=3924.

[24] Linda H. Donahue et al., The Cost of Worker Misclassification in New York State 10 (2007), available at http://digitalcommons.ilr.cornell.edu/reports/9/.

employers in New Jersey in 2005 and found more than 26,000 workers to be misclassified as independent contractors, with an estimated $5 million in unpaid gross income taxes annually.[25]

In light of historic levels of unemployment, and employer schemes to evade paying unemployment taxes, New Jersey's unemployment compensation system has been insolvent for years.[26] In fact, New Jersey borrowed $1.6 billion from the federal government in 2009 and 2010 to help pay unemployment benefits. Id.

These economic statistics do not take into account the loss of the panoply of worker protections that the legislature has created to protect workers in New Jersey.

Sleepy's misclassification of its workers as independent contractors hurt low-wage workers and law-abiding businesses. Permitting such schemes to continue permits the wage standards floor to drop, and costs the states billions of dollars in lost payroll and tax revenue. Claims such as those asserted by the Plaintiffs here would assist the state in its efforts to fight the misclassification problem.

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[25] NJDOI Press Release available at http://www.corporateaviators.com/NJ Worker Misclassification Initiative.pdf.

[26] Stacy Jones, Threat of Unemployment Tax Hikes Have Employers Seeing Red, The Star-Ledger, Jan. 23, 2013 at http://www.nj.com/business/index.ssf/2013/01/unemployment_tax_fund_has_empl.html.

Requiring properly classified workers will allow New Jersey to recover millions of dollars in lost unemployment compensation payments, worker's compensation payments, and state income taxes each year. Moreover, a broad employment relationship test will further the goal of the New Jersey wage laws to "[t]o safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." N.J.S.A. § 34:11-56a. Either the ABC test or the hybrid test from D'Annunzio will, therefore, serve to accomplish the purpose of the New Jersey wage laws, and this Court should respectfully answer the certified question with one of these tests.

V. CONCLUSION

For the forgoing reasons, this Court should declare that the hybrid test as explained in D'Annunzio should apply for determining whether an individual is an employee under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law. In the alternative, this Court should find that the "ABC" test applies due to the NJDOL's interpretation of New Jersey wage laws. Finally, if this Court chooses to adopt neither the D'Annunzio test nor the ABC test, it should adopt the "economic realities" test applicable under the FLSA.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY

SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO, Plaintiffs-Appellants/Cross-Appellees, v. SLEEPY'S, LLC, Defendant-Appellee/Cross-Appellant v. I STEALTH, EUSEBIO'S TRUCKING CORP., and CURVA, Third-Party Defendants-Appellees.	DOCKET NO. 072-742 CIVIL ACTION ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

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Seemingly unwilling to address the question certified to and accepted by this Court, Sleepy's and its corporate amicus ask this Court to address issues outside the scope of the certified question. Rather than address whether the Court should apply the "relative nature of the work" test set forth in D'Annunzio v. Prudential Ins. Co. or the common-law right to control test adopted by the District Court to the New Jersey wage statutes, Sleepy's suggests a new test that would essentially allow all employers to exempt themselves from the New Jersey wage laws by requiring their workers to form a LLC, register as a d/b/a, or by recruiting and paying workers through a third party. Yet whether a person who registers as a business entity or is paid through a third party is banned from recovery under the wage laws is not an issue currently before this Court. However, if it were, virtually every court to address this issue in the United States has rejected it, including this Court more than 30 years ago. Sleepy's proposed "contractual obligation" requirement would also violate the wage laws' strong anti-waiver provisions and the Court should reject it. See N.J.S.A. §§ 34:11-4.7; N.J. Stat. Ann. § 34:11-56a3.

Next, Sleepy's argument that because the Wage Payment Law's definition of "employee" does not further define "independent contractor," this Court must resort to the common law control test, fails for several clear-cut reasons. First, this Court

has repeatedly held that the broader "relative nature of the work" test should apply to employment relationships under remedial legislation. More importantly, the statute does define the more applicable term in the statute -- "employee." Specifically, the Legislature not only defined "employee," but defined it as someone who is "suffered or permitted to work," a definition of employment that is "the broadest definition that has ever been included in any one act." United States v. Rosenwasser, 323 U.S. 360, 363 n. 3, (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo L. Black)). Ignoring the purpose and language of the statute, as well as this Court's recent jurisprudence, Sleepy's engages in a mere fantasy of how courts should give carte blanche to companies wishing to compete unfairly by setting up sham "independent contractor" relationships or by using labor recruiters to avoid basic worker protections.[1]

Sleepy's further spends several pages misstating the underlying facts of the case, which are clearly not relevant to the certified question before this Court. Rather, once the Court has decided what test applies for determining employment

[1] Yesterday, even while vetoing a state law that would have established a presumption that all drayage and parcel delivery drivers in New Jersey are employees, Governor Chris Christie acknowledged that "[t]he willful misclassification of workers as independent contractors denies drivers the benefits and protections that come with employee status" and that misclassification "may also place honest businesses at a competitive disadvantage and may serve as a means of avoiding tax obligations." Veto of Gov. Chris Christie, dated Sept. 9, 2013 at http://www.njleg.state.nj.us/2012/Bills/A2000/1578_V1.PDF.

status under New Jersey's wage laws, it will be for the Third Circuit or the District Court on remand to apply those facts to this case. However, to correct the record, the actual facts show that, regardless of the test under the New Jersey wage laws, Plaintiffs worked full time for Sleepy's, delivered solely Sleepy's products to Sleepy's customers under terms and schedules set by Sleepy's and under Sleepy's supervision, drove Sleepy's trucks, wore Sleepy's uniforms, made deliveries pursuant to Sleepy's instructions, worked only for Sleepy's and were otherwise completely dependent upon Sleepy's for their economic survival.[2] Even the District Court found that Sleepy's had control over how the work was performed. Of course, this

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[2] Among the facts ignored or mischaracterized by Sleepy's are the following:

One of the named plaintiffs, Andre Hall, did not incorporate and received payments from Sleepy's in his own name. See Br. Of Appellants, Hargove, et al. v. Sleepy's LLC, Case No. 12-2540, 3rd Cir. (Docket No. 003111007054) at 5 (citing A242, A247).

Furthermore, the working agreements Sleepy's required drivers to sign required that, while driving for Sleepy's, drivers were not permitted to perform outside work while Sleepy's merchandise was being delivered, Id. at 6 (citing A127); drivers were required to wear uniforms and to make deliveries at times and places specified by Sleepy's, Id. (citing A126, A129); Sleepy's prohibited drivers from assigning their rights under the working agreements, Id. at 7(citing A130); Sleepy's required driver's to install Sleepy's logos on their trucks, Id. (citing A133); Sleepy's admitted that delivery services are an "integral" part of their business and that Sleepy's charged customers for their delivery service, Id. at 8 (citing A1430-1); Sleepy's has in-terminal dispatch employees to direct the operation of the delivery trucks, Id. at 9 (citing A1430); Sleepy's drivers must go through extensive training, Id. at 10 (citing A1603); Sleepy's has final approval for helpers utilized by drivers, Id. at 11 (citing A1439, A1599); Drivers can only carry Sleepy's merchandise when they drive trucks with the Sleepy's logo, Id. at 12 (citing A126, A 133); Sleepy's uses a scanner to track where drivers are all day, Id. at 9 (citing A1430); Sleepy's refused work to drivers who complained to Sleepy's or who refused to work on certain days. Id. at 11 (citing A1454, A1468). For a fuller development of the facts, see Appellant's brief submitted to the Third Circuit on September 4, 2012 at Docket No. 003111007054.

does not change the test, and this is included solely to counter Sleepy's attempt to shade this Court's review of the issue.

Finally, and perhaps most troubling of all, Sleepy's ends by arguing a point that was summarily rejected at oral argument by the Third Circuit and would turn United States Supreme Court precedent on its head; that in the final analysis it doesn't really matter what test applies because there is no discernible difference between them. Sleepy's ignores the Supreme Court's ruling in Darden, which held that the "suffer or permit" employment standard "stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); see also Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947) ("suffer or permit" test "encompasses working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category"). Indeed, this Court has repeatedly recognized as much. D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 121 (2007) ("exclusive reliance on a traditional right-to-control test to identify who is an 'employee' does not necessarily result in the identification of all those workers that social legislation seeks to reach") (citations omitted). In fact, Third Circuit Judge Kent Jordan called Sleepy's assertion that the tests were the same a "remarkable statement"

because the "Supreme Court thinks there is a gigantic difference [between the tests]."[3]

I. EMPLOYMENT STATUS IS NOT AND NEVER HAS BEEN DETERMINED BY A CONTRACTUAL OBLIGATION TO PAY WAGES.

Sleepy's argument that courts must find a contractual obligation to pay wages before weighing an individual's employment status is simply wrong. See Db9-12. First, it is outside the scope of the question that the Third Circuit certified to this Court and it was not addressed by the District Court. Second, Sleepy's proposed requirement would not only make New Jersey's employment relationship test even narrower than the common law test (in which manner of payment is a secondary factor), it would provide an impermissible safe harbor for companies that force their workers to waive their rights under the New Jersey wage laws by simply requiring them to register as a d/b/a or an LLC. For example, factory farms and garment factories have unsuccessfully attempted to avoid the mandates of state and federal wage laws in this manner for decades.[4]

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[3] http://www.ca3.uscourts.gov/oral-argument-recordings (see recording for 12-540Hargrove,etalv.Sleepy'setal.wma at 29:10).

[4] See, e.g., Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 66 (2d Cir. 2003) (garment workers hired by "jobbers" could still be employees of the garment manufacturers); Maldonado v. Lucca, 629 F. Supp. 483, 489 (D.N.J. 1986) (grower who utilized contractors to secure farm labor still an employer under "suffer or permit"); Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403, 405 (7th Cir. 2007) (same).

Sleepy's argues that "where the defendant never was obliged to provide any direct monetary compensation for labor or services to the Plaintiff, the" wage laws are inapplicable and no further analysis is necessary. Db10, 42. Both New Jersey courts and courts throughout the country, however, have repeatedly dealt with this issue and have universally held that that no contractual obligation is needed as long as the other criteria for employment status are met. Indeed, the Supreme Court's landmark decision in Rutherford Foods specifically established that a contractual obligation to pay wages is not a prerequisite to finding employment under the suffer or permit test. Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947).

The situation that Sleepy's alludes to arises in primarily two contexts: 1) where individuals who work for a business incorporate or register as a d/b/a or other business entity, either because they are required to do so or find it necessary to do so to avoid placing their personal assets at risk; or 2) where a business relies on a contract labor agency or third party to secure its labor and pays only that third party, who must then pay the individual workers. As described below, no court analyzing these fact patterns has ever found that a

contractual obligation is a prerequisite to the formation of an employment relationship.[5]

A. The New Jersey Wage Laws Cover Workers Who Provide Their Services Through a Corporate Entity or a D/B/A.[6]

Whether a person is providing services through a corporation or a d/b/a does not exempt him from the protections of the New Jersey wage laws. If such an argument "were to carry the day, an employer who wanted to avoid the requirements of the [wage laws] would simply require its employees to incorporate as a condition of employment." Amero v. Townsend Oil Co., Civ. A. 07-1080-C, 5, n. 4 (Mass. Super. Ct. April 21, 2009) (attached in Addendum).[7]

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[5] Sleepy's cites a string of cases for the proposition that a contractual obligation to pay wages is a prerequisite to a finding of employment status. Db11, 42. These cases are unavailing. For example, Junio concerned whether a volunteer firefighter was covered by Title VII. Junio v. Livingston Parish Fire Dist., 717 F.3d 431 (5th Cir. 2013). Similarly, Graves v. Women's Prof'l Rodeo Assoc., 907 F.2d 71 (8th Cir. 1990) and O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997) concerned the employment status of rodeo association members and an unpaid intern, respectively. The question is whether the putative employee received any remuneration from any entity. Junio explains that under the threshold-remuneration test, "an employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides services—that person being the employee." Id. (citing Graves, 907 F.2d at 72) (emphasis added). Volunteers are not misclassified as independent contractors, they are simply not paid because they are volunteering, an issue not relevant here.

[6] Furthermore, one of the named plaintiffs, Andre Hall, did not incorporate and received payments from Sleepy's in his own name, so even with Sleepy's rule in place, some of Sleepy's drivers could still recover under the New Jersey wage laws. See Br. Of Appellants, Hargove, et al. v. Sleepy's LLC, Case No. 12-2540, 3rd Cir. (Docket No. 003111007054) at 5 (citing A242, A247).

Indeed, the court in Amero held that while a worker's incorporation might be relevant to the consideration of whether the worker operated an independent business, the court must still look to see if the worker was simply a cog in the employer's business as a matter of economic reality. Amero, at 5, n. 4 - the same language as this Court accepted in Tofani to differentiate a contractor from an employee.

Under New Jersey's worker's compensation statute, where the statute expressly uses the common law test for employment,* this Court has found that a truck driver was an employee even though there was no written contract between the driver and the trucking company and as a condition of employment the driver was required to submit a letter stating that he agreed to be treated as an independent contractor. Caicco v. Toto Bros., Inc., 62 N.J. 305, 311 (1973).† Id.

Furthermore, many other courts have held that workers can recover under myriad wage laws even if the employer's formal contractual relationship is with an incorporated entity. In FedEx Ground Package System, Inc., 712 F.Supp.2d 776, 793 (N.D. Ind. 2010), FedEx drivers from many states claimed they were misclassified as independent contractors. The court applied the common law test equally to both incorporated and unincorporated delivery drivers. Id. ("If FedEx retains the right to control unincorporated [] drivers, it retains the right to control

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* As opposed the broad definition of employment incorporated into the New Jersey wage laws, the worker's compensation statute expressly incorporates the common law definition of employee and employer. N.J. Stat. Ann. § 34:15-36 ("'Employer' is declared to be synonymous with master, and includes natural persons, partnerships, and corporations; 'employee' is synonymous with servant.").

† In Rutherford v. Modern Transp. Co., the Superior Court found that a truck driver who had formed a trucking company, was providing his services under the company name, and where the employer was making checks payable to that company, must still be considered an employee. 128 N.J. Super. 504, 509, (Ch. Div. 1974). The court noted that "[f]rom Marcus to Iofani to Caicco, there has devolved a shift in emphasis from the 'right to control' test to the 'relative nature of the work' test." Id. As a result, "[n]o longer do the legal formalities of the relationship control." Id.

incorporated" drivers"). In Phelps v. 3PD, Inc., the court certified a class of Oregon delivery drivers "who entered into a contract with 3PD either on his or her own behalf or on behalf of an entity" for purposes of their Oregon state wage claims. 261 F.R.D. 548, 554, 562 (D. Or. 2009). In Martins v. 3PD, an appliance delivery company required its drivers to incorporate as a condition of employment. Martins v. 3PD, 2013 WL 1320454, at *17 (D. Mass. Mar. 28, 2013). The court held that a driver was still covered by the Massachusetts wage law "even if he has incorporated his business and his putative employer's formal relationship is with the corporate entity."

Similarly, a court held that a real estate agent who had incorporated could be an employee under the FMLA. Demers v. Adams Homes of NW. Fla., Inc., 2007 WL 3333440, *5 (M.D. Fla. Nov. 7, 2007) (despite plaintiff's incorporation "this Court must decide the relationship between these two parties based on the economic realities of the situation."). The NLRB has also held that "incorporation does not preclude a determination that drivers are statutory employees" because "[e]ven after incorporation, business continued as usual and [the employer] was in control of day-to-day operations." NLRB v. OS Transport

LLC, 358 NLRB 117, 358 NLRB 1, 2012 WL 3839[illegible], at *17-21 (NLRB 2012)).[10]

Indeed, only a few months ago, the Massachusetts Supreme Judicial Court dealt with a certified question concerning whether a defendant could be an employer "where there was no contract for service between the plaintiff and defendant." Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1064 (Mass. 2013) In Jan-Pro, the plaintiffs worked for franchisees who contracted with a franchisor. The court held that the workers could still be considered employees of the franchisor because "[l]imiting the [Massachusetts wage law's] applicability to circumstances where the parties have contracted with one another would undermine the purpose of the statute." Jan-Pro Franchising Int'l, 990 N.E.2d at 1067. To elevate the

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[10] See also Martin v. Shelby Telecom, LLC, 2012 WL 2476400, *3-7 (N.D.Ala. June 26, 2012) (worker's incorporated status does not create genuine issue of material fact as to employment status where evidence suggests employer controlled means of work and opportunity for profit); Partilla v. Alicon Constr. & Install. Svcs., LLC, 2009 WL 2868432 (M.D. Fl. 2009) (plaintiff who incorporated found to be misclassified); Ruiz v. Affinity Logistics, Corp., 2009 WL 648973, *1-2 (S.D.Cal. 2009) (disregarding the named plaintiff's separate business entity and certifying a class of delivery drivers for employee misclassification claim); Lee v. ABC Carpet & Home, 236 F.R.D. 193, 198 (S.D.N.Y. 2006) (employment status of mechanics who formed their own corporations must be determined under the applicable classification test); Frazier v. Preferred Operators, Inc., 861 A.2d 1130, 1132-34 (Vt. 2004) (disregarding corporate structure and analyzing plaintiff's employment status based on the nature of the work performed by the plaintiff for the alleged employer); Anfinson v. FedEx Ground Package System, Inc., 244 P.3d 32 (Wash. Ct. App. 2010) (disregarding delivery drivers' personal corporate entities and applying employee-status test directly to the drivers' relationship to the defendant), aff'd, 281 P.3d 289 (Wash. 2012); Ware v. Indus. Comm'n, 743 N.E.2d 579, 586 (Ill. App. 2000) ("we do not see how the fact of Ware's incorporation significantly alters the analysis here") (same); Wisconsin Cheese Service, Inc. v. Dep't of Industry, Labor and H.R., 322 N.W.2d 495 (Wis. Ct. App. 1982) (same); Canda v. Industrial Comm'n, 607 P.2d 403 (Colo. App. 1980) (same).

existence of a corporate/LLC/sole proprietorship over the protections of the New Jersey wage laws would allow similarly violate the purpose of these statutes. If the Legislature wanted to create such an exception it could have done so. It did not.

B. The New Jersey Wage Laws Cover Workers Who Provide Their Services Through A Third Party.

Courts have roundly rejected the notion pressed here by Sleepy's that an employer may evade his obligations under wage laws merely by utilizing third party arrangements. The Supreme Court made this abundantly clear in its holding in Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). In Rutherford, a slaughterhouse utilized a contract labor agency to supply skilled meat boners who used their own tools. Id. at 724. In rejecting the argument that the right to contract trumps the FLSA, the Court held that "the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."[11] Id. at 730. Indeed, courts will look past an outsourcing arrangement if the reality

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[11] Commercial farms often utilize farm labor contractors to recruit, supervise, and pay farmworkers. Courts have routinely held, despite the use of the contractor, that the farm may be considered the employer of the farmworkers. See, e.g., Maldonado v. Lucca, 629 F. Supp. 483, 489 (D.N.J. 1986) (grower who utilized contractors to secure farm labor still an employer under "suffer or permit"); Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403, 405 (7th Cir. 2007) (same); Torres-Lopez v. May, 111 F.3d 633, 642-44 (9th Cir.1997) (farm laborers were procured through a labor agent, who hired them and assigned them to a farm, but Ninth Circuit found that because these laborers constituted an integral part of the farm's business and because the farm exercised indirect control over them by supervising them and controlling the harvest schedule, the farm was a joint employer, along with the labor agent who hired them).

supports a finding of an employment relationship. See Jacobson v. Comcast Corp., 740 F. Supp. 2d 683, 689 (D. Md. 2010) (under the FLSA, finding that cable technicians were jointly employed by labor contractor and Comcast, holding "the economic reality test is intended to expose outsourcing relationships that lack a substantial economic purpose").[12]

The use of "suffer or permit" in the New Jersey wage laws demonstrates that they are meant to cover workers paid by third parties. New Jersey used "suffer or permit" in child labor statutes to ensure that they created liability for business owners who were not considered to be employers under the common law, but who had the ability to control the business and those working there. Bruce Goldstein, et al., Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment, 46 U.C.L.A. L. Rev. 983, 1030-39 (April 1999). The words "suffer or permit" mean that an employer "shall not employ by contract, nor shall he permit by acquiescence, nor suffer by a failure to hinder." Curtis & Gartside Co. v. Pigg, 134 P. 1125, 1129 (Okla. 1913) (emphasis added). The whole purpose behind the use of "suffer or permit" was to hold businesses responsible for child labor that they had the power to prevent. This Court should not allow Sleepy's to

[12] See also, Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 195 (S.D.N.Y. 2003) (pharmacy found to be joint employer of delivery workers who were hired by labor contractors).

rewind the clock by allowing businesses to hide behind the veil of incorporation or third-party labor contractors.

II. THE TEST FOR EMPLOYEE STATUS UNDER THE WAGE PAYMENT LAW HAS NEVER UTILIZED THE COMMON LAW TEST AND NEW JERSEY COURTS HAVE MADE CLEAR THIS IS NOT THE PROPER TEST.

Sleepy's argues that the Wage Payment Law's statutory definition of "employee" requires the application of the common law control test. Db12-37. Not so. The Wage Payment law defines "employee" as "any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees." N.J.S.A. § 34:11-4.1(b). Sleepy's ignores not only the well-established holdings of this Court that the "relative nature of the work" test applies to employee protective legislation, but more importantly, the "suffer or permit" language in the first clause of the definition.

First, as argued in Plaintiffs' opening brief, this Court has consistently held that the "relative nature of the work" test, not the common law test, should apply when determining whether an individual is an employee under remedial legislation. D'Annunzio, 192 N.J. at 120 ("Our courts have long recognized that, in certain settings, exclusive reliance on a traditional right-to-control test to identify who is an 'employee' does not necessarily result in the identification of all those workers that social legislation seeks to reach."); Stomel v. City of

Camden, 192 N.J. 137, 155 (2007); Lowe v. Zarghami, 158 N.J. 606, 618 (1999) ("If a working relationship was created by social legislation under which public policy concerns dictate a more liberal standard, then a court may apply the relative nature of the work test rather than the control test."); Tofani v. Lo Biondo Bros. Motor Exp., Inc., 83 N.J. Super. 480, 489 (App. Div. 1964) *aff'd o.b.*, 43 N.J. 494 (1964). The purpose of the Wage Payment law is "primarily to protect employees."[4] Vengurlekar v. Silverline Technoligies, Ltd., 220 F.R.D. 222, 231 (S.D.N.Y. 2003). This Court, therefore, should hold that the remedial nature of the work test as described in D'Annunzio applies under the New Jersey wage laws.

Second, Sleepy's argument that the use of the words "independent contractor" convert the WPL to a common law test is fatally flawed. Sleepy's contends that the default rule in New Jersey is that where a statutory term is undefined, the common law definition of that term must be used. Db14 (citing Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 348 (1953)). Sleepy's misstates Yanow as the Court must interpret the statute so as to "determine the Legislature's intent." D'Annunzio, 192 N.J. at 118; Yanow, 11 N.J at 348 (citation omitted).

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[4] Furthermore, the purpose of the Wage and Hour Law is to "establish a minimum wage level for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." N.J.S.A. § 34:11-56a.

By the time the Legislature included the "suffer or permit" standard in the 1965, it was already widely recognized as "the broadest definition [of 'employ'] that has ever been included in any one act." Rosenwasser, 323 U.S. at 363, n.3. At that point, it had also been used in New Jersey's child labor and worker's compensation statutes for over 50 years. 1924 N.J. Laws ch. 159, § 1 at 359-60; E. Heller & Bros. v. Dillon, 96 N.J. Eq. 334, 335-36 (1924). By 1947, the Supreme Court had declared that "suffer or permit" "stretche[d] the meaning of employee"' beyond the traditional common-law definition. Rutherford Food, 331 U.S. at 724, 729. Furthermore, by 1964, it was clear that, under social legislation, New Jersey courts looked beyond the right of control to the relative nature of the work to determine whether one was an employee. Marcus v. E. Agr. Ass'n, Inc., 58 N.J. Super. 584 (App. Div. 1959) rev'd sub nom. Marcus v. E. Agric. Ass'n, Inc., 32 N.J. 460 (1960); Tofani, 83 N.J. Super. at 480; Caicco, 62 N.J. at 311 (citing Marcus and Tofani and applying "relative nature of the work" test). The Legislature could not have chosen broader language in the WPL.

As for the WPL's added language excluding subcontractors and independent contractors from the definition of "employee, this does not simply erase the "suffer or permit" standard, nor defeat the overall remedial purpose of the statute. Rather, the

Legislature added this language to make it clear that the statute did not cover true independent contractors.[14]

This exception must, however, be viewed in light of the fact that, in 1964, Tofani had already made clear that an independent contractor was someone operating an independent business, free from the principal's control, that was not simply a cog in the operations of the principal. Tofani, 83 N.J. Super. at 490-91, 93. The Court should find that it is this definition of "independent contractor" that the Legislature must have meant when it excepted them from the WPL.

III. SLEEPY'S SUGGESTION THAT THE TESTS FOR EMPLOYMENT STATUS ARE ALL BASICALLY THE SAME IS WITHOUT MERIT.

Sleepy's, on page 35 of its brief, suggests that there are no differences between the Restatement test and the economic realities test, primarily based upon one line of dicta from the Sixth Circuit Court of Appeals' decision in Shah v. Deaconess, a Title VII case. Analytically, of course, this is incorrect.

In Rutherford Food, the Supreme Court held that the standard under "suffer or permit" derived from child labor laws and was exceptionally broad. 331 U.S. at 728 Meanwhile, this Court affirmed the relative nature of the work test was broader than the common law test in Tofani. 83 N.J. Super. at 489 ("The

[14] See Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969) ("permitted or suffered to work" by itself includes both employees and independent contractors).

reasons for the new approach are stated to be logical irrelevance of the tort-connected test of control to the objectives of social legislation and the vagueness of the control test due to absence of agreement or the rules as to the weight applied to various features and from the fact that the right of control is itself an inference or conclusion seldom capable of direct proof.").

Furthermore, Sleepy's argument ignores the U.S. Supreme Court's decision in Darden. In Darden, the Supreme Court drew a clear distinction between the common-law control test applied under the ERISA and the test applied under the FLSA with its suffer or permit language. Darden, 503 U.S. at 326 (1992) (citing 29 U.S.C. §§ 203(e), (g)). The Supreme Court held that "[suffer or permit], whose striking breadth we have previously noted stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Id.

The Third Circuit's decision to certify a question to this Court implies there is a difference between the common-law test applied by the District Court and the tests outline in Plaintiffs' brief. In fact, when Sleepy's counsel argued that there is no difference between the common law test and tests under D'Annunzio and the FLSA, Judge Kent Jordan considered counsel's comment a "remarkable statement" because the "Supreme

Court thinks there is a gigantic difference" between the tests.[15] After quoting from Darden, Judge Jordan stated that "the Supreme Court of the United States says that these are very, very different standards."[16] Judge Jordan then stated that since New Jersey's wage laws prescribed an employment relationship test different from the common law test applied under the ERISA in Darden, applying the wrong test could not constitute harmless error.[17]

Furthermore, this Court has recognized the difference between the common law test and the broader "relative nature of the work test." See, e.g., Stomel v. City of Camden, 192 N.J. 137, 155 (2007); Lowe v. Zarghami, 158 N.J. at 618 ("If a working relationship was created by social legislation under which public policy concerns dictate a more liberal standard, then a court may apply the relative nature of the work test rather than the control test."). That the "relative nature of the work" test is, in fact, broader, was explained by the Appellate Division's decision in Tofani that was accepted by this Court. 83 N.J. Super. at 491 ("[w]here it is not in the nature of the work for the manner of its performance to be

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[15] http://www.ca3.uscourts.gov/oral-argument-recordings (see recording for 12-540Hargrove,etalv.Sleepy'setal.wma at 29:10.

[16] http://www.ca3.uscourts.gov/oral-argument-recordings (see recording for 12-540Hargrove,etalv.Sleepy'setal.wma at 30:00.

[17] http://www.ca3.uscourts.gov/oral-argument-recordings (see recording for 12-540Hargrove,etalv.Sleepy'setal.wma at 31:20.

within the hiring party's direct control, the factor of control can obviously not be the critical one in the resolution of the case.") (citation omitted).[16] Even the Sixth Circuit recently recognized the difference between the Restatement test and the "suffer or permit" test. Mendel v. City of Gibraltar, 2013 WL 4105641 at *2 (6th Cir. Aug. 15, 2013).

IV. THIS COURT HAS PROPERLY ACCEPTED THE CERTIFIED QUESTION RELATING TO THE WAGE AND HOUR LAW AND IT IS NOT FOR THIS COURT TO REVISIT THE DISTRICT AND APPEALS COURT HOLDING THAT THIS CLAIM IS PROPERLY PLED.

Sleepy's improperly attempts to relitigate its claim that Plaintiffs somehow waived their claim for overtime wages under the Wage and Hour Law. This is wholly irrelevant to resolving the question that was certified by the Third Circuit and accepted by this Court. This is also a federal procedural issue that is not before this court. Moreover, Plaintiffs satisfied the liberal federal pleading standard for alleging a claim for overtime pay. Crull v. GEM Ins. Co., 58 F.3d 1386, 1391 (9th Cir. 1995) (complaint need not cite the specific statute under which relief is sought; but must only "identify the basis of the court's jurisdiction, demand for judgment for the relief sought,

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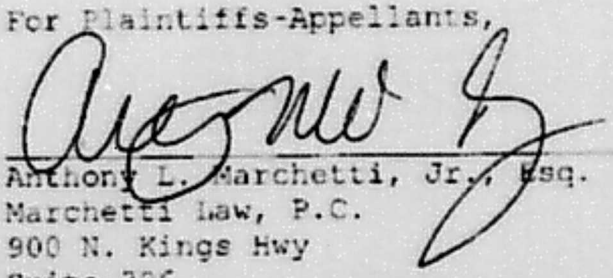
[16] See also, Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987) (drawing distinction between common law control test, which arose from need in tort law to "identify who is answerable for a wrong (and therefore, indirectly, to determine who must take care to prevent injuries)" and the goal of wage laws to protect workers from unfair labor practices).

and contain 'a short and plain statement of the claim showing that the pleader is entitled to relief"); Hall v. Regence Bluecross Blueshield of Oregon/HMO Oregon, 2000 WL33946080, *1 (D.Ore. 2000) ("[p]laintiff's failure to cite the specific statute entitling him to relief is not fatal").

While Plaintiffs did not include a separate count for relief under the New Jersey Wage and Hour Law in their complaint, the facts alleged in the complaint support a claim for overtime pay under N.J.S.A. 34:11-56a4. Both the District Court and Third Circuit recognized that plaintiffs claimed that, as a result of the misclassification, Sleepy's failed to pay overtime. Sleepy's LLC, 2012 WL 1067729, *4 ("Plaintiffs' claims include violations of state wage laws, overtime, unjust enrichment, and breach of contract.") (emphasis added). The Third Circuit agreed, certifying questions as to the application of both statutes to this Court. The Court should answer the questions as certified.

Respectfully submitted,

For Plaintiffs-Appellants,



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SUPREME COURT OF NEW JERSEY

FILED

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CLERK

SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO, Plaintiffs-Appellants/Cross-Appellees, v. SLEEPY'S, LLC, Defendant-Appellee/Cross-Appellant v. I STEALTH, EUSEBIO'S TRUCKING CORP., and CURVA, Third-Party Defendants-Appellees.	DOCKET NO. 072-742 CIVIL ACTION ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT 019 RECEIVED NOV 19 2013 SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF PLAINTIFFS-APPELLANTS AS TO AMICUS BRIEFS

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I. INTRODUCTION

In accordance with the Court's direction, Plaintiffs hereby file their reply to the various amicus briefs filed in this action. The amicus briefs filed in support of Sleepy's by the National Federation of Independent Business Small Business Legal Center (NFIB) and the Academy of New Jersey Management Attorneys generally repeat arguments made by Sleepy's. Both argue for a more stringent employment relationship test under the WPL than the language suggests and, as a threshold matter, that workers show a direct obligation by the putative employer to pay wages. Plaintiffs' prior briefs squarely address these issues and in the interest of judicial economy, Plaintiffs rely upon their prior briefs regarding these points.[1]

The Attorney General, meanwhile, at the invitation of the Court, filed an amicus brief arguing that the same test should apply to both the Wage Payment Law and the Wage and Hour Law. Plaintiffs agree with this proposition, as the statutes use the

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[1] The NFIB goes further, ignoring the question certified to this Court and the limited record supplied by the parties on account thereof, selecting a number of facts it suggests should cause this Court to find that the Plaintiffs were not employees. Of course, none of the thousands of pages of the record before the Third Circuit is before this Court, by agreement of the parties precisely because the issue before this Court is a limited one: "what is the test that applies?" Plaintiffs respectfully suggest that the Court should disregard the NFIB's attempt to selectively import portions of the record.

same "suffer or permit" language. The Attorney General asserts that the test that should be applied is the ABC test. In support, the Attorney General argues that its interpretation of the New Jersey wage laws, which has been in place for 18 years and has never been challenged, is entitled to deference. Plaintiffs do not dispute this proposition. For reasons set forth in Plaintiffs' opening and reply briefs, the relative nature of work test has been more prevalent in recent New Jersey law. Plaintiffs nevertheless agree that, to the extent that the ABC test is an employment relationship test provides coverage beyond the common law, it comports with the both the statutory definition of employment as "suffered or permitted to work" and would serve remedial purpose underlying the New Jersey wage laws.

Regardless of whether the Court adopts the "relative nature of the work" test or the ABC test, what should be clear is that the narrow common law test adopted by the United States District Court in this case is not the proper test under the New Jersey wage laws. This Court, just like the United States Supreme Court in Rutherford Foods v. McComb, 331 U.S. 722 (1947), should affirm that the wage laws cover workers regardless of whether or not they are directly paid by the employer. Both the relative

nature of the work test, the ABC test or even the economic realities test would accomplish the social goals of the wage laws to "correct abuses in employment." New Jersey State Hotel-Motel Ass'n v. Male, 105 N.J. Super. 174, 177 (1969); Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 564 (App. Div. 2009).[2]

II. ARGUMENT

A. THE COURT MAY ADOPT THE "ABC" TEST BECAUSE ITS COMPORTS WITH THIS COURT'S PRIOR RULINGS THAT A BROAD EMPLOYMENT RELATIONSHIP TEST SHOULD APPLY UNDER REMDIAL EMPLOYMENT LEGISLATION.

The New Jersey Attorney General argues for the application of the ABC test to determine who is an employee under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law. The ABC test has been used to define who is an employee under the New Jersey Unemployment Compensation Law since 1936. See L.1936, c. 270; N.J.S.A. 43:21-19(i)(6)(A), (B), (C). As explained by the Attorney General, the New Jersey Department of Labor has utilized the "ABC" test when enforcing the New Jersey wage laws since 1995. See N.J.A.C. 12-56-16.1.

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[2] See also N.J.S.A. § 34:11-56a (goal of wage laws is to "[t]o safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being"). The Amicus challenges to the remedial nature of these statues are without merit.

If this Court adopts the ABC test, it should do so because it is clear that the ABC test is a standard of exceptional breadth and expands coverage of the wage laws beyond those covered at common law and would place the burden upon those seeking to avoid application of the wage laws' protections.

When Congress enacted the unemployment tax provisions of the Social Security Act in 1935, states began drafting unemployment compensation statutes and were "free to create a unique statutory regime tailored to the purposes of the unemployment insurance system."[3] Marc Linder, The Employment Relationship in Anglo-American Law, p. 212 (1989).

The ABC test originated with Wisconsin's unemployment statute.[4] In 1936, while most states, including New Jersey, were

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[3] In Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor, 125 N.J. 567, 580 (1991) this Court stated that "the ABC test's criteria are derived from common-law principles" and that "the actual origin of the test is unclear." As demonstrated herein, the legislative history and development of the test shows that its purpose is to extend coverage of workers beyond the common law.

[4] Wisconsin was the first state to incorporate the "ABC" test into its unemployment law. The test was almost identical to the New Jersey "ABC" test. The Wisconsin test stated that:

"Employment" shall mean any personal service for pay -- . . . unless and until the employer has satisfied the commission that: 1) Such individual has been and will continue to be free from the employer's control or direction over the performance of his work under his contract of service and in fact; 2) That such work is either outside the usual course of the employer's

drafting their unemployment statutes, the Committee on Legal Affairs of the Interstate Conference of Unemployment Compensation Agencies (the states' coordinating body) unanimously agreed that the test of coverage "should not be confined to the technical legal relationship of master and servant." Benjamin S. Asia, Employment Relation: Common-Law Concept and Legislative Definition, 55 Yale L.J. 76, 116, n. 21 (1945) (citing Report of Committee, p. 2.). The Committee's recommendation to extend coverage beyond the common law was due to the remedial purposes of the unemployment statutes "and the belief that restriction of coverage to 'the technical legal relationship of master and servant constitutes an obvious avenue of evading coverage by creating different legal relationships, for example, an independent contractor relationship.'"[5] Id.

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enterprise or performed outside of all the employer's places of business; and 3) That such individual is customarily engaged in an independently established trade, business, profession or occupation.

See Wis. Laws 1935, c. 192, § 5.

[5] Indeed, the doctrine of respondeat superior, the touchstone of the common law control test, has "no necessary relation to the purposes of" social legislation. Asia, supra, 55 Yale L.J. at 82. see also Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987) (common-law test for blocking vicarious liability of employers has no bearing on functions of wage laws that seek to protect workers from substandard wage payment practices) (Easterbrook, J. concurring).

(quoting Report of Committee, p. 2). Instead, the Committee "recommended that a definition of employment similar to that contained in the Wisconsin unemployment compensation law be incorporated in State laws 'as the basis for extending their coverage beyond the master and servant relationship.'"[6] Id. (emphasis added). New Jersey followed the Committee and many other states and adopted the ABC test for its unemployment compensation law in 1936. See L. 1936, c. 270, § 19(i)(7).

Courts first applying the ABC test held that it was "exceptional in breadth." Unemployment Comp. Comm. v. Jefferson Standard Life Ins. Co., 2 S.E. 2d 584, 589 (N.C. 1939) ("The draftsmanship of the definition section, which gives flesh and sinew to the whole, shows a carefully considered and deliberate purpose to leap many legal barriers which would halt less ambitious enactments. As far as language will permit it, the act evinces a studied effort to sweep beyond and to include, by redefinition, many individuals who would have been otherwise excluded from the benefits of the act by the former concepts of

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[6] The Wisconsin Advisory Committee, a statutory body created to advise the legislature in matters of unemployment legislation (among other functions) described the statutory definition which it recommended to the 1935 legislature as providing a definition which "is unique and . . . is to be considered apart from conceptions of employer-employee relationships existing in other fields." Asia, supra, 55 Yale L.J. at 116, n.23 (quoting Explanation of Changes, Bill No. 426, S., 1941 Legislature).

master and servant and principal and agent as recognized at common law."). This Court endorsed this view in its early application of the ABC test under the New Jersey UCL. See Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940); Steel Pier Amusement Co. v. Unemployment Comp. Comm'n, 127 N.J.L. 154 (Sup. Ct. 1941); see also Carpet Remnant Warehouse, Inc., 125 N.J. at 581 ("Because the statute is remedial, its provisions have been construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles."). Like economic realities and the relative nature of the work test, the ABC test casts a broader net than the common law test. Furthermore, the ABC test, unlike the common law, creates a presumption of employee status, which it is the employer's burden to rebut. As such, it properly places the burden on those seeking to avoid the protections Legislature sought to give workers.

As demonstrated above, the ABC test meets this Court's long-held requirement that the test for employment under remedial statutes should cover a broader range of workers than those covered traditionally under the common law. See, e.g., D'Annunzio v. Prudential Ins. Co., 192 N.J. 110, 121 (2007) ("It

is beyond cavil that [CEPA] includes more than the narrow band of traditional employees"); Lowe v. Zarghami, 158 N.J. 606, 618 (1999)(rejecting the common law test in applying a much broader "relative nature of the work test" where "public policy concerns dictate a more liberal standard"). While Plaintiffs believe the "relative nature of the work" test as identified in D'Annunzio is the test that this Court is most likely to apply, there is clear support for adoption of the ABC test pursuant to the Department's regulations. See TAC Associates v. New Jersey Dep't of Envtl. Prot., 202 N.J. 533, 541 (2010) ("interpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation").

Furthermore, if the Court adopts the ABC test or economic realities test, in addition to acknowledging that the test extends coverage beyond the common law, this Court should expressly acknowledge that, similar to the relative nature of the work test, there is no requirement under the ABC test that there be contractual obligation to pay wages. To consider only the agreement, and not the totality of the facts surrounding the parties' relationship, would be to place form over substance. Electrolux Corp. v. Bd. of Review, 129 N.J.L. 154, 155 (E. & A.

1942). This is especially true where, for example, the WPL has a clear non-waiver provision.

Indeed, other states applying the ABC test have held that there need not be a contract between a worker and an employee to create liability for unpaid wages. As discussed in Plaintiffs' reply brief, in Massachusetts, where the ABC test is used under the state's wage laws, the Supreme Judicial Court dealt with a certified question concerning whether a defendant could be an employer "where there was no contract for service between the plaintiff and defendant." Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1064 (Mass. 2013). The court held that the workers could still be considered employees of a franchisor who contracted with a franchisee to supply the workers because "[l]imiting the statute's applicability to circumstances where the parties have contracted with one another would undermine the purpose of the statute." Id. at 1067. Similarly, courts interpreting the ABC test incorporated into the Illinois wage laws have found that courts must look beyond existence or absence of a contract between the parties when weighing an employment relationship. Anderson v. First Am. Grp. of Companies, Inc., 818 N.E.2d 743, 746 (Ill. App. 2004) (citing AFM Messenger Serv., Inc. v. Dep't of Employment Sec., 763

N.E.2d 272, 283 (2001) (in applying ABC test under Illinois unemployment compensation law, Illinois Supreme Court held "the terminology used by the parties in describing their relationship is not controlling, and there is a strict burden of proof placed upon the party claiming the exemption" from the law). As set forth in Plaintiffs' prior briefs, an intervening LLC does not preclude a finding that an individual is an employee who is "suffered or permitted" to work. See, Rutherford Foods. This Court should reject Sleepy's and its Amici's request to engraft a requirement of a direct contractual relationship upon the WPL or WEL, because it would provide a putative employer with the ability to avoid all worker protection laws simply by compelling its workers to form an LLC.

III. CONCLUSION

For the reasons set forth in the Plaintiffs' opening and reply briefs, Plaintiffs respectfully suggest that this Court should adopt one test for coverage under the WPL and WHL. Because of the remedial purpose of the New Jersey wage laws, the Court must choose a test at least as broad as the relative nature of the work test identified in D'Annunzio. Plaintiffs believe the ABC test utilized by the Department of Labor meets that standard. Under either test, however, the focus should be upon the person doing the work, not the language used in the agreement or to whom the putative employer made payments.

Respectfully submitted,

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Dated: November 18, 2013

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SAM HARGROVE, ANDRE HALL AND MARCO EUSEBIO, individually and on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLANTS, V. SLEEPY'S, LLC, DEFENDANT-RESPONDENT, V. I STEALTH, LLC, EUSEBIO'S TRUCKING CORP., AND CURVA TRUCKING, LLC, THIRD-PARTY DEFENDANTS.	SUPREME COURT OF NEW JERSEY DOCKET NO. 072742 **CERTIFICATE OF SERVICE**

I, Anthony L. Marchetti, Jr., hereby certify as follows:

1. I am an attorney licensed to practice in the State of New Jersey and associated with the law firm of Marchetti Law, P.C., attorneys for Plaintiffs-Appellants Sam Hargrove, Andre Hall, Marco Eusebio and all others similarly situated.

2. On November 18, 2013, I dispatched an original and 10 copies of Plaintiffs-Appellants' Reply to various Amicus Briefs by USPS overnight mail, postage prepaid to the

Clerk of the Supreme Court of New Jersey, Hughes Justice Complex, 25 W. Market Street, P.O. Box 970, Trenton, New Jersey 08625-0970.

On this same date, I also served two copies of the foregoing documents to counsel for Defendant, Elizabeth Tempio Clement, Littler Mendelson, P.C., Three Parkway, 1601 Cherry Street, Suite 1400, Philadelphia, PA 19102, as well as Counsel for International Brotherhood of Teamsters (IBT), David Tykulsker, Esq., David Tykulsker & Associates, 161 Walnut Street, Montclair, NJ 07042-3061, Counsel for NELA and Industry Workers Richard M. Schall, Schall and Barasch, LLC., 110 Marter Ave., Suite 302, Moorestown, NJ 08058 and Bennet D. Zurofsky, 17 Academy St., Suite 201, Newark, NJ 07102, Counsel for the Attorney General, Donna Arons, Esq., P.O. Box 112, Trenton, NJ 08625, Attorney General, Division of Law, Counsel for NJLS, Mellville D. Miller, 100 Metroplex Drive, Plainsfiled, Ave., Suite 402, P.O. Box 1357, Edison, NJ 08818-1357, Counsel for National Federation of Independent Business Small Business Small Business Legal Center, Richard M. Hluchan, 6000 Sagemore Dr., Suite 6301, Marlton, NJ 08053, Counsel to New Jersey Management Attorneys, Amy L. Bashore,Esq., Ballard Spahr, 210 Lake Dr., East, Suite 200, Cherry Hill, NJ, 08002. All Counsel were served via telecopy and regular mail.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of these statements are willfully false, I am subject to punishment.

Anthony J. Marchetti, Jr.

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Dated: September 10, 2013

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FILED

AUG 30 2013

CLERK

SUPREME COURT OF NEW JERSEY

SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO, Plaintiffs-Appellants/Cross-Appellees, v. SLEEPY'S, LLC, Defendant-Appellee/Cross-Appellant/Respondent, v. I STEALTH LLC, EUSEBIO'S TRUCKING CORP., and CURVA TRUCKING, LLC, Third-Party Defendants-Appellees.	R-11 SEPTEMBER TERM 2012 072742 CIVIL ACTION ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT/RESPONDENT

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I. PRELIMINARY STATEMENT

The rule of law depends on principled predictability: before people engage in an act, any rules governing that act must (1) be enacted by a valid authority and (2) make it "possible to foresee with fair certainty" the legal consequences of the act. Ronald A. Cass, The Rule of Law in America 7-14 (2001). Although employing someone under the Wage Payment Law ("WPL") is an act fraught with legal consequences, this Court has not identified the standard for determining employee status under that statute.

To clarify this issue, Sleepy's, LLC ("Sleepy's") respectfully requests that the Court adopt a two-tiered analysis. First, because the obligation to pay wages is an independent, antecedent requirement to an employment relationship, a plaintiff should first have to prove that the defendant was contractually obliged to pay wages to him or her. Only where that obligation is established should courts then proceed to a second question: whether that contract rendered the plaintiff an employee of the defendant or whether the plaintiff remained an independent contractor. To decide the latter question, courts should look to § 220(2) of the Restatement (Second) of Agency.

This result would promote the rule of law for two reasons. First, because the Legislature contemplated the Restatement

standard when it enacted the WPL, the Restatement test derives from a valid authority. Second, because that standard is well developed, it makes it possible for companies to foresee with fair certainty the legal consequences of their decisions pertaining to worker classification.

The Court should not decide the correct test for determining employee status under the Wage and Hour Law ("WHL"). Because there was no reference to the WHL in Plaintiffs' Complaint or (more importantly) in Plaintiffs' briefing before the Third Circuit, Plaintiffs may not recover under that statute. Any opinion on this issue would, therefore, be advisory. Should the Court elect to reach this question, however, we respectfully request that the Court conclude that (1) the contractual obligation for the defendant to pay the plaintiff wages is a necessary, but insufficient, element of employee status under the WHL; (2) the "economic reality" test applicable to claims under the Fair Labor Standards Act ("FLSA") governs plaintiffs who satisfy prong one; and (3) there is no material difference between the Restatement and "economic reality" tests.

II. PROCEDURAL HISTORY

The undisputed facts that the District Court identified are set forth in *Hargrove v. Sleepy's, LLC*, 2012 U.S. Dist. LEXIS 43949 (D.N.J. Mar. 29, 2012). To provide the Court with the context of this dispute, Sleepy's highlights what it regards as the salient points among those facts.

Sleepy's is a mattress retailer that contracts with delivery companies to deliver mattresses and other products to its customers. *See id.* at **1-2. These contracts were, at the times relevant to this dispute, referred to as Independent Driver Agreements ("IDAs"). *See id.* at * 2.

The IDAs classified the delivery businesses with which Sleepy's contracted as "independent contractors," and the delivery companies' personnel as "not employee(s) of Sleepy's." *See id.* Under the IDAs, delivery businesses were "responsible for hiring, firing, and paying [their own] personnel and bearing [their] own business expenses." *Id.* at *3. The IDAs created a non-exclusive relationship: on any particular day, Sleepy's was not obligated to request, and no signatory to an IDA was obligated to provide, delivery services for Sleepy's. *See id.* at *2. Further, a delivery business was free to use its vehicles or personnel to perform deliveries for other companies when not performing deliveries for Sleepy's. *See id.* Delivery businesses that entered into an IDA with Sleepy's were

responsible for purchasing or leasing their own trucks, which they also had to insure and maintain. *See id.* at *3.

Delivery businesses that elected to perform deliveries for Sleepy's on any given day had to agree not to have merchandise from other customers on their trucks while those trucks were used to make Sleepy's deliveries, and had to deliver mattresses at times convenient to the purchaser. *See id.* at **2-4. The drivers and helpers the delivery business chose to employ had to receive training materials from Sleepy's and had to pass a background check, if the delivery businesses wished to use those drivers and helpers to make Sleepy's deliveries. *See id.* at **2-3. Sleepy's periodically audited delivery businesses' compliance with the IDAs and had the right under the IDAs to "impose[] penalties" (*i.e.*, withhold payments from) a delivery business that violated a duty under the IDA. *See id.* at *4.

Plaintiff Marco Eusebio was the President of, and created, Eusebio Trucking Corp. ("ETC"). *See id.* at *4. He also helped to create and manage Curva Trucking, LLC ("Curva"). Both ETC and Curva entered IDAs with Sleepy's and, according to Mr. Eusebio, Sleepy's exercised roughly the same level of control over each delivery business. *See id.* at **4-5. These delivery businesses hired and decided how to pay their personnel, and decided which employees worked on which trucks without any input from Sleepy's. *See id.* at *5. Further, ETC employed a number of

individuals who did not perform deliveries for Sleepy's. *See id.* at **5-6.

Plaintiff Samuel Hargrove formed and managed I Stealth LLC ("Stealth") in November 2005. *See id.* at *7. Before 2008, Stealth delivered products for Sleepy's competitor, Dial-a-Mattress. *See id.* at *7. Stealth used one truck to make deliveries for Sleepy's, for which it paid all costs, including fuel, insurance, and maintenance. *See id.* at **7-8. Sleepy's never paid Mr. Hargrove any money; rather, it paid Stealth, which in turn paid all of its own personnel (including Mr. Hargrove) compensation. *See id.* at *8. Such compensation included overtime, worker's compensation insurance, and disability insurance. *See id.* Mr. Hargrove maintained Stealth's personnel files, receipts, and tax returns at its office in Willingboro, New Jersey. *See id.* He decided when he would take a lunch break and the particular route Stealth drivers took to make deliveries. *See id.*

Plaintiff Andre Hall entered into an IDA with Sleepy's and requested an "Employer Identification Number" from the IRS. *See id.* Mr. Hall hired his own help without direction from Sleepy's, except for the aforementioned background checks. *See id.* Mr. Hall negotiated pay rates for deliveries with Sleepy's. *See id.* at *9. The amount Sleepy's paid Mr. Hall depended on the amount of deliveries he performed and the location of those

deliveries. *See id.* Sleepy's did not pay the individuals Mr. Hall employed; rather, Mr. Hall had the responsibility of compensating his workers without any input from Sleepy's. *See id.* Mr. Hall paid for, insured, and serviced all of his vehicles with the only requirement from Sleepy's being that the delivery trucks be fourteen or sixteen feet in size. *See id.*

Notwithstanding these undisputed facts, in March 2010, Plaintiffs filed a Complaint in the United States District Court for the District of New Jersey alleging they were not employees of their own delivery businesses, but were instead Sleepy's common-law employees. As such, Plaintiffs claimed they were "entitled to the same protections and benefits as all other [Sleepy's] employees." *Id.* at *10. Plaintiffs brought eleven counts predicated on their alleged status as Sleepy's common-law employees:

1. Breach of Contract (Count I); 2. Breach of Contract (Count II); 3. Mistake (Count III); 4. Rescission (Count IV); 5. ERISA (Count V); 6. FMLA Violations (Count VI); 7. New Jersey Wage Payment Law (Count VII);	8. New York Labor Law (Count VIII); 9. Massachusetts Wage Law (Count IX); 10. Maryland Wage Payment and Collection Law (Count X); and 11. Connecticut Minimum Wage Act (Count XI).

On March 29, 2012, the District Court granted summary judgment in Sleepy's favor as to all eleven counts on the ground that Plaintiffs were not Sleepy's employees under the common

law. *See id.* at **14-15. Nowhere in the District Court's disposition did it mention the WHL.

In granting summary judgment, the District Court observed that "the chief precedent [governing status as a common-law employee] was established twenty years ago in *Nationwide Mutual v. Darden*, 503 U.S. 318 (1992)." *Hargrove*, 2012 U.S Dist. LEXIS 43949, at *13. *Darden* set forth a twelve factor test grounded in § 220(2) of the Restatement (Second) of Agency, which courts use to determine whether the hiring party exerted sufficient control over the hired party to transform the latter into the former's employee. *See Darden*, 503 U.S. at 323-24. According to the District Court, the following "incidents of the relationship" "overwhelmingly show[ed]" that, under this test, Plaintiffs were not Sleepy's common-law employees:

> (1) each plaintiff set up their own business entity; (2) each entered an IDA; (3) each maintained their own business records; (4) each hired their own workers; (5) each maintained a relationship with the IRS, as a business entity; (6) each purchased their own trucks, and maintained vehicle insurance and obtained motor vehicle registrations from state authorities; and (7) each paid their own expenses.

Hargrove, 2012 U.S Dist. LEXIS 43949, at *15.

Plaintiffs appealed to the Third Circuit, arguing that, under various proposed tests of common-law employee status,

there was an issue of fact as to whether they were Sleepy's employees in relation to all eleven counts, including Count VII, the WPL claim. In that brief, Plaintiffs did not contend that they had ever prosecuted a count under the WHL, that they were entitled to relief under the WHL, or that they were Sleepy's common-law employees in relation to that statute.[1]

The first time the WHL was injected into the lawsuit was on February 20, 2013, when the National Employment Law Project ("NELP") submitted an amicus brief to the Third Circuit. NELP argued, among other things, that the Third Circuit should submit to this Court "a question to determine the appropriate employment relationships tests under the New Jersey Wage and Hour Law and New Jersey Wage Payment Law." At oral argument, the Third Circuit pointed out to NELP that Plaintiffs had never raised a claim under the WHL. As Judge Sloviter put it, "We didn't find it [a WHL claim]. We didn't find it in the complaint. We looked carefully."[2]

Nevertheless, the Third Circuit certified the following question to this Court:

> Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. § 34:11-

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[1] https://ecf.ca3.uscourts.gov/cmecf/servlet/TransportRoom (entry of 09/04/12).

[2] http://www2.ca3.uscourts.gov/mwg-internal/de5fs23hu73ds/progress?id=WOnXnJ86DZ, at 21:19.

4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a. et seq.?

On July 10, 2013, this Court accepted that issue as certified.

III. ARGUMENT

Plaintiffs' brief conflates the analysis of employee status under the WPL and WHL. The purposes and language of each statute, however, are different. Further, the Court's ruling on the proper test for employee status under the WHL would be an advisory opinion with no concrete consequence for any party to this dispute. We therefore analyze the test for employee status under each statute separately.

A. Employee Status Under The WPL Depends On (1) A Contractual Obligation For The Defendant To Pay The Plaintiff Wages And (2) Application Of § 220(2) Of The Restatement (Second) Of Agency.

The WPL governs the time, manner, and method of paying employees' wages, and prohibits the withholding of wages and certain deductions. N.J. Stat. Ann. § 34:11-4.1 *et seq.* In private litigation, only an employee may proceed with a claim under the WPL. *Id.* at § 34:11-4.1(a) (statute only applies to a defendant "employing any person in this State"); *see In re Fed Ex Ground Package Sys., Inc.*, 758 F. Supp. 2d 638, 699-702 (N.D. Ind. 2010) (employee status is prerequisite to private individual prosecuting WPL claim). Because the obligation to pay wages is inherent in the notion of employment, the first

rule that the Court should adopt for determining employee status under the WPL is that the contractual obligation to pay wages is a necessary, but insufficient, element. For plaintiffs who clear that hurdle, the next question should be whether that contract rendered them the defendant's employees or whether they remained independent contractors.

1. Without A Contractual Obligation To Pay Wages, No Combination Of Factors Will Suffice To Establish Employee Status Under The WPL.

The Court should enunciate a bright-line rule: an obligation for the defendant to pay the plaintiff wages is a necessary but insufficient element of employee status under the WPL.

The primary reason for this rule is that the WPL only governs the payment of "wages," which constitute "the direct monetary compensation for labor or services rendered by an employee." *Id.* at § 34:11-4.1(c). It follows that, where the defendant never was obliged to provide any direct monetary compensation for labor or services to the Plaintiff, the WPL is inapplicable and no further analysis is necessary.

This bright-line rule also inheres in the very concept of employment. The WPL only applies to a defendant "employing any person in this State." § 34:11-4.1(a). Before an individual can be an employee under even the most expansive of definitions, he first must be hired: *i.e.*, he must be promised "compensation

in return for services." *Juino v. Livingston Parish Fire Dist.*, 717 F.3d 431, 436 (5th Cir. 2013) (citation omitted). The payment of wages, therefore, is a *sine qua non* of any employment relationship: without compensation, no combination of other factors will suffice to establish employee status. *See id.* at 436-39; *Love v. Cmty. Nutrition Network*, 2010 U.S. Dist. LEXIS 133011, at **24-25 (N.D. Ill. Dec. 16, 2010) ("[T]he circuits that have considered this issue uniformly have held that remuneration in exchange for services is an essential condition to the existence of the employer-employee relationship.").[3] Thus, where the putative employer never was obliged to pay the putative employee any money, the "preliminary question of remuneration is dispositive of the issue of plaintiff's employment, and renders inapplicable" any further analysis. *Kemether v. Pennsylvania Interscholastic Athletic Ass'n*, 15 F. Supp. 2d 740, 759 (E.D. Pa. 1998).[4]

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[3] *Accord Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1244 (11th Cir. 1998); *Graves v. Women's Prof'l Rodeo Assoc.*, 907 F.2d 71, 74 (8th Cir. 1990); *Dean v. Am. Fed'n of Gov't Employees*, 549 F. Supp. 2d 115, 118 (D.D.C. 2008); *Cameron v. Infoconsulting Int'l, LLC*, 2006 U.S. Dist. LEXIS 32463, at **18-19 (E.D. Pa. May 23, 2006).

[4] *Accord O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997); *Cimino v. Borough of Dunmore*, 2005 U.S. Dist. LEXIS 40049, at **17-18 (M.D. Pa. Dec. 21, 2005); *see also Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 492 (6th Cir. 2005) (complainant, who was the owner and sole shareholder of company providing contract labor at plant, was not an "employee" for purposes of Energy Reorganization Act); *Estrada v. City of Los Angeles*, 218 Cal. App. 4th 143, 151 (2013) (favorably citing *O'Connor* and *Graves*).

Finally, clarifying that a contractual right to wages is a necessary but insufficient element of employee status under the WPL would promote judicial economy, freeing the judiciary and the parties from frivolous WPL claims brought by individuals to whom the defendant was never obliged to pay wages in the first place. Indeed, illuminating this point would be critical to the resolution of the present dispute, because Plaintiffs Eusebio and Hargrove admitted that (1) they had no contract with Sleepy's (which means that Sleepy's had no contractual obligation to pay them wages); and (2) Sleepy's never paid them any money (which means that Sleepy's could not possibly have made improper deductions from their wages in violation of the WPL).[5]

2. Where A Contractual Obligation To Pay Wages Exists, Employee/Independent Contractor Status Under The WPL Then Depends On § 220(2) Of The Restatement (Second) Of Agency.

Once the contractual obligation for the defendant to pay wages to the plaintiff is established, the next and determinative question is whether that contract rendered the plaintiff the defendant's employee, or whether the plaintiff

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[5] Plaintiffs Hargrove and Eusebio were solely compensated, at a rate *they* determined, by the delivery companies that they created and managed. If there was a problem with the timing, manner, or method of payment of Mr. Hargrove's or Mr. Eusebio's wages, therefore, that problem can only be attributed to the companies they managed, not to Sleepy's.

remained sufficiently independent to qualify as an independent contractor.

a. The WPL Excludes "Independent Contractors" From Employee Status, But Fails To Define "Independent Contractor".

The WPL excludes from its coverage "independent contractors," defining "employee" as: "any person suffered or permitted to work by an employer, except that **independent contractors and subcontractors shall not be considered employees**." N.J. Stat. Ann. § 34:11-4.1(b) (emphasis added). The WPL does not, however, define "independent contractor," nor does any controlling legal authority clarify the test for determining who is an "independent contractor."[6] To answer the certified question, therefore, the Court must decide what the term "independent contractor" means under the WPL.[7]

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[6] Besides the District Court opinion in this action, our research has uncovered only one other case to decide what analytical framework governs status as an "independent contractor" under the WPL. That case is *In re Fed Ex Ground Package Sys., Inc.*, where the court looked to the Restatement test. *See* 758 F. Supp. 2d at 699. For reasons we discuss below, the *Fed Ex* court was correct.

[7] We do not focus on the term "subcontractor" as used in the WPL because "[s]ubcontractors have been held to be both independent contractors and employees, depending upon the terms and nature of the agreement and the manner of its performance. And in determining whether a subcontractor is an independent contractor, insofar as his relation to the principal contractor is concerned, the same rules apply that are used to determine whether any other person who renders service to an original contractor is a servant or an independent contractor." *Barkley v. C.R. Mitchell*, 411 S.W. 2d 817, 823 (Mo. Ct. App. 1967) (citing 57 C.J.S. Master and Servant § 582)).

b. Where The Legislature Fails To Define A Term In The Text Of A Statute, The Common-Law Definition Of The Term At The Time Of Enactment Controls.

Courts must "refer to the history of the times to ascertain . . . the meaning of the provisions of a statute. . . ." *Yanow v. Seven Oaks Park, Inc.*, 11 N.J. 341, 348 (N.J. 1953) (internal punctuation and quote omitted).[8] Further, because "a legislative body in this State is presumed to be familiar with . . . the common law," where a statute fails to define a term, this Court presumes that the Legislature intended to use the term as the common law defined the term when the statute was enacted. *Id.* at 350; *see* 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 47.30 & n.4 (2007 & Supp. 2012).[9] In a similar vein, when the Legislature uses a term that had a "special or accepted meaning in the law" when the statute was enacted, the Court must construe the term

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[8] *Accord Crater v. County of Somerset*, 123 N.J.L. 407, 413 (N.J. 1939).

[9] *See also Peterson v. Ballard*, 292 N.J. Super. 575, 584-85 (App. Div. 1996) (construing Law Against Discrimination so as not to depart from the common law); *National Lead Co. v. Borough of Sayreville*, 132 N.J. Super. 30, 38 (App. Div. 1975) ("It is established that words and phrases in a statute having a well-defined meaning in the common law are to be interpreted in the same sense under the statute when used in connection with the same or similar subject matter with which they were associated at common law."); *Burke v. Dir., Div. of Taxation*, 11 N.J. Tax 29, 38-39 (N.J. Tax. Ct. 1990) ("charitable trust" as used in Gross Income Tax Act presumably meant what the common law defined the term to mean when the Act was passed).

"in accordance with such . . . special and accepted meaning." N.J. Stat. Ann. 1:1-1.

In re Lead Paint Litig., 191 N.J. 405 (N.J. 2007), illuminates these principles. In that case, the question was "what the Legislature intended when it declared in the Lead Paint Act that the presence of lead paint in buildings is a public nuisance." *Id.* at 429. After a detailed examination of what the term "public nuisance" meant in the common law, including a discussion of the Restatement (Second) of Torts' treatment of the term, *see id.* at 424-49, this Court concluded that "the Legislature's use of the term 'public nuisance' can only have been intended in its strict historical sense," and that the Legislature intended to incorporate the accepted, common-law definition of "public nuisance" into the Lead Paint Act. *Id.* at 430-31. Central to the Court's reasoning was the principle that, because "public nuisance" had an accepted meaning in the common law when the Lead Paint Act was enacted, the Legislature must have intended to use the term in accordance with that meaning. *See id.* at 430.

Similarly, in *In re Plan for the Abolition of the Council on Affordable Housing*, 2013 N.J. LEXIS 727 (N.J. July 10, 2013), the central question was the meaning of the term "in, but not of" in the Fair Housing Act. *See id.* at *45. This Court answered that question by examining the meaning of "in, but not

of" as developed by the common law, and determined that the Legislature, at the time of the statute's enactment, intended the term to mean what it then meant under the common law. *See id.* at **49-50 ("[B]y 1985, when the Legislature adopted the Fair Housing Act, it was understood that the 'in but not of' designation used to create COAH bestowed independence on an agency.").

Once again, the WPL excludes "independent contractors" from its coverage. The Legislature enacted the WPL in 1965.[10] *See* N.J. Stat. Ann. § 34:11-4.1. Therefore, and in light of the foregoing principles, the seminal question is this: How did the common law of New Jersey define "independent contractor" in 1965?

c. When The WPL Was Enacted In 1965, The Common Law Defined "Independent Contractor" As Per § 220(2) Of The Restatement (Second) Of Agency.

As of 1965, two common-law tests for determining "independent contractor" status existed in New Jersey case law: (1) the "control" test derived from § 220(2) of the Restatement (Second) of Agency; and (2) an embryonic "relative nature of the work" test. *See Tofani v. Lo Biondo Bros. Motor Express, Inc.*, 83 N.J. Super. 480, 484-92 (App. Div. 1964).

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[10] The statute was amended on July 12, 1991, but the amendments did not affect the definition of "independent contractor." *See* N.J. Stat. Ann. § 34:11-4.1(b) (effective July 12, 1991).

i. By 1965 The Restatement Test Was Long-Established.

The Restatement test focuses on whether the individual was so controlled as to preclude independent-contractor status. To decide that issue, courts applying the Restatement test circa 1965 focused on nine, non-exclusive factors:

> (1) the extent of control which, by agreement, the master may exercise over the details of the work; (2) whether or not one so employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular activity; (5) whether the employer or the person doing the work supplies the instrumentalities, tools and the place of work; (6) the length of time for which the person is employed; (7) the method of payment; (8) whether or not the work is part of the regular business of the employer; and (9) whether or not the parties believe they are in the relationship of master and servant.

Miklos v. Liberty Coach Co., 48 N.J. Super. 591, 602 (App. Div. 1958) (citing § 220(2) of the Restatement (Second) of Agency (1933)).

The Restatement test traces its origins to the 19th Century. Richard R. Carlson, *Why The Law Still Can't Tell An Employee When It Sees One And How It Ought To Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 304-05 (2001) [hereinafter, "Carlson"]. By the mid-1960's, the Restatement test was so well-known that it had "generally been adopted throughout the

Anglo-American world." *Tofani*, 83 N.J. Super. at 485; *accord* 3-60 Larson's Workers' Compensation Law § 60.01 (2013) ("A typical definition and summary of tests, and one on which practically every court in the Anglo-American world would agree, is that given in the Restatement of Agency (Second).").

New Jersey was no exception to the rule: by 1965, New Jersey courts had used the Restatement test repeatedly, and in varied contexts, to determine whether an individual was an independent contractor. *See Tofani*, 83 N.J. Super. at 485 (applying both Restatement test and "relative nature of the work test" to determine independent-contractor status of truck drivers for purposes of Workmen's Compensation Statute); *Andryishyn v. Ballinger*, 61 N.J. Super. 386, 391 (App. Div. 1960) (applying Restatement test to determine independent-contractor status of truck driver in tort action); *Miklos*, 48 N.J. Super. at 602 (applying Restatement test to determine independent-contractor status of sales company in action for rescission); *Devone v. Newark Tidewater Terminal, Inc.*, 14 N.J. Super. 401, 417-18 (App. Div. 1951) (applying Restatement test to determine independent-contractor status of engineer of "dinkey engine" in negligence case); *Geary v. Simon Dairy Prods. Co.*, 7 N.J. Super. 88, 91 (App. Div. 1950) (applying Restatement test to determine independent-contractor status of truck driver in negligence case).

ii. By 1965 The "Relative Nature Of The Work" Test Had Only A Toehold In The Common Law.

The "relative nature of the work" test evolved from the Restatement test. *See Leach v. Bd. of Parole Comm'rs*, 118 S.W.3d 646, 649 n.3 (Mo. Ct. App. 2003) ("[T]he relative nature of the work test is subsumed within several of the factors of the right to control test. . . ."); *see also Hannigan v. Goldfarb*, 53 N.J. Super. 190, 205 (App Div. 1958) (acknowledging the extent to which the "relative nature of the work" test follows the Restatement test). The former test is different from the latter less in content than in emphasis: instead of highlighting indicia of "control," the "relative nature of the work" test shifts the analytical weight to two factors that (according to the test's proponents) reflect the "underlying principle that really tips the scales in close situations": "whether the work done is an integral part of the [putative] employer's business" (essentially the same as factor (8) of the Restatement factors listed in *Miklos*); and "whether the worker, in relation to the [putative] employer's business, is in a business or profession of his own" (essentially the same as factor (2) of the Restatement factors listed in *Miklos*). 3-60 Larson's Workers' Compensation Law §§ 60.03 & 60.05[3].

Thus, "[t]he 'relative nature of the work' test does not replace the common law employment test; rather the two tests

work in tandem and their weight depends often on the circumstances." *Barnard v. State of Del.*, 642 A.2d 808, 815 (Del. Super. Ct. 1992) (internal quotation omitted). It follows that a court applying the "relative nature of the work" test may consider the same nine criteria set forth in the Restatement. *See Tofani*, 83 N.J. Super. at 501 ("relative nature of the work" and Restatement tests are "inextricably intertwined"); *White v. Gulf Oil Corp.*, 406 A.2d 48, 52 (Del. 1979) (application of "relative nature of the work" test does not operate "to the exclusion of the [Restatement] test").

In contrast to the venerable Restatement test, as of 1965 the "relative nature of the work" test was in its infancy. The chief advocate for, if not the inventor of, the new test was Professor Arthur Larson, who drew mainly on post-1945 cases to argue that the "relative nature of the work" test reflected the determinative factors in close cases. *See* 3-60 Larson's Workers' Compensation Law § 60.05[4] ("most of the cases to be utilized in the text as examples in this discussion are cases decided since 1945"). Professor Larson's efforts began to bear fruit in 1953, when *Kughn v. Rex Drilling Co.*, 64 So. 2d 582, 585 (Miss. 1953) became the first case in the United States to use the term "relative nature of the work."[11]

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[11] Search of "Federal & State Cases, Combined" database on Lexis-Nexis for term "relative nature of the work" (August 22, 2013).

It was not until five years later that the "relative nature of the work" test first surfaced in the common law of New Jersey. In *Hannigan v. Goldfarb*, a case concerning independent-contractor status under the Workmen's Compensation statute, the Appellate Division favorably cited and discussed Professor Larson's treatise. *See* 53 N.J. Super. at 205. The *Hannigan* court made clear, however, that the rationale for the "relative nature of the work" test was rooted in language unique to the Workmen's Compensation statute, which was "construed to bring as many cases as possible within its coverage." *Id.* at 195. Further, the *Hannigan* court did not actually adopt Professor Larson's new test, noting that "we arrive at the same result with either the 'right to control' or the 'relative nature of the work' test." *Id.* at 206.

In *Tofani*, six years later, the Appellate Division again analyzed both the traditional Restatement and "relative nature of the work" tests in the Workmen's Compensation context, and once again noted that it did not have to choose between them, as they led to the same result. 83 N.J. Super. at 491 ("Both the control test and the relative nature of the work test bring decedent within the ambit of our compensation law."). In addition to *Hannigan* and *Tofani*, the term "relative nature of the work" appeared in only four other New Jersey opinions

published before 1966, each of which pertained to Workmen's Compensation.[12]

By 1965, therefore, the "relative nature of the work" test merely represented an incremental change in the Restatement test, one that had gained a toehold in only one area of New Jersey law, Workmen's Compensation. Further, it was not clear that the new test had supplanted the Restatement test even in that narrow context. Professor Larson maintains that, in this Court's *per curiam* opinion in *Marcus v. Eastern Agricultural Ass'n*, 32 N.J. 460 (N.J. 1960), the Court adopted the "relative nature of the work" for Workmen's Compensation cases. *See* 3-60 Larson's Workers' Compensation Law § 60.05 n.7. As of 1964, however, the *Tofani* court regarded that point as sufficiently unsettled that it analyzed the right to benefits under both the Restatement and "relative nature of the work" tests.

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[12] *See Dee v. Excel Wood Prods.*, 86 N.J. Super. 453, 459-61 (App. Div. 1965) (applying "relative nature of the work" test in Workmen's Compensation case); *Burchner v. Bergen Evening Record*, 81 N.J. Super. 121, 132 (App. Div. 1963) (applying both Restatement and "relative nature of the work" tests in Workmen's Compensation case); *Berkeyheiser v. Woolf*, 71 N.J. Super. 171, 173-77 (App. Div. 1961) (same); *Brower v. Rossmy*, 63 N.J. Super. 395, 406 (App. Div. 1960) (applying "relative nature of the work" test in Workmen's Compensation case); *Marcus v. Eastern Agricultural Ass'n*, 58 N.J. Super. 584, 597-605 (App. Div. 1959)(Conford, J., dissenting)(same).

iii. The Restatement Test Determines Employee Status Under The WPL.

In light of this history, we return to the crucial question: How did the common law of New Jersey define "independent contractor" in 1965?

The critical considerations are that, as of 1965, (1) the "relative nature of the work" test represented a new, and incremental, change to the well-established Restatement test; (2) the "relative nature of the work" test had not been applied by New Jersey courts outside the narrow context of Workmen's Compensation; and (3) it was unclear whether the "relative nature of the work" test superseded the Restatement test even in that narrow realm. It is thus highly improbable that, when the Legislature enacted the WPL in 1965, it believed that the "relative nature of the work" test had succeeded the traditional Restatement definition of "independent contractor."

Indeed, even Professor Larson, the "relative nature of the work" test's greatest champion, recognized this point. He wrote that "it is assumed that all modern legislation based on the employment relation intended to adopt *in toto* the case law of master and servant" reflected in the Restatement. 3-60 Larson's Workers' Compensation Law § 60.04[1]. In 1965, the WPL was modern legislation based on the employment relation. When the Legislature explicitly excluded "independent contractors" from

the reach of that statute, the Legislature, therefore, must have intended to adopt the common-law definition of "independent contractor" set forth in the Restatement.

In sum, the traditional Restatement definition of "independent contractor" was the only test of independent-contractor status ensconced in the common law of New Jersey as of 1965, when the WPL was enacted. The Court should therefore hold that, once a plaintiff establishes the defendant's contractual obligation to pay wages, an application of the test found at Restatement (Second) of Agency § 220(2) governs independent-contractor status under the WPL. Taking this step would promote the rule of law by giving effect to the Legislature's intent and by allowing corporations to foresee with a reasonable level of predictability whether an individual is or is not an employee within the meaning of the WPL.

d. The Tests Of Employee/Independent Contractor Status Under The WPL That Plaintiffs Propose Are Improper.

Plaintiffs stake all (or almost all) on the proposition that the WPL is a remedial statute, which therefore must be construed "liberally," in a manner that broadens its coverage. It follows (in Plaintiffs' view) that this Court should "at the very least" (Pb17) engraft onto the WPL a narrow definition of "independent contractor" that was not formulated until 42 years after the WPL was enacted, in *D'Annunzio v. Prudential Ins. Co.*,

192 N.J. 110 (N.J. 2007). (Pb8-16). Plaintiffs are not entirely certain that this is the correct outcome, however, and hedge their bets by suggesting that, perhaps, the Court should write into the WPL an even more narrow definition of "independent contractor": the "ABC test." (Pb17-21). Failing that, in Plaintiffs' view, it would be "understandable[]" if the Court were to apply the "economic reality" test. (Pb22).

Two infirmities doom Plaintiffs' search for some other test of employee/independent contractor status to displace the Restatement test: (i) Plaintiffs' desired conclusions depend almost entirely on the shopworn notion that remedial statutes must, of necessity, be broadly construed; and (ii) consequently, Plaintiffs never address the critical question (what was the commonly accepted meaning of "independent contractor" in 1965?).

i. Plaintiffs Misplace Their Reliance On The Canon That Remedial Statutes Must Be Liberally Construed.

The canon that remedial statutes must be liberally construed "is surely among the prime examples of lego-babble." Antonin Scalia, 40 Case W. Res. L. Rev. 581, 581-82 (1990) ("It is so wonderfully indeterminate, as both when it applies and what it achieves, that it can be used, or not used, or half-used, almost *ad libitum*, depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the

court wishes to achieve.").[13] Because "virtually any statute is remedial in some respect," to say that remedial statutes should be liberally construed is tantamount to saying that *all* statutes should be liberally construed, a tenet that would render the canon useless as a distinguishing principle. *East Bay Mun. Util. Dist. v. Dept. of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998). Further, although the canon assumes that the more "liberal" or "broad" result was necessarily what the Legislature intended, in reality legislation always reflects a balancing of competing purposes, some "liberal" and some not. *See id.*[14]

It is thus unsurprising that courts have routinely brushed aside the notion that, simply because a statute serves a remedial purpose, the statute must be broadly construed. *See,*

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[13] *See also Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985) ("[T]he objective of a statute is not a warrant to disregard the terms of the statute. Congress always has some objective in view when it legislates, and it is always possible to move a little farther in the direction of that objective. The fact that Congress has pointed in a particular direction does not authorize a court to march in that direction without limit. The language and structure of the statute establish how far to go.").

[14] In the WPL, for example, the Legislature unmistakably chose to narrow the scope of the statute by exempting from its coverage "independent contractors," when it could just as easily have achieved a more "liberal" result by including that category of individuals within the ambit of the statute. Thus, if the Court were to accept Plaintiffs' invitation to define "independent contractor" so narrowly as to render meaningless independent contractors' exclusion from the reach of the WPL, the Court would certainly achieve a "liberal" and "broad" result, but it would also reach a result diametrically opposed to the Legislature's intent.

e.g., *Oswin v. Shaw*, 129 N.J. 290, 310-11 (N.J. 1992) (declining to follow canon that remedial statutes are to be liberally construed where liberal construction would have resulted in an interpretation of the statute that changed the common law), superseded on other grounds by N.J.S.A. 39:6A:8 (1998); *Peterson*, 292 N.J. Super. at 584 (same). What courts have actually done, and what this Court should do, is give effect to the legislative intent, regardless of whether that intent was "liberal," "conservative," or somewhere in between.

ii. Plaintiffs Shed No Light On What The Legislature Meant By "Independent Contractor" In 1965.

Once Plaintiffs' reliance on the canon that remedial statutes are to be liberally construed is put aside, the second, and more serious, problem with Plaintiffs' argument becomes more evident: Plaintiffs do not tell the Court how the common law defined "independent contractor" in 1965. An examination of each of the tests that Plaintiffs propose illustrates that point, and other deficiencies.

(a) The *D'Annunzio* Test Did Not Exist In 1965 And Concerns A Statute That Does Not Exclude "Independent Contractors" From Coverage.

Plaintiffs concentrate most of their fire on persuading the Court to engraft onto the WPL the definition of "independent contractor" formulated six years ago in *D'Annunzio*. (Pb8-17).

In *D'Annunzio*, this Court had to decide whether the Plaintiff was an employee within the ambit of the Conscientious Employee Protection Act (CEPA), a statute enacted in 1986 that provides protection to "employee[s]" who blow the whistle on their employers' illegal or fraudulent activities. *Id.* at 114. The CEPA statute defines "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J. Stat. Ann. § 34:19-2(b). The salient question in *D'Annunzio* was whether the plaintiff was an "employee" entitled to bring suit under CEPA. *See* 192 N.J. at 121.

This Court began its analysis by observing that the definition of "employee" in CEPA (unlike the definition of "employee" in the WPL) does not exclude "independent contractors" from the ambit of CEPA's coverage. *See id.* As such, the determinative question in *D'Annunzio* (unlike the determinative question here) did not hinge on whether the plaintiff was an "independent contractor"; indeed, the Court suggested that Mr. D'Annunzio might have been both an independent contractor under the common law *and* an "employee" under CEPA's expansive definition of the term. *See id.* ("It is beyond cavil that [CEPA's definition of 'employee'] includes more than the narrow band of traditional employees."). Instead,

the critical issue in *D'Annunzio* was whether the plaintiff met CEPA's particular definition of "employee". *See id.*

To answer that question, this Court directed that courts employ a three-tiered approach. *See id.* at 122-23. First, courts must apply a 12-factor test that is "a hybrid that reflects" the test found in the Restatement § 220(2). *Id.* Second, courts must then apply "an economic realities test" assessing the worker's economic dependence on the work relationship. *Id.* at 122. Finally, courts must ask whether "there has been a functional integration of the employer's business with that of the person doing the work at issue." *Id.*

D'Annunzio provides no helpful guidance to determine the definition of "independent contractor" under the WPL. As discussed in § III(A)(2)(b), the critical question regarding employee status under the WPL is whether the individual was an "independent contractor" as the term was understood by the common law (and thus the Legislature) in 1965. Because *D'Annunzio* interpreted a statute that does not exclude from its coverage an "independent contractor" and that was enacted 21 years after the WPL, and because *D'Annunzio* contains no discussion of what "independent contractor" meant circa 1965, *D'Annunzio* does not answer the critical question here. *See Fid. & Deposit Co. v. Abagnale*, 97 N.J. Super. 132, 143-44 (Law. Div. 1967) ("[T]he intent of the Legislature must be gathered in

light of conditions and circumstances prevailing at the time of enactment. A new meaning may not be given the words of an old statute in consequence of changed conditions probably not foreseen by the Legislature.").

(b) There Is No Indication That The Legislature Defined "Independent Contractor" As Per The "ABC Test."

In addition to arguing for the *D'Annunzio* test, Plaintiffs contend in the alternative that the Court might apply the "ABC test" to determine whether an individual is an "independent contractor" under N.J. Stat. Ann. § 34:11-4.1 and thus excluded from the WPL's coverage. (Pb17-20.)

The "ABC test" is not a product of the common law; it is a creature of New Jersey's unemployment statute, under which an individual is a non-employee when the following criteria are satisfied:

> (A) Such individual has been and will continue to be free from control or direction over the performance for such service, both under his contract of service and in fact; and
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J. Stat. Ann. § 43:21-19(i)(6)(A)-(C)(2013).

According to Plaintiffs, because the New Jersey Department of Labor has concluded that the "ABC test" applies to claims under the WHL, this Court should therefore afford "substantial deference" to the Department and apply the "ABC test" to Plaintiffs' WPL claim. (Pb17-18).

Plaintiffs' argument fails for five reasons.

First, it is a non sequiter. That New Jersey's Department of Labor and Workforce Development believes that the "ABC test" should apply to one statute does not imply that the Department believes that the "ABC test" should apply to another statute. Plaintiffs do not suggest that the Department has ever expressed any view regarding whether the "ABC test" should be used regarding a WPL claim. Even if this Court were inclined to "defer" to the Department, therefore, there is nothing to defer to.

Second, if the Department had expressed any view about the proper test for determining employment status under the WPL, the Department's view on that strictly legal issue would have been entitled to no deference. *See Utley v. Dep't of Labor*, 194 N.J. 534, 551 (N.J. 2008) (Courts are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue."). Hence Plaintiffs' inability to point to *any* instance in which *any* court has deferred to the

Department's opinion that the "ABC test" should apply to WHL claims, much less WPL claims.[15]

Third, the "ABC test" is the product of a unique legislative scheme that has nothing to do with the WPL. The Legislature intended New Jersey's unemployment compensation regime to provide for "the relief of emergencies in which claimants have been caught." *Oliveri v. Y.M.F. Carpet, Inc.*, 186 N.J. 511, 526 (N.J. 2006) (citation omitted). The statute is therefore designed to effect "speed of decision-making" and "the almost presumptive payment of benefits." *Id.* Considering the unique, "emergency" purposes animating the unemployment statute, it makes sense that the Legislature departed from the common-law test of employee status and mandated the use of the broader "ABC test" to determine eligibility for unemployment compensation. There is no evidence, however, that the unique

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[15] Plaintiffs do not point to such a case because they cannot. A Lexis Nexis search of New Jersey State Court decisions and District of New Jersey decisions using the search term "ABC test" resulted in only thirteen opinions. Eleven applied the ABC test in the unemployment compensation context. One case applied the test in the context of New Jersey's Temporary Disability Benefits Law, which is part of the same statutory scheme as the unemployment statute. *See Special Care of N.J. v. Bd. of Rev.*, 327 N.J. Super. 197, 208, 210-12 (N.J. Sup. Ct. 2000). Only an unpublished decision by the District of New Jersey involving a pro se plaintiff applied the ABC test in the context of state labor laws, without explaining why it applied the test. *See Hicks v. Mulhallan*, 2008 U.S. Dist. LEXIS 36362, at **14-15 (D.N.J. May 5, 2008). That opinion provides no principled support for applying the ABC test to a WPL claim.

legislative intent inspiring the unemployment law played any role in the enactment of the WPL.

Fourth, and relatedly, the Legislature wrote the ABC test into the unemployment statute well before 1965. *See Electrolux Corp. v. Bd. of Rev.*, 129 N.J.L. 157, 158 (N.J. 1942). When the Legislature passed the unemployment statute, it intended to cover a broad array of individuals. To effect that intent, the Legislature included, within the text of the statute itself, an "ABC test" abrogating the common law and extending the statute's reach to at least some individuals who would not have been deemed employees under the Restatement test. Yet, in 1965, when the Legislature enacted the WPL, it did no such thing, which strongly implies that the Legislature did not wish to depart from the common law's understanding of "independent contractor" when it used that term in the WPL. *See In re Plan for the Abolition of the Council on Affordable Housing*, 2013 N.J. LEXIS 727, at *49 ("When the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.") (internal quotes and citations omitted).

Fifth, the WPL is a penal statute. *See Dep't of Labor v. Asbury Metropolitan Hotel Co.*, 80 N.J. Super. 486, 491-93 (App. Div. 1963). As such, the statute's reach must be narrowly construed, *see id.*, which militates toward a more narrow

definition of "employee" or (to state the converse principle) a broader definition of "independent contractor." *See Belcufine v. Aloe*, 112 F.3d 633, 639-40 n.7 (3d Cir. 1997) (Alito, J.) (because Pennsylvania's analog to the WPL is a penal statute, its definition of "employer" must be narrowly construed).

(c) There Is No Indication That The Legislature Defined "Independent Contractor" As Per The "Economic Reality" Test.

Toward the end of their brief, Plaintiffs discuss using the "economic reality" test to determine whether an individual is an independent contractor under the WPL. (Pb20-22).

The "economic reality" test applies to wage claims under the FLSA. Under that test, courts consider a non-exhaustive list of four factors, including (1) hiring and firing authority; (2) authority over work rules and assignments; (3) day-to-day supervision, including the authority to discipline; and (4) control over workers' records, to determine whether an individual is an independent contractor. *See In Re: Enterprise Rent-a-Car Wage & Hour Emp. Practices Litig.*, 683 F.3d 462, 467-69 (3d Cir. 2012).

The operative word, however, is "non-exhaustive." Courts must take into account "the total employment situation," *id.* at 469, such that any factor relevant to the Restatement test could be relevant to the "economic realities" test as well. *See*

Hargrove, 2012 U.S. Dist. LEXIS 43949, at *14 (Restatement analysis requires courts to consider "all of the incidents of the relationship"). For that reason, the "substantive differences between" the Restatement test (or the *Darden* test, which derives from the Restatement) and "economic realities" test are "minimal." *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004).[16]

The lack of any meaningful difference between the Restatement test and the "economic reality" test may explain the tepid endorsement Plaintiffs give the "economic reality" test: "Because of the similarities between the statutory definitions of employment in the FLSA and New Jersey wage laws, the Court could understandably apply the 'economic reality' test here." (Pb21-22).[17]

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[16] *Accord Murray v. Principal Fin. Group., Inc.*, 613 F.3d 943, 945 (9th Cir. 2010) ("no functional difference"); *Estate of Suskovich v. Anthem Health Plans of Va., Inc.*, 553 F.3d 559, 565 (7th Cir. 2009) ("slightly different"); *McIntire v. Bowen-Leavitt Ins. Agency, Inc.*, 1996 U.S. App. LEXIS 31331, at *10 n.6 (10th Cir. Dec. 5, 1996) ("in practice largely indistinguishable"); *Simpson v. Ernst & Young*, 100 F.3d 436, 442 (6th Cir. 1996) ("no material difference"); *Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n*, 1994 U.S. App. LEXIS 1578, at *7 (9th Cir. Jan. 25, 1994) ("substantially similar").

[17] Plaintiffs cannot quite bring themselves to argue that the Court actually should apply the "economic reality" test to the WPL; the farthest Plaintiffs can go is to assure the Court that they would "understand" it if the Court were (for some reason) to retrofit the "economic reality" test onto the WPL.

The FLSA and WPL, however, lack any pertinent "similarities." The WPL clearly and unmistakably excludes "independent contractors," as the term was understood by the common law in 1965, from the "employee[s]" covered by the statute. N.J. Stat. Ann. § 34:11-4.1. The FLSA does not contain an analogous provision. *See* 29 U.S.C. § 203(e). It would make no sense to import into the WPL a test of independent-contractor status applicable to a statute that *does not* explicitly carve out "independent contractors" from its definition of employees.

Further, and relatedly, there is no reason to believe that, in 1965, when the Legislature defined "employee" to exclude "independent contractors," it intended to incorporate within the WPL a test of independent-contractor status from the FLSA. In the absence of such evidence, this Court should not import the FLSA test of independent-contractor status into the WPL. *See Burke*, 11 N.J. Tax. at 35 n.3 (absent a "showing that our Legislature had [a foreign statute] in mind when it adopted" a New Jersey statute, New Jersey courts will not construe the two statutes *in pari materia*) (citing 2A Sutherland, Statutory Construction § 51.06 (4th ed. 1984)).

Notwithstanding Plaintiffs' attempt to propose sundry tests that would write the "independent contractor" exclusion out of the WPL, the Legislature wrote that exclusion into the statute

in plain English. To give effect to the legislative intent, the Court must define "independent contractor" as the term was commonly understood in 1965. The Court should therefore hold that (1) where the putative employer had no contractual obligation to pay wages to the putative employee, employee status does not exist under the WPL; and, (2) for plaintiffs who clear that threshold, § 220(2) of the Restatement (Second) of Agency defines status as an employee or "independent contractor" under the WPL.

B. Because Plaintiffs Have No WHL Claim, This Court Should Reformulate The Certified Question To Exclude Any Reference To The WHL

This Court should not decide the test for employee/non-employee status under the WHL, because any such opinion would be an abstract, advisory opinion having no effect on the outcome of this case.

To elaborate, this Court certified the following question under Rule 2:12A:

> Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq.?

Rule 2:12A-1 gives this Court the discretion to answer a question of law certified to it by the Third Circuit if, and only if, "the answer may be determinative of an issue pending in

the Third Circuit. . . ." N.J. R. App. P. 2:12A-1. Rule 2:12A-1 thus manifests a longstanding principle: the courts of this State will not "render advisory opinions or function in the abstract." *Indep. Realty Co. v. Township of N. Bergen*, 376 N.J. Super. 295, 301 (App. Div. 2005) (citing *Crescent Pk. Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 107 (1971)). Nor will this Court entertain the issue of any third party that attempts to interject itself into a dispute. *County of Bergen v. Port of N.Y. Auth.*, 32 N.J. 303, 307 (N.J. 1960). Thus, the only issues that this Court may decide are "concrete contested issues conclusively affecting adversary parties in interest." *Independent Realty Co.*, 376 N.J. Super. at 301 (citing *New Jersey Tpk. Auth. v. Parsons*, 3 N.J. 235, 240 (N.J. 1949)).

This case presents no concrete, contested issue regarding the WHL. As discussed in § II, and as Judge Sloviter recognized during oral argument before the Third Circuit, Plaintiffs never raised a claim under the WHL in their Complaint. Even more critically, Plaintiffs never argued in their briefs before the Third Circuit that they were entitled to relief under the WHL. Accordingly, even if Plaintiffs had raised a WHL claim in their Complaint, they would have waived that claim by failing to brief it before the Third Circuit and thus may never obtain any relief under that statute, regardless of any opinion this Court might

issue.[18] NELP's eleventh-hour attempt to inject an issue pertaining to the WHL into this dispute does not change that analysis.[19]

Because Plaintiffs cannot recover under the WHL, the correct standard for deciding employee status under that statute is not a concrete, contested issue that could affect any adversary party in interest. It follows that this Court may not, consistent with Rule 2:12A and the Court's own jurisprudence, reach that issue now. The Court should therefore exercise the discretion afforded it under Rule 2:12A-2 and

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[18] *See, e.g., Skiles v. City of Reading*, 449 Fed. App. 153, 156 n.4 (3d Cir. 2011) ("Skiles does not raise any arguments in his opening brief on appeal regarding the District Court's dismissal of his First Amendment freedom of association claim. This claim is waived."); *United States ex rel. Pilecki-Simko v. Chubb Institute*, 443 Fed. Appx. 754, 763 (3d Cir. 2011) (claims not raised on appeal are waived); *Beazer East, Inc. v. Mead Corp.*, 525 F.3d 255, 263 (3d Cir. 2008) (same); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987) (plaintiff is the "master of the complaint" and may eschew certain claims).

[19] *See Gen. Eng'g Corp. v. Virgin Islands Water & Power Auth.*, 805 F.2d 88, 92 n.5 (3d Cir. 1986) (barring "exceptional circumstances," such as jurisdictional issues, "new issues raised by an amicus are not properly before the court."); *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008) ("We need not consider arguments raised solely by an amicus, particularly when they were not raised before the district court and when they are in tension with the strategic position taken by the litigants."); *Resident Council of Allen Parkway Vill. v. United States Dep't of Housing & Urban Dev.*, 980 F.2d 1043, 1049 (5th Cir. 1993) ("[A]n amicus curiae generally cannot expand the scope of the appeal to implicate issues that have not been presented by the parties to the appeal.").

reformulate the certified issue to excise any question pertaining to the WHL.

C. Employee Status Under The WHL Depends On (1) A Contractual Obligation For The Defendant To Pay The Plaintiff Wages and (2) Application Of The "Economic Reality" Test.

The WHL, N.J. Stat. Ann. §§ 34:11-56a-34;11-56a30, principally governs employees' rights to a minimum wage and overtime compensation. Enacted in 1966, *see id.* at § 34:11-56a, the WHL was modeled on the FLSA. Thus, the WHL and FLSA define employee in nearly identical terms. *Compare* N.J. Stat. Ann. § 34:11-56a1(h) (2013) ("'Employee' includes any individual employed by an employer"), *with* 29 U.S.C. § 203(e)(1) (2013) (Subject to certain exceptions, "'employee' means any individual employed by an employer.")

Should the Court elect to decide the standard for determining employee status under the WHL, the Court should adopt a two-tiered analysis, holding that the contractual obligation to pay wages is a necessary, but insufficient, element of employee status under the WHL. For plaintiffs who clear that hurdle, the next question should be whether that contract rendered them the defendant's employees or whether they remained independent contractors. To decide the latter question, courts should apply the same "economic reality" test used to determine employee status under the FLSA.

"[L]egislative adoption of a foreign statute includes judicial interpretations of that statute as of the time of adoption." *Oswin*, 129 N.J. at 309; Singer & Shambie Singer, Sutherland Statutes and Statutory Construction § 47.30. When the WHL was enacted in 1966, and the Legislature adopted an essentially identical definition of "employee" as that contained in the FLSA, judicial interpretations had long established beyond debate that the rather circular definition of "employee" in the FLSA encompassed any individual who was an employee under the "economic reality" test. *See, e.g.*, Ellen C. Kearns et al., The Fair Labor Standards Act §3.II.B C (1999 & Supp. 2013) (citing, *inter alia*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)). It follows that this interpretation of "employee" is included in the WHL. It is therefore unsurprising that courts have repeatedly used the "economic reality" test to determine employee status under the WHL.[20] This Court should embrace that approach.

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[20] *See, e.g.*, *Adami v. Cardo Windows, Inc.*, 2013 U.S. Dist. LEXIS 102447, at *13 (D.N.J. July 23, 2013); *Zas v. Canada Dry Bottling Co.*, 2013 U.S. Dist. LEXIS 90418, at **10-11 (D.N.J. June 27, 2013); *Chen v. Century Buffet and Rest.*, 2012 U.S. Dist. LEXIS 4214, at **5-10 (D.N.J. Jan. 12, 2012); *Shakib v. Back Bay Rest. Group, Inc.*, 2011 U.S. Dist. LEXIS 112614, at **8-14 (D.N.J. Sept. 30, 2011); *Su v. Li*, 2011 U.S. Dist. LEXIS 84168, at **12-17 (D.N.J. Aug. 1, 2011); *Harris v. Scriptfleet, Inc.*, 2011 U.S. Dist. LEXIS 139870, at *4 (D.N.J. Dec. 6, 2011); *Ping Chen v. Domino's Pizza, Inc.*, 2009 U.S. Dist. LEXIS 96362, at **12-13 (D.N.J. Oct. 16, 2009); *Ortiz v. Paramo*, 2008 U.S. Dist. LEXIS 72387, at **11-17 (D.N.J. Sept. 19, 2008).

Under the "economic reality" test, just as under the Restatement test, remuneration is an independent, antecedent requirement to the application of any multi-factor test. *Juino*, 717 F.3d at 435-40. Therefore, the first tier of analysis of a plaintiff's alleged employee status under the WHL should require the plaintiff to prove the defendant's contractual obligation to pay wages to him or her. The employment status of plaintiffs who clear that threshold should then be assessed under the multifactor analysis applicable to FLSA claims, which focuses on (1) hiring and firing authority; (2) authority over work rules and assignments; (3) day-to-day supervision, including the authority to discipline; and (4) control over workers' records. *See In Re: Enterprise*, 683 F.3d at 468-69.

Because there are cases (although this is not one of them) in which WHL claims coexist with claims that call for application of the Restatement test, it would also aid the analytical task of lower courts if this Court were to note that the "economic reality" test is not materially different from the Restatement test, and that a principled application of either test should ordinarily lead to the same result. *See, e.g., Murray*, 613 F.3d at 945; *Estate of Suskovich*, 553 F.3d at 565; *Shah*, 355 F.3d at 499; *McIntire*, 1996 U.S. App. LEXIS 31331, at *10 n.6; *Simpson*, 100 F.3d at 443; *Loomis Cabinet Co.*, 1994 U.S. App. LEXIS 1578, at *7; *see also Broussard v. L.H. Bossier,*

Inc., 789 F.2d 1158, 1160-61 (5th Cir. 1986) (applying "economic reality" test to personnel of independent delivery company, but incorporating Restatement factors).

The Court should not engraft onto the WHL the "relative nature of the work" test, "ABC test" or the *D'Annunzio* test to determine employee status.

As to the "relative nature of the work" test, for the reasons set forth in § III(A)(2)(c)(ii), as of 1966, that test had a limited role to play in one narrow area of New Jersey law, Workmen's Compensation. There is, accordingly, no basis for concluding that the Legislature intended to adopt that standard as the method for determining employee/non-employee status under the WHL.

Regarding the "ABC test," four of the five reasons why the "ABC test" should not apply to the WPL, discussed in § III(A)(2)(d)(ii)(b), apply with equal force to the WHL. The one nuance is that the Department of Labor and Workforce Development opined in 1995 that the "ABC test" "will be used to determine whether an individual is an employee or independent contractor for purposes of the Wage and Hour Law." N.J.A.C. § 12:56-16.1 (2013).

As noted in § III(A)(2)(d)(ii)(b), however, courts are not obliged to provide any deference to the Department's opinion on this pure issue of law. *See Utley*, 194 N.J. at 551; *Kingsley v.*

Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (N.J. 1964) ("An administrative agency may not under the guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows."). Further, in point of fact, courts do not defer to the Department's view on his issue: since the Department enunciated this peculiar legal principle, not a single court has agreed with its position. Our research has uncovered no case in which any court has relied on the Department's interpretation. We have, however, found eight cases (cited in footnote 20) in which courts have applied the "economic reality" test to determine whether an individual is an employee or independent contractor for purposes of the WHL. Considering that there is no evidence that, when the Legislature defined "employee" under the WHL in 1966, it had in mind the "ABC test," it is unsurprising that no courts have followed N.J.A.C. § 12:56-16.1.

The same problem dooms Plaintiffs' argument that the Court should engraft the *D'Annunzio* test onto the WHL: there is no indication that, when the Legislature enacted the WHL in 1966, it had in mind a concept of "employee" that this Court would not enunciate until 2007. *See Fid. & Deposit Co.*, 97 N.J. Super. at 143-44.

D. This Court Should Reject Plaintiffs' Invitation To Make It Even More Difficult To Discern Who Is And Who Is Not An Employee.

For the reasons set forth above, the outcome of the certified question is dictated by evidence of the Legislature's intent in 1965 and 1966, when it respectively enacted the WPL and WHL. The certified question does not hinge on appeals to emotion or debates about what the Legislature should have done when it enacted the statutes. There is, therefore, no need to detain the Court with a discussion of modern-day politicians' views about worker classification or the merits of different policies that might inform the issue.

At pages 25 through 31 of their brief, however, Plaintiffs do just that, digressing into a syllabus of the alleged horrors of misclassification and a discussion of what certain politicians and opinion-makers think ought to be done about the subject. Plaintiffs flavor their analysis with insinuations that misclassification is the product of corporate rapacity ("employer schemes to evade paying unemployment taxes") (Pb30) and a cheap shot at Sleepy's ("Sleepy's misclassification of its workers as independent contractors hurt [sic] low-wage workers and law-abiding businesses") (Pb30).

To deal with these issues in reverse order, Plaintiffs fail to mention that the one court to consider the evidence has concluded that Sleepy's classification of Plaintiffs as non-

employees did not hurt anyone but instead was - "overwhelmingly" - the correct conclusion. *Hargrove*, 2013 U.S. Dist. 43949, at *15. It is one thing for Plaintiffs to disagree but, in light of the District Court's analysis, Plaintiffs should at least concede that a debate about whether they were correctly classified is a not a clash between good and evil. Plaintiffs treat Sleepy's disagreement with them as a sure sign of wickedness, however, because they hope that, by portraying this case as a cartoonish battle between light and darkness, they can overcome the flaws in their legal analysis.

Turning to Plaintiffs' attempt to lay the confusion regarding worker classification at the feet of greedy corporations, the misclassification problem does not exist because malevolent corporations have set out to undermine the public fisc and worker protections. The problem exists because companies responding to rational economic incentives to contract with third-party vendors[21] face "an ever-expanding catalogue of 'factors'" dictating whether the vendor's workers are considered the company's employees. Carlson, *supra*, at 299. As yet new tests and new factors proliferate, "the resulting multi-factored

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[21] Here, for example, Sleepy's wished to avoid incurring the cost of purchasing or leasing the trucks that would have been necessary to carry out its deliveries "in house." It therefore contracted with delivery businesses, such as Plaintiffs', that owned their own trucks or leased those trucks from third parties.

analysis becomes more complex and its outcome less predictable." *Id.*[22] That lack of predictability, in turn, undermines the rule of law. *See* Cass, *supra*, at 7; *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (rule of law requires that parties "have an opportunity to know what the law is and to conform their conduct accordingly").

This Court's role in remedying that problem is limited. To the extent that definitions of "employee" or "independent contractor" in various statutes are unclear, Legislatures created that problem, and only Legislatures can rectify it. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (courts decide what the law is, not what it should be); *see also* Carlson, *supra*, 22 Berkeley J. Emp. & Lab. L. at 366 (proposing "a range of possibilities for statutory reform," not new judicial interpretations, to remedy confusion about worker classification).

What this Court can do, however, is avoid making the confusion regarding worker classification worse by adding to the mix yet another test (or other tests) for defining employee

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[22] Plaintiffs' brief unwittingly reinforces this very point. Plaintiffs can do no better than point to three different tests, each one of which might govern their status as Sleepy's employees. Plaintiffs' inability to point with confidence to any one standard for determining employee status shows just how bewildering this area of the law can be. There is no reason to make matters worse by adopting an entirely new test of employee status for claims under the WPL or Wage and Hour Law.

status under the WPL or WHL. The Legislature intended for the well-established Restatement test to apply to the WPL, and the "economic reality" test to apply to the WHL. These tests are sufficiently developed so as to offer companies and workers a degree of predictability. To the extent that policy considerations play any role in the Court's analysis, those should be the salient concerns.

IV. CONCLUSION

Sleepy's respectfully requests that the Court hold that (1) a contractual obligation for the defendant to pay the plaintiff wages is a necessary, but insufficient, element of employee status under the WPL; and, (2) where the plaintiff can clear that hurdle, an analysis of § 220(2) of the Restatement (Second) of Agency determines status as an employee or "independent contractor" under the WPL.

The Court need not and should not reach the question of what test determines employee status under the WHL. If the Court elects to reach that issue, however, it should hold that (1) the contractual obligation for the defendant to pay the plaintiff wages is a necessary, but insufficient, element of employee status under the WHL; (2) the "economic reality" test applicable to claims under the FLSA governs plaintiffs who clear that threshold; and (3) there is no material difference between the Restatement and "economic reality" tests.

Respectfully submitted,

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SAM HARGROVE, ANDRE HALL AND MARCO EUSEBIO, individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLANTS, V. SLEEPY'S, LLC, DEFENDANT RESPONDENT, V. I STEALTH, LLC, EUSEBIO'S TRUCKING CORP., AND CURVA TRUCKING, LLC, THIRD-PARTY DEFENDANTS.	SUPREME COURT OF NEW JERSEY DOCKET NO. 072742 **CERTIFICATE OF SERVICE**

I, Holly Rich, certify as follows:

1. I am an attorney licensed to practice in the State of New Jersey and associated with the law firm of Littler Mendelson, P.C., attorneys for Defendant-Respondent Sleepy's, LLC.

2. On August 30, 2013, I filed an original and nine copies of Defendant-Respondent Sleepy's, LLC's Brief, and this Certificate of Service with Mark Neary, Clerk of the Supreme Court of New Jersey, Hughes Justice Complex, 25 Market Street, 8th Floor, NW, Trenton, NJ 08625-0970 via Hand Delivery.

3. On this same date, I also served two copies of the foregoing documents to counsel for plaintiff, Anthony L. Marchetti, Esq., Marchetti Law, P.C., 900 N. Kings Highway, Suite 306, Cherry Hill, NJ 08034 via Electronic Mail and First Class Mail.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of these statements are willfully false, I am subject to punishment.

Holly Rich

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Dated: August 30, 2013

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VIA OVERNIGHT MAIL

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Re: Hargrove, et al. v. Sleepy's, LLC, et al.
Docket No. 072742

Dear Mr. Neary:

Pursuant to Rule 2:6-11(d) of the New Jersey Rules of Court, Defendant-Appellee/Cross-Appellant Sleepy's, LLC ("Sleepy's") advises the Court of pertinent and significant supplemental authority that came to its attention after the submission of briefing: *Sandifer v. U.S. Steel Corp.*, No. 12-417, 2014 U.S. LEXIS 799 (Jan. 27, 2014) and *Plaso v. IJKG, LLC*, No. 13-2565, 2014 U.S. App. LEXIS 1105 (3d Cir. January 21, 2014) (copies enclosed).

Sandifer stands for the proposition that, when examining the meaning of a statutory term, a court must decide how the term was used in "the era of [the statute's] enactment." *Sandifer*, 2014 U.S. LEXIS 799, at *14. That principle is dispositive of the main issue before the Court – how to define "independent contractor" under the New Jersey Wage Payment Law – because all of the definitions for which Plaintiffs-Appellants/Cross-Appellees and their amici advocate were invented long after that Law was enacted. *Sandifer* is relevant to the arguments in Sleepy's Brief at pages 12-37 concerning the Legislature's intent in 1965 as to the definition of independent contractor.

Plaso was a harassment case arising under Title VII and the New Jersey Law Against Discrimination. *Plaso*, 2014 U.S. App. LEXIS 1105, at **4-5. Ms. Plaso was a consultant directly employed by MCR Martin, LLC ("MCR Martin"), which assigned her to work for its customer, Bayonne Medical Center ("BMC") from February 2008 through October 2010. *See id.* at **1-4. MCR Martin also assigned Ms. Plaso to "work[] for other Healthcare clients," paid her salary and benefits, reimbursed her expenses, and had the sole power to discharge her. *See id.* at **1-3.

After her assignment, Ms. Plaso "received unfettered access to the hospital, and was provided with BMC email and telephone accounts...." *Id.* at *2. Ms. Plaso also represented BMC to physician practices, worked at BMC five days a week, trained a senior executive of BMC, and

had an office in BMC's hospital. *See id.* at **2-3. Nevertheless, the Court of Appeals for the Third Circuit affirmed summary judgment in BMC's favor, concluding as a matter of law that Ms. Plaso was not, under *Darden*, BMC's employee. *See id.* at **9-16 & n. 4.

Plaso is relevant to the arguments in Sleepy's Brief at pages 12-37, including the argument that the *Restatement* test applies to claims that arise under remedial, employment-related statutes of New Jersey.

Respectfully submitted,

Holly E. Rich

Enclosures

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LEXSEE

Analysis
As of Jan 29, 2014

CLIFTON SANDIFER, ET AL., PETITIONERS v. UNITED STATES STEEL CORPORATION

No. 12-417.

SUPREME COURT OF THE UNITED STATES

2014 U.S. LEXIS 799

November 4, 2013, Argued
January 27, 2014, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sandifer v. United States Steel Corp., 678 F.3d 590, 2012 U.S. App. LEXIS 9302 (7th Cir. Ind., 2012)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, a group of current or former employees, filed an action under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., seeking backpay for time spent donning and doffing various pieces of protective gear. The district court granted summary judgment in part to respondent employer. The U.S. Court of Appeals for the Seventh Circuit affirmed. The U.S. Supreme Court granted certiorari.

OVERVIEW: The Supreme Court held that the word "clothes" as used in 29 U.S.C.S. § 203(o) denoted items that were both designed and used to cover the body and were commonly regarded as articles of dress. Despite the usual meaning of "changing clothes," the broader statutory context made it plain that time spent in changing clothes included time spent in altering dress. The employees' donning and doffing of the protective gear, which included a flame-retardant jacket, pair of pants, and hood, a hardhat, a snood, wristlets, work gloves, leggings, and metatarsal boots, qualified as "changing clothes" within the meaning of § 203(o) because the items were both designed and used to cover the body and were commonly regarded as articles of dress. The safety glasses, earplugs, and respirator did not satisfy the standard because they were not commonly regarded as articles of dress. However, the time expended by each employee donning and doffing safety glasses and earplugs was minimal. The time spent donning and doffing the respirators was part of an employee's normal workday and thus beyond the scope of § 203(o) because they were kept and put on as needed at job locations.

OUTCOME: The judgment was affirmed. Unanimous decision, except that one of the judges did not join in a footnote.

CORE TERMS: "clothes", time spent, donning, doffing, protective, gear, washing, de minimis, principal activities, workday, putting, Fair Labor Standards Act, minute, noncompensable, integral, qualify, steel, dress, respirator, earplugs, spent, collective-bargaining, compensable, clothing, clothes-changing, indispensable, comfort, trifles, safety glasses, compensability

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employ
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Employees
[HN1]The Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., governs minimum wages and maximum hours for non-exempt employees who in any workweek are engaged in commerce or in the production of goods for commerce, or are employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C.S. §§ 206(a), 207(a), 213. The Act provides that "employee" generally means any individual employed by an employer, 29 U.S.C.S. § 203(e)(1), and, in turn, provides that to "employ" is to suffer or permit to work, 29 U.S.C.S. § 203(g).

Labor & Employment Law > Wage & Hour Laws > Statutory Application > Portal-to-Portal Act
[HN2]The Portal-to-Portal Act has limited the scope of employers' liability in various ways. It has excluded from mandatorily compensable time activities which are preliminary to or postliminary to the principal activity or activities that an employee is employed to perform, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. 29 U.S.C.S. § 254(a)(2).

Labor & Employment Law > Wage & Hour Laws > Statutory Application > Portal-to-Portal Act
[HN3]The Department of Labor has promulgated a regulation explaining that the Portal-to-Portal Act did not alter what is known as the "continuous workday rule," under which compensable time comprises the period between the commencement and completion on the same workday of an employee's principal activity or activities, whether or not the employee engages in work throughout all of that period. 12 Fed. Reg. 7658 (1947); 29 C.F.R. § 790.6(b) (2013). A Labor Department interpretive bulletin also specified that whereas "changing clothes" and "washing up or showering" would be considered preliminary or postliminary activities when performed outside the workday and under the conditions normally present, those same activities may in certain situations be so directly related to the specific work the employee is employed to perform that they would be regarded as an integral part of the employee's principal activity. 12 Fed. Reg. 7659, and n. 49; 29 C.F.R. § 790.7, and n. 49.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN4]See 29 U.S.C.S. § 203(o).

Labor & Employment Law > Collective Bargaining & Labor Relations > Subjects of Bargaining
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN5]29 U.S.C.S. § 203(o) provides that the compensability of time spent changing clothes or washing is a subject appropriately committed to collective bargaining.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Statutory Application > Portal-to-Portal Act
[HN6]The U.S. Supreme Court has held that changing clothes and showering can, under some circumstances, be considered an integral and indispensable part of the principal activities for which covered workmen are employed, reasoning that 29 U.S.C.S. § 203(o) clearly implied as much. Any activity that is integral and indispensable to a principal activity is itself a principal activity under 29 U.S.C.S. § 254(a).

Governments > Legislation > Interpretation
[HN7]It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN8]Dictionaries from the era of 29 U.S.C.S. § 203(o)'s enactment indicate that "clothes" denotes items that are both designed and used to cover the body and are commonly regarded as articles of dress. That is what the U.S. Supreme Court holds to be the meaning of the word as used in § 203(o). Although a statute may make a departure from the natural and popular acceptation of language, nothing in the text or context of § 203(o) suggests anything other than the ordinary meaning of "clothes."

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN9]The statutory compensation requirement to which 29 U.S.C.S. § 203(o) provides an exception embraces the changing of clothes only when that conduct constitutes an integral and indispensable part of the principal activities for which covered workmen are employed.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN10]The statutory context makes clear that the "clothes" referred to are items that are integral to job performance; the donning and doffing of other items would create no claim to compensation under the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201 et seq., and hence no need for the 29 U.S.C.S. § 203(o) exception.

Governments > Legislation > Interpretation

[HN11]The role of a court is to apply the statute as it is written--even if it thinks some other approach might accord with good policy.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN12]Although it is true that the normal meaning of "changing clothes" connotes substitution, the phrase is certainly able to have a different import. The term "changing" carried two common meanings at the time of 29 U.S.C.S. § 203(o)'s enactment: to substitute and to alter. Despite the usual meaning of "changing clothes," the broader statutory context makes it plain that time spent in changing clothes includes time spent in altering dress.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN13]The object of 29 U.S.C.S. § 203(o) is to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually beneficial negotiation.

Governments > Legislation > Interpretation
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN14]The U.S. Supreme Court has declared the narrow-construction principle inapplicable to a provision appearing in 29 U.S.C.S. § 203.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Statutory Application > Portal-to-Portal Act

[HN15]The forerunner of 29 U.S.C.S. § 203(o)--the Portal-to-Portal Act provision whose interpretation by the Labor Department prompted its enactment--focused narrowly on the activities involved: activities which are preliminary to or postliminary to the employee's principal activity or activities. 29 U.S.C.S. § 254(a)(2). 29 U.S.C.S. § 203(o), by contrast, is addressed not to certain activities, but to time spent on certain activities, viz., changing clothes or washing.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN16]The question for courts is whether the period at issue can, on the whole, be fairly characterized as time spent in changing clothes or washing. If an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items (perhaps a diver's suit and tank) the entire period would not qualify as time spent in changing clothes under 29 U.S.C.S. § 203(o), even if some clothes items were donned and doffed as well. But if the vast majority of the time is spent in donning and doffing "clothes" as the U.S. Supreme Court has defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted.

SYLLABUS

Petitioner Sandifer and others filed a putative collective action under the Fair Labor Standards Act of 1938, seeking backpay for time spent donning and doffing pieces of protective gear that they assert respondent United States Steel Corporation requires workers to wear because of hazards at its steel plants. U.S. Steel contends that this donning-and-doffing time, which would otherwise be compensable under the Act, is noncompensable under a provision of its collective bargaining agreement with petitioners' union. That provision's validity depends on 29 U.S.C. §203(*o*), which allows parties to collectively bargain over whether "time spent in changing clothes . . . at the beginning or end of each workday" must be compensated. The District Court granted U.S. Steel summary judgment in pertinent part, holding that petitioners' donning and doffing constituted "changing clothes" under §203(*o*). It also assumed that any time spent donning and doffing items that were not "clothes" was "*de minimis*" and hence noncompensable. The Seventh Circuit affirmed.

Held: The time petitioners spend [*2] donning and doffing their protective gear is not compensable by operation of §203(*o*). Pp. 3-15.

(a) This Court initially construed compensability under the Fair Labor Standards Act expansively. See, *e.g.*, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515. The Act was amended in 1949, however, to provide that the compensability of time spent "changing clothes or washing at the beginning or end of each workday" is a subject appropriately committed to collective bargaining, §203(*o*). Whether peti-

tioners' donning and doffing qualifies as "changing clothes" depends on the meaning of that statutory phrase. Pp. 3-6.

(b) The term "clothes," which is otherwise undefined, is "interpreted as taking [its] ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199. In dictionaries from the era of §203(*o*)'s enactment, "clothes" denotes items that are both designed and used to cover the body and are commonly regarded as articles of dress. Nothing in §203(*o*)'s text or context suggests anything other than this ordinary meaning. There is no basis for petitioners' proposition that the unmodified term "clothes" somehow omits protective clothing. Section 203(*o*)'s exception applies [*3] only when the changing of clothes is "an integral and indispensable part of the principal activities for which covered workmen are employed," *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267, and thus otherwise compensable under the Act. See 29 U.S.C. §254(a). And protective gear is the *only* clothing that is integral and indispensable to the work of many occupations, such as butchers and longshoremen. Petitioners' position is also incompatible with the historical context of §203(*o*)'s passage, contradicting contemporaneous Labor Department regulations and dictum in *Steiner*, see 350 U.S., at 248, 254-255. The interpretation adopted here leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices. The view of respondent and its *amici* that "clothes" encompasses the entire outfit that one puts on to be ready for work is also devoid of any textual foundation. Pp. 6-10.

(c) While the normal meaning of "changing clothes" connotes substitution, "changing" also carried the meaning to "alter" at the time of §203(*o*)'s enactment. The broader statutory context makes plain that "time spent in changing clothes" includes time spent in altering [*4] dress. Whether one exchanges street clothes for work clothes or simply chooses to layer one over the other may be a matter of purely personal choice, and §203(*o*) should not be read to allow workers to opt into or out of its coverage at random or at will when another reading is textually permissible. Pp. 10-11.

(d) Applying these principles here, it is evident that the donning and doffing in this case qualifies as "changing clothes" under §203(*o*). Of the 12 items at issue, only 3--safety glasses, earplugs, and a respirator--do not fit within the elaborated interpretation of "clothes." Apparently concerned that federal judges would have to separate the minutes spent clothes-changing and washing from the minutes devoted to other activities during the relevant period, some Courts of Appeals have invoked the doctrine *de minimis non curat lex* (the law does not take account of trifles). But that doctrine does not fit comfortably within this statute, which is all about trifles. A more appropriate way to proceed is for courts to ask whether the period at issue can, *on the whole*, be fairly characterized as "time spent in changing clothes or washing." If an employee devotes the vast majority of [*5] that time to putting on and off equipment or other non-clothes items, the entire period would not qualify as "time spent in changing clothes" under §203(*o*), even if some clothes items were also donned and doffed. But if the vast majority of the time is spent in donning and doffing "clothes" as defined here, the entire period qualifies, and the time spent putting on and off other items need not be subtracted. Here, the Seventh Circuit agreed with the District Court's conclusion that the time spent donning and doffing safety glasses and earplugs was minimal. And this Court is disinclined to disturb the District Court's additional factual finding, not addressed by the Seventh Circuit, that the respirators were donned and doffed as needed during the normal workday and thus fell beyond §203(*o*)'s scope. Pp. 12-15.

678 F.3d 590, affirmed.

COUNSEL: **Eric Schnapper** argued the cause for petitioners.

Lawrence C. DiNardo argued the cause for respondent.

Anthony A. Yang argued the cause for the United States, as amicus curiae.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined, and in which SOTOMAYOR, J., joined except as to footnote 7.

OPINION BY: SCALIA

OPINION

JUSTICE SCALIA delivered the opinion of the Court.*

* JUSTICE SOTOMAYOR joins this opinion except as to footnote 7.

The question before us is the meaning [*6] of the phrase "changing clothes" as it appears in the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. §201 *et seq.* (2006 ed. and Supp. V).

I Facts and Procedural History

Petitioner Clifton Sandifer, among others, filed suit under the Fair Labor Standards Act against respondent United States Steel Corporation in the District Court for

the Northern District of Indiana. The plaintiffs in this putative collective action are a group of current or former employees of respondent's steelmaking facilities. [1] As relevant here, they seek backpay for time spent donning and doffing various pieces of protective gear. Petitioners assert that respondent requires workers to wear all of the items because of hazards regularly encountered in steel plants.

1 Petitioners filed this action under 29 U.S.C. §216(b), which establishes a cause of action that may be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Pending resolution of the instant summary-judgment dispute, a Magistrate Judge set aside a motion to certify the suit as a collective action, see No. 2:07-CV-443 RM, 2009 U.S. Dist. LEXIS 96715, 2009 WL 3430222, *1, n. 1 (ND Ind., Oct. 15, 2009), [*7] but petitioners assert that their ranks are about 800 strong.

Petitioners point specifically to 12 of what they state are the most common kinds of required protective gear: a flame-retardant jacket, pair of pants, and hood, a hardhat, a "snood", "wristlets", work gloves; leggings; "metatarsal" boots; safety glasses; earplugs; and a respirator. [2] At bottom, petitioners want to be paid for the time they have spent putting on and taking off those objects. In the aggregate, the amount of time--and thus money--involved is likely to be quite large. Because this donning-and-doffing time would otherwise be compensable under the Act, U.S. Steel's contention of noncompensability stands or falls upon the validity of a provision of its collective-bargaining agreement with petitioners' union, which says that this time is noncompensable. [3] The validity of that provision depends, in turn, upon the applicability of 29 U.S.C. §203(*o*) to the time at issue. That subsection allows parties to decide, as part of a collective-bargaining agreement, that "time spent in changing clothes . . . at the beginning or end of each workday" is noncompensable.

2 The opinions below include descriptions of some of the items. [*8] See 678 F.3d 590, 592 (CA7 2012); 2009 U.S. Dist. LEXIS 96715, 2009 WL 3430222, *2, *6. And the opinion of the Court of Appeals provides a photograph of a male model wearing the jacket, pants, hardhat, snood, gloves, boots, and glasses. 678 F.3d, at 593.

3 The District Court concluded that the collective-bargaining agreement provided that the activities at issue here were noncompensable, 2009 U.S. Dist. LEXIS 96715, 2009 WL 3430222, *10, and the Seventh Circuit upheld that conclusion, 678 F.3d, at 595. That issue was not among the questions on which we granted certiorari, and we take the import of the collective-bargaining agreement to be a given.

The District Court granted summary judgment in pertinent part to U.S. Steel, holding that donning and doffing the protective gear constituted "changing clothes" within the meaning of §203(*o*). No. 2:07-CV-443 RM, 2009 U.S. Dist. LEXIS 96715, 2009 WL 3430222, *4-*10 (ND Ind., Oct. 15, 2009). The District Court further assumed that even if certain items--the hardhat, glasses, and earplugs--were not "clothes," the time spent donning and doffing them was "*de minimis*" and hence noncompensable. 2009 U.S. Dist. LEXIS 96715, [WL] at *6. The Court of Appeals for the Seventh Circuit upheld those conclusions. 678 F.3d 590, 593-595 (2012). [4]

4 Petitioners also sought, [*9] *inter alia*, backpay for time spent traveling between the locker rooms where they don and doff at least some of the protective gear and their workstations. The District Court denied that portion of respondent's motion for summary judgment, 2009 U.S. Dist. LEXIS 96715, 2009 WL 3430222, *11, and the Seventh Circuit reversed, 678 F.3d, at 595-598. That issue is not before this Court, so we express no opinion on it.

We granted certiorari, 568 U.S. ___, 133 S. Ct. 1240, 185 L. Ed. 2d 177 (2013), and now affirm.

II. Legal Background

[HN1]The Fair Labor Standards Act, enacted in 1938, governs minimum wages and maximum hours for non-exempt "employees who in any workweek [are] engaged in commerce or in the production of goods for commerce, or [are] employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §206(a) (minimum wages), §207(a) (maximum hours); see §213 (exemptions). The Act provides that "employee" generally means "any individual employed by an employer," §203(e)(1), and, in turn, provides that to "employ" is "to suffer or permit to work," §203(g).

The Act did not, however, define the key terms "work" and "workweek"--an omission that soon let loose a landslide of litigation. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25-26, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005). [*10] This Court gave those terms a broad reading, culminating in its holding in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), that "the statutory workweek includes all time

during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.*, at 690-691, 66 S. Ct. 1187, 90 L. Ed. 1515. That period, *Anderson* explained, encompassed time spent "pursu[ing] certain preliminary activities after arriving . . ., such as putting on aprons and overalls [and] removing shirts." *Id.*, at 692-693, 66 S. Ct. 1187, 90 L. Ed. 1515. "These activities," the Court declared, "are clearly work" under the Act. *Id.*, at 693, 66 S. Ct. 1187, 90 L. Ed. 1515.

Organized labor seized on the Court's expansive construction of compensability by filing what became known as "portal" actions (a reference to the "portals" or entrances to mines, at which workers put on their gear). "PORTAL PAY SUITS EXCEED A BILLION," announced a newspaper headline in late 1946. N. Y. Times, Dec. 29, 1946, p. 1. Stating that the Fair Labor Standards Act had been "interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees," Congress responded by passing the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, [*11] 29 U. S. C. §251 *et seq.* (2006 ed. and Supp. V). §251(a).

[HN2]The Portal-to-Portal Act limited the scope of employers' liability in various ways. As relevant here, it excluded from mandatorily compensable time

> "activities which are preliminary to or postliminary to [the] principal activity or activities [that an employee is employed to perform], which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 61 Stat. 87, 29 U.S.C. §254(a)(2).

[HN3]The Department of Labor promulgated a regulation explaining that the Portal-to-Portal Act did not alter what is known as the "continuous workday rule," under which compensable time comprises "the period between the commencement and completion on the same workday of an employee's principal activity or activities . . . [,] whether or not the employee engages in work throughout all of that period." 12 Fed. Reg. 7658 (1947); 29 CFR §790.6(b) (2013). Of particular importance to this case, a Labor Department interpretive bulletin also specified that whereas "changing clothes" and "washing up or showering" "would [*12] be considered 'preliminary' or 'postliminary' activities" when "performed outside the workday and . . . under the conditions normally present," those same activities "may in certain situations be so directly related to the specific work the employee is employed to perform that [they] would be regarded as an integral part of the employee's 'principal activity.'" 12 Fed. Reg. 7659, and n. 49; 29 CFR §790.7 and n. 49.

In 1949, Congress amended the Fair Labor Standards Act to address the conduct discussed in that interpretive bulletin--changing clothes and washing--by adding the provision presently at issue:

> [HN4]"Hours Worked.--In determining for the purposes of [the minimum-wage and maximum-hours sections] of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 63 Stat. 911, 29 U.S.C. §203(o).

Simply put, [HN5]the statute provides that the compensability of time spent changing clothes [*13] or washing is a subject appropriately committed to collective bargaining.

In *Steiner* v. *Mitchell*, 350 U. S. 247, 76 S. Ct. 330, 100 L. Ed. 267 (1956), the Court echoed the Labor Department's 1947 regulations by [HN6]holding that "changing clothes and showering" can, under some circumstances, be considered "an integral and indispensable part of the principal activities for which covered workmen are employed," reasoning that §203(o) "clear[ly] impli[ed]" as much. *Id.*, at 254-256, 76 S. Ct. 330, 100 L. Ed. 267. And in *IBP*, we applied *Steiner* to treat as compensable the donning and doffing of protective gear somewhat similar to that at issue here. 546 U. S., at 30, 126 S. Ct. 514, 163 L. Ed. 2d 288. We said that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity'" under §254(a). *Id.*, at 37, 126 S. Ct. 514, 163 L. Ed. 2d 288.

As relevant to the question before us, U. S. Steel does not dispute the Seventh Circuit's conclusion that "[h]ad the clothes-changing time in this case not been rendered noncompensable pursuant to [§]203(o), it would have been a principal activity." 678 F. 3d, at 586. Petitioners, however, quarrel with the premise, arguing that the donning and doffing of protective gear does not qualify as "changing clothes."

III. Analysis

A. "Clothes"

We begin by [*14] examining the meaning of the word "clothes." [HN7]It is a "fundamental canon of statutory construction" that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979).

> 5 Although the Labor Department has construed §203(*o*) on a number of occasions, the Government has expressly declined to ask us to defer to those interpretations, which have vacillated considerably over the years.

[HN8]Dictionaries from the era of §203(*o*)'s enactment indicate that "clothes" denotes *items that are both designed and used to cover the body and are commonly regarded as articles of dress*. See Webster's New International Dictionary of the English Language 507 (2d ed. 1950) (Webster's Second) (defining "clothes" as "[c]overing for the human body, dress; vestments, vesture"); see also, *e.g.*, 2 Oxford English Dictionary 524 (1933) (defining "clothes" as "[c]overing for the person; wearing apparel; dress, raiment, vesture"). That is what we hold to be the meaning of the word as used in §203(*o*). Although a statute may make "a departure from the natural and popular acceptation of language," *Greenleaf v. Goodrich*, 101 U.S. 278, 284-285, 25 L. Ed. 845 (1880), [*15] (citing *Maillard v. Lawrence*, 57 U.S. 251, 16 How. 251, 14 L. Ed. 925 (1854)), nothing in the text or context of §203(*o*) suggests anything other than the ordinary meaning of "clothes."

Petitioners argue that the word "clothes" is too indeterminate to be ascribed any general meaning but that, whatever it *includes*, it necessarily *excludes* items designed and used to protect against workplace hazards. That position creates a distinction between "protection," on the one hand, and "decency or comfort," on the other--a distinction that petitioners appear to have derived from Webster's Second, which elaborates that "clothes" is "a general term for whatever covering is worn, or is made to be worn, *for decency or comfort*." Webster's Second 507 (emphasis added). But that definition does not exclude, either explicitly or implicitly, items with a protective function, since "protection" and "comfort" are not incompatible, and are often synonymous. A parasol protects against the sun, enhancing the comfort of the bearer--just as work gloves protect against scrapes and cuts, enhancing the comfort of the wearer. Petitioners further assert that protective items of apparel are referred to as "clothing" rather than "clothes." They point [*16] out that, when introduced by the adjective "protective," the noun "clothing" is used more commonly than "clothes." That is true enough, but it seems to us explained by euphonic preference rather than difference in meaning. We see no basis for the proposition that the unmodified term "clothes" somehow omits protective clothing.

Petitioners' proffered distinction, moreover, runs the risk of reducing §203(*o*) to near nothingness. [HN9]The statutory compensation requirement to which §203(*o*) provides an exception embraces the changing of clothes only when that conduct constitutes "an integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S., at 256, 76 S. Ct. 330, 100 L. Ed. 267. But protective gear is the *only* clothing that is integral and indispensable to the work of factory workers, butchers, longshoremen, and a host of other occupations. Petitioners' definition of "clothes" would largely limit the application of §203(*o*) to what might be called workers' costumes, worn by such employees as waiters, doormen, and train conductors. Petitioners insist that their definition excludes only items with some specific *work-hazard-related* protective function, but that limitation [*17] essentially abandons the assertion that clothes are for decency or comfort, leaving no basis whatever for the distinction.

Petitioners' position is also incompatible with the historical context surrounding §203(*o*)'s passage, since it flatly contradicts an illustration provided by the Labor Department's 1947 regulations to show how "changing clothes" could be intimately related to a principal activity. See 29 CFR §790.7, and n. 49. Those regulations cited the situation in which "an employee in a chemical plant . . . cannot perform his [job] without putting on certain clothes" and specified that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 12 Fed. Reg. 7660, and n. 65; 29 CFR §790.8(c), and n. 65. And petitioners' position contradicts this Court's only prior opinion purporting to interpret §203(*o*). *Steiner*, announced less than a decade after the statute's passage, suggested in dictum that, were there a pertinent provision of a collective-bargaining agreement, §203(*o*) would have applied to the facts of that case--where workers "ma[d]e extensive use of dangerously caustic [*18] and toxic materials, and [we]re compelled by circumstances, including vital considerations of health and hygiene, to change clothes" on the job site. 350 U.S., at 248, 254-255, 76 S. Ct. 330, 100 L. Ed. 267.

Petitioners contend that any attempt at a general definition of "clothes" will cast a net so vast as to capture all manner of marginal things--from bandoliers to barrettes to bandages. Yet even acknowledging that it may be impossible to eliminate all vagueness when interpreting a word as wide-ranging as "clothes," petitioners' fanciful hypotheticals give us little pause. [HN10]The stat-

utory context makes clear that the "clothes" referred to are items that are integral to job performance, the donning and doffing of other items would create no claim to compensation under the Act, and hence no need for the §203(o) exception. Moreover, even with respect to items that can be regarded as integral to job performance, our definition does not embrace the view, adopted by some Courts of Appeals, that "clothes" means essentially anything worn on the body--including accessories, tools, and so forth. See, *e.g.*, *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139-1140 (CA10 2011) ("clothes" are "items or garments worn by a person" and [*19] include "knife holders"). The construction we adopt today is considerably more contained. Many accessories--necklaces and knapsacks, for instance--are not "both designed and used to cover the body." Nor are tools "commonly regarded as articles of dress." Our definition leaves room for distinguishing between clothes and wearable items that are not clothes, such as some equipment and devices.[6]

> 6 Petitioners and their *amici* insist that equipment can never be clothes. While we do not believe that every wearable piece of equipment qualifies--for example, a wristwatch--our construction of "clothes" does not exclude all objects that could conceivably be characterized as equipment.

Respondent and its *amici*, by contrast, give the term in question a capacious construction, effectively echoing the Courts of Appeals mentioned above. On this view, "clothes" encompasses the entire outfit that one puts on to be ready for work. That interpretation is, to be sure, more readily administrable, but it is even more devoid of a textual foundation than petitioners' offering. Congress could have declared bargainable under §203(o) "time spent in changing *outfits*," or "time spent in putting on and off *all the items* [*20] *needed for work*." For better or worse, it used the narrower word "clothes." [HN11]"The role of this Court is to apply the statute as it is written--even if we think some other approach might accord with good policy." *Burrage v. United States*, *ante* at 14 (internal quotation marks and brackets omitted).

B. "Changing"

Having settled upon the meaning of "clothes," we must now consider the meaning of "changing." Petitioners assert that when used with certain objects--such as "tire," "diaper," or, indeed, "clothes"--the term "changing" connotes substitution. That is undoubtedly true. See Webster's Second 448 (defining "change" as "to make substitution of, for, or among, often among things of the same kind . . . , as, to *change* one's clothes"). One would not normally say he has changed clothes when he puts on an overcoat. Petitioners conclude from this that items of protective gear that are put on over the employee's street clothes are not covered by §203(o).

We disagree. [HN12]Although it is true that the normal meaning of "changing clothes" connotes substitution, the phrase is certainly able to have a different import. The term "changing" carried two common meanings at the time of §203(o)'s enactment: to [*21] "substitute" and to "alter." See, *e.g.*, 2 Oxford English Dictionary 268 (defining "change," among other verb forms, as "to substitute another (or others) for, replace by another (or others)" and "[t]o make (a thing) other than it was; to render different, alter, modify, transmute"). We think that despite the usual meaning of "changing clothes," the broader statutory context makes it plain that "time spent in changing clothes" includes time spent in altering dress.

[HN13]The object of §203(o) is to permit collective bargaining over the compensability of clothes-changing time and to promote the predictability achieved through mutually beneficial negotiation. There can be little predictability, and hence little meaningful negotiation, if "changing" means only "substituting." Whether one actually exchanges street clothes for work clothes or simply layers garments atop one another after arriving at the job site is often a matter of purely personal choice. That choice may be influenced by such happenstances and vagaries as what month it is, what styles are in vogue, what time the employee wakes up, what mode of transportation he uses, and so on. As the Fourth Circuit has put it, if the statute [*22] imposed a substitution requirement "compensation for putting on a company-issued shirt might turn on something as trivial as whether the employee did or did not take off the t-shirt he wore into work that day." *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 (2009). Where another reading is textually permissible, §203(o) should not be read to allow workers to opt into or out of its coverage at random or at will.

> 7 This Court has stated that "exemptions" in the Fair Labor Standards Act "are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960). We need not disapprove that statement to resolve the present case. The exemptions from the Act generally reside in §213, which is entitled "Exemptions" and classifies certain kinds of workers as uncovered by various provisions. Thus, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ____, ____, n. 21, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012), [HN14]we declared the narrow-construction principle inapplicable to a provision appearing in §203, entitled "Definitions."

C. Application

Applying the foregoing principles to the facts of this case, we hold that petitioners' donning [*23] and doffing of the protective gear at issue qualifies as "changing clothes" within the meaning of §203(*o*).

Petitioners have pointed to 12 particular items: a flame-retardant jacket, pair of pants, and hood, a hardhat; a snood; wristlets; work gloves; leggings, metatarsal boots, safety glasses, earplugs, and a respirator. The first nine clearly fit within the interpretation of "clothes" elaborated above. they are both designed and used to cover the body and are commonly regarded as articles of dress. That proposition is obvious with respect to the jacket, pants, hood, and gloves. The hardhat is simply a type of hat. The snood is basically a hood that also covers the neck and upper shoulder area; on the ski slopes, one might call it a "balaclava." The wristlets are essentially detached shirtsleeves. The leggings look much like traditional legwarmers, but with straps. And the metatarsal boots--more commonly known as "steel-toed" boots--are just a special kind of shoe

The remaining three items, by contrast, do not satisfy our standard. Whereas glasses and earplugs may have a covering function, we do not believe that they are commonly regarded as articles of dress. And a respirator obviously [*24] falls short on both grounds. The question is whether the time devoted to the putting on and off of these items must be deducted from the noncompensable time. If so, federal judges must be assigned the task of separating the minutes spent clothes-changing and washing from the minutes devoted to other activities during the period in question.

Some Courts of Appeals, including the Court of Appeals in this case, have sought to avoid, or at least mitigate, this difficulty by invoking the doctrine *de minimis non curat lex* (the law does not take account of trifles). This, they hold, enables them to declare noncompensable a few minutes actually spent on something other than clothes-changing--to wit, donning and doffing non-clothes items.

Although the roots of the *de minimis* doctrine stretch to ancient soil, its application in the present context began with *Anderson*. There, the Court declared that because "[s]plit-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act," such "trifles" as "a few seconds or minutes of work beyond the scheduled working hours" may be "disregarded." 328 U. S., at 692, 66 S. Ct. 1187, 90 L. Ed. 1515. "We [thus] do not . . . preclude [*25] the application of a *de minimis* rule." *Ibid.*

We doubt that the *de minimis* doctrine can properly be applied to the present case. To be sure, *Anderson* included "putting on aprons and overalls" and "removing shirts" as activities to which "it is appropriate to apply a *de minimis* doctrine." *Id.*, at 692-693, 66 S. Ct. 1187, 90 L. Ed. 1515. It said that, however, in the context of determining what preliminary activities had to be counted as part of the gross workweek under §207(a) of the Fair Labor Standards Act. [8] A *de minimis* doctrine does not fit comfortably within the statute at issue here, which, it can fairly be said, is *all about* trifles--the relatively insignificant periods of time in which employees wash up and put on various items of clothing needed for their jobs. Or to put it in the context of the present case, there is no more reason to *disregard* the minute or so necessary to put on glasses, earplugs, and respirators, than there is to *regard* the minute or so necessary to put on a snood. If the statute in question requires courts to select among trifles, *de minimis non curat lex* is not Latin for *close enough for government work*.

> 8 We note, moreover, that even in that context, the current regulations of the Labor [*26] Department apply a stricter *de minimis* standard than *Anderson* expressed. They specify that "[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him." 29 CFR §785.47.

That said, we nonetheless agree with the basic perception of the Courts of Appeals that it is most unlikely Congress meant §203(*o*) to convert federal judges into time-study professionals. That is especially so since the consequence of dispensing with the intricate exercise of separating the minutes spent clothes-changing and washing from the minutes devoted to other activities is not to prevent compensation for the uncovered segments, but merely to leave the issue of compensation to the process of collective bargaining. We think it is possible to give the text of §203(*o*) a meaning that avoids such relatively inconsequential judicial involvement in "a morass of difficult, fact-specific determinations." *Sepulveda*, 591 F.3d, at 218.

[HN15]The forerunner of §203(*o*)--the Portal-to-Portal Act provision whose interpretation by the Labor Department prompted [*27] its enactment--focused narrowly on the activities involved: "activities which are preliminary to or postliminary to [the employee's] principal activity or activities." §254(a)(2). Section 203(*o*), by contrast, is addressed not to certain "activities," but to "time spent" on certain activities, viz., "changing clothes or washing." Just as one can speak of

"spending the day skiing" even when less-than-negligible portions of the day are spent having lunch or drinking hot toddies, so also one can speak of "time spent changing clothes and washing" when the vast preponderance of the period in question is devoted to those activities. To be sure, such an imprecise and colloquial usage will not ordinarily be attributed to a statutory text, but for the reasons we have discussed we think that appropriate here. [HN16]The question for courts is whether the period at issue can, *on the whole*, be fairly characterized as "time spent in changing clothes or washing." If an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items (perhaps a diver's suit and tank) the entire period would not qualify as "time spent in changing clothes" under §203(*o*). [*28] even if some clothes items were donned and doffed as well. But if the vast majority of the time is spent in donning and doffing "clothes" as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted.

In the present case, the District Court stated that "the time expended by each employee donning and doffing" safety glasses and earplugs "is minimal." 2009 U.S. Dist. LEXIS 96715, 2009 WL 3430222, *6, a conclusion with which the Seventh Circuit agreed. 678 F.3d, at 593. As for respirators, the District Court stated that they "are kept and put on as needed at job locations," 2009 U.S. Dist. LEXIS 96715, 2009 WL 3430222, *2, which would render the time spent donning and doffing them part of an employee's normal workday and thus beyond the scope of §203(o). The Seventh Circuit did not address respirators at all, and we are not inclined to disturb the District Court's factual conclusion.

* * *

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Analysis
As of: Jan 29, 2014

ERICA PLASO, Appellant v. IJKG, LLC; IJKG PROPCO, LLC, a/k/a Newco; IJKG OPCO, LLC, d/b/a Bayonne Medical Center

No. 13-2565

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2014 U.S. App. LEXIS 1105

January 16, 2014, Submitted Under Third Circuit LAR 34.1(a)
January 21, 2014, Filed

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 2-11-cv-05010). District Judge: Honorable Jose L. Linares.
Plaso v. IJKG, LCC, 2013 U.S. Dist. LEXIS 70757 (D.N.J., May 14, 2013)

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-Where an employee was hired by a consulting company, worked at a medical center, and alleged that the consulting company's president sexually harassed her, the medical center was not her employer under Title VII of the Civil Rights Act of 1964 and the New Jersey Law Against Discrimination (NJLAD), because the consulting company and its president controlled her employment and her daily tasks; [2]-The medical center was not the employee's "joint employer," because, inter alia, only the consulting company paid her salary and business expenses, maintained employee records for her, and had the authority to terminate her; [3]-The medical center and the consulting company were not a single employer under the "integrated enterprise" theory. [4]-The employee's NJLAD claims for quid pro quo discrimination and retaliatory discharge failed.

OUTCOME: Summary judgment affirmed.

CORE TERMS: entity, assigned, quid pro quo, summary judgment, independent contractor--, hired, administrator, terminated, integrated, hiring, interacted, employment relationship, sexual harassment, indicia, tenure, medical centers, retaliation, supervision, discipline, correctly, quotations, payroll, patient, salary, reasons stated, employment contract, material fact, formally, business expenses, gender discrimination

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
[HN1]An appellate court reviews a district court's grant of summary judgment de novo

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employers
[HN2]In determining whether an entity is an "employer" for purposes of Title VII of the Civil Rights Act of 1964, a court considers the factors articulated in Darden. The court may consider the following non-exhaustive list of factors: (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4)

the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits, and (12) the tax treatment of the hired party.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employers

[HN3]In the context of determining whether an entity is an "employer" for purposes of Title VII of the Civil Rights Act of 1964, the essence of the Darden test is whether the hiring party has the right to control the manner and means by which the product is accomplished. Courts applying Darden may focus on three indicia of control: (1) which entity paid the plaintiff; (2) who hired and fired the plaintiff, and (3) who had control over the plaintiff's daily employment activities.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employers

[HN4]In the context of determining whether an entity is an "employer" for purposes of Title VII of the Civil Rights Act of 1964, since the common-law test contains no shorthand formula or magic phrase that can be applied to find the answer of employment, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employers

[HN5]A joint employment relationship exists when two entities exercise significant control over the same employees. When determining whether an entity exercises significant control with another employer, district courts in the Third Circuit have assessed the following factors: (1) the entity's authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) its day-to-day supervision of employees, including employee discipline; and (3) its control of employee records, including payroll, insurance, taxes and the like.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Federal & State Interrelationships

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employers

[HN6]The employment analysis under the New Jersey Law Against Discrimination (NJLAD) is substantially similar to that for Title VII of the Civil Rights Act of 1964. Title VII precedent is a key source of interpretive authority when construing provisions of the NJLAD.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employers

[HN7]Whether a court should consider two entities as an integrated enterprise rests on the degree of operational entanglement--whether operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another. Relevant operational factors include: (1) the unity of ownership, management, and business functions; (2) whether the entities present themselves as a single entity to third parties; (3) whether the parent company indemnifies the expenses or losses of its subsidiary; and (4) whether one entity does business exclusively with the other.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Quid Pro Quo

[HN8]The New Jersey Law Against Discrimination's goods and services subsection, N.J. Stat. Ann. § 10:5-12(l), prohibits the quid pro quo sexual harassment of an independent contractor, as well as her discriminatory termination from a contract.

COUNSEL: For ERICA PLASO, Plaintiff - Appellant: Lawrence C. Glynn, Esq., Caruso Glynn, Fresh Meadows, NY.

For IJKG, IJKG PROPCO, a/k/a Newco, IJKG OPCO, d/b/a Bayone Medical Center, Defendants - Appellees: Scott M. Wich, Esq., Clifton, Budd & DeMaria, New York, NY.

JUDGES: Before: AMBRO, HARDIMAN and GREENAWAY, JR., Circuit Judges.

OPINION BY: HARDIMAN

OPINION

HARDIMAN, *Circuit Judge*.

Erica Plaso appeals the District Court's summary judgment in favor of IJKG, LLC, IJKG PROPCO, LLC a/k/a Newco; and IJKG OPCO, LLC d/b/a Bayonne Medical Center (collectively, BMC). We will affirm, essentially for the reasons stated by the District Court in its thoughtful opinion.

I

Plaso began working for MCR Martin, LLC, d/b/a Healthcare MCR (Healthcare), an Ohio-based consulting business, in January 2008. She was hired by Healthcare's President and Managing Partner, R. Brent Martin. Plaso's employment contract, which governed the terms of her tenure at Healthcare, provided that she would report to Martin, and that she "shall provide the Services as directed by [Healthcare] and in compliance with . [*2] . . the terms of the Client Engagement to which [she] is assigned." The contract obliged Healthcare to pay Plaso's salary and benefits, and to reimburse her for expenses incurred when she worked at a client's site. It also authorized only Healthcare or Plaso to terminate her employment with the company.

In February 2008, Martin assigned Plaso to work at Bayonne Medical Center, where he served as the Chief Restructuring Officer. Plaso worked at BMC five days a week, and per BMC's contract with Healthcare, interacted daily with BMC executives and employees. She received unfettered access to the hospital, and was provided BMC email and telephone accounts, an access pass that identified her as a Healthcare contractor, and an office. She also gave assignments to two BMC employees and was asked by BMC to evaluate them, but on Martin's instruction did not do so. During Plaso's time at BMC, Martin was almost always on site, and she spoke and/or sent e-mails to him every day. Martin established Plaso's work hours, and she asked him for permission to take leave or to work from home. Martin was the only individual to formally discipline Plaso while she worked at BMC.

At some point, BMC formed a [*3] new physicians outreach group, BMC Medical Associates (BMCMA), and Martin assigned Plaso to serve as the group's "practice administrator." In that role, Plaso represented BMC to physician practices in the community and trained BMCMA's future Vice President of Business to perform these responsibilities.

While Plaso spent the vast majority of her tenure with Healthcare assigned to BMC, she also worked for other Healthcare clients, including medical centers in California, Florida, Michigan, and Montana.

According to Plaso, Martin began making unwanted sexual advances in 2008. Specifically, she alleged that he forcibly kissed her in June 2008, sent her sexually suggestive text messages in May and June 2010, and made inappropriate comments (*i.e.*, telling her to wear "skirts only" at a work-related event, encouraging another co-worker in her presence to have sex with a BMC owner) throughout her time with Healthcare. On June 24, 2010, Plaso complained to BMC's Vice President of Human Resources, Jennifer Dobin, about Martin's sexual harassment. The same day, she informed Daniel Kane, the CEO of BMC, that she no longer wanted to work near Martin. Kane then asked her to return home and to avoid [*4] Martin while she packed up her office. According to her deposition, Plaso believed that BMC would offer her employment, but her communications with Kane quickly ceased.

Neither Martin nor Healthcare formally terminated Plaso, and she remained on the company's payroll until October 2010. In August 2010, Plaso filed charges against Martin for employment discrimination with the Ohio Civil Rights Commission; she filed similar charges against Healthcare in October 2010 with the New Jersey Division on Civil Rights. These claims were settled in October 2010.

Almost a year after she settled her claims against Martin and his company, Plaso sued BMC in the District Court, alleging hostile work environment, *quid pro quo* discrimination, retaliation, and gender discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2. She also alleged three similar counts pursuant to the New Jersey Law Against Discrimination (NJLAD), N.J. Stat. Ann. § 10:5-1. These claims stem solely from Martin's alleged sexual harassment.

On May 14, 2013, the District Court granted BMC's motion for summary judgment, finding that BMC was not Plaso's "employer" for purposes of liability under [*5] Title VII and the NJLAD. *See Plaso v. IJKG, LLC*, No. 2-11-cv-05010, 2013 U.S. Dist. LEXIS 70757, 2013 WL 2182233 (D.N.J. May 14, 2013). Plaso contended that BMC had formed an employment relationship with her in one of three ways: (1) as an employer; (2) as a joint employer; or (3) as an "integrated entity" with her employer, Healthcare. In a persuasive opinion, the District Court rejected all three of Plaso's arguments, finding that Healthcare (not BMC) exercised control over Plaso's employment and that Plaso offered "only speculation and conclusory allegations" to the contrary. The District Court also found Plaso's argument in the alternative--that BMC would be liable for *quid pro quo* discrimination, even if she were only an independent contractor--unavailing.

Plaso filed this timely appeal.

1 The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a), and we have jurisdiction under 28 U.S.C. § 1291. [HN1]We review the District Court's grant of summary judgment de novo. *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 454 (3d Cir. 2003).

II

Plaso contends that summary judgment was improper because triable issues of material fact exist regarding her employment status. First, she maintains that the [*6] District Court ignored key pieces of evidence in the record that are material to her status at BMC. Second, Plaso argues that while the District Court properly identified the standards outlining the "employment" and "joint employment" relationships, it failed to apply those tests correctly. Third, Plaso claims that BMC and Healthcare are part of an "integrated enterprise," rendering it a single employer, and finally, that she is entitled to NJLAD relief as an independent contractor.[2] We address each argument in turn.

2 In her complaint, Plaso alleged claims for *quid pro quo* discrimination and retaliation as an independent contractor under both Title VII and NJLAD. Because she does not discuss the Title VII issue in her opening brief, she has waived that issue on appeal. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005).

A

Plaso focuses on four facts in the record that she claims were ignored by the District Court. First, pointing to testimony in Kane's deposition, she alleges that Martin "structured" the environment at BMC and controlled how BMC employees interacted. Plaso thus urges us to draw the favorable inference that she, with whom BMC employees regularly communicated, [*7] was also a BMC employee. The record undermines this argument, however, as Kane merely stated that Martin "structured" BMC's interactions with Healthcare employees. Martin did not control BMC; to the contrary, he supervised the manner in which Healthcare's employees--including Plaso--interacted with BMC and the company's other clients.

Second, Plaso notes that she interacted daily with BMC executives and received assignments from them--indicia, she contends, that they "took part in controlling the manner and substance of [her] employment." She points to her increasing responsibility at BMC--as BMCMA's "practice administrator" and her "supervision" of two BMC employees--as further material evidence of her employment. These facts do not bear the weight Plaso assigns them; they merely highlight the nature of Healthcare and BMC's contractual relationship. Healthcare, as Plaso's employer, assigned her to perform certain functions. Martin outlined Plaso's responsibilities, and BMC provided some direction within those functions in accordance with its contract. For example, Martin informed Plaso that she would serve as BMCMA's practice administrator, and he directed her to cease performing this function. [*8] Similarly, Plaso declined to submit a performance evaluation for one of BMC's employees at Martin's direction. That BMC provided some direction in the work assigned to Plaso by Healthcare does not raise a dispute of material fact as to whether she was an employee of BMC.

Third, Plaso points to Martin's role as BMC's Chief Restructuring Officer as "compelling evidence" the District Court ignored. In fact, the District Court did address Martin's role at BMC, finding that Plaso failed to present specific evidence as to how Martin's job title would render her a BMC employee. Furthermore, we have held that "mere nomenclature" is insufficient to demonstrate a supervisory relationship. *See Jensen v. Potter*, 435 F.3d 444, 453 n.4 (3d Cir. 2006) (citing *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998)), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). Although it sheds light on the significance of his work on behalf of BMC, Martin's title does not compel the finding that he was a BMC employee.

Fourth, Plaso alleges that BMC considered her an employee when it demanded in unrelated litigation that her communications with [*9] BMC's counsel were privileged. This claim is unsupported by the record, which demonstrates that BMC and Plaso never agreed upon the basis of such a privilege. Although Plaso's communications with BMC's counsel were ultimately treated as privileged, BMC's counsel--despite Plaso's insistence that she be considered a BMC employee--rejected this characterization.

For the reasons stated, we reject Plaso's argument that the District Court failed to adequately consider the evidence of record. We next consider whether this evidence raises a genuine dispute of material fact.

B

[HN2]In determining whether an entity is an "employer" for purposes of Title VII, we consider the factors articulated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992). [HN3]The essence of the *Darden* test is whether the hiring party has the "right to control the manner and means by which the product is accomplished." *Id.* at 323. We have held that courts applying *Darden* may focus on

three indicia of control: (1) which entity paid plaintiff; (2) who hired and fired plaintiff, and (3) who "had control over [plaintiff's] daily employment activities." *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 119 (3d Cir. 2013) [*10] (citation and internal quotations omitted).

> 3 The court may consider the following non-exhaustive list of factors: (1) "the skill required"; (2) "the source of the instrumentalities and tools"; (3) "the location of the work"; (4) "the duration of the relationship between the parties"; (5) "whether the hiring party has the right to assign additional projects to the hired party"; (6) "the extent of the hired party's discretion over when and how long to work"; (7) "the method of payment"; (8) "the hired party's role in hiring and paying assistants"; (9) "whether the work is part of the regular business of the hiring party"; (10) "whether the hiring party is in business"; (11) "the provision of employee benefits"; and (12) "the tax treatment of the hired party." *Darden*, 503 U.S. at 323-24 (citation and internal quotations omitted).

Contrary to our holding in *Covington*, Plaso claims the District Court erred by focusing on those three indicia instead of applying all twelve *Darden* factors, nine of which she claims are in her favor. We are unpersuaded, for as the Supreme Court stated in *Darden* itself: [HN4]"Since the common-law test contains no shorthand formula or magic phrase that can be applied [*11] to find the answer [of employment], . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (citation and internal quotations omitted). The District Court engaged in a detailed, considered discussion of the three *Covington* indicia and, in a footnote, acknowledged the relevance of the other nine *Darden* factors. It found, quite correctly, that Martin and Healthcare (not BMC) controlled Plaso's employment and her daily tasks.

Similarly, Plaso's reliance on *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 160 U.S. App. D.C. 14 (D.C. Cir. 1973), is misplaced. There, the D.C. Circuit held that a private nurse, who was retained and compensated by hospital patients, could state a claim under Title VII against the hospital where he worked. *Id.* at 1344. Sibley sued for gender discrimination because the hospital would not refer him to patients requesting a private nurse whenever the patient was female. *Id.* at 1339-40. Plaso claims that Sibley was an "employee" by virtue of his physical presence in the hospital building, analogizing his situation to her case. In fact, Sibley was deemed *not* an employee of the hospital, although he was protected [*12] by Title VII because the hospital blocked his access to employment. *Id.* at 1342. This rationale does not apply to Plaso's suit, as BMC had no authority to affect Plaso's employment.

Nor do we find that the District Court erred, as Plaso contends, in its joint employment determination. Under *Graves v. Lowery*, 117 F.3d 723 (3d Cir. 1997), [HN5]a joint employment relationship exists when "two entities exercise significant control over the same employees." *Id.* at 727 (citations omitted); *see also Nat'l Labor Relations Bd. v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982). When determining whether an entity exercises significant control with another employer, district courts in the Third Circuit have assessed the following factors: (1) the entity's "authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours"; (2) its "day-to-day supervision of employees, including employee discipline", and (3) its "control of employee records, including payroll, insurance, taxes and the like." *See, e.g., Abdallah v. Allegheny Valley Sch.*, No. 10-5054, 2011 U.S. Dist. LEXIS 10667, 2011 WL 344079, *3 (E.D. Pa. Feb. 1, 2011); [*13] *Butterbaugh v. Chertoff*, 479 F. Supp. 2d 485, 491 (W.D. Pa. 2007); *Cella v. Villanova Univ.*, No. 01-7181, 2003 U.S. Dist. LEXIS 2192, 2003 WL 329147, *7 (E.D. Pa. Feb. 12, 2003). Here, the District Court reviewed these three factors, noting that only Healthcare paid Plaso's salary and business expenses, maintained employee records for her, and had the authority to terminate her. In addition, Martin outlined Plaso's day-to-day responsibilities, controlled how she could use BMC resources, and told her when to work. On the other hand, as the District Court aptly found, Kane and other BMC employees exercised only limited supervision over Plaso, which did not create a joint employment relationship.

Plaso claims the District Court focused entirely on her employment contract, which set forth the original terms of her employment at Healthcare, and thus failed to consider the evolution of her role and her increasing responsibilities at BMC. Again, she references her duties as program administrator for BMCMA, and she further argues that Kane "ultimately terminated" her employment.

As discussed above, however, the record demonstrates that Plaso's tenure as program administrator fell within her contractual duties as a Healthcare [*14] employee. Martin assigned her to the position, outlined her responsibilities, and instructed her when to stop performing that role. When Kane and other employees interacted with Plaso and offered feedback on her work, they did so within the confines of her assigned functions. The District Court correctly turned to Plaso's employment contract as a touchstone for its analysis, but it did

not do so to the exclusion of the other evidence in the record. Rather, the District Court explained how Plaso's work conditions at BMC--her constant communication with Martin, the fact that Martin controlled how she used BMC's equipment, and Martin's status as the only person to formally discipline her--comported entirely with the terms of her contract with Healthcare.

Similarly, the record does not support the inference that BMC "ultimately terminated" Plaso. Beyond mere allegations, Plaso offers no specific evidence that she was terminated, and for that matter, that BMC played a role in terminating her role at the hospital. Though Plaso stopped working in June 2010, BMC presented evidence that she remained on Healthcare's payroll until at least October 2010. Thus, Plaso's argument that BMC was her "joint [*15] employer" is unconvincing.

Accordingly, we find no error in the District Court's detailed consideration of *Darden* and *Graves*, respectively, and affirm its conclusions that BMC constitutes neither Plaso's "employer" nor "joint employer" for purposes of Title VII.[4]

> 4 Because [HN6]the employment analysis under the NJLAD is substantially similar to that for Title VII, we also hold there is no genuine issue of material fact supporting Plaso's contention that BMC was her employer or joint employer under that law. *See Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 600, 626 A.2d 445 (N.J. 1993) (holding that Title VII precedent is "a key source of interpretive authority" when construing provisions of the NJLAD) (citation omitted).
>
> Plaso contends that the District Court's succinct treatment of her NJLAD claim glossed over the multi-factored test for employment set forth by *Pukowsky v. Caruso*, 312 N.J. Super. 171, 711 A.2d 398, 404 (N.J. Super. Ct. App. Div. 1998). We do not find that a "principled application" of *Pukowsky* would yield a different outcome. *See id.* at 405 ("We cannot perceive how the standards set forth in the federal cases could have been construed more broadly to warrant a different result [under the NJLAD].").

C

Plaso also [*16] argues that the District Court erred in finding that BMC and Healthcare were not a single employer under the "integrated enterprise" theory. [HN7]Whether we should consider two entities as an integrated enterprise "rests on the degree of operational entanglement--whether operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another." *Nesbit v. Gears Unltd., Inc.*, 347 F.3d 72, 87 (3d Cir. 2003). Relevant operational factors include (1) the unity of ownership, management, and business functions, (2) whether the entities present themselves as a single entity to third parties; (3) whether the parent company indemnifies the expenses or losses of its subsidiary; and (4) whether one entity does business exclusively with the other. *Id.*

In our view, the evidence Plaso presents in support of this theory is legally insufficient. As a threshold matter, Plaso did not allege in her complaint that BMC and Healthcare constitute a single employer. Further, it is undisputed that BMC and Healthcare are independent legal entities, and Plaso has not proffered evidence that they are united in ownership, management, or purpose. Although Plaso [*17] represented BMC to third-party physicians in the community in her capacity as BMC-MA's administrator, she did so as an independent contractor and not as a BMC employee. Similarly, Healthcare performed its own administrative functions, as it maintained its own employee records, paid Plaso's salary, and reimbursed Plaso for her business expenses. Healthcare also served other clients, and indeed, Plaso was assigned to other medical centers during her time with the company. Accordingly, Plaso cannot sustain her Title VII and NJLAD claims under the integrated enterprise theory.

D

Finally, Plaso maintains that the District Court erred in granting summary judgment on her claims as an independent contractor under the NJLAD for *quid pro quo* discrimination and retaliatory discharge. Perhaps because of the multiplicity of her claims, Plaso failed to alert the District Court to this NJLAD argument in her memorandum of law opposing summary judgment, instead discussing her *quid pro quo* discrimination and retaliation claims solely "in the context of a suit brought under Title VII." Pl.'s Mem. Opp'n Summ. J. 25, Apr. 1, 2013, ECF No. 30. Thus, the District Court reasonably looked only to Title VII. However, [*18] because Plaso "offer[ed] only citations to the NJLAD and New Jersey case law . . . [and] no support for her conclusion that pertains to Title VII," it found her Title VII argument unpersuasive.[5]

> 5 Plaso has waived her claim with respect to Title VII. *See supra* note 4.

Plaso contends that this omission was a mere "typo" and that her NJLAD claims should be considered. Even were we to accept this explanation, Plaso's NJLAD arguments fail on their merits. [HN8]NJLAD's goods and services subsection, N.J. Stat. Ann. § 10:5-12(l), prohibits the *quid pro quo* sexual harassment of an independent contractor, as well as her discriminatory termination from a contract. *See, e.g., J.T.'s Tire Services, Inc. v.*

United Rentals North America, Inc., 411 N.J. Super. 236, 985 A.2d 211, 215 (N.J. Super. Ct. App. Div. 2010). But the alleged sexual harassment at issue here was inflicted only by Martin, and Plaso has not articulated why BMC should be held liable for Martin's conduct. Further, as discussed earlier, Plaso has not offered evidence either that she was terminated or that BMC instigated the end of her tenure at the hospital. As such, her NJLAD claims for *quid pro quo* discrimination and retaliatory discharge must fail.

III

For the reasons [*19] stated, we will affirm the judgment of the District Court.

LICHTEN & LISS-RIORDAN, P.C.

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March 26, 2014

VIA OVERNIGHT DELIVERY

Mark Neary, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625

Re: Hargrove et al., v. Sleepy's, LLC
Docket No. ~~072-724~~ 072742

Dear Mr. Neary:

During oral argument on March 17, 2014, Attorney Harold Lichten cited Anderson v.Homedeliveryamerica.com, et al. to rebut Sleepy's argument that a direct contractual relationship is required to form an employment relationship. Plaintiffs now provide the Court with this decision pursuant to Rule 2:6-11(d) since it was issued after briefing was filed.

In Homedeliveryamerica.com, Judge George O'Toole rejected an argument that an employment relationship could not form where an individual contracted with an employer through a corporate entity, holding that such an argument "depends on the appropriateness of choosing to honor form over substance, so that when Joe Driver drives his truck without incorporating he is an employee, but if he drives his truck under the aegis of Joe Driver, Inc., then he is an independent contractor." Anderson v. Homedeliveryamerica.com, Inc., 2013 WL 6860745, *2 (D. Mass. Dec. 30, 2013). Rather, Judge O'Toole held, "a worker can qualify as an employee under [the Massachusetts ABC Test] even if he has incorporated his business, and the employer's formal relationship is with the entity and not the individual." Id. (citing Martins v. 3PD, Inc., 2013 WL 1320454, at * 16-17 (D. Mass. Mar. 28, 2013)) (attached as Exhibit A). Judge O'Toole's decision is now submitted pursuant to Rule 2:6-11(d).

An original plus eight copies of this letter are being provided so that it may be circulated to the Court.

Sincerely,

Harold L. Lichten, Esq.

cc: Anthony Marchetti, Jr, Esq.
Elizabeth Clement, Esq.
Donna Arons, Esq.
Sarah Hymowitz, Esq.
David Tykulsker, Esq.
Richard Hluchan, Esq.
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2013 WL 6860745
Only the Westlaw citation is currently available.
United States District Court,
D. Massachusetts.

Calvin ANDERSON, Murilo Silva, Ralston Johnson, and Johnnie Funches, individually and on behalf of a class of similarly situated individuals, Plaintiffs,

v.

HOMEDELIVERYAMERICA.COM, INC., d/b/a Home Delivery America, and Sls LOgistics Services, Inc., Defendants.

Civil Action No. 11-10313-Gao. | Dec. 30, 2013.

Opinion

OPINION AND ORDER

O'TOOLE, District Judge.

*1 The plaintiffs are delivery drivers for Home Delivery America ("HDA"). The complaint alleges that HDA, as well as Sears Logistics Services ("SLS"), which is alleged to be a joint employer with HDA, have misclassified the plaintiffs as independent contractors contrary to the requirements of Mass. Gen. Laws ch. 149, § 148B, and as a result have violated the Massachusetts Wage Law, Mass. Gen. Laws ch. 149, § 148. The plaintiffs move for partial summary judgment solely against HDA, seeking a determination that they are employees of HDA and that HDA is consequently liable for violating Section 148.

I. Background

The undisputed facts relevant to this motion are as follows.

The plaintiffs perform work for H DA by delivering and installing products that customers have bought through Sears and K-Mart stores. SLS provides logistical services in managing home delivery of retail merchandise, but it has outsourced its delivery service in the Massachusetts area to HDA. HDA works out of SLS's warehouse in Westwood. Plaintiffs Anderson, Silva, and Funches all contracted with HDA to perform delivery services. Each contracted with HDA not directly in his individual capacity but rather through a business form such as a limited liability company or corporation. The drivers drove trucks bearing a Sears logo, wore uniforms with both Sears and HDA logos, and performed deliveries in accordance with daily manifests provided by SLS and HDA. Drivers, such as plaintiffs Anderson, Silva, and Funches, each drove his own truck and also employed and paid a "helper" to assist in the deliveries. As a helper, plaintiff Johnson did not have a contract with HDA, and he was paid by the driver whom he helped. When under contract, each driver worked full time and exclusively delivering for HDA.

II. Discussion

Under Massachusetts law, an "individual" performing services for another is considered to be an employee of the other unless:

> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact, and
>
> (2) the service is performed outside the usual course of the business of the employer, and
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Mass. Gen. Laws ch. 149, § 148B. All three conditions must be established for HDA to prevail in its assertion that the drivers were not employees but independent contractors, and the burden is on HDA to establish each condition. *Di Giovanni v. JanKing Int'l, Inc.*, 262 F.R.D. 71, 84 (D. Mass. 2009). In other words, there is a presumption that the drivers are employees, and it falls to HDA to prove otherwise. *See Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 747 (Mass. 2009).

HDA does not contest the relevant facts. It instead makes two legal arguments. First, it says that the plaintiffs fall outside the protection of Section 148B because they contracted with HDA through legal entities, and not personally, so that they are not "individuals" within the meaning of the statute. Second, HDA argues that Section 148B is preempted by the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("FAAAA").

*2 HDA's first argument depends on the appropriateness of choosing to honor form over substance, so that when Joe Driver drives his truck without incorporating he is an employee, but if he drives his truck under the aegis of Joe

Driver, Inc., then he is an independent contractor. But that formalistic distinction is precisely what Section 148B is intended to preclude. As the Massachusetts Attorney General has noted, a principal objective of the law is to prevent potential employers, who would be otherwise subject to the wage statute, Section 148, from avoiding compliance by requiring the persons they contract with to do so under legal forms "such as LLCs and S corporations." *An Advisory from the Attorney General's Fair Labor Division on M.G.L. 149 § 148B ("AG Advisory")*. I agree with those courts that have concluded that a worker can qualify as an employee under § 148B "even if he has incorporated his business, and the employer's formal relationship is with the entity and not the individual." *Martins v. 3PD, Inc.*, 2013 W.L. 1320454, at * 16–17 (D.Mass. Mar. 28, 2013). *See* also, *De Giovanni*, 262 F.R.D. at 86.

The inquiry is whether *in substance* the worker is an employee or a person (or entity) acting genuinely as an independent contractor. There is no convenient bright line to be used, and each case must be determined on its own facts. Recently, in another case I decided that a plaintiff was *not* an "individual" within the meaning of Section 148B. *Dehoyos v. FedEx Home Delivery*, 2013 WL 5434142 (Sept. 27, 2013). In that case, the plaintiff claiming to be an employee under Section 148B managed multiple delivery routes out of two locations. He owned multiple vehicles and had hired over sixty employees during the course of his contract with FedEx. *Id.* I concluded that under those circumstances he was engaged in a "legitimate ... business-to-business relationship" (AG Advisory) with FedEx and was therefore not an "individual" employee within the meaning of the statute. *Id.*

In contrast, the facts of this case show that the plaintiffs do qualify as employees under Section 148B. They worked as individual truck drivers performing full-time personal services exclusively for HDA. They did not manage any delivery operations beyond their personal (individual) work for HDA. HDA also dictated that the drivers were required to hire a helper, who had to wear the Sears and HDA uniform, and undergo drug and background testing performed by HDA.

Johnson, who was a helper, also qualifies as an employee under Section 148B even though he did not directly contract with HDA. The Supreme Judicial Court has held that "the lack of a contract for service between the putative employer and putative employee does not itself preclude liability under G.L. c. 149, § 148B." *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 990 N.E.2d 1054, 1069 (Mass.2013). In *Depianti*, the question arose in the context of a two-tier franchising arrangement. Jan-Pro, the franchisor, contracted with a "master franchisee," which then contracted with a "unit franchisee," the plaintiff. Noting that remedial statutes such as Section 148B are "entitled to liberal construction," *id.* at 1066, the court held that the unit franchisee was not excluded from being considered an employee simply because of the lack of a direct contractual relationship with the franchisor. A helper stands in essentially the same relationship to HDA as the unit franchisee did to the franchisor. HDA makes no further argument with regard to helpers beyond the simple lack of a direct contractual relationship.

*3 HDA also argues, quite briefly, that Section 148B is preempted by the FAAAA because a ruling in the plaintiffs' favor would interfere with its contracting with third party businesses to perform delivery services for it, arguably impinging improperly on federally regulated activity. This is the same categorical error. It is not a proper interpretation of the statute to think that because an individual who incorporates may still be considered an employee, then any incorporated entity must be considered an employee. Section 148 does not interfere with legitimate business-to-business independent contractor relationships but rather seeks to prevent companies from avoiding the Massachusetts wage law with respect to workers who are *in substance* employees. *See Martins*, 2013 W.L. 1320454, at *10–13 (finding that Section 148B is not preempted by the FAAAA); *Massachusetts Delivery Ass'n v. Coakley*, 2013 WL 5441726, at * 4–10 (D.Mass. Sept. 26, 2013) (same).

The final issue is whether HDA violated the Massachusetts Wage Law by taking unlawful deductions from the drivers' pay. Mass. Gen. Laws ch. 149, § 148. HDA does not contest the allegation that deductions were taken from the plaintiffs. HDA's argument is simply that the plaintiffs were not employees and therefore the wage statute does not apply. For the reasons discussed above, it does apply and it follows that HDA's deductions from the plaintiffs' pay violated Section 148.

III. Conclusion

For the foregoing reasons, the plaintiffs' Motion for Partial Summary Judgment as to liability against HDA (dkt. no. 65) is GRANTED.

It is SO ORDERED.

End of Document

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February 19, 2014

VIA HAND DELIVERY - NJ Lawyers Service

Mark Neary, Clerk
Supreme Court of the New Jersey
Hughes Justice Complex
25 W. Market Street, 8th Floor, NW
Trenton, New Jersey 08625-0970

Re: Hargrove, et al., v. Sleepy's, LLC, et al.
Docket No. 072742

Dear Mr. Neary:

Pursuant to Rule 2:6-11(d), Plaintiffs file this response to Defendant Sleepy's, LLC's ("Sleepy's") letter dated February 6, 2014.[1] Respectfully, neither of the additional cases submitted by Sleepy's should change or even add to the analysis of the certified question currently before this Court – what test employment relationship test applies under the New Jersey wage laws.

Sleepy's cites Plaso v. IJKG, LLC, 13-2565, 2014 WL 212589 (3d Cir. Jan. 21, 2014), an unpublished decision with no precedential value, even within the Third Circuit[2], as having a bearing on this Court's interpretation of New Jersey's Wage laws. It should not. In this uncirculated opinion, the panel applied the Darden/Restatement test for the plaintiff's Title VII claim and then, in a footnote, found that her LAD claims failed under the same test. Id. at n. 4. In pure dicta, the panel added that the plaintiff's LAD claims would also fail under the broader Pukowsky test. Id.

Plaso does not, and indeed could not, suggest that the Pukowsky test is the same as the right to control test. This Court, in D'Annunzio, clearly set forth that the test for employment status in remedial legislation is broader than the Restatement test, even

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[1] Plaintiffs did not receive Sleepy's letter until February 10, 2014.

[2] Pursuant to Third Circuit Internal Operating Procedure Rule 5.7: "The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."

under CEPA, which does not use the broad "suffer or permit" language. D'Annunzio v. Prudential Ins. Co,, 192 NJ 110, 120 (2007) (where a statute is remedial in nature, "the control test does not emerge as the dispositive factor").

Sleepy's also cites the United States Supreme Court's recent opinion in Sandifer v. U.S. Steel, 134 S. Ct. 870 (Jan. 27, 2014), a case involving what constituted "changing clothes" under the federal Fair Labor Standards Act. In Sandifer, the Supreme Court broke no new ground in its application of the rules of statutory construction. Only after the Court noted that the U.S. Department of Labor had "expressly declined" to ask the Court to defer to its regulations interpreting the FLSA, the Court looked at the dictionary definition of "clothes" as the definition appeared when the term was added to the FLSA in 1949. Id. at 876-77, n. 5. This seemingly innocuous approach is unavailing for several reasons. First, unlike in Sandifer, the New Jersey Department of Labor has expressly asked this Court in this case to defer to its statutory interpretations. Second, the Supreme Court's use of the 1950 dictionary definition was wholly insignificant because the word "clothes" has the same meaning today as it did 64 years ago. This Court has already held that the hybrid test should apply under remedial employment legislation in New Jersey. D'Annunzio, 192 N.J. at 120. The Sandifer decision does not call that ruling into question.

Third, even if this Court was bound to apply the employment test as it was intended in 1965, this would not lead to an application of the common law test. The New Jersey wage laws defined employment as to "suffer or permit" to work, a term that has been used in New Jersey's child labor and worker's compensation laws as early as 1904. See E. Heller & Bors. V. Dillon, 96 N.J. Eq. 334, 335-36 (1924); 1924 N.J. Laws ch. 159, § 1 at 359-60. Moreover, as of 1947, it was settled law that the "suffer or permit" test was "broad" and "streche[d] the meaning of employee" beyond the traditional common-law definition. Rutherford Food Corp. v. Mc Comb, 331 U.S. 722, 728 (1947). Further, as this Court recognized in Lowe v. Zarghami,158 N.J.606(1999), the relative nature of the work test had been recognized in New Jersey and this Court at least since 1960. *See, also*, Tofani v. Lo Biondo Bros. Motor Exp., Inc., 83 N.J. Super. 480, 489 (App. Div. 1964) aff'd sub nom. Tofani v. Lobiondo Bros. Motor Exp., Inc., 43 N.J. 494, (1964). Unless this backdrop, the New Jersey Legislature chose to use the even broader "suffer or

permit" language in the WPL. Just as it was well before 1965, this test is much broader then the "right to control" test. The Sandifer decision, therefore does not support Sleepy's position.

As always, thank you for your consideration of this matter.

Respectfully submitted,

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Supreme Court of New Jersey
DOCKET NO. 072742

SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO Plaintiffs-Appellants/Cross-Appellees	:	
v.	:	Civil Action
SLEEPY'S LLC Defendant-Appellee/Cross-Appellant	:	
v.	:	
I STEALTH, EUSEBIO'S TRUCKING CORP., and CURVA TRUCKING LLC Third-Party Defendants-Appellees	:	

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BRIEF OF AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

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INTRODUCTION

The certified question - what test should apply in determining a worker's employment status under the New Jersey Wage Payment Law (WPL) and the New Jersey Wage and Hour Law (WHL) - carries considerable significance for lower income workers in the state. Systemic avoidance of wage and employment obligations, through schemes such as use of marginal subcontractors and other intermediaries who circumvent or ignore the wage laws, off the books employment, misclassification of employees as independent contractors, and exploitation of immigrant workers, presents serious economic, human rights and public policy concerns. Legal Services of New Jersey urges this Court to embrace a test that reflects the full historical breadth of the statutory "suffer and permit" language, a definition that has been employed in child labor and wage laws for more than a century. While the certified question has not been addressed specifically by this Court for New Jersey's two primary wage statutes, extensive national precedent and New Jersey decisions under other remedial and protective employment statutes point the way toward a suitably broad and flexible test consistent with the wage statute aims.

Several challenges attend resolution of the certified question. Since by its terms the question is not limited to the facts of the current Third Circuit appeal, the test adopted must be flexible enough to apply readily to a full range of foreseeable

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circumstances and evasive schemes. Broad themes and similarities must be synthesized from more than sixty years of federal and national precedent. Such themes, in turn, must be harmonized with considerable New Jersey precedent defining "employment" under both other remedial statutes and common law. Finally, to the extent possible, the relationship between the statutory "suffer or permit" standard and the regulatory "independent contractor" inquiry must be examined and, to the extent possible, reconciled.

This brief opens with a brief background overview of typical employer practices designed to avoid statutory employment law responsibilities. The ensuing legal argument examines both federal and other states' precedent under the identical "suffer or permit" language in a wage enforcement context, reviews other pertinent New Jersey employment definition decisions, seeks to harmonize these concepts with the New Jersey Department of Labor (NJDOL) independent contractor regulation, and then concludes with a proposed unifying test that ties together those various elements.

BACKGROUND

Although many labor laws have been enacted in New Jersey to protect the rights of workers, for decades some employers - especially in lower wage sectors - intentionally have sought to evade wage and other employment requirements. *See generally*

Contract Labor - The Making of an Underground Economy, State of New Jersey Commission on Investigation (1997) ("SCI Report") available at: http://www.state.nj.us/sci/pdf/labor.pdf; and, for a more recent portrait, *All Work and No Pay - Day Laborers, Wage Theft and Workplace Justice in New Jersey*; Seton Hall Center for Social Justice (2011) available at: http://law.shu.edu/wagetheftreport.

Such employment law abuses are not limited to this state, but occur *nationwide*. *See generally*, Zatz, N., *Working Beyond the Reach or Grasp of Employment Law, in the Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market*, UCLA School of Law, Public Law & Legal Theory Research, p.31 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=1075828 ("labor practices exploit these limitations of reach or grasp [of the employment law]").

Use of Marginal Subcontractors

In many industries, principal employers utilize a labor workforce employed through subcontractors and other third parties to obfuscate the working relationship. See SCI Report at 2-3 ("underlying the problems and abuses . . . is a system characterized by an intensive demand for low-cost, unskilled labor by factory management and a ready source of supply for that labor from private contractors and a no-questions asked relationship

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between the two"). These non-traditional working structures seek to shield the principal employer from liability and expose workers to wage violations. *See generally*, Zatz, N., *supra*.

Industries which rely on unskilled labor often are populated with "small, undercapitalized" subcontractors in a highly competitive market. *See* Mallo, C. & Weil, D., *Government Regulation of the Minimum Wage: Estimating the Effects of Intervention*, Boston University School of Management (2005) at 4-5, available at: *http://smgapps.bu.edu/smgnet/Personal/Faculty/Publication/pubUploads/WP2005-22.pdf?did=540&Filename=WP2005-22.pdf*. Enforcing violations of wage and hour laws by pursuing marginal subcontractors is often difficult given their unstable economic base. *See* Rogers, B., *Toward Third Party Liability for Wage Theft*, 31 Berkeley J. Emp. & Lab. L. 1, 20 (2010).

Misclassification of Workers

A common form of evasion is for an employer to deny an employment relationship with a worker and assert that the worker's complaints lie beyond the scope of employment law. *See* Zatz at p.44. In many cases, employers avoid compliance with wage and employment laws through the misclassification of employees as independent contractors. *See* SCI Report, p.2-3 available at: http://www.state.nj.us/sci/pdf/labor.pdf. The employer reports

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payments it made for services rendered, but fails to pay or deduct payroll taxes, or record hours worked or wages paid. *Id.* at 10-11; *See* also Rubinstein, M.H., *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers who Operate in the Borderland Between an Employee-and-Employer Relationship*, 14 U. Pa. J. Bus. L. 605, 609 (2012)("it has been estimated that classifying individuals as independent contractors instead of as employees might result in a savings of twenty to forty percent of labor costs").

Employee misclassification also causes significant revenue losses for government in payments for taxes, unemployment insurance fees, workers compensation, and Social Security. *See Employee Misclassification as Independent Contractors*, Wage and Hour Division, U.S. Dept. of Labor, (last visited Oct. 3, 2013) available at: http://www.dol.gov/whd/workers/misclassification/.

Some employers create complex webs to sustain such misclassification. It is a familiar practice to require workers to sign, as a condition of employment, contracts that create fictitious business entities designed to help employers avoid statutory responsibilities. See, e.g., Vizcaino v. Microsoft, 120 F.3d 1006, 1010 (9th Cir. 1997) (requiring certain employees to sign independent contractor agreements where workers are to be "responsible" for all federal and state taxes and other benefits). In so doing, employers attempt to get around reporting

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requirements, deny benefits, and avoid standards set by wage and hour laws. Unsophisticated workers, particularly in low wage sectors, may be unaware of their available and important legal protections or afraid to assert their legal rights for fear of reprisal. See Estlund, C., *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum. L. Rev. 319, 330 (2005).

"Off the Books" Employment

Employers in certain industries also may pay workers' wages in cash, and in so doing avoid tax reporting, minimum wage, overtime, and other legal obligations. See Zatz, *supra*, (2008), at 45, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075828. This "off the books" evasion extends through many industries, but it is an acute issue in low-wage sectors, resulting in rampant violations of the rights of low level workers. See Weil, D., *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 *Indus. & Labor Relations Review* 238, 240 (2005) available at: http://digitalcommons.ilr.cornell.edu/ilrreview/vol58/iss2/4/. *See also* Berhardt, A., et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, UCLA Institute for Research on Labor and Employment (2009) at 5 available at:

http://www.unprotectedworkers.org/index.php/broken_laws/index. (finding that over two thirds of sample of low-wage workers had experienced at least one pay-related violation in the previous weeks).

Exploitation of Immigrant Workers

Wage and hour violations are widespread in lower-wage sectors where disproportionate numbers of employees are immigrants or otherwise undocumented. *See* Weil, D., *supra*, at 238,240, 244 at http://digitalcommons.ilr.cornell.edu/ilrreview/vol58/iss2/4/. They are less likely to be aware of their rights, and more likely to be afraid to assert them. Such workers also are routinely paid "off the books," and sparse record keeping is maintained, if any.

Given such abuses, judicial adherence to the broad employment definitions in remedial statutes is essential. As a corollary, determinations of employment status cannot be left to the employer, through adhesive contracts. *See* Rubenstein, *supra*, at 609 (employers and employees cannot simply self-define their status by entering into a contractual agreement declaring that the individual in question is or is not an employee of a particular employer).

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ARGUMENT

THE "SUFFER OR PERMIT" TO WORK STATUTORY TEST FOR EMPLOYMENT IN NEW JERSEY'S WAGE STATUTES IDENTICAL TO THAT IN THE FAIR LABOR STANDARDS ACT, AND THE EXTENSIVE FEDERAL AND NATIONAL PRECEDENT INTERPRETING THIS LANGUAGE SHOULD GUIDE THIS COURT'S RESPONSE TO THE CERTIFIED QUESTION.

Both New Jersey's Wage and Hour Law (WHL) and Wage Payment Law (WPL) use the "suffer or permit" to work standard originally contained in the Fair Labor Standards Act (FLSA). Federal and other states' decisions interpreting that language in a wage enforcement context bear special force in considering the meaning of New Jersey's statutes.

A. New Jersey's Use of "Suffer or Permit" As a Test for Employment.

No New Jersey case specifically interprets the suffer or permit standard in a wage enforcement context, making this certification a matter of first impression. New Jersey, however, has used suffer or permit, or variants such as "allow", in other settings. *See Division of Alcoholic Beverage Control v. Maynards, Inc.*, 192 *N.J.* 158 (2007) (marking the most recent in a line of alcohol regulation cases); *E. Keller & Bros., Inc. v. Dillon*, 95 *N.J. Eq.* 334 (E&A 1924) (interpreting the Factory Act, governing *inter alia* hours and child labor).

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New Jersey was an early adopter in the use of the "suffer or permit" standard, using it to define employment relationships in a variety of employment contexts. *See* Goldstein, B., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 U.C.L.A. L. Rev. 983, 1092 (1999). By 1907, New Jersey used "suffer or permit" in its child labor laws and, in 1924, it became just the third state to include "suffer or permit" in its workers' compensation statute. *Id.* (citing 1924 N.J. Laws ch. 159, § 1 at 359-60). Such early cases consistently stress the intended broad, unconstrained reach of the statutory "suffer or permit" phrasing.

B. The FLSA "Suffer or Permit" Standard.

The Fair Labor Standards Act was enacted in 1938 to "combat the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 *U.S.C.* § 202 (a). It was intended to "correct and as rapidly practicable eliminate" such conditions, which burden commerce and create unfair competition. 29 U.S.C. § 202(b). FLSA's key provisions protect workers by establishing a minimum wage, limiting the number of hours which may be worked in a work week, and providing other standards for the fair treatment of workers. 29 *U.S.C.* § 202-219. Importantly, FLSA was also intended to prevent employers

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from strategically structuring subcontractor relationships to avoid responsibility for wage and hour violations of its workers. *See Zheng v. Liberty Apparel Co., Inc.*, 355 *F.3d* 61, 76 (2nd Cir. 2003). Prior to the enactment of FLSA, employers had free reign to exploit workers, who were required to work long hours for little pay.

The "suffer or permit" standard is one of "striking breadth." *Nationwide Mutual Insurance Company v. Darden*, 503 *U.S.* 318, 326 (1992); *see also Daughtrey v. Honeywell, Inc.*, 3 *F.3d* 1488, 1495 (11th Cir. 1993) (describing the FLSA definition as "sweeping"). It has been called "the broadest definition [of employee] that has ever been included in one act." *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996), *quoting U.S. v. Rossenwasser*, 323 U.S. 360, 363 n.3 (1945) and statement of Senator Hugo Black, 81 Cong. Rec. 7, 657 (1938). The "suffer or permit" standard is intentionally broad, reflecting the legislative intent to protect workers from exploitation.

While FLSA applied to employers engaged in interstate commerce, concerned states needed to regulate practices of employers operating solely within their borders. New Jersey was the third state to adopt FLSA-type language for its own wage and hour statute, in 1966 (WPL in 1965). *See Goldstein, 46 U.C.L.A. L. Rev. 983, 1092* (1999). Under the WHL, the definition of "employ" is identical to that in FLSA: "to suffer or permit to

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work." *N.J.S.A.* 34:11-56a1(f). Other states have adopted language similar to FLSA's "suffer and permit" in their wage and hour laws. *See, e.g., N.Y. Comp. Codes R. & Regs. Tit.* 12 § 142-2.14; *Conn. Gen. Stat.* § 31-71(a)(2); *Fl. Const. art. X* § 24; *Idaho Code Ann.* § 45-601(4); *Kentucky Rev. Stat* § 337.010(2(a); *N.C. Gen. Stat.* § 95-25.2(3).

Prior to its adoption in state and federal wage and hour legislation, the definition of employ as "to suffer or permit to work" had been used for several decades in federal and state laws prohibiting child labor. *See* Goldstein, *46 U.C.L.A. L. Rev.* 983, 1015. The standard, as described by one state supreme court, was that a business owner "shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." *Curtis & Gartside Co. v. Pigg,* 39 Okla. 31, 39 (1913) (emphasis supplied). Under the "suffer or permit" standard, business owners were held accountable for child labor violations even in situations where the business owner had used subcontractors to hire and employ these workers. *People ex rel. Price v. Sheffield Farms-Slawson Farms-Decker Co.*, 167 *N.Y.S.* 958, 960 (App. Div. 1917), *aff'd*, 121 N.E. 474 (N.Y. 1918). *See also Forceil v. Philadelphia & Reading Coal & Iron Co.*, 99 N.E. 899, 902 (Ill. 1912).

The "suffer or permit" language was interpreted to hold business owners accountable for violations of child labor laws

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even in cases in which they neither directly hired nor supervised the employee. *See* Goldstein at 1037. When Congress adopted the phase "to suffer or permit to work" in FLSA, it was interpreted as an intention to impose on business owners the same expansive liability as imposed by the child labor statutes. *See* Goldstein at 1101; *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).

Courts analyzing employment relationships pursuant to the "suffer or permit" standard under FLSA have often relied on an "economic reality" concept to determine whether there was an employment relationship. This "economic reality" test does not appear anywhere in the statutory language. It is a judicial construction developed and applied over the course of 65 years of case law analyzing whether a worker has been "suffered or permitted" to work. Under this test, a worker is an employee of any entity *or entities* on which the worker is ultimately dependent "as a matter of economic reality." *Rutherford Food v. McComb*, 331 *U.S.* 722; *Charles v. Burton*, 169 *F.3d* 1322 (11th Cir. 1999).

The economic reality analysis originated in the United States Supreme Court's analysis of an employment relationship in *Rutherford Food v. McComb, supra*. The Court analyzed a slaughterhouse's liability under FLSA for a crew of deboners furnished by an outside labor contractor. The contractor hired and supervised the deboners, who worked exclusively at the

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slaughterhouse. The contract between the slaughterhouse and the contractor provided that the contractor was to have "complete control" over his employees, including the right to hire and fire crew members, set hours of work, establish the wage rate, supervise their labor, and pay them their wages. *Id.* 331 *U.S.* at 725.

The Supreme Court held that the slaughterhouse was an employer of the deboners, largely because the deboners "did a specialty job on the production line," 331 *U.S.* at 730, and were *"part of the integrated unit of production." Id.* at 729 (emphasis supplied). Consequently, the deboners "were more like" persons following "the usual path of an employee." The Court also noted that the slaughterhouse owned the premises and that the work, though skilled, "was more like piecework," adding that the deboners' work did not depend for its success on the contractor's "initiative, judgment or foresight." *Id.* at 730. The slaughterhouse asserted its economic interests sufficiently to ensure that the daily, routine work performed by the meat deboners became integrated into the production process that was central to its business. Such involvement was entirely proper but also constituted the "suffering or permitting" of the deboners' work, making the deboners employees rather than independent contractors. They were deemed employees of the slaughterhouse as well as the contractor.

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Since *Rutherford*, many circuit courts have utilized an economic reality test to determine whether a putative employer "suffered or permitted" an individual to work. *Antenor*, 88 F.3d at 929; *Charles v. Burton*, 169 *F.3d* 1322, 1328 (11th Cir. 1999); *Bonnette v. California Health and Welfare Agency*, 704 *F.2d* 1465, 1469 (9th Cir. 1983); *Zheng*, 355 *F.3d* at 66; *Donovan v. DialAmerica Marketing, Inc.*, 757 *F.2d* 1382, 1387 (3rd Cir. 1985). The circuit courts have varied in the particular factors they examine in their economic reality tests, but the central consideration has remained consistent - was the worker dependent on the putative employer as a matter of economic reality?

Circuit courts have used the Ninth Circuit's factors put forth in *Bonnette*, 704 *F.2d* 1465, the Second Circuit's test in *Zheng*, 355 *F.3d* 61, the Third Circuit's list in *DialAmerica*, 757 *F.2d* 1376, or various combinations of those and others. The Third Circuit test was later adopted by a New Jersey federal court in *Zavala v. Wal-Mart Stores, Inc.*, 393 *F. Supp. 2d* 295, 328 (D.N.J.) *aff'd sub nom.*, 691 *F. 3d* 527 (3d Cir. 2012). Federal district courts have also applied the broad economic reality test to claims for minimum wage and overtime under the FLSA. See, e.g., *Recio v. Scriptfleet, Inc.*, Civil Action No. 11-4561, 2011 U.S. Dist. LEXIS 139870 *12 (D.N.J. Dec. 6, 2011).

Regardless of which variation of the economic reality analysis courts use, there is wide agreement that whether an

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employment relationship exists does not turn on isolated or technical factors, but instead depends on the circumstances of the whole activity. *Rutherford*, 331 *U.S.* at 730; *Antenor*, 88 *F.3d* at 933; *Charles*, 169 *F.3d* at 1333-1343; *Bonnette*, 704 *F.2d* at 1469; *Zheng*, 355 *F.3d* at 71; *DialAmerica*, 757 *F.2d* at 1382. No one factor is determinative, and the absence of evidence on any one factor does not preclude a finding of employment. Instead, factors are to be used as tools to evaluate an employment relationship, with weight given each factor based on the degree to which it sheds light on the workers' economic dependence, or lack thereof, on the putative employer. *Antenor*, 88 *F.3d* at 932-33.

C. Harmonizing National Suffer and Permit Precedent with New Jersey Cases: Moving Toward An Integrated and Workable New Jersey Approach To Identifying Employment In Wage Cases.

This Court's analysis of an employment relationship in *D'Annunzio v. Prudential Ins. Co. of America*, 192 *N.J.* 110 (2007), reflects the economic reality analysis that was adopted by the United States Supreme Court in *Rutherford* and that has been utilized in interpreting state wage and hour statutes since *Rutherford*:

> "When CEPA or other social legislation must be applied in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor, we must look beyond the label attached to the relationship. The considerations that must come into play are three: (1) employer control; (2)

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> the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue."

The difference between the *Rutherford* and *sequelae* economic reality test and the formulation in *D'Annunzio* is minimal, chiefly modest differences in terminology. *D'Annunzio* sets forth three test components - employer control, functional integration of the employer's business with that of the person doing the work, and economic dependence, offering examples for each. *Rutherford*-based economic reality tests typically consider integration and dependence as part of an economic reality analysis. The wording of the tests may differ, but the considerations appear very similar.

After *D'Annunzio*, at least three questions remain in the quest to harmonize national precedent with current New Jersey employment definitions in non-wage contexts:

(1) Are any key elements of national "suffer or permit" interpretation not included in the *D'Annunzio* formulation?

(2) How are *D'Annunzio* and other national precedent to be reconciled with the New Jersey Department of Labor independent contractor regulation, *N.J.A.C.* 12:56-16:1?

(3) How is New Jersey's suffer or permit test to be administered: which elements are most critical, what

are their relative weights, and when is a strong showing on one element sufficient?

We address each in turn.

1. The Need to Consider The Power to Prevent the Violation.

After *Rutherford*, "suffer or permit" has been interpreted to hold an entity liable for wage violations as an employer if the entity had the power to prevent the violation and failed to do so. *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969). An employer cannot escape the duty of following the law merely by delegating the duty to another who exercises direct control over the worker. *Id.* at 512.

This focus on the importance of analyzing the power to prevent, by either direct or indirect control, through the exercise of reasonable diligence to acquire knowledge and then act, grew out of cases involving enforcement of the child labor laws. Under the broad language of "suffer or permit," business owners were held accountable for child labor violations even in situations where the business owner had used labor contractors to hire and employ these workers:

> "[The statute's] purpose and effect . . . is to impose upon the owner or proprietor of a business the duty of seeing to it that the condition prohibited by the statute does not exist. He is bound at his peril so to do . . . [T]he duty is an absolute one, and it remains with him whether he carries on the business himself . . . [or] intrusts the conduct of it to others.

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People ex rel. Price v. Sheffield Farms Slawson Farms-Decker Co., 167 N.Y.S. 958, 960 (App. Div. 1917), aff'd, 121 N.E. 474 (N.Y. 1918). *See also Purtell v. Philadelphia & Reading Coal & Iron Co.*, 99 N.E. 899, 902 (Ill. 1912)."

The language was interpreted to hold business owners accountable for violations of child labor laws even in cases in which there was a secondary employer, and where there was no contractual obligation. The business owner was held accountable even when he neither directly hired nor supervised the employee. In *Purtell*, the plaintiff was employed as a water boy by workers in the defendant's coal yard. He was injured while working, and sued under the state's Child Labor Act. The court held that the relation of master and servant is not necessary in applying the act, and found the defendant business proprietor liable for violating the act, even though they did not directly hire, supervise, or ratify his employment. Similarly, in *Sheffield Farms*, the defendant business owner was held liable for violating a child labor statute after a driver who delivered dairy products for the business had hired a child under the statutory employment age to assist him in his deliveries. To accomplish the purpose of the statute, the term "to suffer or permit to work" was deemed to include both the entity that hired and supervised the underage workers, as well as business owners on whose premises the violation occurred. Judge Cardozo, writing for the New York State Court of Appeals, explained that the language was intended to

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prevent business owners from evading liability by claiming that a third-party or subcontractor was responsible for the violation:

> "[The employer] must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others. . . He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he had delegated "his own power to prevent."

Sheffield Farms, 121 N.E. at 475-76 (internal citations omitted)

The language of "suffer or permit" thus creates liability, as long as the business owner had "knowledge or the opportunity through reasonable diligence to acquire knowledge" of the violation, and the ability to prevent it. *Id.* at 476. Similarly, when Congress adopted the term "to suffer or permit to work" in the FLSA, it evinced an intention to impose on business owners the same expansive liability imposed by the child labor statutes. If they suffer or permit individuals to work, they "employ" the workers and are required to afford them such statutory protections as minimum wage. If a violation occurs, even in cases in which the workers were hired through a subcontractor, the touchstone for liability is whether the work was performed as a regular part of the defendant's business and whether the business was in a position to know of the work. By adopting the language of the FLSA and its precursors, the state child labor statutes and cases, the New Jersey state legislature

implicitly adopted the meaning given to the language through this case law.

Following this analysis, the California Supreme Court recently decided to give the "definition of 'employ' its historical meaning", since "that meaning was well established when the [Industrial Welfare Commission] first used the phrase 'suffer, or permit' to define employment, and no reason exists to believe the IWC intended another." *Martinez v. Combs*, 49 *Cal.4th* 35 (2010) The court viewed itself as bound to honor the literal and historical interpretations of the statute due to the fact that the California statute was adopted contemporaneously with the child labor cases. It also relied, however, on the fact that "the historical meaning continues to be highly relevant today: A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." *Id.*

2. Interaction of *D'Annunzio* and National Precedent.

Running through some of the national cases is a question about this interaction of "suffer or permit" with claims of independent contractor status. In *D'Annunzio*, this Court made clear that the reality of an employment relation was not precluded

by a claim, contractual or otherwise, of independent contractor status:

> In sum, D'Annunzio pointed to many facts that support the creation of an employment relationship for CEPA purposes, notwithstanding that his agreement described him as an independent contractor.

D'Annunzio at 127.

Put another way, after *D'Annunzio*, the fact that a worker may be claimed to be an "independent contractor" under one or more tests for that concept is not by itself determinative of whether the worker is an "employee" under the particular remedial statute or other legal situation at issue in a particular case.

Viewed in this light, the 1995 NJDOL regulation importing its independent contractor "ABC" test over to the WHL, *N.J.A.C.* 12:56-16:1, requires context and clarification. Such a regulation cannot narrow the legislature's intended breadth of the "suffer or permit" language in the 1965 WPL and the 1966 WHL. This inferred legislative intent is all the more compelling in light of the timing. FLSA became law in 1938 (2013 marks its 75th anniversary), and *Rutherford* was decided in 1947, respectively 27 and 18 years before passage of the two New Jersey statutes.

A corroboration comes from the NJDOL's own comment in proposing the ABC test, declaring that its intent was to embrace and conform to existing federal decisions, not diverge from them:

> "A new rule at subchapter 16 is proposed to add criteria for determining independent contractor status. These

criteria are based on Federal and State case law as well as Administrative Rulings of the Federal Fair Labor Standards Act."

27 N.J.R. 2868 (a) (1995).

To date, this Court has interpreted the "ABC" test only in the context of eligibility for unemployment benefits. *Carpet Remnant Warehouse v. New Jersey Department of Labor*, 125 *N.J.* 567 (1991). As the Court noted in *Carpet Remnant Warehouse*, this context was different from the wage context, since in unemployment there has been "expansion of exclusions", and the Court decided that case in the context of that legislative intent. *Id* at 580-581. In contrast, the historical breadth of the interpretation of the "suffer and permit" test has been in place since its inclusion in child labor laws, including New Jersey, at the beginning of the last century.

Nonetheless, it should be noted that in *Carpet Remnant Warehouse* this Court interpreted the unemployment ABC test in a manner consistent with *Rutherford* and *D'Annunzio*, emphasizing economic "dependence" and declaring that the "determination is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship." *Id.* at 581. The Court noted that because "the statute is remedial, its provisions have been construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles." Ultimately, the Court held

that prong C of the test was a test of "dependence" and that the other prongs were subordinate. *Id.* at 585-586. This Court also emphasized that an "employer need not control every facet of a person's responsibilities, however, for that person to be deemed an employee." *Id.* at 582-583.

Given this Court's analysis in *D'Annunzio*, the NJDOL ABC regulation must be viewed as containing the department's view of a test for assessing whether a putative employer's claim for independent contractor status would constitute an *exclusion* or *exception* from "suffer or permit" employment.

As already shown, the national *Rutherford* line of precedent and the culmination of New Jersey employment definitions in *D'Annunzio* in effect fuse to constitute New Jersey's definition of the "suffer or permit" statutory language. "Independent contractor" status is not the legal definition of suffer or permit in the wage statutes. A claim of such status may be advanced by a claimed employer as an exclusion from suffer or permit, but the employer bears the full burden of proof and persuasion to show that the particular facts demonstrate that ground C of the ABC test (examining economic dependence, in this Court's view) is not met. Since *D'Annunzio* makes clear that independent contractor status does not end or override the need for overall examination of employment status pursuant to the underlying statute, the

putative employer would still have to show that the applicable statutory test - here suffer or permit - has been met.

3. Application of the Suffer or Permit Factors.

One issue remains: what is the relative weight of the various factors and indicators? *D'Annunzio* and the *Rutherford* line of cases make clear that it is the totality of circumstances, rather than any one factor, that will dictate the conclusion. Nonetheless, given their individual range and significance, the clear presence of any one of the three broad *D'Annunzio* considerations - control, functional integration or economic dependence - will as a practical matter create a very strong presumption that the suffer or permit standard is satisfied, and an employment relationship exists. To this list, in the statutory wage enforcement context under the suffer or permit standard, we urge the addition of the fourth major factor - the direct or indirect power, through the exercise of reasonable diligence, to avoid or rectify statutory violations. This aggregation of four would be our suggested test to be included in the response to the Circuit.

CONCLUSION

For the reasons presented, we urge this Court to advise the Circuit that the suffer or permit language of the wage statutes

(WHL and WPL) import the three key examinations set forth in *D'Annunzio*, coupled with the power to avoid or rectify standard abundant in national case law, and to further note that an independent contractor claim does not preclude or end the need for such complete "suffer or permit" analysis, nor override the result of that consideration.

Respectfully submitted,

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Dated: October 4, 2013

CALVIN HARRIS, on behalf of himself and others similarly situated, Plaintiff, v. SCRIPTFLEET, INC., Defendant.

Civil Action No. 11-4561 (SRC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2011 U.S. Dist. LEXIS 139870

December 6, 2011, Decided
December 6, 2011, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: [*1] For CALVIN HARRIS, on behalf of himself and others similarly situated, Plaintiff: MICHAEL R. DICHIARA, DICHIARA LAW FIRM LLC, PARK RIDGE, NJ.

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JUDGES: STANLEY R. CHESLER, United States District Judge.

OPINION BY: STANLEY R. CHESLER

OPINION

CHESLER, District Judge

This matter comes before the Court upon Defendant Scriptfleet, Inc.'s ("Defendant") motion to dismiss the Amended Complaint, pursuant to *Federal Rule of Civil Procedure 12(b)(6)* [docket entry 2]. Plaintiff Calvin Harris ("Plaintiff") has opposed the motion. The Court has opted to rule based on the papers submitted and without oral argument, pursuant to *Federal Rule of Civil Procedure 78*. For the reasons expressed below, Defendant's motion will be denied.

I. BACKGROUND

Plaintiff worked as a medical courier for Defendant from March 2010 until June 2011, delivering pharmaceutical products to nursing homes, hospitals, and other pharmacy customers. According to Plaintiff, Defendant knowingly and intentionally failed to pay him minimum wages and overtime pay, and routinely took improper deductions from his salary. [*2] As a result, Plaintiff initiated this matter, asserting a Fair Labor Standards Act ("FLSA"), New Jersey State Wage and Hour Law ("NJWHL"), and New Jersey Wage Payment Law ("NJWPL") claim against Defendant.[1] Defendant now moves to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

1 The Court has not considered whether Plaintiff has sufficiently set forth a NJWPL claim in his Amended Complaint since Defendant did not raise this argument in its motion to dismiss.

II. LEGAL ANALYSIS

A. Standard of Review

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims have facial plausibility. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)*. This means that the complaint must contain sufficient factual allegations to raise a right to relief above the speculative level, assuming the factual allegations are true. *Id. at 1965*. *Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008)*. The Supreme [*3] Court has made clear that "a formulaic recitation of the elements of a cause of action will not do." *Twombly, 127 S.Ct. at 1964-65*, *see*

also Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

In evaluating a *Rule 12(b)(6)* motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon those documents. *See Pension Benefit Guar. Corp., 998 F.2d at 1196.* The issue before the Court "is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997)* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*).

B. Discussion

Defendant first argues that the Amended Complaint should be dismissed because only a party who is an "employer" is liable under the FLSA and NJWHL and Plaintiff has failed to sufficiently plead the existence of an employment relationship between himself and Defendant. [*4] The definitions for "employer" and "employee" under the two statutes are virtually identical. *Chen v. Domino's Pizza, Inc., No. 09-107, 2009 U.S. Dist. LEXIS 96362 at *9 (D.N.J. Oct. 16, 2009); see 29 U.S.C. § 203(d)* ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . "); *29 U.S.C. § 203(e)(1)* ("'Employee' means any individual employed by an employer."); *N.J.S.A. § 34:11-56a1(g)* ("'Employer' includes any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly in the interest of an employer in relation to any employee."); *N.J.S.A. § 34:11-56a1(h)* ("'Employee' includes any individual employed by an employer."). When determining whether an employment relationship exists under the FLSA and NJWHL, courts must consider the totality of the circumstances and look to the "economic realities" of the relationship. *Chen 2009 U.S. Dist. LEXIS 96362 at *11* (citing *Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947)*). Under the economic realities test, the Third Circuit requires courts to weigh the following six factors:

> 1) [T]he degree of the alleged employer's [*5] right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.

Cahill v. City of New Brunswick, 99 F. Supp. 2d 464, 471 (D.N.J. 2000) (citing *Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1382 (3d Cir. 1985)*); *see Shakib v. Back Bay Rest. Grp., Inc., No. 10-4564, 2011 U.S. Dist. LEXIS 112614 at *8 n.2 (D.N.J. Sept. 30, 2011)* (same analysis used to determine whether a defendant is an employer under the FLSA and NJWHL). The presence or absence of any specific factor is not dispositive as courts must examine the circumstances as a whole to determine whether the economic realities indicate that an employment relationship exists. *Id.*

Here, Plaintiff has pled facts sufficient to show that an employment relationship existed with Defendant. As alleged in the Amended Complaint, [*6] Defendant required that medical couriers start each work day at a fixed time and location, demanded that couriers wait at start locations for hours until Defendant permitted them to begin their deliveries, monitored and provided couriers work instructions throughout the day, required couriers to end the day at a fixed location, and suspended and/or terminated couriers who violated company rules. These averred facts infer that Defendant possessed and exercised operational control and policy-making authority over Plaintiff, including but not limited to control and authority over hiring and firing employees, setting employment policies, employee wages and hours, and employee schedules. [2] As such, Plaintiff's Amended Complaint sufficiently alleges that Defendant was his "employer," rendering both the FLSA and NJWHL applicable.

> 2 It is worth noting that another court previously rejected Defendant's assertion that its medical couriers are independent contractors rather than employees. (DiChiara Decl., Ex. B).

Defendant subsequently contends that the Amended Complaint should be dismissed because Plaintiff has failed to allege facts sufficient to state a claim for failure to pay overtime compensation [*7] or minimum wage under either the FLSA or NJWHL. Essentially, Defendant contends that Plaintiff has not satisfied the pleading standards set forth in *Twombly* and *Iqbal*.

1. Fair Labor Standards Act Claim

Rule 8 of the Federal Rules of Civil Procedure merely requires a "short and plain statement" to put the defendants on notice. *Fed.R.Civ.P. 8(a)(2).* To meet this

standard, the plaintiffs' claim must be "plausible on its face" such that the Court may draw a "reasonable inference" that the defendants are liable. *Twombly*, 550 U.S. at 556. Unlike the complex antitrust scheme at issue in *Twombly* that required allegations of an agreement suggesting conspiracy, the requirements to state a claim of a FLSA violation are quite simple and straightforward. *Sec'y of Labor v. Labbe*, 319 Fed. Appx. 761, 763 (11th Cir. 2008). To successfully state a FLSA claim, a plaintiff must simply show "a failure to pay overtime compensation and/or minimum wages to covered employees." *Id.*; *see* 29 U.S.C. §§ 206, 207, 213(a)(2).[3] The Third Circuit has not explicitly addressed how precisely a FLSA claim must be alleged in the complaint.[4] *See Mell v. GNC Corp.*, No. 10-945, 2010 U.S. Dist. LEXIS 118938 at *15 (W.D. Pa. Nov. 9, 2010). [*8] As such, this Court will consider whether, based on our judicial experience and common sense, sufficient facts have been pled that will allow us to conclude that there is more to Plaintiff's allegations than a simple claim that "defendants harmed us." After distinguishing between the well-pleaded facts of the Amended Complaint and the legal conclusions, this Court arrives at the following list of factual allegations:

> o Plaintiff worked for Defendant from March of 2010 until June of 2011;
>
> o Plaintiff regularly worked in excess of 40 hours in a workweek for which he was never paid overtime;
>
> o Plaintiff was compensated for his time performing deliveries on a flat rate basis, ostensibly calculated with regard to miles driven and deliveries made;
>
> o Plaintiff would have to arrive at a pharmacy and wait up to two or more hours prior to performing deliveries, time which he was consistently uncompensated for;
>
> o Defendant took deductions from each of Plaintiff's paychecks for expenses, including for a hand-held screening device and uniform, reducing Plaintiff's wages to below the minimum wage; and
>
> o Defendant failed to reimburse Plaintiff for legitimate business expenses such as fuel, tolls, and cellular [*9] telephone expenses, reducing his wages to below the minimum wage.

These factual allegations, if proven, give rise to a plausible claim for relief under the FLSA.

3 *Section 207(a)(1)* forbids an employer from having an employee work "for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed." *29 U.S.C. § 207(a)(1). Section 206(a)* provides that every employer "shall pay to each of his employees" wages not less than the specified minimum rate. *29 U.S.C. § 206(a).*

4 Some courts have applied a fairly generous standard which allows the plaintiff to proceed with little more than a statement of the elements of a claim. *See, e.g., Uribe v. Maryland Nursery, Inc.*, No. 07-[illegible]9, 2007 U.S. Dist. LEXIS 90984 at *7-8 (E.D. [illegible] Dec. 11, 2007)* (plaintiffs who alleged they were non-exempt employees who had not been compensated at the appropriate overtime rates had satisfied the "liberal standard" of *Twombly*); *Qureshi v. Panjwani*, No. 08-3154, 2009 U.S. Dist. LEXIS 48142 at *10-11 (S.D. Tex. Jun. 9, 2009)* (plaintiffs' allegations that "they [*10] were required to work in excess of a forty hour week without overtime compensation, and that they were employed by the defendants" were sufficient to state a claim under the FLSA.) Other courts have required more detailed factual allegations. *See, e.g., Pruell v. Caritas Christi*, No. 09-11466, 2010 U.S. Dist. LEXIS 101761 at *10-11 (D. Mass. Sept. 27, 2010)* (plaintiffs failed to state a claim when they did not allege approximately how many hours they worked per week and their hourly rate or weekly wages); *Villegas v. JPMorgan Chase*, No. 09-261, 2009 U.S. Dist. LEXIS 19265 at *13 (N.D. Cal. Mar. 9, 2009)* (plaintiff's "factual" statement that she did not receive properly computed overtime wages was insufficient to state a claim under the FLSA).

In its motion to dismiss, Defendant stresses that, in order for Plaintiff to have successfully stated a FLSA claim, Plaintiff had to allege a specific estimate of how many hours he worked for which he was either under- or un-compensated for. However, the FLSA requires every employer to keep records of the "wages, hours, and other conditions and practices" of its employees. *29 U.S.C. § 211(c).* Regulations advanced pursuant to *Section 11(c) of the FLSA* [*11] require employers to keep, *inter alia*, payroll records of the following: 1) hours worked per day; 2) total hours worked per week; 3) total daily or weekly straight-time earnings; and 4) total premium pay for overtime hours. *See 29 C.F.R. 516.2, see also Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 127 (3d Cir. 1984). These payroll records must be preserved for three years. *29 C.F.R. 516.5.* It cannot be the case that a plaintiff must plead specific instances of unpaid overtime

or minimum wage violations before being allowed to proceed to discovery to access the employer's records. *See Acho v. Cort, No. 09-00157, 2009 U.S. Dist. LEXIS 109064 at *3 (N.D. Cal. Oct. 27, 2009)* (where plaintiff alleged the dates of his employment, described his job responsibilities sufficiently for the court to infer that he was correct in his description of his position as non-exempt, and generally alleged failure of the defendant to pay overtime wages, his complaint would survive dismissal even though he had not identified the specific dates on which he allegedly worked overtime). A review by Defendant of its own records would provide the specific number of overtime hours worked and weekly earnings [*12] by Plaintiff.

Accordingly, because Plaintiff has alleged that he regularly worked overtime hours each week without receiving overtime pay and has set forth specific reasons why his wages were reduced to below the minimum wage, the amended pleading provides adequate factual grounds supporting the Plaintiff's FLSA claims. Therefore, Defendant's motion to dismiss with respect to this issue is denied.

2. New Jersey Wage and Hour Law Claim

Because the NJWHL overtime compensation and minimum wage requirements are modeled after and nearly identical to their analogous Fair Labor Standards Act regulations, judicial interpretations construing the FLSA are applicable. *See Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, 882 A.2d 374, 383-385 (N.J. Super. App. Div. 2005)* (construing similar "executive employee" provisions); *see, e.g., N.J.S.A. § 34:11-56a20* ("Every employer of employees subject to this act shall keep a true and accurate record of the hours worked and the wages paid by him to each[.]"). As such, this Court's analysis under the *Iqbal* and *Twombly* pleading standards set forth in section II.B.1 of this Opinion is germane to Plaintiff's allegations of state law minimum wage and overtime compensation [*13] violations. Thus, Defendant's motion to dismiss Plaintiff's NJWHL cause of action is denied for the same reasons this Court denies Defendant's motion to dismiss Plaintiff's FLSA claims.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's Amended Complaint under *Federal Rule of Civil Procedure 12(b)(6)* is denied. An appropriate form of order will be filed together with this Opinion.

/s/ Stanley R. Chesler

STANLEY R. CHESLER

United States District Judge

DATED: December 6, 2011

FILED

OCT - 1 2013

CLERK

SUPREME COURT OF NEW JERSEY

SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO, Plaintiffs-Appellants/Cross-Appellees v. SLEEPYS, LLC. Defendant-Appellee-Cross-Appellant v. I STEALTH, EUSEBIO'S TRUCKING CORP., and CURVA, Third-Party Defendants-Appellees.	)	DOCKET NO. 072-742 CIVIL ACTION ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

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LETTER BRIEF ON BEHALF OF AMICUS CURIAE, ATTORNEY GENERAL OF NEW JERSEY FOR DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

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Re: HARGROVE V. SLEEPY'S, LLC
Docket No. 072-742

On Certified Question of Law from the
United States Court of Appeals for the
Third Circuit

Amicus Brief on Behalf of
New Jersey Department of Labor and Workforce
Development

Dear Mr. Neary:

At this Court's request, the Attorney General of the State of New Jersey submits this letter on behalf of amicus curiae New Jersey Department of Labor and Workforce Development ("Department").

The Department is the State agency charged with enforcing a number of State laws governing employer-employee relationships, including the Wage Payment Law ("WPL"), N.J.S.A. 34:11-2, et seq. and the Wage and Hour Law ("WHL"), N.J.S.A. 34:11-56a, et

seq. (collectively, the "Wage Laws"). These laws work in tandem to provide a panoply of wage protections for employees. Pursuant to these statutory provisions, employers are required to pay employees at least the minimum wage, N.J.S.A. 34:11-56.4, and are forbidden from taking illegal or unauthorized deductions from wages. N.J.S.A. 34:11-4.4. Employers are also required to keep true and accurate records, including addresses, rates of pay, hours worked and wages paid to each employee, N.J.S.A. 34:11-56a20, and to provide employees with a statement of deductions made from his or her wages for each period deductions are made. N.J.S.A. 34:11-4.6. The Commissioner of the Department is authorized to investigate compliance with these statutes and, where violations are found, to collect wages and assess administrative fees and penalties. N.J.A.C. 12:55-1.1, et seq.; N.J.A.C. 12:56-1.1, et seq.; and N.J.A.C. 12:61 1.1, et seq. In many instances, employers are charged with multiple violations involving various sections of these integrated wage statutes.

The Department has traditionally interpreted and implemented the Wage Laws using the "ABC" test. See N.J.A.C. 12:56-16.1. Under the ABC test, service "performed by an individual for remuneration" is presumed to be employment unless the employer shows that:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such

> service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> N.J.S.A. 43:21-19(i)(6)(A)-(C)

Promulgated in 1995, N.J.A.C. 12:56-16.1, which incorporates the ABC test into the WHL, has been in effect for nearly twenty years. It was readopted without change in 2000, 2006 and 2011.[1] Its validity has never been challenged. As the Department explained in the rule adoption, the purpose of the rule was "[t]o clarify that the criteria used by the Office of Wage and Hour Compliance for determining the independent contractor status is the same as the criteria delineated under the Unemployment Compensation Law through the ABC test and the case law which interprets the statute." 27 N.J.R. 3958(a) (Oct. 16, 1995).

The rule references only the WHL. However, over time, the Department has applied the ABC test for independent contractor determinations under the WPL as well. No court has ever

[1] See 32 N.J.R. 2643(a), 32 N.J.R. 3855(a)(2000); 37 N.J.R. 4170(a), 38 N.J.R. 1190(a)(2006); 43 N.J.R. 553(a), 43 N.J.R. 2351(a)(2011). The current rule is scheduled to expire on August 4, 2018. See 43 N.J.R. 2351(a).

examined the interplay between the ABC test and the WPL. When N.J.A.C. 12:56-16.1 was adopted, the Department explained that "it is necessary to include reference to this criteria in the Wage and Hour rules since an individual's employment status impacts determinations concerning entitlements under the minimum wage, overtime, wage payment and wage collection statutes." 27 N.J.R. 3958(a) (Oct. 16, 1995) (emphasis supplied). Hence, through this rulemaking, the Department sought to ensure consistent interpretation of this key concept under all of the interrelated wage protection laws.

Employers are required to comply with the requirements of all of the wage protection provisions, but in order to do so, they must be able to ascertain whether they have an employment relationship with the individuals who perform work for them. Thus, for Department purposes, "employee" and "independent contractor" are interpreted similarly under various sections of this interrelated statutory scheme to foster compliance. In sum, the Department's rule at N.J.A.C. 12:56-16.1 explicitly provides that the ABC test shall be used to determine independent contractor status under the WHL, and by extension, the WPL. That rule was validly promulgated and has been enforced for nearly two decades. Moreover, historically, the ABC test, found in N.J.S.A. 43:21-19(i)(6)(A)(B)(C), has been applied in New

Jersey to determine a plaintiff's employment status for purposes of both the WPL and WHL.

Respectfully Submitted,

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SUPREME COURT OF NEW JERSEY
A-70 SEPTEMBER TERM 2012
072742

SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO,

Plaintiffs-Appellants/ Cross-Appellees,

v.

SLEEPY'S, LLC,

Defendant-Appellee/ Cross-Appellant,

v.

I STEALTH LLC, EUSEBIO'S TRUCKING CORP., and CURVA TRUCKING, LLC,

Third Party Defendants/ Appellees.

ON A CERTIFIED QUESTION OF LAW PURSUANT TO RULE 2:12A FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE ACADEMY OF NEW JERSEY MANAGEMENT ATTORNEYS

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I. PRELIMINARY STATEMENT.

In this case, the Court has agreed to answer a certified question certified question: "Under New Jersey law, which test should a court apply to determine [illegible] laintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq.?" These laws (collectively, the "Wage Laws") govern the most basic economic aspects of the employment relationship: wages, overtime calculation, and time and mode of payment. Their application and interpretation are critical to the day-to-day operation of businesses in every corner of the State.

At the outset, however, the Academy of New Jersey Management Attorneys ("ANJMA") notes that this case may not be an appropriate vehicle for an opinion involving the Wage and Hour Law, as Sleepy's LLC ("Sleepy's") has demonstrated. Db37-40. ANJMA therefore joins Sleepy's in urging this Court to reformulate the certified question so as to exclude the Wage and Hour Law from consideration and to adopt Sleepy's reasoning as to the proper test under the Wage Payment Law: employee status under that law should depend on (1) the existence of a contractual obligation of a defendant to pay a plaintiff wages, and (2) only if there is such an obligation, an application of Section 220(2) of the Restatement (Second) of Agency.

In the event that this Court does not reformulate the certified question and does not adopt the test urged by Sleepy's under the Wage Payment Law, ANJMA submits that the proper test under the Wage Laws is the "economic realities" test developed and applied under the Fair Labor Standards Act.

Plaintiffs Hargrove and Eusebio, who provided trucking services to Sleepy's through their corporate entities, and Hall, who did the same as a sole proprietor, urge that the Court adopt either: (1) the "relative nature of the work" test applicable to matters arising under the Conscientious Employee Protect Act ("CEPA"), as interpreted by D'Annunzio v. Prudential Ins. Co. of America (the "D'Annunzio test") or (2) the "ABC test" created by and for New Jersey's Unemployment Compensation Law. These tests, as Plaintiffs readily acknowledge, are the broadest tests possible for employee status, and their incorporation into the Wage Laws potentially would transform the principals of many independent businesses into "employees" of the businesses they serve.

There is little valid justification for such a wholesale re ordering of economic relationships throughout the State. An overly expansive construction of the term "employee" serves no purpose save that of the individual plaintiffs here, and it neither takes into account the legitimate role that true independent contractors play in the modern economy, nor balances

the entrepreneurial upside for those contractors against the protective but constricting embrace of the Wage Laws. Such a broad construction readily lends itself to easy abuse, permitting self-styled contractors to enjoy the many legal benefits of conducting operations as recognized business entities, but allowing them to claim "employee" status when that better suits their immediate purposes.

Not all those classified as independent contractors are "misclassified." For that reason, it is critical that the test adopted by the Court give due weight to the competing and legitimate interests involved here. The D'Annunzio and ABC tests, with their virtual presumption of employee status, are overly inclusive for purposes of the Wage Laws. There is no justification to import these tests -- created for very different laws and for very different reasons -- into the Wage Laws, particularly when the robust and long-standing case law under their federal counterpart, the Fair Labor Standards Act, suggests a reasonable and logical alternative: the "economic realities" test. This more balanced approach would align the New Jersey and federal wage laws and, because courts have been applying the economic realities test under the FLSA for many years, would bring a measure of much needed predictability and stability to the application and interpretation of these bedrock employment laws.

II. PROCEDURAL HISTORY.

In lieu of repeating the procedural history of this appeal, ANJMA incorporates by reference the procedural history recited by Defendant Sleepy's, LLC ("Sleepy's").

III. STATEMENT OF THE FACTS.

In lieu of repeating the factual history of this appeal, ANJMA incorporates by reference the statement of facts recited by Sleepy's.

IV. ARGUMENT.

A. The proper and best test for determining independent contractor status under the Wage and Hour Law is the economic realities test.

The "economic realities" test developed under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (the "FLSA"), is the most appropriate test to apply to determine employee versus independent contractor status under the Wage and Hour Law; [1] it represents the principled rule of law the Court should adopt in response to the certified question. That test requires a qualitative analysis of six factors in the context of the "circumstances of the whole activity" to evaluate "whether, as a

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[1] To the extent this Court intends to adopt a test under the Wage and Hour Law, ANJMA addresses this statute first. This approach makes practical sense as most litigation under New Jersey's two wage and hour laws arises under the Wage and Hour Law.

matter of economic reality, the individuals are dependent upon the business to which they render service;" the factors are:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business.

[Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir. 1991).]

These factors properly balance the competing interests of businesses, contractors and claimed employees, and the relevant statutory language compels this result: the definitions of "employee" and "employ" are identical under both statutory schemes. Compare N.J.S.A. § 34:11-56a1(h) and (f) (defining "employee" as "any individual employed by an employer" and defining "employ" as "to suffer or to permit to work"), with 29 U.S.C. § 203(e)(1) and (g) (defining "employee" as "any individual employed by an employer" and defining "employ" as "suffer or permit to work").

And, the Wage and Hour Law was adopted nearly three decades after the FLSA. In that context, New Jersey's adoption of identical definitions of the relevant terms evidences the Legislature's intent to adopt their interpretation under the

FLSA. See Oswin v. Shaw, 129 N.J. 290, 309 (1992), superseded by statute (interpreting New Jersey statute in accordance with New York statute on which it was modeled because "legislative adoption of a foreign statute includes judicial interpretations of that statute as of the time of adoption"); W. Morris Pediatrics, P.A. v. Henry Schein, Inc., 385 N.J. Super. 581, 593 (Law Div. 2004), aff'd, 2006 N.J. Super. Unpub. LEXIS 104 (App. Div. Mar. 30, 2006) (concluding that New Jersey courts are guided by federal class action cases because New Jersey's class action rule was modeled after federal rule); McDonough, Murray & Korn, P. A. v. Breuninger, 179 N.J. Super. 574, 577 (Law Div. 1980) (concluding that, where law is unclear, court is to "be guided in its interpretation . . . by other New Jersey rules employing similar language and by the federal rule which served as the model").

Based on this identity in statutory language, New Jersey's federal court applies the same analysis to claims brought under the Wage and Hour Law as under the FLSA. See Cannon v. Vineland Hous. Auth., 627 F. Supp. 2d 171, 176 n.4 (D.N.J. 2008) (concluding that, based on "nearly identical language," same analysis regarding compensability of on-call hours applies under both the Wage and Hour Law and FLSA); Aa68-71, Thompson v. Real Estate Mortg. Network, Inc., 2011 U.S. Dist. LEXIS 149774, at *7 (D.N.J. 2011) (noting that the

District of New Jersey customarily applies same analysis to all claims under Wage and Hour Law and FLSA); Aa52-60, Shakib v. Back Bay Rest. Group, Inc., 2011 U.S. Dist. LEXIS 112614, at *10, n.2 (2011) (same). Thus, our federal court already routinely applies the economic realities test to determine whether an individual is an independent contractor or employee under the Wage and Hour Law.[2]

There is no compelling reason to upend this settled body of case law and impose a new test; the resulting and needless uncertainty a new test undoubtedly will engender in the business community -- employers, independent contractors and employees alike, who are experienced with this well established federal test and have been ordering their affairs in accordance with it for years -- cannot be quantified.

Optimally, for independent contractors and the entities securing their services to determine at the outset of their business relationship who is an employee and who is an independent contractor, and to order their business affairs accordingly, the tests used to determine employee status and, thus, basic coverage under the law -- should be consistent across federal and state law. As a practical matter, it makes little sense to give different interpretations to identically

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[2] This point is set forth by Sleepy's, Db 41 n.20, and need not be explored further here.

worded definitions under the FLSA and the Wage and Hour Law. To conclude differently would of necessity result in the anomaly that some individuals properly classified as independent contractors under federal wage and hour law would be considered employees under state law. Consistency of treatment is crucial to ensure predictability for employers and contractors trying to comply with their legal obligations, a view echoed forcefully in the recent revisions to the State's own wage and hour regulations. 43 N.J.R. 725(a), 726 (Mar. 21, 2011) (explaining that "inconsistencies [between federal and state standards] have caused considerable confusion and consternation within the regulated community and there does not appear to be any meaningful purpose served by allowing them to persist. Therefore, the [NJDOL] intends to eliminate the differences between the State and Federal regulations").

Adopting the economic realities test for the Wage and Hour Law also is consistent with recent administrative actions to conform the Wage and Hour Law to the FLSA. See N.J.A.C. 12:56-7.2. In 2012, the New Jersey Department of Labor and Workforce Development ("NJDOL") repealed its existing overtime exemptions and replaced them with the FLSA exemptions when changes to the FLSA's definition of exempt individuals made the federal and state laws no longer consistent. 43 N.J.R. 725(a)

(Mar. 21, 2011).[3] The NJDOL noted that the divergent definitions created unnecessary confusion, and that conformity with the FLSA would have a positive societal impact for employers by providing certainty that their actions will comply with both federal and state law. Id. at 726.

In short, the appropriate test for whether an independent contractor qualifies as an employee should be the FLSA's economic realities test.

B. If the Restatement test does not apply to claims under the New Jersey Wage Payment Law, the economic realities test likewise should apply.

Sleepy's posits that the Legislature intended that the common law right to control test under Restatement (Second) of Agency § 220(2) was to govern the definition of "employee" under the Wage Payment Law. Db12-24. ANJMA agrees and urges that the Court adopt that conclusion.

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[3] Plaintiffs' reliance on Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302 (2005), for the proposition that the Wage and Hour Law may provide broader coverage than the FLSA, (Pb14), is misplaced for two reasons. First, although state laws are permitted to provide greater protections than the FLSA, Id. at 309-10, Marx in fact looked to judicial and agency interpretations of the FLSA to determine whether the plaintiff was exempt; it did so because the language of the Wage and Hour Law and the pre-amendment FLSA governing overtime exceptions was identical. Marx did not construe the Wage and Hour Law any differently than its federal counterpart. Id. at 310-11. Second, the NJDOL has revised its regulations on exemptions from overtime to conform with the recent FLSA amendments.

That said, if the Court declines to adopt the Restatement test, then the economic realities test is the only logical and practical alternative, for three reasons. First, like its sister statute, the Wage Payment Law employs language that echoes the FLSA in its definitions of employer and employee. Compare N.J.S.A. 34:11-4.1(b) (defining "employee" as "any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees"), with 29 U.S.C. § 203(e)(1) (defining "employee" as "any individual employed by an employer").

Second, adoption of the economic realities test would harmonize the two New Jersey laws governing wage and hour issues with one another as well as with the federal law; this would provide more consistent and predictable outcomes for employers trying to comply with the law and for individuals to evaluate their status under the law.

Finally, the Restatement test shares many similar factors and has, over time, often been applied with similar results.[4]

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[4] Again, Sleepy's has made this point, Db42; no repetition is necessary here.

C. Neither the D'Annunzio test nor the ABC test should apply to the Wage Laws.

Plaintiffs urge that the Court adopt either: (1) the D'Annunzio test,[5] applicable to matters under CEPA and built on the test designed for claims under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42 ("LAD") or (2) the ABC test set forth in the Unemployment Compensation Law, N.J.S.A. 43:21-19(i)(6). That proposal is faulty for each of the following three separate reasons.

1. Merely alleging that the Wage Laws are remedial or social legislation does not justify application of the D'Annunzio test.

Asserting that New Jersey's wage and hour laws are "remedial legislation" or "social legislation," Plaintiffs reason that the D'Annunzio test, developed for claims under CEPA and the LAD, likewise should apply to the Wage Laws. In doing so, Plaintiffs ask that the Court join them in an unwarranted leap of faith: that the moniker "remedial legislation" or "social legislation" suffices to justify the result favorable to them.

The vice inherent in that proposition is that it is far too broad and casts far too wide a net, and ignores the Legislature's reasoned basis for statutorily defining who is and

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[5] D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110 (2007).

who is not an employee under the Wage Laws. The notion that classifying legislation as "remedial" or "social" unshackles it from the rational basis restraints applicable to all legislation is contrary to law, and is a poor substitute for the analytical rigor required in proper statutory interpretation. That analysis requires that the Court adopt a reasoned test for determining who can invoke the provisions of the Wage Laws. In short, Plaintiffs' proposal -- that, like "Abracadabra," the simple invocation of the notions of "remedial" or "social" legislation suffices to open the doorways into the Wage Laws -- is no proposal at all: in their view, any person or entity in a business relationship with another person or entity may, wherever it suits them, convert themselves into employees even when (like two of the three Plaintiffs) they have adopted corporate personas, separate legal entities, or (like all the Plaintiffs) hired their own employees for the provision of their services.[6]

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[6] Although the D'Annunzio test is inapplicable to the Wage Laws, it should be noted that Plaintiffs have mischaracterized the test as a three-prong inquiry. Pb10, 12 n.5. D'Annunzio specifically affirmed the Pukowsky twelve-factor test while indicating that the factors identified by Plaintiffs may be given particular emphasis. D'Annunzio, supra, 192 N.J. at 122, 125.

2. The divergent goals of CEPA and the LAD versus the Wage Laws underscore how the D'Annunzio test is inapplicable.

In advancing the D'Annunzio test, Plaintiffs fail to acknowledge the very different goals and policies of the Wage Laws, on the one hand, and the remedial/social statutes upon which they rely: CEPA and the LAD. Unlike the focused scope of protection the Wage Laws give to an individual employee, the larger public is served by a much broader application of CEPA and the LAD. A brief review of the purposes of these statutes suffices to make the point.

The Legislature intended the LAD to be "liberally construed" to "further the statute's goal of eradicating the cancer of discrimination from the workplace" and to protect not only the civil rights of individuals but also "the public's strong interest in a discrimination-free workplace." Pukowsky v. Caruso, 312 N.J. Super. 171, 177 (App. Div. 1998) (citations and internal quotation marks omitted); Hoag v. Brown, 397 N.J. Super. 34, 47 (App. Div. 2007). This societal goal is served best by broader individual protections, which encourage more individuals to enforce their rights under the LAD and "eradicate the cancer of discrimination" throughout the State. Battaglia v. United Parcel Serv., 214 N.J. 518, 546 (2013) (citations omitted). This Court has acknowledged that LAD cases are unique, explaining that when a case "involves the LAD, special

rules of interpretation also apply." Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 108 (2010).

In a like vein, CEPA was enacted not only to protect employees who report illegal or unethical workplace conduct but also to discourage employers from engaging in that very conduct. Through its deterrent effect, "the public at large benefits from a less restricted approach to who may sue under CEPA," that is, from a very broad definition of "employee." See D'Annunzio, supra, 192 N.J. at 119-20, 124.

In contrast, the Wage Laws occupy a more nuanced position in the legislative firmament, and their proper application must balance the interests of various constituencies. While paying employees correctly and in compliance with the Wage Laws serves society in general, these laws are primarily concerned with protecting the individual employee. See N.J.S.A. 34:11-56a ("It is declared to be the public policy of this State to establish a minimum wage level for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being.").

Moreover, unlike the LAD and CEPA, there are significant societal benefits to be protected through a more

limited interpretation of "employee" under the Wage Laws. True independent contractors are an important and integral part of the modern economy; they often begin and expand small businesses, and those businesses are the engines of economic growth and prosperity. Philip J. Romero, The Economic Benefits of Preserving Independent Contracting, 4, 13, 15 (Sept., 2011), http://www.calchamber.com/governmentrelations/documents/economicbenefitsofpreservingindependentcontractingstudy.pdf; MBO Partners, The State of Independence in America, 4 (Sept. 2013), http://info.mbopartners.com/rs/mbo/images/2013-MBO_Partners_State_of_Independence_Report.pdf (reporting that 14% of independent contractors plan to build their solo operations into businesses employing individuals); Jeffrey Eisenach, The Role of Independent Contractors in the U.S. Economy, 36-37 (Dec. 1, 2010), http://www.itsmybusiness.com/wp-content/uploads/2012/07/Eisenach-Study_Navigant-Economics_Role-of-ICs.pdf (noting the strong relationship between independent contracting, entrepreneurship and small business formation).

Independent contractor status also provides these entrepreneurs with the ability to earn compensation in excess of that guaranteed by the Wage Laws. See Karen Kerrigan, Independent Contractors: Preserving the Model is an Economic Imperative, 16: 12 Legal Opinion Letter (Wash. Legal Found. May 16, 2006), www.sbecouncil.org/uploads/wlt.pdf. And, contrary to

Plaintiffs' grossly inaccurate depiction of them as universally exploited cheap labor, independent contractors overwhelmingly are satisfied with an arrangement that provides them with desired and highly valued flexibility and self-determination. See Romero, supra, at 21 (citing survey in which 82.3 percent of independent contractors reported preference for their status over regular employment); MBO Partners, supra, at 6, 13 (reporting that independent workers are largely satisfied with their work arrangement and most chose to be independent for greater flexibility and control over their lives); Kerrigan, supra, at 1 (citing study that fewer than 10% of independent contractors would prefer traditional employment); Eisenach, supra, at 34-35 (flexibility in schedule cited as reason for choosing to be independent contractor).

The object lesson arising from these studies is clear. If the test for independent contractor status is too narrow, employers will be dissuaded from contracting with a sole proprietor or small business in favor of more established companies, retarding opportunities for entrepreneurship, business development and growth. From the independent contractor's perspective, if the test is too narrow, those who desire to be independent and have ordered their business affairs accordingly will find themselves unwillingly recast as "employees" -- deprived of the economic potential and control

they thought they had. See Romero, supra, at 4 (stating that "new, small businesses are by far the most important creator of jobs in America today").

Put simply, not every worker or small business proprietor wants to be -- or rightly should be -- an "employee." See Governor's veto statement to Assembly Bill No. 1578 (Sept. 9, 2013) (partially vetoing bill to adopt ABC test for determining whether truck drivers in drayage and parcel delivery industry are independent contractors because of its "chilling effect on business"). Both in theory and in fact, there is little or no countervailing benefit to society to be had by importing notions unique to CEPA or the LAD into a context foreign to either statute.

The D'Annunzio test should not apply under the Wage Laws.

3. The ABC test under the Unemployment Compensation Law should not apply to the Wage Laws.

Plaintiffs also urge, as an alternative to the D'Annunzio test, that the Court adopt the "ABC" test of New Jersey's Unemployment Compensation Law,[7] a test that presumes the

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[7] Named after the subsections of N.J.S.A. 43:21-19(i)(6), the ABC test provides that:

> Services performed by an individual for remuneration shall be deemed to be employment subject to this

employee status of any individual who renders services for any remuneration, and which places the burden of proof on the putative employer to disprove that status. See Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 581 (1991); Philadelphia Newspapers, Inc. v. Bd. of Review, 397 N.J. Super. 309, 319-20 (App. Div. 2007), certif. den., 195 N.J. 420 (2008). That alternative also is a square peg for a round hole.

Like CEPA and the LAD, the Unemployment Compensation Law, N.J.S.A. 43:21-1 to -24.30, implicates social concerns far broader than those of the Wage Laws without the counterbalancing business considerations important to the latter. The Unemployment Compensation Law was passed in response to the Great Depression, a singular event in our nation's history, as part of New Deal legislation designed to provide desperately needed relief for the destitute with no other source of income.

> chapter (R.S.43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:
>
> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

See Lourdes Med. Ctr. Of Burlington County v. Bd. of Review, 197 N.J. 339, 361, 369 (2009); Carpet Remnant Warehouse, Inc., supra, 125 N.J. at 578. See also Steward Machine Co. v. Davis, 301 U.S. 548, 586-87 (1937). It was enacted not only to protect individuals who had lost their jobs involuntarily but also the "public good and the general welfare of the citizens of this state" by allowing such persons affected to "maintain[] purchasing power" and to "limit[] the serious social consequences of poor relief assistance." Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 525-26, (2006) (quoting N.J.S.A. 43:21-2). See also Utley v. Bd. of Review, 194 N.J. 534, 543 (2008) (stating that "economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state").

Olivieri recognized that the unique purpose of the Unemployment Compensation Law results in "the almost presumptive payment of unemployment compensation benefits." Olivieri, supra, 186 N.J. at 527. See also Utley, 194 N.J. at 543 (explaining that Unemployment Compensation Law should be liberally construed in favor of allowing benefits); Lord v. Bd. of Review, 425 N.J. Super. 187, 195 (App. Div. 2012) (stating that Unemployment Compensation Law should be read so as not to disqualify persons from coverage because of serious adverse consequences to unemployed person). Employee status is the

"default setting" under New Jersey's Unemployment Compensation Law, and there are strong policy reasons that undergird that reasoning. But those considerations do not apply to the Wage Laws; there are equally strong policy reasons not to graft onto the Wage Laws a test that, from the outset, tips the scale in favor of employee status.

Admittedly, the NJDOL has issued a regulation adopting the ABC test for independent contractors under the Wage and Hour Law. That interpretation, however, should not control, as agency regulations are not entitled to deference where they expand the scope of the statutory language or where they frustrate the policy of the statute. T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 490 91 (2007). See also Ragsdale v. Wolverine World Wide, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002) (holding that regulation under the FMLA allowing employees an additional 12 weeks of leave if the leave was not designated FMLA leave was contrary to the statute). That is the case here. Nothing in the statutory language or legislative history supports importing the ABC test into the Wage Laws. Indeed, in the almost two decades since the regulation was adopted in 1995, only a single decision has applied it, and then without any explanation whatsoever for

doing so.[8] Significantly, in the years following that regulation, the NJDOL has taken firm steps in the opposite direction, moving to harmonize and coordinate the Wage and Hour Law with its federal counterpart, the FLSA. See, supra, § IV.A. Under these circumstances, the ABC regulation is not entitled to deference.

Likewise, in 2007, the Legislature adopted the Construction Industry Independent Contractor Act, N.J.S.A. 34:20-1 to -11, which adopted the ABC test for determining independent contractor status, but only on a limited basis and then only to address a specific ill: those in the construction industry who are improperly classified as independent contractors. See N.J.S.A. 34:20-2 (declaration of legislative findings); N.J.S.A. 34:20-4 (adopting ABC test for construction industry only). The fact that the Legislature must be deemed to be well aware of the ABC test -- it is, after all, its original author -- and intentionally has elected to apply it only in two discrete settings, under the Unemployment Compensation Law and to construction industry contractors, speaks volumes. If the Legislature had intended the ABC test to apply generally to all persons or entities subject to the Wage Laws, it would have said so, and it has not. See Borough of East Rutherford v. East

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[8] Sleepy's provides a more robust description. Db31-32.

Rutherford Police Benevolent Ass'n Local 275, 213 N.J. 190, 215 (2013) (Patterson, J., dissenting) (stating that, in such circumstances, "th[e] Court traditionally applies the principle of expressio unius unius est exclusio alterius -- expression of one thing suggests the exclusion of another left unmentioned") (citations and internal quotation marks omitted).

In the aggregate, these principles tell us that the ABC test should be limited to the law that created it or to which it has been expressly added. That limitation recently was recognized by the veto of Assembly Bill No. 1578, which would have adopted the ABC test for certain contractors within the transportation industry: for all drayage and parcel delivery drivers in this State. Condemning the evils of true "worker misclassification," the veto message observed that "the approach taken in this Bill is overreaching and has the potential to cause severe and significant economic harms to New Jersey's trucking industry." Governor's veto statement to Assembly Bill No. 1578, at 1 (Sept. 9, 2013). The wholesale application of the ABC test to the Wage Laws would have the same result, but on a far wider scale, bringing those same "severe and significant economic harms" to New Jersey businesses across the board. To paraphrase the veto message: the ABC test "not only impacts willful misclassifiers, but may harm virtually any . . .

business engaging . . . independent contractors." Ibid. It continued:

> In addition to making New Jersey unfriendly to the trucking industry, the Bill would likely have other undesirable consequences. For example, if trucking businesses flee the State, overseas shippers are likely to deliver goods to ports in other states and all manner of commerce could see adverse price impacts. In light of need to continue to improve the economic climate in New Jersey, I cannot sign a bill that would have such a chilling effect on business.
>
> [Ibid.]

These prudent considerations likewise should inform the decision here; the Court should not adopt a test for the Wage Laws that perforce effects "such a chilling effect on business."

D. The existence of an intervening business entity should have significant weight in determining independent contractor status.

Amicus National Federation of Independent Business Small Businesses Legal Center ("NFIB") properly highlights the irony that two of the three plaintiffs here voluntarily created corporate entities through which they provided their services, and the third operated as a sole proprietorship, a less formal iteration of a business entity. Thus, it urges that, no matter what test the Court adopts, the establishment and existence of an intervening business entity should carry significant, if not conclusive, weight in assessing independent contractor status. ANJMA agrees.

That reasoning and conclusion acknowledge both the language of the Wage Laws as well as the realities of today's economy. See Aa19-29, Luxama v. Ironbound Express, Inc., 2013 U.S. Dist. LEXIS 90879, at *14-15 (D.N.J. June 27, 2013) (granting motion to dismiss because plaintiff truck drivers were independent contractors under FLSA in part because they had opportunity to increase profits through managerial skills); Barlow v. C.R. Eng., Inc., 703 F.3d 497, 506-07 (10th Cir. 2012) (concluding that, because plaintiff created limited liability company to provide his services which had its own bank account, records and filed its own corporate tax return, plaintiff was independent contractor); Aa61-67, Spellman v. Am. Eagle Express, Inc., 2013 U.S. Dist. LEXIS 35032, at *14-15 (E.D. Pa. Mar. 14, 2013) (noting that forming business entity and other "entrepreneurial conduct" "strongly suggests" independent contractor status); Bennett v. Unitek Global Servs., LLC, 2013 U.S. Dist. LEXIS 128350, at *16, 21-22 (N.D. Ill. Sept. 9, 2013) (distinguishing cases because they did not involve individuals who owned separate company, and concluding, in respect to economic realities test, that plaintiffs' ability to control their overhead and therefore affect profits as well as their discretion as to whether and how much to pay themselves as owners of their companies was significant).[9]

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[9] Plaintiffs here were not paid "wages" as that term is

The establishment of a business entity cannot be dispositive in all cases. As in other settings, evidence of fraud or a sham certainly justifies ignoring or piercing the corporate structure. But where a plaintiff chooses to establish a business entity by and through which he chooses to offer his services -- regardless of its form (e.g., co[illegible]ration, limited liability company or sole proprietorship) -- the burden should rest on that plaintiff to demonstrate that his own business is a

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commonly understood. See N.J.S.A. § 1:1-1 (requiring that words be accorded their common and ordinary meaning). That is, they were not paid an hourly wage or salary. Instead, their business entities were paid a sum certain in exchange for providing delivery services. Out of that sum, Plaintiffs were responsible for paying wages to their employees; purchasing and maintaining their trucks; purchasing insurance for their businesses; paying for a variety of other overhead items, such as office space and professional services; as well as paying themselves wages and profits. Aa13-18, Hargrove v. Sleepy's, LLC, 2012 U.S. Dist. LEXIS 43949, at *2-9 (D.N.J. Mar. 28, 2013). Plaintiffs' net earnings thus depended on a multitude of factors over which they have sole and exclusive control. These include: whether to purchase or lease a truck; when and whether to buy a new vehicle or additional vehicles; how many employees to hire; how many employees to assign to a job; how much those employees earn; which insurance policies to purchase; provision of and contribution to employee benefits; whether and where to lease office space; what professional services to retain; and how much money to reinvest in the business. As Sleepy's notes, "wages" are a necessary precursor to employee status under both Wage Laws. (Db10-12, 40). But the manner in which Plaintiffs were compensated makes it exceedingly difficult to assess what their "regular rate" or overtime compensation would be, even if their payments from Sleepy's constituted statutory wages. See N.J.S.A. § 34:11-56a4 (minimum wage and overtime rate expressed as an hourly rate).

fraud or sham.[10] See Pukowsky, 312 N.J. Super. at 183-84 (noting that, although it may not be barred by collateral estoppel, New Jersey courts look "askance" at the dichotomy when a plaintiff claims to be an independent contractor when it is to her advantage under the tax laws but an employee when it is to her benefit under the employment statutes).

To a large extent, the cases relied on by Plaintiffs in support of their contentions on this point are not helpful to their case. Prb6-9. At best, these cases illustrate only that establishment of a business does not ***preclude*** a finding of employment status. Indeed, the only cases cited by Plaintiffs that engage in any real analysis involve evidence of a fraud or sham business. See e.g., Aa1-5, Amero v. Townsend Oil Co., 31 Mass. L. Rep. 111, at *3-4, 7 (Mass. Super. Ct. 2009) (plaintiff incorporated after learning he could be civilly liable for an accident but had a non-competition agreement with defendant that required him to provide services only for defendant, preventing him from operating a truly independent business); Aa30-51, Martins v. 3PD, Inc., 2013 U.S. Dist. LEXIS 45753, at *50-51 (D.

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[10] Factors other than the formal establishment of a corporate structure also should be given significant weight if they are indicative of a business enterprise. For example, Plaintiffs, including Plaintiff Hall (who operated as a sole proprietorship), hired their own employees and were therefore themselves employers.

Mass. Mar. 28, 2013)[11] (noting that the Massachusetts Attorney General issued an opinion that the independent contract act applies to employers who contract with corporate entities for the purpose of evading the state law); Aa6-12, Demers v. Adams Homes of Northwest Florida, Inc., 2007 U.S. Dist. LEXIS 82797, at *4 n.3, 10 (M.D. Fla. Nov. 7, 2007) (plaintiff only incorporated because she was told it would benefit her tax-wise but was required to perform services only for defendant, precluding her from operating a truly independent business); OS Transp. LLC, 358 NLRB No. 117, slip op. at *1, 8 (Aug. 31, 2012) (concluding that the employer "coerc[ed] its employees [in]to sign[ing] sham independent-contractor agreements" by requiring them to incorporate).

The only New Jersey case cited by Plaintiffs was decided under the worker's compensation statute and, therefore, has no application to the Wage Laws. Rutherford v. Modern Transp. Co., 128 N.J. Super. 504 (Law Div. 1974).[12]

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[11] Amero and Martins were also decided under Massachusetts law, which contains an express presumption of employment and which has a specific statute defining independent contractors under state wage and hour law. Aa1-5, Amero, supra, 31 Mass L. Rep. 111, at *5; Aa30-51, Martins, supra, 2013 U.S. Dist. LEXIS 45753, at *2-3.

[12] The "jobbers" or staffing firm cases cited by Plaintiffs, (Prb5-6, 10-13), are inapplicable. Plaintiffs are not contending that their companies were jointly responsible with Sleepy's for paying their wages. Their contention is that Sleepy's was their sole employer. Thus, the issue of

V. CONCLUSION.

For the foregoing authority, arguments and reasons, and for the reasoning advanced by Sleepy's, amicus curiae Academy of New Jersey Management Attorneys respectfully requests that the Court respond to the certified question posed by the United States Court of Appeals for the Third Circuit under Rule 2:12 by holding that: (1) as a matter of New Jersey law and absent any legislative enactment to the contrary, the economic realities test is the proper and applicable test for determining whether an individual is an independent contractor under the Wage and Hour Law and the Wage Payment Law (to the extent the Restatement test is not adopted for this latter statute), and (2) in the application of that test, significant, if not

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joint employment liability and the implications thereof are not before this Court.

conclusive, weight should be given to the putative employee's choice to assume an independent business structure.

Respectfully submitted,

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SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO, Plaintiffs-Appellants/Cross-Appellees, v. SLEEPY'S, LLC, Defendant-Appellee/Cross-Appellant v. I STEALTH, EUSEBIO'S TRUCKING CORP., and CURVA, Third-Party Defendants-Appellees.	DOCKET NO. 072-742 CIVIL ACTION ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

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BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION OF NEW JERSEY, NEW JERSEY INDUSTRIAL UNION COUNCIL, AND NATIONAL EMPLOYMENT LAW PROJECT

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Dated: September 25, 2013

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SUMMARY OF ARGUMENT

As a matter of public policy, work performed for a corporation is entitled to a wide array of protections in New Jersey. These include the Wage and Hour Law, the Wage Payment Law, the Worker's Compensation Law, the Unemployment Compensation Law, the Law Against Discrimination, and the Conscientious Employee Protection Act. In D'Annunzio v. Prudential Ins. Co., , this Court sought to harmonize these workplace protection statutes by identifying a broad test for employment status to ensure coverage for "all those workers that social legislation seeks to reach." 192 N.J. 110, 121 (2007).

To that end, this Court identified a three-factor test that should be applied to determine who is an employee under New Jersey's remedial employment statutes: (1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work. Id. at 122 (citing Lowe v. Zarghami, 158 N.J. 606, 615-18 (1999)). This reflects the long-held belief in New Jersey that remedial employment legislation should cover a broader range of workers than those covered traditionally under the common law. See, e.g., D'Annunzio, 192 N.J. at 121 (2007)("It is beyond cavil that [CEPA] includes more than the narrow band of traditional employees"); Lowe v. Zarghami, 158 N.J. 606, 618

(1999)(rejecting the common law test in applying a much broader "relative nature of the work test" where "public policy concerns dictate a more liberal standard"); Caico v. Toto Bros. Inc., 62 N.J. 305, 311 (1973)(given the "underlying philosophy of the [workers' compensation] statute," applying the broad "relative nature of the work test" - noting that the plaintiff "subcontractor" was a "cog in the wheel" of the defendant's operation and therefore entitled to the protection of the law); E. Heller & Bros. v. Dillon, 96 N.J. Eq. 334, 335-36 (1924) (1904 child labor law provided that no minor under the age of 16 years shall be "employed, permitted or suffered to work" at certain occupations).

The certified question before this Court is what employment relationship test applies to the New Jersey Wage Payment Law, N.J.S.A. §§ 34:11-4.1-4.14, which requires the timely payment of wages owed and forbids withholding or diverting of those wages by employers, and the New Jersey Wage and Hour Law, N.J.S.A. §§ 34:11-56a-56a38, which requires employers to pay minimum wage and overtime premium pay. Both statutes serve the important public policy function of insuring the fair and prompt payment of wages and overtime to workers within the state of New Jersey.

Misclassification of employees as independent contractors is common now among many industries, including construction and the package and furniture delivery business, as employers seek

to shift the costs of doing business onto their employees.[1] Doing so enables companies to underpay their workers, ignore rules protecting worker safety, lower labor costs, and avoid paying payroll taxes, workers compensation, and other insurance premiums. The cumulative societal impact of employers' abuse of the independent contractor designation is substantial. Federal and state governments have lost billions of dollars in unpaid funds; law-abiding employers feel pressure to concoct similar schemes in order to stay competitive; and millions of workers lack vital labor protections to which they are otherwise entitled. Given their remedial purpose, this Court should adopt the three-prong D'Annunzio test for determining who is an employee under these laws.

Indeed, a test at least as broad as the one outlined in D'Annunzio is compelled by the very broad definition of employee in both the NJWHL and WPL as someone who is "suffered or

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[1] In enacting the Construction Industry Independent Contractor Act, the Legislature found that "employers in the construction industry who improperly classify employees as independent contractors deprive these workers of proper Social Security benefits and other benefits, while reducing the employers' State and federal tax withholdings and related obligations. Moreover, this practice puts businesses that bear higher costs for complying with the law at a competitive disadvantage." N.J.S.A § 34:20-2. Furthermore, despite his veto of an act to establishing a presumption that all drayage and parcel delivery drivers in New Jersey are employees, Governor Chris Christie acknowledged that "[t]he willful misclassification of workers as independent contractors denies drivers the benefits and protections that come with employee status" and that misclassification "may also place honest businesses at a competitive disadvantage and may serve as a means of avoiding tax obligations." Veto of Gov. Chris Christie, dated Sept. 9, 2013 at http://www.njleg.state.nj.us/2012/Bills/A2000/1578_V1.PDF.

permitted to work." The words "suffer or permit" derived from child labor laws and embody "the broadest definition [of employment] that has ever been included in any one act." United States v. Rosenwasser, 323 U.S. 360, 363 n. 3, (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo L. Black)). Thus, utilizing the D'Annunzio test under the New Jersey wage laws would be consistent with the inclusion of "suffer or permit."

While Sleepy's, and supporting amicus, argue that New Jersey courts should apply the narrower common law test (narrowed even further by their proposed imposition of a threshold test requiring a worker to demonstrate a contractual obligation to be paid wages by the putative employer) such a requirement flies in the face of the remedial purpose underlying New Jersey's wage laws and would violate those laws' strong anti-waiver provision. See N.J.S.A. § 34:11-56a3; N.J.S.A. § 34:11-4.7. Moreover, as this Court's holding in D'Annunzio demonstrates, remedial employment legislation is meant to "focus not on labels but on the reality" of a worker's relationship with the entity he is providing his services for. 192 N.J. at 121. As a result, this Court should reject any test under which employers can evade compliance with the New Jersey wage laws by either requiring workers to incorporate or form a d/b/a or by using third-party labor contractors.

ARGUMENT

I. THIS COURT SHOULD CONFIRM THAT THE D'ANNUNZIO TEST APPLIES TO NEW JERSEY WAGE PAYMENT AND WAGE AND HOUR LAWS AS THESE LAWS ARE THE VERY TYPE OF SOCIAL LEGISLATION FOR WHICH THE TEST WAS DEVELOPED.

As noted above, this Court has firmly established that a three-prong employment relationship test applies under remedial New Jersey worker's rights statutes, focusing on "(1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue." D'Annunzio, 192 N.J. at 122. As early as 1960, this Court affirmed the application of this test to determine whether a worker was an employee under New Jersey's worker's compensation statute. Marcus v. E. Agr. Ass'n, Inc., 58 N.J. Super. 584 (App. Div. 1959) rev'd sub nom. Marcus v. E. Agric. Ass'n, Inc., 32 N.J. 460 (1960) (under social legislation, New Jersey courts looked beyond the right of control to the relative nature of the work to determine whether one was an employee).[2] This Court in Marcus reversed the

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[2] As Judge Conford wrote in his dissent in Marcus that was later adopted by this Court:

> while some measure of control is essential to a finding of an employer-employee relationship, there are various situations in which the control test does not emerge as the dispositive factor. For example, where it is not in the nature of the work for the manner of its performance to be within the hiring party's direct control, the factor of control can obviously not be the critical

Appellate Division decision and instead adopted the dissenting opinion of Judge Conford even though the worker's compensation statute at issue in that case expressly called for the application of the common law control test in its definition of employment. See N.J.S.A. § 34:15-36 ("'Employer' is declared to be synonymous with master, and includes natural persons, partnerships, and corporations; 'employee' is synonymous with servant . . . ."). Despite the definition harkening back to the common law master-servant test, this Court has affirmed an approach whereby "[e]ffectuation of the policy of the statutes in that category (social legislation) requires that their use of the term 'employee' not be accorded a constrictive and mechanical definition but rather one geared to comport with the specific statutory purpose." Tofani, 83 N.J. Super. at 489

> one in the resolution of the case, but takes its place as only one of the various potential *indicia* of the relationship which must be balanced and weighed in determining what, under the totality of the circumstances, the character of that relationship really is. Thus, the requirement of control is sufficiently met where its extent is commensurate with that degree of supervision which is necessary and appropriate, considering the type of work to be done and the capabilities of the particular person doing it. Patently, where the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning such details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor status might be equally consistent with an employment relationship. In such a situation the factor of control becomes inconclusive, and reorientation toward a correct legal conclusion must be sought by resort to more realistically significant *criteria*.

Marcus, 58 N.J. Super. at 597.

(quotation marks omitted). Due to the social purpose underlying the worker's compensation statute, New Jersey courts have "recognized the 'logic, clarity and forth-rightness' of the 'relative nature of the work test,' i.e., whether or not the work is a part of the regular business of the employer-especially where the worker is one in the general category meant to be protected by the act but whose right to protection is questionable under strict application of common-law principles." Id. at 489-90 (quoting Hannigan v. Goldfarb, 53 N.J.Super. 190, 206 (App.Div.1958)), (citing Westover v. Stockholders Pub. Co., 237 F.2d 948, 951 (9th Cir. 1956)). This Court affirmed this approach in Caicco v. Toto Bros., Inc., 62 N.J. 305, 310 (1973) ("The 'relative nature of the work' criterion of employment is that which is most pertinent here.") (citing 1A Larson, The Law of Workmen's Compensation (1967), §§ 43.52, 43.53, Marcus, *supra*; Hannigan, *supra*; Brower v. Rossmy, 63 N.J.Super. 395 (App.Div.1960), certif. den. 34 N.J. 65 (1961)).

This Court later applied the same remedial test in Lowe v. Zarghami, 158 N.J. 606 (1999). In Lowe, a doctor who was sued for malpractice claimed immunity under the Tort Claims Act ("TCA") as a public employee. 158 N.J. at 613-15. The TCA defined "employee" as "an officer, employee or servant, whether or not compensated or part-time, who is authorized to perform any act or service; provided, however, that the term does not

include an independent contractor." N.J.S.A. § 59:1-3.

This Court looked at two different employment relationship tests: the control test and what it referred to as "the relative nature of the work" test. Lowe, 158 N.J. 615-18. This Court held that "[i]f a working relationship was created by social legislation under which public policy concerns dictate a more liberal standard, then a court may apply the relative nature of the work test rather than the control test."[3] Id. at 618 (citations omitted).[4] Based on the TCA's goal of limiting the liability of public entities and their employees, this Court applied a hybrid employment relationship test, including both the control test and the relative nature of the work test in finding that Dr. Zarghami was a public employee. Id. at 618-24. It was this analysis that was then adopted under CEPA in D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110 (2007). In D'Annunzio, the plaintiff had filed a complaint alleging that he was fired from his position as medical director for defendant in retaliation for whistleblowing in violation of New Jersey's Conscientious Employee Protection Act ("CEPA"),

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[3] This Court noted that "if the working relationship involves professional services where an employer cannot exercise control over the methods used to provide those services, the relative nature of the work test may provide a more accurate assessment of the working relationship." Id. (citing Dullen v. F. Montecalvo Contracting Co., 273 N.J. Super. 23, 23-30 (App. Div. 1994)).

[4] This echoes statements made by the Supreme Court. .

N.J.S.A. § 34:19-1 to -8. The D'Annunzio Court examined CEPA's definition of "employee," as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. § 34:19-2(b). Although as is the case with the New Jersey's worker's compensation statute, this definition appears on its face to reference the common law control test, the D'Annunzio Court noted that "[o]ur courts have long recognized that, in certain settings, exclusive reliance on a traditional right-to-control test to identify who is an 'employee' does not necessarily result in the identification of all those workers that social legislation seeks to reach." 192 N.J. at 119. Indeed, courts must "look to the goals underlying [the applicable statute] and focus not on labels but on the reality of plaintiff's relationship with the [putative employer]." Id. at 119 (quoting Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 239 (2006); citing MacDougall v. Weichert, 144 N.J. 380, 388 (1996) (same applies for Pierce wrongful discharge claim)).

This Court in D'Annunzio therefore concluded that when considering who is an employee under "CEPA or other social legislation [t]he considerations that must come into play are three: (1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's

business with that of the person doing the work at issue." Id. at 120 (emphasis added) (citing Lowe, 158 N.J. at 615-18). This approach was affirmed in this Court's holding in Stomel v. City of Camden, 192 N.J. 137, 155 (2007) ("traditional right-to-control test should not be the exclusive determiner of whether a professional is an employee" under New Jersey whistleblower statute).

Under the D'Annunzio test, workers who "may be an essential aspect of the employer's regular business" are considered employees even though the employer does not exert day-to-day control over the worker's specialized services. Id. To gauge "functional integration," a court should consider whether the worker is one of the "cogs" in the employer's enterprise; whether the work is continuous and directly required, as opposed to intermittent; and whether the worker is regularly at the disposal of the employer, as opposed to being available to the public. Id. "If so, an employer-employee relationship more likely has been established." Id.

Other New Jersey courts have followed this approach. In Hoag v. Brown, the Appellate Division highlighted the need to look beyond labels when addressing whether an individual is an employee under New Jersey's Law Against Discrimination ("LAD"). 397 N.J. Super. 34, 47-53 (App. Div. 2007) ("To determine whether plaintiff should be considered an employee of the State

under the LAD, we are guided in our analysis by the LAD's purpose."); see also Scafuri v. Sisley Cosmetics USA, Inc., A-3871-08T3, 2009 WL 4251861 (N.J. Super. Ct. App. Div. Nov. 25, 2009) (this Court refined the Pukowsky test in D'Annunzio to "emphasize[] the need to look beyond labels to the substance of the relationship between the individual and the organization"). Based on the LAD's remedial purpose, the Appellate Division focused on the three-prong hybrid test laid out in D'Annunzio.[5] Id. at 48.

Contrary to the assertions of Sleepy's and supporting amicus, a broad employment relationship standard will not prohibit outsourcing or the use of subcontractors in New Jersey. As the Second Circuit recognized, "manufacturers, and especially manufacturers of relatively sophisticated products that require multiple components, may choose to outsource the production of some of those components in order to increase efficiency." Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 73 (2d Cir. 2003) (citing Ravi Venkatesan, Strategic Sourcing: To Make or Not to Make, Harv. Bus. Rev., Nov./Dec.1992, at 98 (arguing that manufacturers should outsource the production of components to maximize efficiency)). However, "[a]t the same time . . . if

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[5] Other states have adopted the relative nature of the work test under their wage payment laws. See, e.g., Scovil v. FedEx Ground Package Sys., Inc., 886 F. Supp. 2d 45, 53 (D. Me. 2012), reconsideration denied (Oct. 10, 2012) (finding that relative nature of the work test applies under the Maine wage payment law).

plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws." Id. at 73-74. This Court has made clear that such evasion of the basic protections of this State's labor and employment laws through the misuse of "independent contractor" agreements is not to be tolerated.

II. REQUIRING WORKERS TO DEMONSTRATE A CONTRACTUAL OBLIGATION TO RECEIVE WAGES WOULD UNDERMINE NEW JERSEY'S WORKPLACE PROTECTIONS.

Sleepy's argues that this Court should apply a threshold test for employment not endorsed by any court in the United States - that a worker must be able to demonstrate a contractual obligation to receive wages before any employment relationship test is applied. Db10, 40. However, such a requirement would allow businesses to evade compliance with all of New Jersey's basic labor protections by creating a multi-tiered structure -- by using labor contractors or by requiring the workers themselves to incorporate or form a "d/b/a" - thus ensuring broader exploitation of laborers, most of whom would be low-wage, unskilled workers, who are particularly vulnerable to dangerous and exploitative working conditions.[6] To require a

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[6] See, e.g., Cynthia Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation, 105 Colum. L. Rev. 319, 352 (2005)

contract for services between a plaintiff and a defendant under the New Jersey wage laws would skirt the intent of the laws and permit Sleepy's and other impecunious employers to take advantage of large groups of workers via a technical loophole that does not exist in the law.

As a preliminary matter, wage legislation is a derogation from the common law and what would otherwise be the parties' right to contract any way they want. See Sec. of Labor v. Lauritzen, 835 F.2d 1529, 1544-45 (7th Cir. 1987) (Easterbrook, J., concurring) (wage laws are "designed to defeat rather than implement contractual arrangements. If employees voluntarily contract to accept $2.00 per hour, the agreement is ineffectual"). Accordingly, the New Jersey wage laws declare in strong language that any contracts contravening their requirement are automatically "null and void." See N.J. Stat. Ann. § 34:11-56a3 ("The employment of an employee in any occupation in this State at an oppressive and unreasonable wage is hereby declared to be contrary to public policy and any contract, agreement or understanding for or in relation to such employment shall be void."); N.J. Stat. Ann. § 34:11-4.7 ("It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such

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(janitorial and cleaning service industry relies on low-wage immigrant labor and habitually skirts workplace protections by utilizing franchise agreements).

employee otherwise than as provided in this act, except to pay wages at shorter intervals than as herein provided, or to pay wages in advance. Every agreement made in violation of this section shall be deemed to be null and void . . ..."). Requiring a contract for payment of wages would allow an employer to escape responsibility simply by having employees sign independent contractor agreements agreeing that they were being as independent contractors and not wages as employees. Such agreements would clearly violate the New Jersey wage laws' anti-waiver provisions. See N.J. Stat. Ann. § 34:11-56a3; N.J. Stat. Ann. § 34:11-4.7

It is well-established that courts must not read limitations into remedial statutes. D'Annunzio, 192 N.J. at 120 (citing Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 239 (2006); Higgins v. Pascack Valley Hosp., 158 N.J. 404, 420 (1999); Yurick v. State, 184 N.J. 70, 77 (2005) (quoting Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 417)). The doctrine protecting remedial statutes from judicial limitations applies with particular force to the wage laws. See, e.g., Marx v. Friendly Ice Cream Corp., 380 N.J.Super. 302, 310 (App.Div.2005) (based on Legislature's remedial purpose in enacting minimum wage law, all exemptions to N.J.S.A. 34:11-56a4 should be construed narrowly); Yellow Cab Co. v. State, 126 N.J.Super. 81, 86 (App.Div.1973) (same), certif. denied, 64 N.J.

498, 317 A.2d 711 (1974); State v. Comfort Cab, Inc., 118 N.J.Super. 162, 175 (1972) (Wage and Hour Law is humanitarian and remedial legislation, requiring any exemption to be narrowly construed); In re Raymour & Flanigan Furniture, 405 N.J. Super. 367, 376-77 (App. Div. 2009) (due to "the humanitarian purpose of the Wage and Hour Law, we construe the exemption [for overtime pay to trucking industry employers] narrowly, not broadly"); see also Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor, 125 N.J. 567, 581 (1991) ("Because the [Unemployment Compensation Law] is remedial, its provisions have been construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles.") (citations omitted). As a whole, the wage laws have been drafted and interpreted to provide broad protections for workers, and the Legislature has consistently enacted statutes that put New Jersey at the vanguard in protecting an employee's right to fair wages. In light of the Legislature's clear intent to provide strong protections to employees, this Court should interpret the New Jersey wage laws broadly to protect and achieve the policies behind these laws.[7]

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[7] See, e.g., N.J.S.A. § 34:11-56a ("It is declared to be the public policy of this State to establish a minimum wage level for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of

New Jersey has always been at the vanguard of enacting progressive workplace legislation.[8] In 1904, New Jersey enacted a child labor law that defined "employ" as "suffer or permit to work."[9] E. Heller & Bros. v. Dillon, 96 N.J. Eq. 334, 335-36 (1924) (1904 child labor law provided that no minor under the age of 16 years shall be "employed, permitted or suffered to work" at certain occupations). In 1924, New Jersey added "suffer or permit" to its worker's compensation statute. See

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serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being.").

[8] One of the goals of early workplace legislation was to eliminate the abusive conditions of sweatshops where "sweaters" or middlemen "sweated their profit out of the difference between what they paid the workers and what they received from those above them." Goldstein, 46 UCLA L. Rev. at 1055-56. Sweaters, however, were often insolvent and in no position to correct workplace abuses. See, e.g., Maldonado v. Lucca, 629 F. Supp. 483, 489 (D.N.J. 1986) (recognizing "injustice suffered by migrant and seasonal workers who are underpaid in the first instance and who cannot realistically recover unpaid wages from a crew leader who is undercapitalized and nowhere to be found"). Under the common law, courts generally concluded that business owners were not liable for sweatshop conditions because to employ a worker required some formally or informally employment contract. Id. at 1016. In the early 1900s, legislative reform efforts sought to "make factory owners liable for their contractors' sweating of the workers and responsible for improving their conditions." Id. at 1065. Significantly, legislatures sought to reach business owners by defining employment using the "suffer or permit" standard, rather than the common law, in child labor and minimum wage laws.

[9] In the child labor context, to "suffer or permit" meant that an individual "shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." Curtis & Gartside Co. v. Pigg, 134 P. 1125, 1129 (Okla. 1913) (emphasis added). The language thus "cast[ ] a duty upon the owner or proprietor to prevent the unlawful condition, and the liability rest[ed] upon principles wholly distinct from those relating to master and servant. The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist." People v. Sheffield Farms-Slawson-Decker Co., 121 N.E. at 476 (the omission to discover and prevent was a sufferance of the work)).

1924 N.J. Laws ch. 159, §1, at 359-60. By 1933, New Jersey included the broad "suffer or permit" standard to a minimum wage law on behalf of women and children. See 1933 N.J. Laws ch. 152, at 315.

The New Jersey wage laws include similarly broad definitions of employment. The Wage and Hour Law defines "employ" as to "suffer or permit to work." N.J.S.A. § 34:11-56a1(f). The Wage Payment Law, meanwhile, provides that an "employee" is any person "suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees." N.J.S.A. § 34:11-4.1.

The Supreme Court has held that the "suffer or permit" standard "stretches the meaning of employee" to include work relationships that were not within the traditional common-law definition of "employee." Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947); see also Darden, 503 U.S. at 326. "A broader or more comprehensive coverage of employees . . . would be difficult to frame." United States v. Rosenwasser, 323 U.S. 360, 362 (1945). The use of "suffer or permit" refers specifically to employment relationships that do not include contractual relationships. Curtis & Gartside Co. v. Pigg, 134 P. 1125, 1129 (Okla. 1913) ("suffer or permit" means that a business owner "shall not employ by contract, nor shall he permit by acquiescence, nor suffer by a failure to hinder").

The added language excluding independent contractors and subcontractors in the Wage Payment Law does not require the application of a different test. As discussed above, this Court has held that New Jersey courts apply a broad definition of employment to social legislation. D'Annunzio, 192 N.J/. at 121. As the Supreme Court held in Rutherford, even with the use of "suffer or permit," there "may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees." Rutherford Food, 331 U.S. at 729. The Supreme Court resolved the breadth of the "suffer or permit" standard by saying it reaches more broadly than the common law, but it not so broad as to exclude the existence of true independent contractors. New Jersey was doing the same with by defining "employee" under the Wage Payment to exclude those very same true independent contractors. Following Sleepy's argument, the "suffer of permit" language would be mere surplusage, a possibility that conflicts with the rules of statutory construction and the specific holdings of this Court that New Jersey's remedial employment statutes should be interpreted broadly.

Another context in which Sleepy's proposed contractual obligation would affect New Jersey workers is where the worker provides his labor where he is himself an incorporated entity or has formed a d/b/a/. For example, in the underlying case,

Sleepy's drivers largely formed corporations and contracted with Sleepy's via those entities. There is no strict contractual relationship between Sleepy's and the drivers. Restricting the application of the New Jersey wage laws in such instances would essentially allow another "end run" for corporations hiring such workers. Indeed, Plaintiffs, in their brief, cite to numerous cases where trucking companies used this same ploy and were still found to be liable under myriad federal and state wage laws despite the presence of an intervening corporate entity. See Prb9-11.

New Jersey courts have routinely rejected the business formalities between the parties to find an employment relationship. In Caicco v. Toto Bros., this Court held that a truck driver was an employee under the worker's compensation statute despite the fact that the driver was required to, as a condition of employment, supply the putative employer with a letter stating that he would be responsible for his own federal income taxes and that he was self-employed, and the requirement that the driver obtain his own insurance for vehicle liability and worker's compensation, and the additional fact that the driver held himself out as an independent company. 62 N.J. 305, 308 (1973).

Instructively, the Massachusetts Supreme Judicial Court addressed a strikingly similar question raised here by Sleepy's

-- whether a contract for services is required for a finding of employment status under a state wage law. See Depianti v. Jan-Pro Franchising Int'l, Inc., 990 N.E.2d 1054, 1067 (Mass. 2013)) (addressing the certified question "Whether a defendant may be liable for employee misclassification under [G.L. c. 149, § 148B,] where there was no contract for service between the plaintiff and defendant."). The court rejected Jan-Pro's argument that a contract for service was not required, holding that "[l]imiting the statute's applicability to circumstances where the parties have contracted with one another would undermine the purpose of the statute, as such limitation would permit misclassification where a putative employer, otherwise liable under the statute, is insulated from such liability by virtue of an arrangement permitting it to distance itself from its employees. Id. at 1067 (citations omitted). The same is true here.

Sleepy's has cited to no persuasive authority in support of their contractual obligation threshold requirement. Instead, Sleepy's cites to a string of volunteer cases where the question was whether a volunteer received any remuneration from any entity for their services. Db11, 42; see, e.g., Junio v. Livingston Parish Fire Dist., 717 F.3d 431 (5th Cir. 2013) (whether volunteer firefighter was an employee under Title VII). This is an issue wholly separate from whether an individual who

provided his services for remuneration received his wages in a timely manner without any unauthorized deductions, whether the wages he received were above the minimum wage, or whether he was paid an overtime premium for hours over 40 in a given week.

III. EMPLOYEE MISCLASSIFICATION SCHEMES SUCH AS SLEEPY'S MULTI-TIERED CONTRACTING ARRANGEMENTS IMPOSE SIGNIFICANT COSTS IN NEW JERSEY.

In all forms of independent contractor misclassification, cost savings allow a misclassifying employer to obtain unfair economic advantage over competitors. In addition to weakened labor standards protections for workers, employer schemes like Sleepy's impose significant costs in today's economy. Generally, misclassification also results in state governments losing hundreds of millions of dollars each year in unemployment insurance, worker's compensation, and income tax revenues.[10] The New Jersey Legislature has expressly recognized that the misclassification of employees as independent contractors "deprive[s] these workers of proper Social Security benefits and other benefits, while reducing the employers' State and federal tax withholdings and related obligations. Moreover, this practice puts businesses that bear higher costs for complying

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[10] Sarah Leberstein, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (2011), available at http://www.nelp.org/page/Justice/2010/IndependentContractorCosts.pdf?nocdn=1

with the law at a competitive disadvantage."[11] See N.J. Stat. Ann. § 34:20-2 (Construction Industry Independent Contractor Act). The Governor has also recognized the same effect resulting from, coincidentally, the misclassification of delivery drivers. See Veto of Gov. Chris Christie, dated Sept. 9, 2013 (despite vetoing delivery driver misclassification statute, Governor Chris Christie acknowledged that "[t]he willful misclassification of workers as independent contractors denies drivers the benefits and protections that come with employee status" and that misclassification "may also place honest businesses at a competitive disadvantage and may serve as a means of avoiding tax obligations").[12,13]

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[11] Law-abiding companies have also recognized that misclassification harms their businesses. In FedEx Home Delivery v. NLRB, the business-friendly Washington Legal Foundation, in an amicus brief filed in support of FedEx, acknowledged that 38 percent of businesses misclassify workers as independent contractors. See Brief of Washington Legal Foundation, United States Business and Industry Council, and Allied Educational Foundation as Amici in Support of FedEx, 2008 WL 4425830 (D.C. Cir. July 9, 2008)(citing Tiffany Fonseca, Collective Bargaining Under the Model of M.B. Sturgis, Inc.: Increasing Legal Protection for the Growing Contingent Workforce, 5 U. Pa. J. Lab. & Emp. L. 167, 174 (2002)). The Washington Legal Foundation added:

> When in doubt about the proper classification, many smaller firms will err in favor of an "employee" classification in order to avoid the potentially ruinous financial penalties they could face if a court later determined that someone classified as an independent contractor was really an employee. Yet, doing so will make it difficult for those firms to compete against firms that decide to take advantage of ambiguities in the law and their competitors' caution by inappropriately classifying employees as independent contractors.

[12] Available at http://www.njleg.state.nj.us/2012/Bills/A2000/1578_V1.PDF

The problem is significant. In New York, for example, misclassification of workers resulted in over $175 million of unpaid unemployment taxes per year.[14] Assuming a similar rate of misclassification in New Jersey, a state with a population

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[13] The Massachusetts Attorney General also acknowledged the harmful effects of misclassification in a 2007 advisory on the Massachusetts Independent Contractor Law, stating:

> Entities that misclassify individuals are in many cases committing insurance fraud and deprive individuals of the many protections and benefits, both public and private, that employees enjoy. Misclassified individuals are often left without unemployment insurance and workers' compensation benefits. In addition, misclassified individuals do not have access to employer-provided health care and may be paid reduced wages or cash as wage payments.
>
> Similarly, entities that misclassify individuals deprive the Commonwealth of tax revenue that the state would otherwise receive from payroll taxes. In addition, as a result of misclassification, the Commonwealth often incurs additional costs, such as providing health care coverage for uninsured workers. Other potential costs for the Commonwealth include providing workers' compensation benefits paid by the Workers' Compensation Trust Fund, and unemployment assistance without employer contribution into the Division of Unemployment Assistance fund, among other indirect costs.
>
> Finally, businesses that properly classify employees and follow all of the relevant statutes regarding employment are likely to be at a distinct competitive disadvantage when vying for the same work, customers or contracts as those businesses that do not play by the rules. Further, by paying the proper taxes and insurance premiums, businesses following the Law are, in effect, subsidizing those businesses that do not. Misclassification undermines fair market competition and negatively impacts the business environment in the Commonwealth.

An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B (available at http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf).

[14] Linda H. Donahue et al., The Cost of Worker Misclassification in New York State 10 (2007), available at http://digitalcommons.ilr.cornell.edu/reports/9/.

nearly half the size of New York, would result in roughly $80 million in unpaid unemployment taxes per year. The NJDOL, meanwhile, audited only two percent of employers in New Jersey in 2005 and found more than 26,000 workers to be misclassified as independent contractors, with an estimated $5 million in unpaid gross income taxes annually.[15]

In light of historic levels of unemployment, and employer schemes to evade paying unemployment taxes, New Jersey's unemployment compensation system has been insolvent for years.[16] In fact, New Jersey borrowed $1.6 billion from the federal government in 2009 and 2010 to help pay unemployment benefits. Id.

Moreover, these statistics do not take into account the loss of the panoply of worker protections that the Legislature has created to protect workers in New Jersey. Permitting such schemes to continue permits the wage standards floor to drop, and costs the states billions of dollars in lost payroll and tax revenue.

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[15] NJDOL Press Release available at http://www.corporateaviators.com/NJ Worker Misclassification Initiative.pdf.

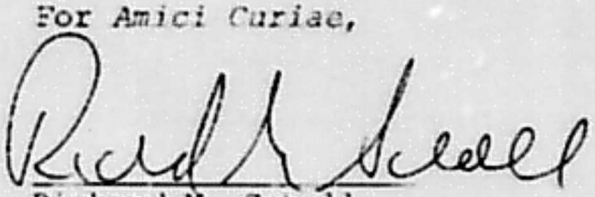
[16] Stacy Jones, Threat of Unemployment Tax Hikes Have Employers Seeing Red, The Star-Ledger, Jan. 23, 2013 at http://www.nj.com/business/index.ssf/2013/01/unemployment_tax_fund_has_empl.html.

CONCLUSION

For the foregoing reasons, in addition to reasons set forth by Plaintiffs, *amici* urge this Court to ensure basic labor protections for workers throughout New Jersey, and clarify that the three-prong test outlined in D'Annunzio should be utilized to determine who is an employee under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law.

Respectfully submitted,

For *Amici Curiae*,



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SUPREME COURT OF NEW JERSEY

SAM HARGROVE, et al.	:	
	:	Docket No.: 072742
Plaintiffs/Appellants,	:	
v.	:	
	:	Civil Action
SLEEPY'S,	:	
Defendant/Appellee.	:	
	:	
	:	

BRIEF OF AMICUS CURIAE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

#41

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INTEREST OF THE AMICUS

The International Brotherhood of Teamsters ("IBT" or "Teamsters") is a national union whose jurisdiction includes many workers who are classified as independent contractors. The Teamsters represent over 60,000 New Jersey workers, many of whom are truck drivers. Teamster members drive local delivery trucks for servicing all industries from construction, warehouse and grocery stores to manufacturing plants in communities throughout New Jersey. New Jersey Teamsters work and drive for such national and international corporations as United Parcel Service, as well as for so-called Mom and Pop entities in New Jersey, and all size enterprises in between. In New Jersey Teamsters work as long-haul drivers, moving freight across country for companies like Yellow Freight and Arkansas Best Freight. Teamster members drive trucks involved in port drayage, hauling containers in and out of the Port of Newark and Elizabeth.

The widespread misclassification of employees, particularly truck drivers, within the State of New Jersey undercuts and threatens the standards contained in the contracts that these members have fought so hard to obtain. Through misclassification, unscrupulous employers obtain an illegal advantage over union companies who play by the rules and comply with the law.

In addition, the Teamsters are actively engaged in organizing truck drivers in multiple industries throughout New Jersey, including drivers at Port Newark and Elizabeth, as well as drivers working in other industries. Misclassification illegally deprives these workers of the right to organize under Federal law, as well as various benefits conferred upon employees by New Jersey statutes. For all these reasons, the IBT has both an informed perspective and a vital interest in how

independent contractors are distinguished from employees under New Jersey law.

QUESTION PRESENTED

This Court has accepted Certification of the following question from the United States Court of Appeal for the Third Circuit: Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq., ("WPL") and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq. ("WHL")?

SUMMARY OF RESPONSE

This Court should adopt the "relative nature of the work" test to determine a plaintiff's employment status under both the WHL and the WPL.

ARGUMENT

THE COURT SHOULD USE THE RELATIVE NATURE OF THE WORK STANDARD TO SUPPLEMENT THE RIGHT OF CONTROL TEST AS THE BASIS FOR DISTINGUISHING EMPLOYEES FROM INDEPENDENT CONTRACTORS UNDER BOTH STATUTES

The traditional common-law test of employee status, revolving around issues of the right to control, was decisively rejected by the Legislature in both the WHL and the WPL. The statutory language focuses upon a far broader concept, whether the putative employer did "suffer or permit to work" the worker who is rendering services to the enterprise. See N.J.S.A 34:11-4.1(b); 34:11-56(a)(1)(f). As both the WHL and the WPL are meant to be comprehensive and protective statutes, the "relative nature of the work" test is properly applied. As developed in the context of the Worker's Compensation Law (WCL), N.J.S.A 34:15-1 *et seq.*, this test looks to two elements: the worker's economic dependence on the work and the integration of the worker into the enterprise. The leading

decisions adopting the relative nature of the work standard as the test to be applied under the WCL, did so in full knowledge, and partially because, the WCL is one of a class of statutes designed to protect those who labor in working relationships. See *Marcus v. Eastern Agricultural Ass'n, Inc.*, 58 N.J. Super. 584, 602 (App. Div. 1959), rev'd, adopting Judge Conford's dissent, 32 N.J. 460 (1960); *Hannigan v. Goldfarb*, 53 N.J. Super. 190, 196 (App. Div. 1958) (the first appellate decision adopting the relative nature of the work test under the WCL). The WPL and the WHL plainly are also constituents of this class of labor-protective legislation as is the WCL. This commonality strongly points to the use of the relative nature of the work standard as the test for coverage i.e. employee status under those statutes.

This Court has applied the relative nature of the work test in contexts beyond the WCL, see *Lowe v. Zarghami*, 158 N.J. 606 (1999) (Tort Claims Act), and it is thus entirely consistent with that precedent to apply the same standard to the WHL and the WPL.

As this Court has instructed in the context of another statute designed to protect employees, the Court should "look to the goals underlying [the statute] and focus not on labels but on the reality of plaintiffs' relationship with the party against whom the [] claim is advanced." See *D'Annunzio v. Prudential Ins. Co. of America*, 192 N.J. 110, 121 (2007) (discussing Conscientious Employee Protection Act ("CEPA"), 34:19-1 *et seq.*). As this Court instructed in the context of another CEPA case, "(t)he categorization of a working relationship depends not on the nominal label adopted by the parties, but rather on its salient features

and the specific context in which the rights and duties that inhere in the relationship are ultimately determined." *Macdougall v. Weichert*, 144 N.J. 380, 388-89 (2006). For this proposition, *Macdougall* cites *Volb v. G.E. Capital Corp.*, 139 N.J. 110 (1995) "determining status as special employee using relationship's salient features" under the WCL, analysis of which amicus now turns.

A. The Application Of The Relative Nature of The Work Test To The WCL In New Jersey

The relative nature of the work test was first employed in this State under the WCL. The WCL does not have a definition of employee versus independent contractor.[1] This Court's leading decision in defining whether a worker is properly considered an employee or an independent contractor under that statute is its adoption of then-Judge Conford's dissent in *Marcus v. Eastern Agricultural Ass'n, Inc.*, 58 N.J. Super. 584, 602 (App. Div. 1959), rev'd, adopting Judge Conford's dissent, 32 N.J. 460 (1960).

Judge Conford explained that the traditional test of right to control is simply inappropriate in many work situations:

> For example, where it is not in the nature of the work for the manner of its performance to be within the hiring party's direct control, the factor of control can obviously not be the critical one in the resolution of the case, but takes its place as only one of the various potential indicia of the relationship which must be balanced and weighed in determining what, under the totality of the circumstances, the character of that

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[1] The WCL does have a definition of "employee" in N.J.S.A 34:15-36. It also carries over from the child labor statutes, discussed *infra*, the use of "suffer or permit to work" in discussing the coverage of minors under the WCL, see N.J.S.A. 34:15-10.

> relationship really is. See *De Monaco v. Renton*, 18 N.J. 352 (1955), at page 357; *Hannigan v. Goldfarb*, 53 N.J. Super. 190, 196 (App. Div. 1958). Thus, the requirement of control is sufficiently met where its extent is commensurate with that degree of supervision which is necessary and appropriate, considering the type of work to be done and the capabilities of the particular person doing it. See *De Monaco v. Renton*, supra (18 N.J., at page 357) (newsboy selling papers on street); *Fitzpatrick v. Haberman*, 16 N.J. Super. 490, 495 (App. Div. 1951) (house painter). Patently, where the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning such details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor status might be equally consistent with an employment relationship. In such a situation the factor of control becomes inconclusive, and reorientation toward a correct legal conclusion must be sought by resort to more realistically significant criteria.

58 N.J.Super. at 597. Making deliveries via truck to customers and locations outside the main terminal or warehouse is very much one of the "type of work [that] requires little supervision for its proper prosecution" such that an experienced driver is able to fulfill the enterprise's needs by him- or herself many miles away from the main location of the enterprise. Indeed, with the increasing use of modern telecommunications, ever-expanding numbers of jobs are moving away from the usually-understood concept of place-specific supervisory control.

With regard to the "more realistically significant criteria" the Judge considered the possibility of utilizing multi-element tests that weigh such factors as who provided the equipment, the manner of payment, benefits provided and the like.[3] As he pointed

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[3] Examples of such tests include the four-factor test adopted by the Third Circuit for use under the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*, in *Hayberger v. Lawrence*

out, "(t)he application to the facts of this case of most of the other (than control) criteria customarily applied educes an inconclusive composite. The alignment of the individual circumstances here presented into pro-employee and pro-independent contractor lists is not particularly helpful -- the mechanical process yields ambivalence more fruitful of debate than answers." 58 N.J.Super. at 600. An "inconclusive composite" which "yields

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County Adult Prob. & Parole, 667 F.3d 408, 418 (3d Cir. 2012)("1) had the power to hire and fire the employee[], (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."); the six-factor test used by the Third Circuit under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*: *Donovan v. Dialamerica Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir.), cert. den., 474 U.S. 919, 106 S. Ct. 246, 88 L. Ed. 2d 255 (1985)("1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business."). In addition the Third Circuit makes clear that the presence or absence of any one factor is not decisive, and that the trial court should not to limit consideration to the enumerated factors, but rather to consider "any relevant evidence". See *Harburger*, 667 F.3d at 418. Additionally, there is the twenty factor test used by Internal Revenue Service, Rev. Rul. 87-41, 1987-1 C.B. 296, and adopted by the Appellate Division for use in connection with this State's public pension statutes. See *Francois v. Board of Trustees*, 415 N.J. Super. 335, 350-51 (App.Div. 2010), and cases cited (consideration of "(1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; (20) right to terminate.").

ambivalence more fruitful of debate than answers" is the all too frequent result of multi-factor tests when applied under various statutes.

Judge Conford went on to explain that such tests were essentially unworkable and incapable of producing coherent results:

> The difficulty with the various tests in relation to the facts just mentioned is not only that they are not conclusive here, but also that they are not cohesive. They are not designed to operate together as a workable or realistic standard by which a given set of facts may be evaluated in the light of the philosophy and purposes of the statute. They may have utility where the inquiry into the work relationship is made in order to determine vicarious liability, tort or contract, as dependent upon agency. But they have less relevance as guides where the inquiry determines the scope of social legislation for the benefit of workers in business and industry. Effectuation of the policy of statutes in that category requires that their use of the term "employee" not be accorded a constrictive and mechanical definition but rather one geared to comport with the specific statutory purpose. *Hannigan v. Goldfarb*, supra (53 N.J. Super., at pages 194-195); *Westover v. Stockholders Publishing Company*, 237 F.2d 948, 951 (9 Cir. 1956) (construing the Federal Unemployment Tax Act, 26 U.S.C. (I.R.C. 1939) § 1600 et seq.); *United States v. Silk*, 331 U.S. 704, 711-712, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947) (construing the Social Security Act, 42 U.S.C.A. § 301 et seq.); Larson (op. cit., supra, at § 43.42, p. 630). Note the unified approach to cognate social service legislation in this field manifested by Chief Justice Vanderbilt in *De Monaco v. Renton*, supra (18 N.J., at pages 356, 357). Moreover, since these tests are subject to manipulation by a prospective employer, reliance thereon must be guarded. Larson (op. cit., supra, § 45.10, pp. 657-8), quoted with approval in *Hannigan*, supra (53 N.J. Super., at pages 205-206).

58 N.J.Super. at 602. As is plain from the nature of these enactments, and as emphasized by the Legislative history, the WPL and WHL are "social legislation for the benefit of workers in business and industry" of a character similar to the WCL. Id. at 602. *Marcus* soundly counsels that such multi-factor tests "have

less relevance,", id., in providing a test of the scope of coverage in remedial legislation for the benefit of workers like the WPL and WHL.

Two points from the above excerpt are worthy of further comment. First, the Court's approval of a "unified approach to cognate social service legislation in this field," id., merits this Court's consideration. Having established the relative-nature-of-the-work test for purposes of the WCL, it is commendable for many reasons to apply the same test to "cognate social service legislation" like the WPL and WHL. Id. Second, as Judge Conford rightly notes, many of the factors employed in the various multi-factor tests are inherently within the control of the enterprise, and hence "subject to manipulation by a prospective employer". To pick just one example, the enterprise generally unilaterally determines whether to record the worker's earnings for tax purposes on a Form 1099 or a Form W-2. The financial incentive to record the earnings on the Form 1099 is obviously strong - by doing so, enterprise is able to shift to the worker its half of the Federal FICA and Medicare tax burden. Given the inherent inequity in the bargaining power between the enterprise and the worker, these are numerous factors "subject to manipulation by a prospective employer" counsel strongly against the use of a multi-factor test.

In *Hannigan*, the Appellate Division expanded on the foregoing point:

> With the advent of social and labor legislation * * * drawing a distinction between independent contractors and employees, there has been an increasing effort on the part of employers to avoid both the financial cost and

> the bookkeeping and reporting inconvenience that goes with workmen's compensation, unemployment compensation, social security and the like * * * these arrangements are often carefully drawn with an eye to the 'control' test, and since employers are in fact sometimes willing actually to relinquish a considerable degree of control, it becomes very difficult to deal with these contracting-out cases with the old test. There is therefore beginning to be evinced in the decisions a sort of unexpressed conviction that if the proper scope of workmen's compensation and other remedial enactments is not to be defeated, a different criterion based on the realistic nature of the work must be given more weight.

53 N.J. Super at 205-206. The Teamsters have substantial experience that such is very much the case in the trucking industry, particularly in the Port. Thus, if the "proper scope" of "remedial enactments" like the WCL. WPL and WHL is "not to be defeated", criteria for coverage "based on the realistic nature of the work" must be utilized. Id.

In *Marcus*, Judge Conford concluded by setting forth the proper approach to developing an appropriate test:

> In a case like this we must seek more pervasive and fundamentally relevant guideposts in implementation of the statutory objective. The purpose of workmen's compensation legislation, says Larson (op. cit., supra, § 43.51, p. 632), "* * * is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any workers whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the area of intended protection." And see *Tocci v. Tessler & Weiss, Inc.*, 28 N.J. 582, 586 (1959). The test in the type of case before us here must, therefore, be essentially an economic and functional one, and the determinative criteria not the inconclusive details of the arrangement between the parties, but rather the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.

58 N.J.Super. at 603. Thus, it is entirely clear that the "the rule [is] that courts must "implement the legislative policy of affording coverage to as many workers possible." See *Brunell v. Wildwood Crest Police Dep't*, 176 N.J. 225, 247 (2003), citing *Lindquist v. City of Jersey City Fire Dep't*, 175 N.J. 244, 258 (2003). The relative nature of the work test is vital to provide the very broad coverage, extending well beyond the common law notion of employees, that is necessary to implement the legislative policies animating the WCL, and other worker-protective statutes.

As this Court explained in *Caicco v. Toto Bros., Inc.*, 62 N.J. 305, 310 (1974), the relative nature of the work test is particularly applicable in the field of trucking. As this Court explained:

> The hauling of materials performed through decedent's labor was a cog in the wheel of respondent's operation as a subcontractor of Zimmerman in as realistic a sense as the hauling being done by respondent's regular employees. Decedent had made himself substantially dependent on respondent, economically, during the period in question. The fact that he sought work from others during slack periods with respondent does not derogate from that fact. Nor does the circumstance that he maintained the superficial trappings of an independent businessman so long as substantial economic dependence on respondent and functional integration of operations persisted.

62 N.J. at 310. As "the hauling being done" rendered the trucker a "cog in the wheel of" the putative employer's "operation" such the trucker was "substantially dependent . . . economically" on the putative employer, the relative nature of the work standard was

made out. Under similar circumstances, the WHL and the WPL should also apply.

This Court returned to the proper characterization of truck drivers who leased their vehicles in *Tofani v. Lo Biondo Bros. Motor Express, Inc.*, 83 N.J. Super. 480 (App.Div.), aff'd o.b. 43 N.J. 494 (1964). After reviewing the trial court's findings, the Court held:

> It is readily to be conceded that some aspects of the lease agreement, if considered in isolation, point to a relationship of independent contractor. But the lease does not purport necessarily to fix the nature of the relationship between such drivers as the lessor may provide under the lease agreement and the lessee. Here Tofani not only leased the use of his manned tractor to LoBiondo, but personally undertook the sole operation of that tractor on a regular and continuing basis, thereby becoming a working cog in the conduct of LoBiondo's regular business. His factual status in that regard stands separate from and independent of his status as the lessor of a piece of equipment. In the latter regard he was a businessman -- a renter of equipment; in the former, a workman. If under its policy and social philosophy the workmen's compensation act assimilates his status as a workman to the relationship of employment with LoBiondo, his entrepreneurial character as renter will not derogate therefrom. We find this to be the case here.
>
> For the period of time he placed himself under engagement to LoBiondo, Tofani was economically dependent on LoBiondo; he was not conducting a separate and independent business, at least during that period; and his work constituted an integral part of the regular and continuous functioning of the LoBiondo trucking enterprise. The "relative nature of the work test" for determination of the employment relationship for purposes of workmen's compensation is therefore here met . . .

83 N.J.Super. at 493. One need only add that the verbiage of the lease agreement should not distract the Court from the status of

the trucker as a workman who has become a "working cog in the conduct of [the employer's] regular business."

The contemporary understanding is that there are two, alternative tests to demonstrate whether a worker is an employee or an independent contractor for purposes of the WCL: the control test or the relative nature of the work test. See *Re/Max of N.J. v. Wausau Ins. Cos.*, 162 N.J. 282, 286 (1986)(approving the trial court's use of both tests). The statutory policies that underlie the WHL and the WPL similarly compel the conclusion that the "test in the type of case before us here must, therefore, be essentially an economic and functional one, and the determinative criteria not the inconclusive details of the arrangement between the parties, but rather the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business." *Marcus*, 58 N.J.Super. at 603.

B. Background - The Legislature's Repeated Efforts To Regulate Payment of Wages and Hours Before Passage of the WPL and WHL And The Recognized Need For Comprehensive Coverage

Prior to the passage of the WPL and the WHL in 1965 and 1966 respectively, the Legislature had engaged in numerous efforts to provide full and timely payment of wages, regulate hours and set minimum wages. The Legislature's attempt to require timely and full payment of wages, the subject of the WPL, goes back at least one hundred and fifty-seven years. See L.1856, c. 104, the

antecedent of the current N.J.S.A. 34:11-31. These efforts continued throughout the last quarter of the Nineteenth Century and the early part of the Twentieth, with enactments including L.1877, c.147, requiring that work be remunerated in "lawful money" of the United States; L.1880, c. 198, barring certain industries from paying the wages of "workmen or employees" in "store goods" or other forms of non-ready money; L.1881 c. 72, giving "mechanics, workmen and laborers employed" a preferential lien for "such unpaid wages due them" on the goods etc. of the "producer of any manufactured articles"; L.1881, c.190, barring the "withholding the payment wages longer than the usual time of payment" to control the employees or laborers to use the company store; L.1884, c. 146, barring the assignment of any "pay or wages" of "any laborer or employee"; L. 1891, barring a business's diverting any wages to a fund for sickness or disability; L.1895, c. 142, barring a forfeiture of earnings for a worker's failing to give notice of leaving; L.1896, c. 27, amending the 1856 statute to increase the amount of unpaid wages subject to a preferential lien to two months; L. 1899, c.38, requiring payment of wages to those "engaged" in a business no less frequently than every two weeks; L.1909, c. 59, requiring the prompt payment of unpaid wages of a deceased worker; L. 1926, c. 156, again requiring semiweekly payments to employees "engaged" in a business, as do L.1929, c. 235, and L.1932, c.249. Further, in L. 1934, c. 91, the

Legislature created the Wage Collection Division as an administrative alternative to judicial proceedings. These enactments, particularly the repeated use of "engaged" to describe the relationship of the worker to the enterprise is indicative of the Legislature's understanding that prompt and full payment, without improper deductions or holdbacks, was required of enterprises for those to workers.

The Legislature's efforts to regulate hours and provide a minimum wage began in the early part of the Twentieth Century with the passage of the Factory Act of 1904, L.1904, c. 216 which aimed to regulate child labor. That statute stated in Section 1:" No child under the age of fourteen years shall be employed, allowed or permitted to work in any factory, workshop, mill or place where the manufacture of goods of any kind is carried on; any corporation, firm, individual, parent or guardian of any child who shall violate any of the provisions of this section shall be liable to a penalty of $50 for each offence." _Emphasizing the deliberateness of the chosen language, in Section 8 of the Act, the phrase utilized is "employing, allowing or permitting to work" and in Section 9 of the Act, it is "employed, permitted or allowed to work. There would appear to be no significance to the ordering of "allow" versus "permit".[3]

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[3] Interestingly, Section 27 of the 1904 Factory Act is strikingly similar to the provision of the 1895 statute barring the forfeiture of earnings for failing to give notice.

The scope of this statutory language as used in Section 1 of the Factory Act is described in *Hetzel v. Wasson Piston Ring Co.*, 89 N.J.L. 201, 203 (E & A. 1914):

> Its primary object is the protection of children who are too young to appreciate the dangers arising out of work in places such as those described in the act. And in order to make that protection complete the legislature left no loophole for the escape from its provisions of either the employer or the parent. It says to the employer, "You shall not employ any chi[illegible]nder the age of fourteen years in your factory; you sha[illegible]ot allow or permit him to work there." It says to the parent of such a child, "You shall not allow or permit your boy or girl to work in such a place until he or she has reached the age of fourteen years."

As this State's then highest Court made clear, the statutory language of "employed, allowed or permitted to work" in the Factory Act was utilized by the Legislature "In order to make the protection [of the statute] complete" such that there is "left no loophole for the escape from its provisions" by the employing enterprise. Id.; accord *Feir v. Weil And Whitehead*, 92 N.J.L. 610, 614 (E & A. 1919).

In the following years, the Legislature had repeated recourse to this statutory language. The 1910 Amendment to the 1904 Factory Act, L. 1910, c. 277, uses the phrase "employed permitted or allowed to work" three times. The 1911 statute regulating child labor uses the phrase "employ, allow or permit to work", or its grammatical variant, four times. A 1912 statute regulating women's work in bakeries and other mercantile establishment, L.1912, c. 216, covers women "employed, allowed or permitted to

work." L. 1914, c. 60, covered children "employed, allowed or permitted to work" in the printing trades. Later that year, in L.1914, c. 236, the Legislature used the identical phrase to cover children working in factories. Still later that year, L. 1914, c. 252, generally covering child labor, the Legislature used "employed, allowed or permitted to work" five times, as well as an additional grammatical variant. The final enactment of 1914 on the subject, L. 1914, c. 253, uses the formulation five times. "Employed, permitted or allowed to work" occurs three times, as well as two additional grammatical variants, in the 1918 amendments covering child labor, L. 1918, c. 204. The following year, "employed, permitted or allowed to work" is used three times in the 1919 amendments to the Factory Act, L. 1919, c. 36, and three times in additional amendments concerning child labor, L.1919, c.37. In 1921, the Legislature amended its 1912 statute concerning women's labor to cover female "employed, allowed or permitted to work. . . ." L.1921, c. 194. Returning to child labor, the 1923 amendments to the Factory Act contain three iterations of "employ, allow or permit to work." L. 1923, c. 80.[4] In sum, the Legislature had

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[4] For the sake of completeness, the Court should be aware that in the 1933 amendments to the 1904 Factory Act, L. 1933, c. 265, the Legislature covered youth "hired, employed, or permitted to work," directing he Commissioner of the NJ Department of Labor ("Commissioner") to define harmful trades. In 1937, the Legislature used the phrase "employed or permitted to work" in amending the 1912 statute covering women's labor. L. 1937, c. 113.

used the phrase "employ, allow or permit to work" on multiple occasions following the State's highest Court's pronouncement, subsequently reiterated, "in order to make the protection [of the statute] complete" such that there is "left no loophole for the escape from its provisions" by the employing enterprise. *Hetzel*, supra, 89 N.J.L. at 203; *Feir*, supra, 92 N.J.L. at 614. These repeated re-enactments make plain that the Legislature understood that its use of this phrase accords with this judicial interpretation, an interpretation of which it approved. As this Court has multiply stated, the construction of a statute by courts "supported by long acquiescence on the part of Legislature, or by continued use of same language . . . is evidence that such construction is in accordance with the legislative intent." *Department of Children & Families, Div. of Youth & Family Servs. v. T.B.*, 207 N.J. 294, 307 (2011)(additional citations omitted).

The first Legislative use of the phrase "permitted or suffered to work" occurs in the 1905 amendment to the previous year's Factory Act, L. 1905, c. 102, in Section 2, which states that "[n]o employe (sic) shall be required, permitted or suffered to work in any bakery more than sixty hours. . . ." The same statute also states in Section 9 that "[n]o person under the age of eighteen years shall be employed, allowed, permitted or required to work" during evening and night hours. Per the 1912 re-enactment of the statute to regulate child labor, L. 1912, c. 127, "no person under

the age of sixteen of sixteen years shall be employed or allowed or permitted or required to work" evening or night hours. The very same sentence continues "no employe (sic) in any such place shall be required, permitted or suffered to work" more than sixty hours per week or ten hours per day. The phrase "employed, suffered or permitted to work" is used twice in L. 1914, c. 225, along with the multiple uses of "employ, permit or allow to work" mentioned above. See *Lesko v. Liondale Bleach Dye & Print Works*, 93 N.J.L. 4, 4 (Sup. Ct. 1919). Similarly, in L.1923, c. 80, the Legislature twice used "employed, permitted or suffered to work" along with other uses of "employ, allowed or permit to work." In L. 1932, c. 55, the Legislature twice stated that minors under the age of sixteen must not be "employed, permitted or suffered to work" in various occupations. The following year, in L. 1933, c. 265, the Legislature twice proscribed any "minor under the age of sixteen [who] shall be employed, permitted or suffered to work" in certain occupations.

In *E. Heller & Bros., Inc. v. Dillon*, 96 N.J. Eq. 334, 336 (E & A 1924), the State's then-highest Court specifically adverted to the "suffer or permit" language, and stated "the statute was passed by the legislature in the exercise of its police power, primarily for the protection of child life, as being beneficial to the state." The Court went on to explain: "The mandate of the statute is that no minor under the age of sixteen years shall be employed,

permitted or suffered to work at laundering machinery. There is no middle ground. The prohibition is absolute. The courts must enforce the provisions of the statute as written." As with *Fert* and *Hetzel*, *S.Heller* makes clear that the "suffer or permit" language "left no loophole for the escape from its provisions" by the employing enterprise.

The Factory Act was the precursor to the Child Labor Law, which was enacted in 1940. *See Gabin v. Skyline Cabana Club*, 54 N.J. 550, 557 (1969). In its present form, the Child Labor Law states "No minor under 16 years of age shall be employed, permitted or suffered to work in, about, or in connection with power-driven machinery. No minor under 18 years of age shall be employed, permitted or suffered to work in, about, or in connection with the following." N.J.S.A. 34:2-21.17. *Gabin* holds that the "broad scope" of this language covers two basic policies: the elimination of economic exploitation and the protection of the individual worker. 54 N.J. at 554, 557, and that they covered the situation in which the minor was receiving no compensation for the work performed. Those policies have been plainly carried over to the WHL and the WPL.

The Court should also be aware of the Minimum Wage Law, L.1933, c. 152, which provided for a system of wage boards to set minimum wages for women and minors. As the Legislature stated in its preface, that underpayment of wages, because of a lack "of

equality in bargaining with their employers in regard to minimum fair wage standards [rendered] 'freedom of contract' as applied to their relations with their employers [] illusory." Cf. *Winslow v. Corporate Exp., Inc.*, 364 N.J. Super. 128, 137 (App.Div. 2003) ("in view of the general inequality of bargaining position between employers and employees, it may be assumed that most employment agreements which violate the Wage Payment Law are "agreements" in name only, and in reality involve terms the employer imposes upon the employees.") Noting that the underpayment of compensation "is a matter of grave and vital public concern," the Legislature continued that "(i)n the absence of any effective minimum fair wage rates . . . the . . . lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry." The wage board system was created to remedy these evils with regard to the work of minors and women. As will be seen, and over the objections of industry, it was re-enacted in the WHL, this time covering not just women and minors, but all those who work.

Legislative use of the "suffer or permit to work" standard continued in the 1950s. Thus by L.1952, c. 9, the Legislature banned sex discrimination in pay, and defined "employ" as including "to suffer or permit to work", precisely the same definition as used in the WHL. See N.J.S.A. 34:11-56.1(c).

At least two more instances of the Legislative use of the phrase in Title 34 occurred in the 1960s. By L.1962, c. 45, the Legislature passed the Construction Safety Act, which defines an employee to mean "any person suffered or permitted to work", and a "place of employment as "any place in or about which an employee is suffered or permitted to work". See N.J.S.A. 34:5-167(g) and (i). 34:5A-34, 34:6-98.6(n) Contemporaneous with the WHL, in the Worker Safety and Health Act, L. 1965, c. 154, employee is defined as "any person engaged in service to an employer for wages, salary or other compensation; " employer is similarly defined as any person or entity that "engages the services of an employee" and defines a "place of employment" as "any building or other premises occupied by an employer in or about which an employee customarily is suffered or permitted to work." N.J.S.A. 34:6A-2 (g), (h) and (j). The substance of the statute is provided in the next section: "Every employer shall furnish a place of employment which shall be reasonably safe and healthful for employees. " N.J.S.A. 34:6A-3. The policy of providing the broad coverage for these remedial, humanitarian is clear.

As indicated, prior to 1965, the Legislature has had frequent recourse to both "employed, allowed or permitted to work" and "employed, suffered or permitted to work." The difference between "allowed" and "suffered" in this context is best explained as the former's involving the enterprise's knowledge of the activity at

issue, and the latter not requiring any such knowledge. As this Court explained in the context of alcoholic beverage regulation:

> Moreover, the fundamental argument advanced by respondent--that, despite its best efforts, it could not have stopped what it did not know was occurring--is legally unavailing. Respondent was charged with "allowing, permitting or suffering" the illegal sale of cocaine in or upon the licensed premises. At least in respect of respondent having "suffered" these illegal acts, respondent's knowledge or preventative efforts are irrelevant. It has long been the law in New Jersey that, in the context of the regulation of alcoholic beverages, the word 'suffer' . . . imposes responsibility on a licensee, regardless of knowledge, where there is a failure to prevent the prohibited conduct by those occupying the premises with his authority.

Division of Alcoholic Beverage Control v. Maynards, Inc., 192 N.J. 158, 180 (2007)(citations and internal quotations omitted). The Legislature's repeated utilization of "suffer or permit to work" in the context of labor legislation requires a similar conclusion.

The policies animating the numerous enactments on hours and minimum wages was to provide a minimum amount of economic protection to workers and to limit the amount of economic exploitation so that there was fairer competition among competing enterprises. To achieve this goal, comprehensive coverage of the affected enterprises was necessary. It is thus plain that well before the enactment of the Federal Fair Labor Standards Act in 1938, the Legislature was thoroughly conversant with language the "broad scope" of the language of "employ suffer or permit to work" or "employ, allow or permit to work."

The Court should further note that the Legislature has, subsequent to the passage of the WPL and the WHL, continued to enact worker-protective statutes that use "suffer or permit to work" as part of the statutory definitions of the relationships covered by these remedial statutes. See N.J.S.A. 34:11B-3d (Family Leave Act)("d. "Employ" means to suffer or permit to work for compensation, and includes ongoing, contractual relationships in which the employer retains substantial direct or indirect control over the employee's employment opportunities or terms and conditions of employment.")

Thus, it may be seen that the Legislature has continued to used the "suffer or permit to work" standard in a wide variety of remedial statutes designed to protect those who labor. The language has been construed by the Courts, including in the alcoholic beverage context, see infra, as indicating a Legislative intent to focus on whether the activity in question benefits the enterprise at a time when the worker is economically dependent on that enterprise. "[T]he construction of a statute by the courts, supported by long acquiescence on the part of the legislature or by continued use of the same language or failure to amend the statute, is evidence that such construction is in accord with the legislative intent." *Smith v. Fireworks by Girone*, Inc., 180 N.J. 199, 215 (2004)(citations omitted). In sum, the Legislature's continued use of "suffer or permit to work" language in defining

the relationship of those who labor to the enterprise should strongly point this Court toward a consistent, broad construction, and the use of the relative nature of the work test.

C. The Construction of Similar "Suffer Or Permit" Language In The Regulation of Alcoholic Beverages Reaches Many So-Called Independent Contractors

This State's Alcoholic Beverage and Control regulations have often used phrases like "suffer or permit to work" at the licensee's premises. The phrase has been consistently interpreted to reach those in a traditional independent contractor relationship.

Thus, as of November, 1940, the regulations governing the service of alcoholic beverages have included a provision to the effect that no "licensee shall allow, permit or suffer any female employed on the licensed premises to accept any food or beverage, alcoholic or otherwise, at the expense of or as a gift from any customer or patron." See *Kravis v. Hock*, 137 N.J.L. 252, 255 (E & A. 1948). At issue in *Kravis* were "certain females who had been secured by the petitioner through the services of a New York theatrical agency and who had appeared in a show running on the petitioner's premises during the month of November, 1947," who had accepted drinks and gifts. 137 N.J. Eq. at 254. The licensee "contends that her conviction should be reversed on the ground that the female entertainers, allegedly treated to drinks, were not employees of the licensee; that they were 'independent

contractors,' having been furnished through a theatrical agency in New York." Id. The Court of Errors and Appeals rejected "this argument [a]s besides the point and specious." Id. Our State's then-highest Court accepted as fair the Commissioner's interpretation that the quoted language was meant "' to embrace "all persons whose services are utilized in furtherance of the licensed business notwithstanding the absence of a technical employer-employee relationship."

The Appellate Division subsequently considered whether a regulation which stated that "No licensee shall * * * allow, permit or suffer any actually or apparently intoxicated person to work in any capacity in or upon the licensed premises" covered independent contractors in *Freud v. Davis*, 64 N.J. Super. 242 (App.Div. 1960). Davis was admittedly not an employee of the licensee, but played his drums there regularly. The Court held that because Davis was "permitted to play in furtherance of appellants' business," he was engaged in work for the tavern which was chargeable with his actions. Id. at 249.

In sum, if the activity is in furtherance of the business of the enterprise, the decisions have consistently construed "suffer or permit" in this context as reaching many so-called independent contractors. The Legislature must be presumed to be aware of this construction, and by enacting it in the WHL and the WPL to have approved of it, as it is settled that "(i)n construing a statute it

is to be assumed that the Legislature is thoroughly conversant with its own legislation and the judicial construction placed thereon." *Barringer v. Miele*, 6 N.J. 139, 144 (1951). Hence, when the Legislature used the "suffer or permit to work" standard to define employment in the WPL and WHL, it must be concluded that it meant to reach many workers denominated as "independent contractors" whose labor furthers the business of the enterprise.

It should be noted that there has been no retreat from this interpretation in more recent decisions. Citing *Kravis* and *Freud*, the Appellate Division has rejected a claim that an independent contractor could not be "employed" by the licensee. See *G. & J.K. Enterprises, Inc. v. Division of Alcoholic Beverage Control*, 205 N.J. Super. 77 (App.Div. 1985), certif. den. *IMO G. & J.K. Enterprises, Inc., t/a the Rendezvous Lounge v. Division of Alcoholic Beverage Control*, 102 N.J. 397 (1986). *G & J.K. Ent.* considered the appellant's having been found to have violated N.J.A.C. 13:2-23.13(a)(3) which states in pertinent part: "No licensee shall conduct the licensed business unless . . . A list, in form prescribed by the Director of the Division of Alcoholic Beverage Control, containing the names and addresses of, and required information with respect to, all persons currently employed on retail licensed premises, is kept on the licensed premises." The licensee argued "that the dancers were not "employees" within the meaning of the regulation requiring

maintenance of a list of persons currently employed on the retail premises, but rather were "independent contractors."" 205 N.J. Super. at 86. In rejecting the licensee's characterization, the Appellate Division stated: "A licensee may not avoid responsibility for acts performed by persons entertaining the patrons of a licensed premises by attempting to categorize them as either independent contractors or even casual performers. Here the dancers were working in furtherance of the licensed premises. " Id., see also *NJ Division of Alcoholic Beverage Control V. S B Lazarus, Inc., T/A Sensations Sports Bar and Restaurant*, OAL Dkt. No.. ABC 2309-07, Agency Dkt. No. S-06-32782; H-2006-7803, 2008 N.J. AGEN LEXIS 342 (Office of Administrative Law, June 2, 2008) (holding "the female dancers providing entertainment on Sensations' licensed premises were employees of Sensations, whether they were hired by the licensee directly or contracted through an outside service"), slip op. at 41-42.

For the sake of completeness, amicus will review the Legislature's other uses of "suffer or permit" language. Such language has been used in connection with animal cruelty and crimes legislation, N.J.S.A. 4:22-24 and N.J.S.A. 4:22-26 as well as with regards to conduct at cemeteries, N.J.SA. 45:7-65.1 (stating "no person shall serve, or permit or suffer to be served" any food or refreshment) and N.J.S.A. 26:6-41 (holding criminally responsible anyone who "knowingly permits or suffers" a violation of the

Cemetery Law. Similarly, in N.J.S.A. 13:9-23, one "who shall permit or suffer" litter to accumulate is deemed "to have created an extraordinary fire hazard . . . , and to have made and maintained a public nuisance." In each of these instances, the language is clearly being employed to reach beyond a traditional contract relationship.[5]

D. The Contemporaneous Understanding of "Suffer or Permit to Work" In Other Jurisdictions

By the time the WPL and the WCL were enacted, New Jersey was hardly unique in enacting labor legislation that contained a definition that used some variant on "suffer or permit to work". As one study noted, "By 1907, fourteen states already had on the

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[5] This phrasing has frequently been employed by the Legislature in granting the power to various authorities to covenant against allowing any lien or other use of revenues in their issuance of bonds viz. N.J.S.A 5:10-11(d)(NJ Sports and Exposition Authority); N.J.S.A. 5:12-162.1(j)(2) and 5:12-173.7(b)(Casino Reinvestment Development Authority); N.J.S.A 12:11A-12(a)(ii)(South Jersey Port Corporation); N.J.S.A. 13:8C-8(c)(Garden State Preservation Trust); N.J.S.A. 13:17-23(a) (Hackensack Meadowlands Development Commission); N.J.S.A 27:1B-10(c)(NJ Transportation Trust Fund); N.J.S.A. 27:25A-15(b)(South Jersey Transportation Authority); N.J.S.A. 40:11A-12(c)(municipal Parking Authorities); N.J.S.A. 40:37A-119(b)(County Improvement Authorities); N.J.S.A. 40:37D-10(d)(County Food Distribution Authorities); 52:18A-66(g)(iii)(State Building Authority); N.J.S.A. 52:18A-78.15(b)(NJ Building Authority); 52:27H-41.2(b)(Atlantic City Convention Authority); 55:14K-21(a)(New Jersey Mortgage and Finance Authority); 58:1B-10(d)(New Jersey Water Supply Authority). To similar effect is N.J.S.A. 52:27D-484(c) concerning the power of District Agents to secure payment. While the Legislative purpose is clearly to allow for the broadest possible authority to insert such covenants into public bonds, it would not appear that this frequent usage is not otherwise pertinent to the issue at hand.

books child labor laws containing the 'permit or suffer to work' standard . . .In addition, many states used the 'permit' standard in their child or women's or other protective labor laws . . .By World War I, several more states had adopted the 'employed, permitted or suffered to work' standard." Goldstein, B; Linder, M; Norton II, L. E. and Ruckelshaus, C.K., "Enforcing Fair Labor Standard in the Modern American Sweatshop; Rediscovering the Statutory Definition of Employment," 46 U.C.L.A. L. Rev. 983, 1036-1037 (April 1999)(citations and footnotes omitted).

The decisions under these contemporaneous statutes make clear that so-called independent contractors who were economically dependent on the enterprise and whose work advanced the business of the enterprise were covered by the "suffer or permit to work" standard. Thus, for example, the Supreme Court of Montana held:

> Under our statute and those of similar import, it is held that the fact that the boy was employed by, and working for, an independent contractor is immaterial; it is the fact that a child under the forbidden age is permitted to perform services or labor in a dangerous place which gives rise to liability or prosecution, and not the fact of hiring.

Daly v. Swift & Co., 90 Mont. 52, 300 P. 265, 268 (Mont. 1931). To similar effect is *Commonwealth v. Hong*, 158 N.E 759 (Mass. 1927); *Nichol's v. Swift's Bakery*, 116 So. 638 (1929); *Waldron v. Garland Pocahontas Coal Co.*, 89 W. Va. 426, 109 S.E. 729, 733-34 (1921); *Ivey v. Railway Fuel Co.*, 211 Ala. 10., 99 So. 177 (1924);

Milwaukee News Co. v. Industrial Com., 224 Wis. 130, 271 N.W. 78 (1937).

In addition, the U.S. Congress passed the Fair Labor Standards Act in 1938 which defines "employ" to include "to suffer or permit to work." 29 U.S.C. § 203(g). As the U.S. Supreme Court explained: "The definition of "employ" is broad. It evidently derives from the child labor statutes . . . " *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947); *accord Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325, 326, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992). The U.S. Supreme Court had previously explained that the FLSA's use of "suffer or permit to work" in defining the relationships covered is "comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category." See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152, 67 S. Ct. 639, 91 L. Ed. 809 (1947). *Rutherford Food* goes on to explain:

> We conclude, however, that these meat boners are not independent contractors. We agree with the Circuit Court of Appeals, quoted above, in its characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an "independent contractor" label does not take the worker from the protection of the Act.

331 U.S. at 729. In sum, at the time of the enactment of the WPL and the WHL, the integration of the work with the enterprise's

business together with the economic dependence of the worker thereon was widely deemed sufficient to bring the activity within employment defined on the basis of "suffer or permit to work." In adopting the "suffer or permit to work" standard in both the WPL and the WHL, the Legislature must be presumed familiar with these judicial interpretations.

E. The Legislative History of the WPL and the WHL Embody Legislative Policies That Properly Tie Their Application To The Labor Of Anyone Who Benefits The Enterprise

The legislative history of the WPL is scanty. Although there were numerous bills introduced on the subject in 1964 and 1965, the bill that was eventually enacted was introduced on March 22, 1965, denominated A. 620 by Assemblymember McDermott and eight others. There was no statement accompanying the bill. The fiscal analysis a week later indicates it "revises the laws governing the payment of employees wages and is designed to modernize the procedures with current payroll practices." As originally introduced, the bill defined employee as meaning "any person hired by or on behalf of an employer . . ." That definition was amended in committee to delete "hired by or on behalf of" and to substitute "suffered or permitted to work by" an employer. The bill as thus amended was passed by both chambers and signed into law. The WPL thus represented an updating of more than a century of Legislative efforts to assure that those whose labor furthered the enterprise's business would be promptly paid without inappropriate deductions or holdbacks. Its

deliberate use of "suffered or permitted to work" in the definitional language indicates its determination to assure a "broad scope", *Gabin*, of the statute's reach.

The WPL has been recognized as one of the "statutes enacted to protect employees from wrongful conduct by employers." *Winslow*, 364 N.J.Super. at 137. Thus, the Appellate Division has held that the WPL is one of the "types of laws [that] have been liberally construed in order to fulfill their 'humanitarian and remedial' purposes." *Kas Oriental Rugs, Inc. v. Ellman*, 407 N.J. Super. 538, 564 (App.Div. 2009). The model in both instances is the WPL.

In addition, the Appellate Division has explained, in a decision largely adopted by this Court:

> Although the Wage law does not include a legislative statement of intent, its enactment leads to the conclusion that the statute was designed to protect employees' wages and to guarantee receipt of the fruits of their labor. Generally, unless expressly provided by the Wage law, employers may not withhold or divert any portion of an employee's wages.

Rosen v. Smith Barney, Inc., 393 N.J. Super. 578, 585 (App.Div. 2007), aff'd 195 N.J. 423 (2008). The policy of protecting wages and guaranteeing receipt by those who work of the fruits of their labor invokes both the economic dependence and advancing the enterprise that constitute the elements of the relative nature of the work test.

The history of the WHL begins with Governor Richard Hughes Fourth Annual Message to the Legislature, in which he states:

> I believe we must now make a maximum joint effort to right economic wrongs wherever they exist . . .
>
> First and foremost New Jersey must grow up in the next hundred days as a modern, industrial state by establishing for the first time in our history a comprehensive Minimum Wage Law for all workingmen and women, with the fewest exceptions possible. We must also include a provision in such a law for higher or lower minimums in particular industries under separate wage board agreements where special economic conditions exist. Such a minimum wage must be a realistic one at least equal initially to the Federal minimum of $1.25, moving toward $1.50 an hour over a period of the next four years. Such a minimum wage must cover every concentration of low-wage marginal employment such as agricultural workers, hospital and nursing home workers, hotel and retail employees, and others. For these have been the people left behind in great measure by the upward march of the affluent Great Society. And it is to these workers, above all, that we owe *economic justice*. . . .
>
> A rich State such as New Jersey can no longer tolerate the poverty wage levels of marginal business or industry.

Fourth Annual Message, January 11, 1966, at p. 24.[6] Gov. Hughes followed this up with a "Special Message on Labor and Economic Development" on May 9, 1966 in which he stated:

> A specific proposal has been developed for a comprehensive minimum wage act - the first in this State's history - to give long overdue minimum hourly wage coverage to those 100,000 employees not now covered by any minimum wage provision or order. This bill calls

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[6] Gov. Hughes noted that the purpose was to bring workers up to the Federal poverty line of $3,000, and further noted that Congress was contemporaneously considering an increase in the Federal minimum wage. It is of interest to note that one of the ten demands of the 1963 March on Washington was "A national minimum wage act that will give all Americans a decent standard of living." See http://www.crmvet.org/docs/mowrg2.pdf, p. 4 (last visited September 20, 2013).

> for the establishment - within 180 days of its enactment - of an hourly minimum wage of $1.25, which will rise to $1.40 on January 1, 1968 and $1.50 on January 1, 1969. All workingmen and women with the exception of domestic employees and persons under 18 are covered by the statutory rate and even those two groups could be covered wage board action where necessary.

P. 3-4. The major proponent of the legislation made clear that it was meant to provide universal coverage for all those who work except in the specified categories of domestic and youth employment.

The very same day of May 9, 1966, the bill that became the WHL was introduced as S.391 by Senator Keegan. On May 31, 1966, the Senate amended the bill to except farm, hotel, passenger motor bus and livestock raising from the bill's requirement of premium pay for hours worked in excess of 40 during a week. With that amendment, the bill passed the Senate a week later; was passed by the Assembly on June 13, 1966, and signed into law on June 17, 1966.

As the Appellate Division stated, in an opinion largely accepted by this Court:

> The State of New Jersey has established a minimum wage level to "safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition. . . ." N.J.S.A. 34:11-56a. To this end, this State requires that "[e]very employer shall pay to each of his employees wages . . . for 40 hours of working time in any week and 1 ½ times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week. . . ." N.J.S.A. 34:11-56a4. (The statute has numerous exceptions which are not germane to the present case.) We recognize N.J.S.A. 34:11-56a to 56a-30 (the

> Wage and Hour Law) as "humanitarian and remedial" legislation which we will construe generously to fulfill the Legislature's intent. *Yellow Cab Co. of Camden v. State*, 126 N.J. Super. 81, 86 (App.Div. 1973), certif. denied, 64 N.J. 498 (1974).

New Jersey Dept. of Labor v. Pepsi-Cola Co., 336 N.J. Super. 532, 538-39 (App.Div.), aff'd "substantially for the reasons stated in the thorough and thoughtful opinion of Judg[illegible]ug", 170 N.J. 59 (2001).

Governor Hughes's reiteration of the need for comprehensive coverage is embodied the WHL's definition of "employ" as including "to suffer or permit to work". This Court has emphasized that "(t)he remedial purpose of the Wage and Hour Law dictates that it should be given a liberal construction." *Pepsi Cola*, 170 N.J. at 62. The most comprehensive scope is necessary to advance the two basic policies to which Governor Hughes pointed, and which are made explicit in N.J.S.A.34:11-56a: to limit the economic exploitation of those who work and to provide a measure of regulation of the conditions by which enterprises compete in the marketplace. Both these policies are advanced by coverage of those who are economically dependent on an enterprise whose business is advanced by their efforts i.e. by resort to the relative nature of the work test.

F. Misclassification of Workers As Independent Contractors Is A Significant Social Problem

The lived experience of the Teamsters is that the misclassification of workers in the New Jersey trucking industry as

independent contractors is a growing problem. The former Commissioner of the Department of Labor & Workforce Development testified to Congress on July 25, 2007, that based on a random audit 38% of all employers in the State misclassified employees as independent contractors. (https://www.youtube.com/watch?v=ge6RuRPMYhI, last viewed on September 22, 2013; the press release describing this audit is at https://carpenters.org/misclassification/ALL%20DOCUMENTS/NJ%20to%20share%20employment%20tax%20audit%20info%20with%20IRS-NJDWD%20Release%2011-08-07.pdf, last viewed on September 22, 2013). Indications are that the extent of such misclassification is growing. See Lieberstein, S., "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," (June, 2010) (http://www.faircontracting.org/wp-content/uploads/2012/09/IndependentContractorCosts1.pdf last viewed on September 22, 2013). The effects of such misclassification have exerted substantial downward pressure on pay in the trucking industry in the Port of Newark and Elizabeth. See Smith, R., Bensman, D., and Marvy, P.A. "The Big Rig: Poverty, Pollution and Misclassification At America's Ports, A Survey and Research Report," http://www.nelp.org/page/-/Justice/PovertyPollutionandMisclassification.pdf?nocdn=1 (last viewed on September 22, 2013).

In addition to the very substantial lost tax revenues see Lieberstein, *supra*, and environmental degradation that results from the lower pay from misclassification, see Smith, *supra*, misclassification has other undesirable social effects. Because misclassification requires a worker to finance benefits individually it significantly increases the probability that a worker will lack any form of health insurance; according to Smith and collaborators, the probability of so-called independent contractor drivers being uninsured is two-and-a-half times that of employee drivers. Id. at p. 11. The result of such uninsured status has significant negative effects not just on the health status of uninsured individuals, who tend to have increased morbidity and mortality, but on the financial health of their families. Institute of Medicine of the National Academy of Sciences, America's Uninsured Crisis Consequences for Health and Health Care, p. 2 (2007). "Uninsurance at the community level is associated with financial instability for health care providers and institutions, reduced hospital services and capacity, and significant cuts in public health programs, which may diminish access to certain types of care for all residents, even those who have coverage." Id.

CONCLUSION

As the Courts of this State have recognized for almost a century, the broadest possible coverage is necessary to effectuate

the humane and remedial Legislative purpose of statutes enacted for the benefit of those who are allowed, "suffered or permitted to work." Long precedent here and elsewhere, the statutory language, and the remedial policies embodied in the WHL and the WPL all consistently point this Court toward adopting the relative nature of the work standard for coverage under these statutes, and it should so certify to the Third Circuit.

RESPECTFULLY SUBMITTED

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SAM HARGROVE, ANDRE HALL, and MARCO EUSEBIO Plaintiffs-Appellants/Cross-Appellees v. SLEEPY'S LLC Defendant-Appellee/Cross-Appellant v. I STEALTH, EUSEBIO'S TRUCKING CORP., and CURVA TRUCKING LLC Third Party Defendants-Appellees.	SUPREME COURT OF NEW JERSEY Docket No. 072-742 ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEP 3 2013 CLERK

BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLEE, SLEEPY'S LLC

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INTRODUCTION

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) appears as amicus curiae to urge the Supreme Court of New Jersey to make clear the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq. ("Employment Statutes") cannot be interpreted to convert the employees of an established business into the employees of a separate company.

QUESTION PRESENTED

Under New Jersey law, which test should a court apply to determine a plaintiff's employment status for purposes of the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq.?

STATEMENT OF THE CASE

Amicus Curiae NFIB Legal Center adopts the Statement of Case and Procedural History as stated in the brief of Defendant-Appellee Sleepy's LLC ("Sleepy's"). However, NFIB Legal Center restates the following facts:

Plaintiffs-Appellants, Sam Hargrove, Andre Hall, and Marco Eusebio (collectively "Service Providers") advance this lawsuit in their individual capacities. They allege that Sleepy's misclassified them as "independent contractors," when in fact they were *employees*—entitled to the benefits bestowed on

"employees" under the New Jersey Wage Payment Law, N.J.S.A. § 34:11-4.1, et seq., and the New Jersey Wage and Hour Law, N.J.S.A. § 34:11-56a, et seq. (collectively "Employment Statutes").[1] The individual plaintiffs advance this argument in spite of the fact that two had gone through the process of establishing a lawfully incorporated business (or forming a limited liability company), and the other had taken steps to establish his own business.

Mr. Eusebio obtained financing from other individuals to form his own business in 2003, when he filed Articles of Incorporation for "Eusebio's Trucking Corp." A1128-29, Eusebio Dep. 715-16; A195-96, SOF ¶¶ 31-33; A1457, Pl. Resp. to SOF ¶¶ 31-33. He also formed a limited liability company under New Jersey law, creating "Curva Trucking LLC." *Hargrove v. Sleepy's LLC*, CIV.A. 10-1138 PGS, 2012 WL 1067729 (D.N.J. Mar. 29, 2012). Likewise, Mr. Hargrove owned and operated "I Stealth LLC." In forming these companies, they observed various business formalities including:

(a) obtaining a certificate of formation from the New Jersey Department of Treasury (A226, SOF ¶¶ 290-92; A1469, Pl. Resp. to SOF ¶¶ 290-92), and obtaining operating licenses from

[1] Though Plaintiffs-Appellants invoke the Wage and Hour Law at this juncture, it should be noted that they failed to invoke the Wage and Hour law in their complaint.

the Department of Transportation, *Hargrove*, CIV.A. 10-1138 PGS, 2012 WL 1067729;

(b) forming a Board of Directors (A197, SOF ¶ 40; A1457, Pl. Resp. to SOF ¶ 40);

(c) conferring titles such as "President", Hargrove, CIV.A. 10-1138 PGS, 2012 WL 1067729;

(d) obtaining an Employer Identification Number from the Internal Revenue Service (A197, SOF ¶¶ 222-23; A1465-66, Pl. Resp. to SOF ¶¶ 222-23; A381-82, Letters From IRS; A226, SOF ¶ 291; A1469, Pl. Resp. to SOF ¶ 291);

(e) maintaining a company office and bank account (A894-96, Eusebio Dep. 92-94.);

(f) recruiting and managing employees (A201, SOF ¶ 75, A205, SOF ¶ 117; A1459, Pl. Resp. to SOF ¶ 74; A1461, Pl. Resp. to SOF ¶ 117; A227, SOF ¶¶ 295, 297; A230, SOF ¶¶ 315-20; A231, SOF ¶¶324-25; Pl. Resp. to SOF ¶¶ 295-96; A1470, SOF ¶¶ 315-20; A1471, Pl. Resp. to SOF ¶¶ 324-25; A196-202, SOF ¶¶ 38, 63-64, 88-98; A1457-60, Pl. Resp. to SOF ¶¶ 38, 63-64, 88-8; A997-1001, Eusebio Dep. 416-20; A319-21, Paychecks);

(g) paying wages to personnel (A356, ETC Pay Document; A1178-79; Pedro Eusebio Dep. 90-91; A944, Eusebio Dep. 257; A199, SOF ¶¶ 57-61; A210, SOF ¶¶ 164-69; A231, SOF ¶¶ 327-29; A245-46, SOF ¶¶ 432-37; A1458, Pl. Resp. to SOF ¶¶ 57-61; A1463,

Pl. Resp. to SOF ¶¶ 164-69; A1471, Pl. Resp. to SOF ¶¶ 327-29, 432-37);

(h) acquiring assets in the company name (A218, SOF ¶¶ 224-27; A1466 Pl. Resp. to SOF ¶¶ 224-27); and

(i) representing the company to the public as a legitimate business enterprise in its own right (A261, Warner Decl., ¶ 4; A383 Delivery Form).

The third plaintiff, Mr. Hall, was a sole proprietor. He opted against conducting his business through a corporation or a limited liability company (LLC).[2] He held his business out to the world as "H and B Trucking," (A242, SOF ¶¶ 410-11, 415-17; A243, SOF ¶¶ 415-17; A1475, Pl. Resp. to SOF ¶¶ 410-11, 415-17) and referred to this business as his "company." (A1389, Hall Resp. to Requests for Admission, ¶¶ 8-10, A242, SOF ¶¶ 408, 410; A248, SOF ¶ 451; A1474, Pl. Resp. to SOF ¶ 408; A1475, Pl. Resp. to SOF ¶ 410). He obtained an Employer Identification Number from the IRS (A243, SOF ¶¶ 414; A1475, Pl. Resp. to SOF ¶ 414), and used revenue obtained from his service agreement with Sleepy's for his business expenses, including paying wages to his personnel and to himself (A246, SOF ¶¶ 435-437; A1476, Pl. Resp. to SOF ¶¶ 435-437). Hall also invested assets and assumed financial liabilities (or debts) in the furtherance of his

[2] Amicus submits that Mr. Hall's decision to operate his business without incorporating or forming an LLC should not be relevant to the issue before this Court.

enterprise, purchasing and leasing trucks and other equipment that he used in carrying out his business. (A249, SOF ¶¶ 458-63, A1477, Pl./Resp. to SOF ¶¶ 458-63). He also covered expenses associated with operation of his trucks, including maintenance, fuel and insurance costs. (A252-53, SOF ¶¶ 485-86; A1478, Pl. Resp. to SOF ¶¶ 485-86).

Having followed business formalities in establishing their respective companies, the Service Providers thereafter each negotiated and signed a contract to provide delivery services for Sleepy's ("Service Agreement").[3] Eusebio and Hargrove admit signing in their capacity as an agent for their respective businesses. (Docket Entry 57, p. 3, Pl.'s Reply Memo). Nonetheless, they now contend that, for the purposes of the Employment Statutes, the court should look past business formalities to reclassify their economic relationship with Sleepy's. This approach would convert Eusebio and Hargrove from officers of a lawfully established independent business to the employees of a separate business. Likewise Hall asserts that—despite investing in his sole proprietorship, and despite operating as an independent business—he became Sleepy's employee.

[3] The Service Agreement outlined the expectations of the parties, including various requirements intended to assure that services provided would adequately satisfy Sleepy's commercial needs. The terms were included for the purpose of ensuring that delivery services were performed in a manner that assured customer satisfaction, which was an important consideration for the parties.

SUMMARY OF ARGUMENT

It is crucially important for this Court to clarify that the Employment Statutes respect business formalities when setting forth the test for determining whether a person is an employee of a specific entity. A reviewing court should begin its analysis with an antecedent question: was the work in question performed pursuant to a valid service agreement between two independent companies? If this question is answered in the affirmative, that should be the end of the inquiry. In such a case the economic relationship is clear and unambiguous—the laborer is an agent of the company performing the services ("Servicing Company"), not an employee of the company receiving such services ("Recipient Company").

But Plaintiffs-Appellants' proffered approach would have courts essentially ignore business formalities, or would view them as merely one factor in an amorphous balancing test. Such an approach gives little guidance to anyone, and must be rejected because it improperly assumes that the Legislature intended to upend settled common law principles. Indeed, there is no reason to assume that the Legislature would have wanted to convert the agents of a legitimate business into employees of another independent company.

For that matter, Plaintiffs-Appellants' approach should be rejected because it would unnecessarily complicate the

employment test—creating uncertainty for businesses seeking to establish legitimate service agreements with other businesses. Such an approach would call into question many longstanding service agreements, and would make it exceedingly difficult for businesses to negotiate future agreements. This would have the unfortunate effect of discouraging mutually beneficial working relationships between businesses that might otherwise produce new jobs and wealth within the state. Furthermore, a test converting the agents of company A into the employees of company B would prove particularly harmful for small businesses and new entrants into the market, as it would discourage companies from contracting with smaller businesses. It might also perversely incentivize small businesses, with existing service contracts, to refrain from pursuing new business opportunities.

Accordingly, *Amicus* argues that business formalities, where properly observed, should be of overwhelming significance in determining a laborer's employment status. Our proffered approach is straightforward, consistent with established principles of agency law, and promotes entrepreneurialism. The proper test should recognize that there is no ambiguity where the laborer in question has gone through the formal process of—and assumed the risks inherent in—establishing an independent business. Having gone through the formality of establishing a legitimate business, the owner should not be allowed to

unilaterally create at the time of the owner's choosing and without any advance notice—a parasitic employment relationship with a separate business. The Legislature could not have intended such an absurdity. Nor could the Legislature have intended to abrogate the long-settled principle that an entrepreneur can establish a business as a sole-proprietor or general partnership. For that matter, the Legislature could not have intended to make one independent business the de facto insurer of another.

ARGUMENT

I. THE EMPLOYMENT TEST MUST INITIALLY CONSIDER WHETHER THE LABORER PERFORMED SERVICES PURSUANT TO A LEGITIMATE CONTRACT BETWEEN INDEPENDENT BUSINESSES

A. The Employment Test Requires an Initial Determination of Which Entity is the Most Likely Employer

It would be absurd to assume—as Plaintiffs-Appellants suggest—that the Employment Statutes look past business formalities to convert the agents of an independent company into employees of another. It cannot be that the Legislature intended to view every service contract, or similar arrangement between distinct legal entities, as potentially creating a relationship whereby an employee, officer, director, member or owner of one party to a contract is transferred without notice into an employee of the other party to the contract. And nothing in the text of the Employment Statutes supports such an approach.

The New Jersey Wage Payment Law defines "employee" simply as a "person suffered or permitted to work by an employer," with the caveat that "independent contractors and subcontractors shall not be considered employees." N.J.S.A. § 34:11-4.1(b). The New Jersey Wage and Hour Law is even less illuminating—defining "employee" in tautological fashion: "'Employee' includes any individual employed by an employer." N.J.S.A. § 34.11-56a1. While the text suggests very little as to how a court should endeavor to distinguish between employees and independent contractors, the text is abundantly clear in providing that a laborer's employment status is understood with reference to work performed by a potential "employer." Thus—in a situation where two legal entities might potentially be characterized as the employer of a laborer—it is necessary to consider which entity is more appropriately viewed as the potential "employer" of that laborer before moving to the question of whether the laborer should be categorized as an "employee."[4] *See also* Karen R. Harned, et. al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. Bus. Entrepreneurship & L. 93 (2010) ("Determining whether a particular worker should be classified as an employee or an independent contractor currently

[4] Amicus submits that it would be inappropriate for an independent business owner to invoke a theory of joint employment to unilaterally—and without prior notice—establish a parasitic employment relationship with another company. Equitable principles should foreclose such gamesmanship.

depends heavily upon the *specific circumstances of employment.*") (emphasis added).

The text offers no special definition for the term "employer."[5] In the absence of a specially assigned definition, the term "employer" should be given its common law definition. *See* Richard R. Carlson, *Variations on A Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. Tex. L. Rev. 661, 680 (1996); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (holding that, in the absence of a specially assigned definition, the common law meaning is presumed). Even if the definition must be given an idiocentric meaning, the text is clear and unambiguous in requiring courts to respect business formalities and basic principles of agency law. *See* N.J.S.A. § 34:11-4.1(a) (clarifying that "officers of a corporation … shall be deemed the employers of the employees of the corporation.").

B. The Employment Test is Inapposite When the Economic Relationship is an Arms-Length Service Agreement Between Separate Companies

It would be a violent presumption to assume that the Legislature intended to blur the lines between independent

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[5] The Wage Payment Law defines "employer" as "any individual, partnership, association, joint stock company, trust, corporation… employing any person in this State." N.J.S.A. § 34:11-4.1(a). Likewise, in circular fashion, the Wage and Hour Law defines the term "employ" with reference to the "suffer or [] permit" language included in the definition of the term "employee." N.J.S.A. § 34:11-56a(1).

businesses with enactment of the Employment Statutes. *See In re Vadlamudi's Estate*, 183 N.J. Super. 342, 443 A.2d 1113 (1982) (statutory language should not be construed to alter common law principles in the absence of explicit language). The common law has always recognized that separate independent businesses may freely enter into a service contract.[6] And the employees of the business providing services are not subsumed as employees of the Recipient Company. This is because the law recognizes both businesses as separate and distinct legal entities—assuming each to be an independent economic actor.[7] *See Tung v. Briant Park Homes Inc.*, 287 N.J. Super 232, 670 A.2d 1092 (App.Div. 1996).

Thus the question—of whether an individual laborer is appropriately classified as an "independent contractor"—is only pertinent when the laborer appears to act in his or her individual capacity. *See O'Connor v. Davis*, 126 F.3d 112, 115 (2nd Cir. 1997) (explaining that "a prerequisite to considering whether an individual is [an employee or independent contractor]...is that the individual [must] have been hired in

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[6] By virtue of its police powers, the State may choose to impose limitations on contracting parties; however, in the absence of a clear intent to impose restrictions, the common law recognizes that businesses are free to establish a service relationship. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406 (1937) (noting that at common law, "freedom of contract was the general rule and restraint the exception").

[7] This mattered immensely at common law when assessing liability between businesses in a tort case. The general rule was that the principal would not be liable for the conduct of an independent contractor. Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale L.J. 76, 77 (1945) (explaining the origins of the common law independent contractor test).

the first instance."). Simply put, the economic relationship is clear and unambiguous if the individual rendering services is definitively acting as an agent of the Servicing Company. The laborer—in his or her individual capacity—has no independent relationship with the Recipient Company.[8] *See Sodexho Operations, LLC v. Dir., Div. of Taxation*, 21 N.J. Tax [illegible]39 (2003) aff'd, 23 N.J. Tax 167 (Super. Ct. App. Div. 2004) (suggesting that the antecedent question to determining whether an individual is an employee or an independent contractor is whether there is an agency relationship between the two parties); *N. Rothenberg & Son, Inc. v. Nako*, 49 N.J. Super. 372, 383, 139 A.2d 783, 789 (App. Div. 1958) (explaining that the party alleging the existence of an agency relationship bears the burden of proof).

Accordingly, it is only necessary to deal with an employment law test—whether at common law or in legislation—where an individual laborer has been hired to perform services in a manner that ambiguously straddles the line between an independent entrepreneurial enterprise and a truly subservient employment relationship. *See Keller v. Niskayuna Consol. Fire*

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[8] This individual was "hired" by the Servicing Company, not the Recipient Company. *See New Jersey Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co.*, 203 N.J. 208, 220, 1 A.3d 632, 639 (2010) ("An agency relationship is created 'when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'") (quoting *Restatement (Third) of Agency* § 1.01 (2006)).

Dist. 1, 51 F. Supp. 2d 223 (N.D.N.Y. 1999) (recognizing the question of "whether [the alleged employee] had been 'hired,' is antecedent to the question of whether he or she is a hired employee or a hired independent contractor…."); *see also Bahrle*, 145 N.J. at 157-58, 678 (holding that the rules of agency have no application where the parties have no direct relationship).

C. The Employment Test Must Recognize Sole-Proprietorships and Partnerships as Independent Businesses

The distinction between an "employee" and an "independent contractor" is notoriously difficult because the test has always concerned *ambiguous* economic relationships. *See e.g., D'Annunzio v. Prudential Ins. Co. of America*, 192 N.J. 110 (2007) (considering whether a licensed professional worked as an employee or an independent contractor when hired as a medical consultant in his individual capacity); *Pukowsky v. Caruso*, 312 N.J. Super. 171 (1998) (considering and rejecting the assertion that a plaintiff was hired as an employee, where she took halting steps to establish a business). Of course, once an entrepreneur goes through the process of formally incorporating his or her business (or forming an LLC) there is no longer any ambiguity-the owner has unquestionably established a legally distinct commercial enterprise.[9] *Richard A. Pulaski Const. Co.*,

[9] At that point, the business unquestionably stands as an independent economic actor, and holds itself out to the world as such.

Inc. v. Air Frame Hangars, Inc., 195 N.J. 457, 472, 950 A.2d 868, 877 (2008) (abiding by "the fundamental proposition" that a corporation is a distinct entity); *Tung*, 287 N.J. Super 232, 670 A.2d 1092 (App. Div. 1996) (same). But, the law also recognizes sole proprietorships and partnerships as independent businesses in their own right by, for example, generally requiring those businesses to obtain separate employer identification numbers.[10]

To be sure, one need not incorporate or form an LLC to establish a legitimate business. And nothing in the Employment Statutes changes this. On the contrary, the Legislature's deliberate choice to preserve independent contracting relationships confirms that the Legislature intended to allow individuals, running non-incorporated businesses, to maintain service agreements with other firms. *See* N.J.S.A. § 34:11-4.1(b. Accordingly, in order to preserve independent contracting relationships, the court must recognize a distinction between an individual acting in the capacity of an independent business owner and an individual merely accepting work as a free agent. But the only principled way to distinguish between the two is to consider whether the individual has

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[10] "Generally businesses need an EIN." Internal Revenue Service, Employer ID Numbers. Available online at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Employer-ID-Numbers-EINs (last visited August 28, 2013). The only exception is for sole-proprietorships that have no employees and satisfy several other criteria. *See* Internal Revenue Service, Do You Need an EIN?, available online at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Do-You-Need-an-EIN%3F (last visited August 28, 2013).

initiated an entrepreneurial venture. *See Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (explaining that even under the economic realities test, "the alleged employee's opportunity for profit or loss depending upon his managerial skill" and "investment in equipment or materials" are highly relevant considerations).

Plaintiffs-Appellants suggest that the distinction should hinge largely on the degree of control exerted on the Servicing Company; however, such an approach would inappropriately preclude independent businesses from agreeing to ordinary—and often important—conditions in a service agreement.[11] And the fact that a service contract requires the Service Provider to satisfy certain conditions is simply irrelevant to the question of whether the Service Provider entered the agreement in the capacity of a business owner or merely as an individual in search of work. To resolve that question it is necessary to look to the Service Provider's actions for indications that the individual had taken on the sort of risks inherent in an

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[11] It seems beyond question that a service contract, between two major corporations, might somehow convert the employees of the Servicing Company into employees of the Recipient Company. And there is no principled reason why an identical contract between a smaller Servicing Company and larger Recipient Company should be viewed any differently. So long as the service is rendered pursuant to the terms of a contract between independent businesses, there is no ambiguity as to the nature of the service relationship. The Servicing Company should be recognized as an independent business, at least where such independence can be ascertained by actions such as (a) the creation of a separate legal entity, (b) the acquisition of a tax identification number for the entity, (c) the purchase of assets by the business, and or (d) the assumption of debt, or other liabilities, in the business' name.

entrepreneurial enterprise. Indeed the essential element of an independent business is the assumption of entrepreneurial risk. Thus for example, the fact that a Servicing Company assumes debt in the furtherance of the enterprise, or invests assets and resources, demonstrates that the Servicing Company has established an independent business. *See Spellman v. Am. Eagle Exp., Inc.*, CIV.A. 10-1764, 2013 WL 1010444 (E.D. Pa. Mar. 14, 2013) ("This kind of entrepreneurial conduct strongly suggests an independent contractor relationship, while the absence of such activity is indicative of employment.") (*citing Fedex Home Delivery v. NLRB*, 563 F.3d 492, 499, 385 U.S. App. D.C. 283 (D.C. Cir. 2009). An individual assuming such risks, and holding himself (or herself) out to the world as a business owner, should be treated as such.

II. IT SHOULD BE PRESUMED THAT THE LEGISLATURE DID NOT INTEND TO IMPOSE A TEST FOR EMPLOYMENT THAT WOULD IGNORE BUSINESS FORMALITIES

Plaintiffs-Appellants offer no apparent basis for ignoring business formalities beyond the self-serving, and circular assertion that courts should look past labels because "misclassification" of employees is a problem.[12] But, it would be absurd to assume that the Legislature intended to disregard business formalities with enactment of the Employment Statutes

[12] *Amicus* submits that courts should be much more concerned that an overly-expansive application of the employment test threatens to undermine legitimate service relationships between independent businesses, and will ultimately discourage businesses from contracting with smaller firms.

because they are of fundamental importance in every other area of the law. Indeed, it would be improper to interpret the Employment Statutes in a manner that would disregard long-established principles. *Velazquez ex rel. Velazquez v. Jiminez*, 172 N.J. 240, 257, 798 A.2d 51, 61 (2002) ("No statute is to be construed as altering the common law, farther than its words import.") (internal citations omitted).

A. It Does Not Make Sense that Business Formalities Should be Vitally Important in Other Areas of the Law, but Irrelevant in Employment Law

Business formalities matter immensely. When a business is created as an independent legal entity and operated in accordance with the law pursuant to which the entity was created, the actions of its agents are attributable to the business itself--not the individual owner(s). *Richard A. Pulaski Const. Co.*, 195 N.J. at 471-72. As such, under the doctrine of respondent superior, the business will be held liable for the tortious acts of its employees; however, the owner will not incur personal liability because the business stands as an independent legal entity. *Dep't of Labor v. Berlanti*, 196 N.J. Super. 122, 127, 481 A.2d 830, 832 (App. Div. 1984); *Fortugno v. Hudson Manure Co.*, 51 N.J. Super. 482, 500, 144 A.2d 207, 217 (App. Div. 1958) ("The general rule is that a corporate entity may not be disregarded.").

A plaintiff bears the heavy burden of piercing the corporate veil if it wishes to be permitted to disregard the corporate entity and seek to impose personal liability on the individual owners of the business. *Kugler v. Koscot Interplanetary, Inc.*, 120 N.J. Super. 216, 254-55 (Ch. Div. 1972). Likewise, absent compelling reasons to disregard corporate formalities, the law views the owner's personal assets as separate and distinct from assets owned by the business. *Richard A. Pulaski Const. Co.*, 195 N.J. at 471-72. The same protections from personal liability are afforded by use of a limited liability company. *See* Carter G. Bishop, *Reverse Piercing: A Single Member LLC Paradox*, 54 S.D. L. Rev. 199, 200 (2009) (explaining LLCs possess "a corporate styled limited liability shield").

As such, businesses appropriately structure contracts, and other working relationships, in consideration of business formalities and long-established principles of agency law. For example, knowing that Company A is only liable for the conduct of its own employees, there is no reason for Company A to seek insurance coverage for Company B's agents.[11] But, if the Employment Statutes look past business formalities-converting workers from employees of one company to the employees of the

[11] To be sure the Service Providers maintained their own insurance in this case. *Hargrove*, CIV.A. 10-1138 PGS, 2012 WL 1067729.

next—that creates a whole world of problems for independent firms seeking to maintain or create service relationships.[14]

B. A Test Ignoring Business Formalities Would Discourage Companies from Contracting with Smaller Firms and Would Make it Exceedingly Difficult to Negotiate Service Contracts

The New Jersey Employment Statutes should be interpreted to respect business formalities and established principles of agency law, because a contrary interpretation would cause incoherence in the law. *Henderson v. Sea-Land Serv., Inc.*, 192 N.J. Super. 1, 8, 468 A.2d 1064, 1068 (Ch. Div. 1983) (explaining that whenever possible, courts should interpret statutes in a manner that avoids tension or conflict in the law) (citing *Morton v. Mancari*, 417 U.S. 535, 549-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974)). Such an approach would schizophrenically treat the same company as an independent economic actor for the purposes of assessing liabilities, while simultaneously viewing the company as indistinguishable from the owner in the employment law context. This inconsistency would—as

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[14] It is difficult enough for small businesses to deal with accounting, and other administrative requirements, under current wage and hour laws—let alone the complexities of the tax code. See Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 98 (2012) (explaining that the cost of regulatory compliance is higher for small businesses because they cannot afford in-house counsel or compliance officers). These burdens would be exponentially more cumbersome if a business was required to apply a special test to determine whether (and when) to count another company's employees as its own. Conversely, small businesses would be forced to guess when—and for what purposes—their employees might become the employees of a wholly independent business.

Plaintiffs-Appellants suggest result in a regime wherein the agents, of an otherwise independent business must be viewed as the employees of a separate business, at least for the narrow purpose of performing service contracts.

It is highly unlikely that the Legislature would have intended to work such a disjunction in the law. *See Marshall v. Klebanov*, 188 N.J. 23, 37, 902 A.2d 873, 881 (2006) (explaining the presumption against derogation of the common law). It is even less likely that the Legislature would intend a result that would discourage independent businesses from entering into mutually beneficial service agreements that might otherwise create jobs and wealth. Yet that is exactly what would happen under Plaintiffs-Appellants approach.[15] If the Employment Statutes can be invoked to effect a parasitic employment relationship, businesses will be hesitant to enter into service contracts.[16] And since Plaintiff-Appellant's theory holds that a smaller Servicing Company is more likely to be subsumed into the functional apparatus of the Recipient Company, businesses will

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[15] The law should allow businesses to impose parameters on service agreements in order to promote healthy working relationships without risking running afoul of the Employment Statutes. If inclusion of such terms is understood to potentially convert the employees of a Servicing Company into employees of the Recipient Company, companies will find it difficult to structure service agreements in a manner that meets their mutual needs.

[16] This will translate into lost opportunities for economic growth, as companies might forgo business ventures that they cannot manage in house or which they cannot manage as efficiently.

predictably avoid entering into ongoing service relationships with smaller firms—especially new entrants into the market.

III. THE PROPER TEST CANNOT HINGE ON THE VOLUME OF BUSINESS BETWEEN TWO LEGITIMATE COMPANIES

If business formalities are ignored, there is no predictable way to determine when reliance on an existing contract might convert the employees of a Servicing Company into employees of a Recipient Company.[17] Plaintiffs-Appellants' suggest that the ultimate touchstone should look to the Servicing Company's volume of business—apparently on the theory that there is a *de facto* incorporation once the Servicing Company becomes economically dependent upon its relationship with the Recipient Company. But, this approach would inappropriately give the Servicing Company the right to unilaterally convert a free and consensual contractual relationship into a parasitic employment relationship. *Morton v. 4 Orchard Land Trust*, 180 N.J. 118, 129-30, 849 A.2d 164, 170 (2004) (citing *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 538-39, 95 A.2d 391 (1953)) (reaffirming the fundamental

[17] Not only do courts have an obligation to interpret the law in a principled manner, but they must do so in a way that intelligibly indicates what is required or forbidden. *See FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012); *Connally v. General Construction*, 269 U.S. 385, 391 (1926) (explaining that a statute defining obligations and prohibitions "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law (i.e. the requirement of notice).").

principle that a valid contract requires a "meeting of the minds").

As such, this Court should make clear that, so long as the Servicing Company retains the right to freely grow and to diversify its client base, it remains fully independent. *State, Dep't of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 501, 468 A.2d 150, 164 (1983) (courts will recognize even a subsidiary as a wholly independent company unless "the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent."). A Recipient Company cannot subsume the Servicing Company into its functional apparatus when the Servicing Company retains the right to diversify and expand its operations. Thus, while the Recipient Company may be dependent on the Servicing Company for those needs addressed in their agreement, the Servicing Company nonetheless remains a separate business.

Importantly, it is not the role of any business to provide life-support to a failing company.[18] If a business has neglected

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[18] Some might wish to see the government impose such a rule; however, this would be a radical and highly controversial imposition. It is highly doubtful that the Legislature intended to impose such a duty on business with enactment of the Employment Statutes. Such a rule would convert ordinary businesses into the de facto insurers of the companies with whom they contract. This contravenes the essential principle that there must be a "meeting of the minds" to have a valid contract. *Morton*, 180 N.J. at 129-30. Indeed, no company would enter an arm's length service agreement with the intent to assume the other companies employees or liabilities. Of course there are companies in the business of insuring against financial risk; but, these companies only agree to provide insurance coverage for specifically contemplated liabilities and they require the insured party to pay a premium

to pursue new opportunities, or failed to secure new clients, it is not the responsibility of its existing client-base to continue to provide a stream of revenue, nor to assume the failing company's liabilities or financial obligations. Indeed, a company's decision not to diversify its client-base is its own choice for better or for worse.[19] *See FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 502 (D.C. Cir. 2009) (explaining "failure to take advantage of an opportunity is beside the point."); *C.C. E., Inc. v. N.L.R.B.*, 60 F.3d 855, 860 (D.C. Cir. 1995).

Moreover it would be poor public policy to force a parasitic employment relationship upon businesses remaining loyal to firms with few existing clients because this would encourage businesses to withdraw from service relationships with struggling firms, or to simply avoid entering into relationships with all but the strongest and largest firms. Such a regime would also create a perverse incentive for smaller firms to hold-off on expanding business operations. In a regime where a Servicing Company is guaranteed a right of parasitic integration into the apparatus of a Recipient Company, there would be a

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to attain the benefit of such coverage. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 492, 323 A.2d 495, 505 (1974) (the purpose of insurance "is to protect the insured from liability *within the limits of the contract*…") (emphasis added).

[19] Risk is inherent in the entrepreneurial pursuit, as is the opportunity for a return on one's investment. As always in business, wise or fortuitous choices will prove fruitful, while poor or improvident choice may be costly.

substantial disincentive against expanding business operations to take on new opportunities.

IV. ABSENT COMPELLING SIGNS OF CONSPIRACY, LAWFULLY CREATED BUSINESSES ARE ASSUMED SEPARATE LEGAL ENTITIES, WITH SEPARATE EMPLOYEES

The relative size of the contracting businesses should not matter under the Employment Statutes any more than the volume of business.[20] It would be absurd to say that smaller firms are somehow going to be swallowed-up by larger firms simply by virtue of the fact that they have fewer employees. To be sure, it would not make sense to say that the employees of a small business become the employees of a larger business any more than it would make sense to say that the assets and liabilities of the small business become those of the larger business. *See State v. Gill*, 47 N.J. 441, 444, 221 A.2d 521, 523 (1966) (explaining that statutes should be interpreted to avoid absurd results). Regardless of size, the law must treat separate companies as distinct and independent legal entities-unless it is demonstrably clear that the smaller company is a sham. *See Ventron Corp.*, 94 N.J. at 501.

There may be extreme cases wherein conniving corporate officers of one company scheme to set up and control a sham

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[20] Should the employees of a boutique law firm be counted as the employees of a large law firm simply because they have developed an on-going business relationship? Should the employees of a small Information Technology company be converted into the employees of a large corporation simply because the small company has a service contract with the large corporation?

company. In such a case the sham company would in actuality be an extension of the first company. *Ventron Corp.*, 94 N.J. at 501. Thus, in a case where an employee of a parent company claims to be an employee of the subsidiary, the claimant is making a fraudulent claim. *Id.* at 468 (explaining that courts will not look past corporate formalities unless "the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law.").

But, a plaintiff alleging his company to be a sham should bear a heavy burden of demonstrating a complete lack of entrepreneurial risk, and a total lack of independent judgment from the beginning. An officer of the Servicing Company should not prevail in a claim that the company was set up as a sham where the Servicing Company was established by that very individual who personally assumed debts and other liabilities, and otherwise invested personal assets into the company.[21] Moreover, an assertion that the Servicing Company was set up as an extension of the Recipient Company must fail where it can be proven that the business owner retained the prerogative to

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[21] In such a case the individual is acting as an entrepreneur. The fact the individual invests his or her personal assets and assumes personal liabilities demonstrates independent judgment. *See* Internal Revenue Serv. Rul. 87-41 (Jan. 1987).

solicit other business, to take new clients, or to otherwise expand operations in other directions.[22]

V. THE COURT SHOULD AVOID DISCOURAGING INDEPENDENT CONTRACTING RELATIONSHIPS

All of the tests proposed by Plaintiffs-Appellants would be difficult to apply in practice—as they are all essentially balancing tests, offering little guidance to anyone. Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (positing that invocation of a balancing test suggests that "uniformity is not a particularly important objective with respect to the legal question at issue."). But regardless of whether the Court should hold that the common law test applies—or that the Employment Statutes require a more expansive test—it is essential that the Court reject any articulation of the test that would disproportionately tip the scales against the independent contracting relationship. While Plaintiffs-Appellants invoke vague concepts of 'social justice' as guiding principles for their proffered test(s), it is important to remember that the Legislature saw value in preserving independent contracting relationships. To be sure,

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[22] Moreover, it would seem that the veil piercing standard should be even higher in a case where an apparent business owner seeks to pierce his or her own company's corporate veil for expedient reasons. This is because the veil piercing doctrine is an equitable remedy and should not be invoked to promote gamesmanship. See *Ventron Corp.*, 94 N.J. at 500 ("The purpose of the doctrine _ is to prevent an independent corporation from being used to defeat the ends of justice.").

the New Jersey Wage Payment Law clearly states that "independent contractors and subcontractors shall not be considered employees." N.J.S.A. § 34:11-4.1(b).

Amicus NFIB Legal Center submits that public policy disfavors further lowering the threshold for employees under New Jersey law. It is important to remember that independent contractors serve as a vital resource for small business owners who need to hire someone with a skill for a short period of time, or on an occasional basis—especially where the business lacks the necessary cash-flow to hire a full-time employee. Businesses commonly have short-term needs that arise during the year that cannot be handled by the current workforce, but which do not justify hiring an additional employee.[23] Thus, the availability of independent contractors allows small businesses to be more flexible and competitive. *See* John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337, at 339-341 (1991) (discussing the modern trend toward a service-based economy and changing consumer patterns). And of course a contract for services between a small business and an independent contractor is a mutually beneficial arrangement.

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[23] *See* Testimony of Diana A. Ehrlich to Governor's Task Force on Independent Contractor Status (Albany, NY 2004), available at http:www.bcnys.org/inside/sb/ictest.htm (explaining that independent contractors serve a variety of functions that fill the needs of businesses).

According to the U.S. Department of Labor (DOL), only 10% of workers cite "economic reasons" for choosing to pursue independent contracting opportunities. United States Department of Labor, Employment and Training Services Administration, Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, 28-29 (Feb. 2000) ("DOL Study"). "Nearly 84 % of ICs state[] that they prefer[] their alternative arrangement to a more traditional one..." *Id.* Indeed, individuals engage in contract work for a variety of healthy and legitimate reasons. To illustrate the point, DOL confirms that men typically pursue work "as an independent contractor because they like[] being their own boss', whereas the common reasons given by women for being an [independent contractor] include[] 'the flexibility of scheduling and the ability to meet family obligations that the [contracting] arrangement afford[s].'" *Id.* Accordingly, "[a]s the economy continues to change, communications technology advances and more workers search for alternative ways of living their lives, there is a greater interest in independent contracting and part-time work." *Id.* at 2.

But, businesses will be forced to cut back on the number of people to whom they can offer work if the court should apply too expansive of a test for employment--because they cannot afford the costs attendant to hiring, or being deemed to hire, full-

time employees. Christopher J. Cotnoir, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation*, 46 ME. L. REV. 325, 344 (1994). This will result in lost economic opportunities. For individuals who might like to find contract work, opportunities will be harder to find. And many businesses will be compelled to delay new projects, or forced to use limited labor resources in an inefficient manner.

CONCLUSION

For the foregoing reasons, the Court should make clear that business formalities are of overwhelming significance in determining a laborer's employment status. The Court should hold that, absent compelling signs of conspiracy, the employees of a legitimate Servicing Company must be viewed as employees of that independent business—and that the Employment Statutes do not view such workers as the employees of any other company. Finally, the Court should make clear that the employment test must be objectively applied in a manner that preserves independent-contracting relationships.

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