No. B259570

IN THE CALIFORNIA COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION 7

YVETTE NOE, MICHAEL RENDON, FELTON HENDERSON and EDWARD RAMIREZ,

Petitioners,

v.

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES,

Respondent.

LEVY PREMIUM FOODSERVICE LIMITED PARTNERSHIP, ANSCHUTZ ENTERTAINMENT GROUP, INC., ANSCHUTZ SOUTHERN CALIFORNIA SPORTS COMPLEX, LLC, AEG ONTARIO ARENA, LLC., and L.A. ARENA COMPANY, INC.,

Real Parties in Interest.

On Petition for Statutory Writ of Mandate from a decision of the Los Angeles County Superior Court, Case No. BC486653 (The Honorable Mary H. Strobel and John Shepard Wiley, Jr.)

PETITIONERS' RESPONSE TO *AMICI CURIAE* BRIEF OF THE U.S. CHAMBER OF COMMERCE, *ET AL.*

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INTRODUCTION

Amicus U.S. Chamber of Commerce et al. ("the Chamber") rests its argument on a false premise, namely, that petitioners' construction of Labor Code §226.8 would impose statutory penalties on every entity, joint employer or not, that contracts with an employer that has willfully misclassified its workers as independent contractors. That is simply not accurate.

The reason defendants Levy and AEG are potentially liable for the willful misclassification of petitioners is because of the facts establishing their employment relationship. In the joint employment context, joint and several liability is the rule, not the exception; and in this case, the facts establish not only that a triable issue exists concerning Levy's and AEG's status as petitioners' joint employers (as the trial court found), but also that Levy and AEG "engaged in" the requisite knowing and intentional misclassification of those employees. *See* Petition at 24 (definition of "engaged in" to include "involve oneself; to take part in").

Levy and AEG would not face any potential liability under Labor Code §226.8 if they had simply negotiated an arms-length labor services contract that delegated to Canvas complete and independent control – rather than shared control – over the concession workers' terms and conditions of employment. But as the trial court found, the record contains facts sufficient to establish Levy's and AEG's status as joint employers, as it demonstrates that defendants retained for themselves – and repeatedly exercised – the right to control critical aspects of petitioners' employment (including the right to discipline those workers, to bar them from defendants' entertainment venues, to supervise them, and to dictate their rules of conduct and working conditions. *See* Petition at 11-12 (citing

record); Reply Brief in Support of Petition ("Reply") at 18 (same); App. 4559-67). It is the *nature* of defendants' employer-employee relationship with petitioners that makes Levy and AEG potentially liable under Section 226.8, not the mere fact that the relationship arose out of a contract between defendants and Canvas. *See Castanada v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1020-23 (far "more than a contractual relationship" is required to establish joint employer liability).

The issue in this writ proceeding is not whether the trial court's analysis of Levy's and AEG's joint employer status was erroneous. Defendants do not challenge that ruling, and the Chamber's lengthy discussion of the joint employer doctrine is therefore entirely beside the point. The issue before this Court is whether the trial court erred in granting summary adjudication to defendants Levy and AEG on a separate issue: whether the facts would support a finding that they are liable for statutory penalties under Section 226.8 *assuming* they are petitioners' joint employers (and further assuming that petitioners were in fact misclassified as independent contractors rather than employees – an issue defendants did not dispute in their summary judgment motion). *See* Appendix ("App.") 4559-67. As to this issue, which is the actual issue, the Chamber's arguments are far more muted.

As petitioners have demonstrated, the trial court's summary adjudication ruling rested on a fundamental legal error, the court's mistaken conclusion that only one employer – the employer that *initially* made the misclassification decision – can be liable under Section 226.8 for an act of misclassification. App. 4567-69. Petitioners' principal response, which the Chamber offers no argument to refute – is that misclassification is *not* a one-time-only event under California (or federal) law. Instead,

worker "misclassification" occurs not only when an "employee" is first hired and wrongfully misclassified, but continuously, on an ongoing basis, unless and until the misclassification is corrected (either by a re-classification or a material change in job duties). Reply at 19-20.

The legislative purpose of Section 226. 8 is straightforward: to establish a powerful economic disincentive for companies that might otherwise deprive their employees of fundamental Labor Code protections by misclassifying them as independent contractors. *See* App. 379, 381. The Chamber does not dispute this purpose. Oddly, though, the Chamber takes the position that the Legislature sought to accomplish this worker-protection goal by *increasing* the evidentiary burden on jointly employed misclassified workers, requiring them to prove that each of their joint employers independently committed different acts of willful misclassification rather than being jointly liable for each other's wrongful acts. There is no reason to believe that the Legislature intended to impose such a burden, especially because when joint employers are in a contractor/subcontractor relationship, as here, the most direct evidence of willful misclassification will almost always be obtained from the subcontractor that had the most frequent day-to-day dealings with the jointly employed workers (which in many cases, is undercapitalized and largely judgment-proof. *See, e.g.,* App. 2366).

Nonetheless, there is ample evidence in the record below to support a finding that Levy and AEG independently engaged in petitioners' willful misclassification, including by failing to require petitioners' reclassification (which Levy and AEG were plainly able to do under their contracts with Canvas), despite having actual knowledge that Canvas' commission pay structure resulted in massive minimum wage violations whose legality was

questioned by Levy's own Director of Human Resources. *See infra* at 14-18.

The Chamber also offers a brief argument that no private right of action exists under Section 226.8. But that argument has been waived, and besides, it contradicts the express language of Labor Code §218 (which, as petitioners have shown, grants workers the right to sue to enforce several Labor Code provisions, including Section 226.8) and ignores entirely the applicable legislative history of Section 226.8 (which expressly refers to that private action right).

ARGUMENT

I. *Amici* Fail to Overcome Petitioners' Showing that Joint Employers May be Held Jointly and Severally Liable for Willful Misclassification Under Section 226.8, Even if the Initial Act of Misclassification Occurred Before the Start of the Joint Employment Relationship.

The Chamber's brief fundamentally misconstrues petitioners' position and the trial record. Petitioners have never contended that Section 226.8 "impos[es] automatic liability . . . on innocent businesses based solely on their lawful contractual relationships," or that it "triggers automatic liability for any contractual party once willfulness has been shown by any one party to that relationship." Chamber Br. at 3, 4. To the contrary, the limiting principle in petitioners' argument is precisely what the Chamber claims to be missing: the "requirement that the person or business entity [must] be a joint employer, or exercise . . . control over the employees, to incur liability." Chamber Br. at 4; *see* Petition at 21, 24, 28; Reply at 17-19, 21-27.

The Chamber ignores the considerable evidence, which the trial court found sufficient to overcome summary adjudication, that Levy and

AEG are petitioners' *joint employers* and not merely arms-length contracting parties that have no independent employer-employee relationship with Canvas' workforce.[1] The Chamber also ignores the legal principle, widely applied under the California Labor Code and its federal statutory counterparts, that companies that choose to enter into the shared duties and responsibilities of a joint-employment relationship thereby make themselves jointly and severally liable for each other's unlawful treatment of their jointly employed workers. *See, e.g., Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912 (Labor Code and FLSA); *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1184 (FEHA); *Chao v. A-One Med. Servs., Inc.* (9th Cir. 2003) 346 F.3d 908 (FLSA); *Carrillo v. Schneider Logistics, Inc.* (C.D. Cal. Jan. 31, 2012) 2012 WL 556309, at *4 (Labor Code and FLSA). That principle, coupled with the facts of record, is controlling here.[2]

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[1] Although the Chamber devotes a substantial portion of its brief to arguing that Levy and AEG are not, in fact, petitioners' "employers," *see, e.g.,* Chamber Br. at 17-20, that is an issue that cannot be resolved until trial. *See* App. 4567.

[2] The Chamber attempts to distinguish just two of the joint employer cases cited by petitioners, without success. In *Mathieu*, 115 Cal.App.4th 1174, this Court held that in the joint employer (or "dual employer") context, an employee whose FEHA rights have been violated may "look to both employers for redress," just as jointly employed workers with workers' compensation claims may seek benefits from both employers. *Id.* at 1184; *see* Reply Br. at 24. In other words, the holding in *Mathieu* stated precisely the same principle that petitioners are urging here. The Chamber nonetheless contends that this Court's actual analysis in *Mathieu* was inconsistent with that holding, because in affirming the trial court's award of summary judgment, this Court "assessed only [one employer's] conduct after it learned of the harassment." Chamber Br. at 20. But the reason this Court – like the parties – focused on that one employer (the temp agency, Norwell), was because plaintiff had settled her claims against the other employer (the temp agency's client, Gulfstream) early in the trial court

A. Labor Code §226.8 Applies to Joint Employers No Less than to Single Employers.

While generally acknowledging the state and federal case law establishing joint and several liability for joint employers, the Chamber contends that a different principle should apply here because Section 226.8 does not expressly provide for such liability. The Chamber argues that if the Legislature intended shared liability for joint employers under Section 226.8, "it would have incorporated specific language into the statute." Chamber Br. at 9.

But joint employer liability arises whenever more than one entity (or person) satisfies the statutory or common law definition of "employer," even if the underlying statute or common law principle makes no reference

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litigation, before the temp agency employer had even filed its motion for summary judgment. 115 Cal.App.4th at 1181 n.3. Moreover, the evidence showed that the client employer had told the harasser "to stop his improper behavior," had encouraged plaintiff to complain if the harasser did not stop, and that plaintiff thereafter never complained – all of which constituted reasonable behavior as well. *Id.* at 1180.

In *Benton v. Telecom Network Specialists* (2013) 220 Cal.App.4th 701, this Court held that the joint employer defendant "would be liable to the class" for unpaid overtime premiums, even though its alleged joint employer staffing agencies had made the unlawful payroll decisions and had issued the unlawful paychecks, if it "fail[ed] to ensure its staffing companies paid the technicians overtime wages." *Id.* at 730-31. The Chamber contends that this was not a holding, but merely an acknowledgement for class certification purposes of plaintiffs' *theory* of liability. Plaintiffs' theory, however, was that they could prove through classwide evidence that all defendants and its staffing agencies were joint employers and that those employers had collectively failed to ensure the proper payment of wages. The underlying legal *principle*, which the Court had to accept as the predicate for considering that theory, was that each joint employer is legally responsible for the Labor Code violations of each other – a principle that this Court in *Benton* fully embraced, and appropriately so.

to "employers" in the plural or to "joint employers." A "joint employer" is simply an "employer" under circumstances where more than one entity satisfies the applicable definition. As the DLSE has explained, "[t]he broad definition of 'employer' for purposes of wage and hour law . . . potentially allows more than one person to be liable for unpaid wages and penalties." DLSE Enforcement Policies and Interpretations Manual at §37.1.2, *available at* http://www.dir.ca.gov/dlse/DLSE_EnfcManual2012.pdf.

"The Legislature is presumed to have knowledge of existing judicial decisions when it enacts and amends legislation." *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 217. Consequently, when the Legislature enacted Section 226.8 in 2011, it was presumptively aware that courts customarily hold joint employers to be jointly and severally liable for each other's violations of their joint employees' Labor Code rights. Had the Legislature intended to make a different rule for Section 226.8 penalties, it would have used far different language than, "It is unlawful for any person or employer to *engage in*" the activity of willful misclassification. Labor Code §226.8 (emphasis added); *see* Petition at 18-22; Reply at 22-23; *see also* Labor Code §226.8(j) ("Nothing in this section is intended to limit any rights or remedies otherwise available at law."). Just as Levy and AEG must be held jointly and severally responsible along with Canvas for whatever backpay, interest, and other penalties are awarded if petitioners establish joint employer liability and petitioners prevail on their minimum wage and other Labor Code claims, so too should all defendants be held jointly and severally liable for statutory penalties under Section 226.8 if petitioners establish willful misclassification within the meaning of that section.

B. The Chamber Ignores that Section 226.8 Makes it Unlawful to "Engage in the Activit[y of] Willful Misclassification."

The Chamber contends that the Legislature did not intend to impose joint and several liability under Section 226.8 because the statute prohibits misclassification that is "willful," and "[a] finding of willfulness is always based on the employer's own intent and actions, not the actions of others. Chamber Br. at 11. The Chamber does not cite any authority for that proposition, in the joint employer context or otherwise, and that proposition does not make logical sense given the language of Section 226.8 and its acknowledged purpose.[3]

Labor Code §226.8 provides in pertinent part:

> (a) It is unlawful for any person or employer to engage in any of the following activities:
>
> (1) Willful misclassification of an individual as an independent contractor.

In determining what it means to "engage in . . . the . . . activit[y of w]illful misclassification of an individual," the Court should consider not only the meaning of the broad term "engage in," Reply at 22-23, and the Legislature's unquestioned purpose of substantially increasing the remedies available to wrongfully misclassified employees, *see* Petition at 23-24; Reply at 25-27, but also the employee-centric focus of the Labor Code as compared to the employer-focused approach under common law. *See Martinez v. Combs* (2010) 49 Cal.4th 35, 59. The goal of Section 226.8 is to protect workers who have been willfully misclassified and to deter such misclassification in future cases. The Legislature sought to achieve those goals by imposing statutory liability on "any person or employer" that

[3] None of the cases cited by the Chamber in describing the willfulness standard arose in the context of determining joint employer liability.

"engages in" the proscribed misclassification "activit[y]," whether by deliberate acts or knowing omissions.

We note again that this Court need not actually decide in this proceeding what constitutes "willful misclassification" within the meaning of Section 226.8, because the trial court awarded summary adjudication to Levy and AEG without even reaching that question. *See* Reply at 30-31. Instead, the trial court based its ruling on the wholly insupportable theory that defendants did not engage in *any* misclassification, willful or not, because the "affirmative act" of misclassification that resulted in petitioners being treated unlawfully as independent contractors was committed by Canvas, once and for all time, on a date that preceded Canvas' contractual relationship with Levy and AEG. *See* Reply at 19-20. That error of law, which had nothing to do with *any* defendant's state of mind, is sufficient by itself to require reversal of the trial court's summary adjudication ruling.

Even if the trial court had not committed that threshold error, though, reversal would still be required because: 1) Section 226.8 does not require separate proof that each joint employer committed independent acts of willful misclassification; and 2) even if it did, petitioners submitted sufficient facts to the trial court to establish that Levy and AEG *did* engage in the activity of willful misclassification with respect to those employees.

Joint employer liability (like joint enterprise, co-conspirator, or agent-principal liability) is an *exception* to the general rule that liability for unlawful conduct rests only with the party that directly committed the misconduct. *See, e.g., Cervantez v. Celestica Corp.* (C.D. Cal. 2009) 618 F.Supp.2d 1208, 1211-12, 1214 (joint employer may be held liable for unpaid time spent in security screenings even though it was not responsible for paying the employees and had no access to, or control over, the co-

employer's timekeeping practices); *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 (joint enterprise liability is a recognized "exception to the general rule that imputed liability for the negligence of another will not be recognized"). That is why, even under workplace statutes that require willfulness or other specific intent to establish liability or heightened penalties, courts frequently impute the willful misconduct of one joint employer to each of its co-joint employers. *See, e.g., A-One Med. Servs.*, 346 F.3d at 918-19 (aggregating hours worked for both joint employers under the FLSA and holding both joint employers jointly and severally liable for third year of damages based on "a willful violation" under 29 U.S.C. §255(a)); *Velasquez v. Khan* (E.D. Cal. July 11, 2005) 2005 WL 1683768, at *2-*3 (joint liability under Labor Code §1174.5, which prohibits willful failure to keep itemized wage records, and Labor Code §203, which prohibits willful failure to pay wages due at the termination of employment); *see also Pena v. Taylor Farms Pac., Inc.* (E.D. Cal. Oct. 15, 2013) 2013 WL 5703505, at *11 (plaintiff stated claim for willful failure to pay wages at termination even though final check was sent by co-employer); *Carrillo*, 2012 WL 556309, at *4 (joint and several liability for violations of the FLSA's anti-retaliation provision, which may turn on the state of mind of single individual).

The Chamber proclaims, without citing any case authority, that the Department of Labor's FLSA regulations could "hardly mean[] that, where the FLSA *does* impose a mens rea requirement, a joint employer could violate the statute without meeting it." Chamber Br. at 14 (emphasis in original). But that is precisely how courts have construed the FLSA and its interpretative regulation in the federal cases cited in the preceding paragraph.

The common principle that joint employers share joint and several liability for each other's wrongful employment practices directed against their jointly employed workforce is fully consistent with other joint liability doctrines under California law, including doctrines that directly overlap with the joint-employer doctrine. The Supreme Court held in *Martinez v. Combs*, that one way an entity can become an "employer" (and, necessarily, a joint "employer") under California law is for it to act "'directly or indirectly, or *through an agent*'" or otherwise, in exercising control over wages, hours or working conditions. *Martinez*, 49 Cal.4th at 60 (quoting Wage Order No. 14 (Cal. Code Regs., tit. 8, §11140, subd. 2(F))). As this language suggests, many joint employer cases arising under the Labor Code involve companies and individuals that act as each other's "agents," often by one employer representing another in dealings with third parties such as their joint employees. *See* Civ. Code §2295 (defining agent); *Blazek v. Adesa California, LLC* (S.D. Cal. Sept. 8, 2009) 2009 WL 2905972, at *2 ("an entity acting as an agent of the employer may be held liable as an employer"); *Guerrero*, 213 Cal.App.4th at 934 ("counties act as agents of the state, rendering both the state and County employers").

As a matter of basic agency law, a joint employer that acts through the agency of another joint employer is necessarily liable for all workplace violations committed in the course of that agency relationship, even if the violation results from the agent's willful or tortious conduct and even if the violation is contrary to the principal's express instructions. *See, e.g., Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652, 654 ("willful and malicious tort" of throwing a hammer at another employee); *Johnson v. Monson* (1920) 183 Cal. 149, 150-51 (malicious and willful assault; ratification by principal unnecessary; "[i]t would . . . make no difference if the assault had

been in violation of express orders" by the principal); *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 617-24 (assault); *see also* Civ. Code §2338 (principals liable for "wrongful acts" committed by agents "in and as a part of the transaction of [the] business" of the agency). Under the Chamber's (and the trial court's) construction of Section 226.8, not only would companies who become joint employers by virtue of an agency relationship become immune from statutory penalties absent separate proof of their independent acts and unique *mens rea*, but no joint employers could be held liable without that proof, despite their shared duty of care to their joint employees and their shared responsibility for ensuring the protection of those employees' fundamental workplace rights under the Labor Code. Indeed, taking the Chamber's and the trial court's construction to its logical conclusion, employers in joint employment relationships would be insulated from Section 226.8 liability even where they *knew* and *condoned* each other's willful violation of the law, provided they did not independently commit an "affirmative act" of misclassification. *See* App. 4569; Chamber Br. at 5 (arguing that liability for willful conduct in the joint employer context requires a "voluntary act").

There is no indication that the Legislature intended to erect arbitrary distinctions in the scope of Section 226.8 liability based on how the parties chose to structure their joint employment relationship. Nor is there any sound reason for parsing liability among joint employers so finely, especially because so many joint employer relationships involve elements of agency (and aid-and-abetting and conspiracy) as to which shared responsibility is well established.

The rule imputing an agent's liability to a principal "rests on the broad[] ground that every man who prefers to manage his affairs through

others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while acting in the scope of their employment." *Carr*, 28 Cal.2d at 655 (quotation marks and citation omitted). An employer that chooses to share employment responsibilities with others – regardless of the precise structure of that relationship – should bear full responsibility for ensuring that its employees are not deprived of their Labor Code rights by *any* joint employer. If the "activity of willful misclassification" has resulted in an employee being deprived of fundamental Labor Code rights, every employer that accepts and condones that activity is "engaged in" wrongdoing within the meaning of Section 226.8. Any other rule, which would increase the litigation burden on plaintiffs having to separately prove the acts and intent of an "employer" that may be one step removed from the entity that directly hired the worker, would be inconsistent with the broad remedial purposes of Section 226.8 and the fundamental Labor Code rights that it protects. *See Indus. Welfare Comm'n v. Superior Court* (1980) 27 Cal.3d 690, 702 (requiring liberal construction of worker protection provisions of Labor Code and Wage Orders).

The Chamber contends in passing that if Section 226.8 liability were extended to joint employers, there could be statutory liability with "no question of intent" and "without a finding of willfulness." Chamber Br. at 12, 13. That, too, is a complete misstatement. No one disputes that there must be a "willful misclassification of an individual as an independent contractor" for Section 226.8 to be violated, or that responsibility for misclassification is the obligation of "any person or employer" that "engaged in" that wrongful "activit[y]." But as petitioners have shown, an employer can "engage in" the ongoing activity of willful misclassification

even the initial misclassification decision was made in the first instance by a joint employer at the commencement of the employer-employee relationship, as long as that misclassification continues on an ongoing basis. *See* Reply at 19-21.[4]

C. The Facts Establishing Defendants' Willful Misclassification Should Have Been Found Sufficient to Overcome Summary Judgment Even Without Levy's and AEG's Shared Responsibility for Canvas's Wrongful Acts.

Even if the Legislature had intended to impose on employees the burden having to separately prove each joint employer's independent acts of willful misclassification under Section 226.8, the trial court's summary adjudication order in favor of Levy and AEG would still have to be reversed. The facts presented by petitioners in opposition to defendants' summary judgment motion were sufficient to establish that Levy and AEG *did* engage in the activity of willful misclassification with respect to petitioner concession workers.

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[4] The Chamber, like defendants, points to Labor Code §2753 to support its narrow construction of Section 226.8. That provision extends joint and several liability to third parties who "knowingly advise[] an employer to treat an individual as an independent contractor to avoid employee status." The Chamber compares this to Section 226.8's definition of willful misclassification as "voluntarily and knowingly misclassifying," and concludes that the Legislature's use of the term "knowingly" in both statutes "forecloses the imposition of automatic vicarious liability regarding intentional misclassification." Chamber Br. at 10. Even assuming the Legislature intended "knowing" to have the same meaning in both statutes, the Chamber's conclusion does not follow from its premise. To "knowingly advise" is not the same as to "engage in" the "activit[y] of." That is why Section 2753 will apply to persons and entities who give "knowing[] advi[c]e" but are not employers or joint employers; and why Section 226.8 will apply to joint employers who engage in the activity of willful misclassification but do not "knowingly advise" anyone of anything. The Chamber's argument makes no logical sense.

The basic structure of the Levy-AEG-Canvas relationship is undisputed. AEG, the owner of various sports and performance venues in Southern California, granted Levy the exclusive right to run food service operations at those venues in exchange for a share of the profits, *see* App. 1763-64, while requiring Levy to "consult with [AEG] concerning . . . labor matters," to "be solely responsible for all labor matters relating to personnel," and not to "take any actions relating to labor matters which could reasonably be expected to have a material adverse impact on [AEG]" – all of which, at a minimum, placed Levy on a duty of inquiry with respect to the concession workers to whom, as their employer, it owed a duty of care. *See* App. 1431-32 (Staples Concession Agreement).

Levy, in turn, subcontracted with Canvas to provide concession workers at those venues to sell food and drink to AEG's and Levy's customers. *See* App. 1764-67. Although Levy hired some concession workers directly, it properly classified those workers as "employees" and paid them on an hourly basis in accordance the provisions of the collective bargaining agreements it negotiated with their representatives. *See* App. 2362-63. By subcontracting with Canvas for the services of the vast majority of the concession workers, though, AEG and Levy were able to reap the benefits of those workers being paid far less than the minimum wage as "commissioned" independent contractors.

Despite delegating to Canvas the responsibility for actually paying petitioner concession workers, AEG and Levy otherwise maintained and exercised near-total control over the most critical terms and conditions of those workers' on-site employment. A typical AEG-Levy contract established certain hiring protocols, required Levy to consult with AEG regarding labor matters, and reserved to AEG the right to, for example: set

"standards of behavior relating to guest service, employee courtesy and conduct"; reassign Levy staff; select the uniforms to be worn and the products to be sold; approve staffing levels and the areas where sales will take place at each event; and approve any subcontracting of work. App. 1346, 1348-49. A typical Levy-Canvas contract, in turn, reserved for Levy similar rights over individuals hired by Canvas, including requiring Canvas to "agree[] that it will comply with all of Levy's and [AEG's] work rules, policies and procedures." App. 1463-65.[5] The evidence shows that AEG and Levy in fact exercised considerable authority over Canvas workers, including by establishing workplace rules, setting workers' hours and events, and supervising and disciplining them. *See* Petition at 10-12 (and evidence cited therein).

While AEG and Levy have asserted that they were unaware that their concession worker employees were misclassified, the evidence would readily support a factfinder's contrary inference. *See Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1450 (all reasonable inferences must be drawn in favor of the party opposing summary adjudication). For example, in 2008, a Levy Director of Human Resources learned that Canvas paid the jointly employed workers on a commission-pay basis that did not ensure a minimum wage (even though Canvas's subcontractor agreement with Levy required it to pay "at least the applicable minimum wage" to its concession worker "employees," App. 1465 at ¶5.3 (Concession Agreement between Levy and Canvas); *id.* 1488 at ¶5.3; *id.* 3486 at ¶5.3). In response to that information, she asked, "Isn't that against

[5] Meanwhile, indemnification provisions in the AEG-Levy and Levy-Canvas contracts attempted to shift any liability arising out of this arrangement from AEG and Levy to Canvas. *See* App. 360, 1468.

wage [and] hour law?" App. 4568-69, 3731. And of course, it would be, unless the employees were *properly* classified as independent contractors.

Levy knew that the concession workers at its sports and entertainment venues *should* have been classified as "employees," both because that is how Levy classified its direct employees and because that is what Levy required in its subcontract with Canvas. *See* App. 4568 (Levy treated concession workers it hired directly as employees); App. 1465-1466 (references to concession workers as "employees"); *see also* App. 4568 (order on summary judgment: the fact that Levy classified workers it hired directly as employees "suggests Levy knew the Canvas vendors should have been classified as employees, rather than independent contractors"). Yet Levy (which acted throughout as AEG's agent, *see* App. 4564-65) did nothing to rectify the wrongful misclassification despite having clear contractual authority (at a minimum) to do so.

In addition to that evidence, Canvas's owner testified that in 2009 he discussed his company's pay structure with a Levy representative. App. 3382-85. Further, a different Levy representative testified that he became aware on multiple occasions that members of the putative class of petitioner concession workers were not being paid the minimum wage. App. 3176-77. And Levy itself created the spreadsheet that calculated the specific commission amounts due to those workers, which showed that some of those concession workers were being paid as little as $1.20 and $1.66 for a day's work – not an hour's work (which would itself be grossly unlawful), but a day's. *See* App. 1793-94, 3629-30, 3424-25. The evidence also shows that several of those concession workers complained to both AEG and Levy that they were not being paid properly. *See, e.g.*, App. 1794-95. Yet Levy and AEG took no steps to require the workers' re-classification –

either at the time or until *nine months* after petitioners filed this lawsuit alleging wrongful (and willful) misclassification – the filing of which incontestably put Levy and AEG on notice that petitioners had been misclassified as independent contractors. *See* App. 87, 1054-55; *see also* App. 1796, 3400-01 (Canvas's owner discussed this lawsuit and the "liability factor" with Levy's General Counsel four months before Levy terminated its relationship with Canvas).

The trial court never addressed any of this evidence, because it rested its summary adjudication ruling on the erroneous conclusion that only Canvas had engaged in the one-time "affirmative act" of misclassification, which meant the trial court did not have to examine the knowledge or intentions of AEG or Levy. But the record establishes that, even if the Legislature had intended to require "employees" separately to prove each of their joint employers' willful misclassification, petitioners met that burden here, at least to the extent necessary to defeat defendants' motion for summary adjudication under Section 226.8. While the Chamber contends otherwise, stating without any citation to the record that Canvas classified its employees "without any knowledge or intent by" Levy and AEG, *see* Chamber Br. at 3, the facts are to the contrary.

II. The Legislature Intended Employees Protected By Section 226.8 to Have a Private Right of Action to Enforce its Provisions.

Almost as an afterthought, the Chamber states its support for defendants' argument that the Legislature did not intend willfully misclassified employees to have a private right of action to enforce Section 226.8. *See* Chamber Br. at 21-23. As petitioners have shown, defendants waived this argument by failing to raise it in timely fashion, including in their Answer, in their summary judgment briefing before the trial court, or

in their Opposition to Petition for Writ of Mandate. *See* Reply at 8-9. Besides, Labor Code §*218* creates a private right of action for claims under Section 226.8, as petitioners have shown, and the legislative history to Section 226.8 states the Legislature's unambiguous understanding that the new statutory provision would "*provide misclassified workers a private right of action . . . .*" App. 381 (emphasis added). *See Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142 ("If the Legislature intended a private right of action, that usually ends the inquiry.").

The Chamber ignores defendants' waiver and this legislative history, and instead addresses only petitioners' reliance on Labor Code §218, which authorizes any "wage claimant *to sue directly . . . for any wages or penalty due him under this article*" (which includes Section 226.8). *See* Reply Br. at 10-12. The Chamber concedes, as it must, that Section 218 "empowers a wage claimant to sue directly to recover any wages or penalties personally due to the employee." Chamber Br. at 22. But it asserts that Section 218 does not apply because penalties under Section 226.8 are allegedly payable only to the Labor and Workforce Development Agency. *Id.*

There is no support for this position, which even defendants have not advanced. First, the two provisions relied upon by the Chamber, Section 226.8(b) and (c), simply specify the applicable penalties; they say nothing about who is entitled to receive them. *See Sampson v. Parking Serv. 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 220 (footnote omitted) ("Section 218 authorizes an employee or his or her assignee to 'sue directly' for any unpaid wages or penalty owed under the Labor Code."). Second, even if those provisions had designated the LWDA as the recipient of those penalties, Labor Code §2699(a) expressly states:

> Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3

(Emphasis added).

In any event, to the extent the statutory language is found to be ambiguous, the 2011 legislative history, quoted by petitioners yet entirely ignored by the Chamber, should dispel that ambiguity. The Legislature recognized that in providing a private right of action, it was creating financial incentives to encourage private parties to pursue claims and thereby assist with enforcement of the statute. *See* App. 381 ("The proponents argue that, because governmental entities do not have the resources or time to go after all employers who misclassify workers, and employers know this, significant penalties and a private right of action are the most effective deterrents to the wrongful conduct."). Those incentives would not exist, and no private litigation would be brought, if private parties were not entitled to recoup the penalties. The Chamber offers no response.

CONCLUSION

The Chamber's *amicus* brief offers no persuasive basis for affirming the trial court's erroneous construction of Section 226.8. For the reasons set forth above and in petitioners' prior briefs, the trial court's grant of summary adjudication to defendants as to petitioners' Section 226.8 claim should be reversed.

Dated: March 9, 2015

Respectfully submitted,

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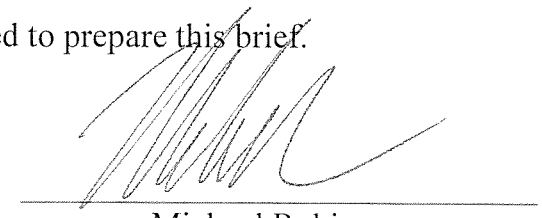
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that this Petitioners' Response to *Amici Curiae* Brief of the U.S. Chamber of Commerce, *et al.* is proportionately spaced, has a typeface of 13 points or more, and contains 5,855 words, excluding the cover, tables, signature block, and this certificate, which is fewer than the number of words permitted by the Rules of Court. Counsel relies on the word count of the word processing program used to prepare this brief.

Dated: March 9, 2015



Michael Rubin

PROOF OF SERVICE
Code of Civil Procedure §1013

CASE: *Yvette Noe, et al. v. Superior Court for the County of Los Angeles*

CASE NO.: CA Court of Appeal, 2d App. Dist., Div. 7 No. B259570 (Los Angeles County Superior Court, Case No. BC486653 – Hon. Mary H. Strobel and John Shepard Wiley, Jr.)

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On March 9, 2015, I served the following document(s):

PETITIONERS' RESPONSE TO *AMICI CURIAE* BRIEF OF THE U.S. CHAMBER OF COMMERCE, *ET AL.*

By First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this March 9, 2015, at San Francisco, California.

Doug Loranger