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.)

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF: BRIEF OF *AMICI CURIAE* IN SUPPORT OF REAL PARTIES IN INTEREST

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TO THE PRESIDING JUSTICE OF THE SECOND APPELLATE DISTRICT, DIVISION SEVEN:

Pursuant to Rule 8.200(c) of the California Rules of Court, the Chamber of Commerce of the United States of America ("Chamber"), CalChamber and Civil Justice Association of California ("CJAC") respectfully request leave to file an *amicus curiae* brief in support of Real Parties in Interest 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").

The U.S. Chamber of Commerce is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and organizations of every size, in every industry sector, from every region of the country, and in California. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber participates as amicus curiae only in cases, like this one, that have a significant impact on California businesses.

The Civil Justice Association of California is a nonprofit organization representing businesses, professional associations and financial institutions. CJAC's principal purpose

is to educate the public about ways to make our laws more "fair, efficient, economical and certain" in determining who gets paid, how much, from whom and under what circumstances, when certain conduct occasions harm to others. Toward this end, CJAC regularly petitions the judiciary on a variety of issues, including the liability of employers to employees for various asserted wrongs. See, e.g., *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1.

The Chamber, CalChamber and CJAC have a vital interest in this case because our members are potential defendants in suits alleging joint liability for misclassification of independent contractors. This case involves a California statutory scheme, under California Labor Code Sections 226.8 and 2753, aimed at preventing willful misclassification of employees as independent contractors. The trial court correctly construed "willful misclassification" under the statute as requiring an affirmative act before any liability attaches. The trial court's construction of "willful misclassification" is supported by state and federal cases addressing the definition of "willfulness" under other employment statutes. Petitioner's position, by contrast, stretches the language of this statute far beyond its original intent by imposing automatic liability for civil penalties on innocent businesses based solely on their lawful contractual relationships.

The employees at issue in this case directly contracted with a third party, not the Real Parties. That third party solely and directly allegedly classified the workers as independent contractors, without any knowledge or intent by the Real Parties. The alleged misclassification predated Labor Code Section 226.8 and any contractual agreements between the parties. In an attempt to improve its chances of recovering a

judgment, the Petitioners seek to entangle every link in the business relationship in the chain of liability.

Nothing in the Real Parties' arms-length contractual relationships warrant this extrapolated liability. The owner of the various venues, AEG, contracted with Levy to provide all its food service operations at several venues under a Concession Agreement.[1] Levy subcontracted with Canvas to provide vendors to sell food and beverages in the general seating areas of the venues under a subcontractor agreement.[2] The subcontractor agreement specifically states that the third party, Canvas, is the employer of the vendor workers and is liable for paying them at least the applicable minimum wage, providing unemployment and workers' compensation coverage and keeping all required records.[3]

Petitioners suggest that the Court should adopt an interpretation of the statute that triggers automatic liability for any contractual party once willfulness has been shown by any one party to that relationship. This automatic joint liability effectively imputes intent for willful misclassification to any person or business entity that contracts for services. Under the Petitioners' reading of the statute, there is no requirement that the person or business entity be a joint employer, or exercise any control over the employees, to incur liability. Companies that enter into legitimate arms-length transactions would automatically become jointly and civilly liable for other companies' employment decisions, even if those decisions were made years before their relationship began and without their knowledge. The potential civil penalties are high depending on the number

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[1] Appendix of Exhibits in Support of Petition for Writ of Mandate ("Exh.") 00891-00892, 003069-003071.
[2] *Id.* Exh. 00131, 001372, 001421.
[3] Exh. 001464, 001465, 001476, 001487, 001488.

of violations and the number of individuals involved. It adds yet another layer of complexity and confusion to California's numerous, written and unwritten, diverse independent contractor rules.

Petitioners' position goes far beyond the statutory text and the Legislature's intent, which was to reach only those employers and persons that knowingly and intentionally misclassify employees as independent contractors. Businesses that are involved in joint ventures with other employers, private equity companies involved with their portfolio companies, franchisors and franchisees, employers that use staffing agencies, hire subcontractors to perform work, or as in this case, lease space at its facilities to concessionaires, may find themselves faced with automatic liability for another business' actions. Even if the third party has total or primary control over the third party employees' paychecks, or their other terms and conditions of employment, including interviewing, hiring, firing, scheduling, setting pay rates, assignments, record keeping, discipline, evaluation, supervision and direction, these companies would be automatically jointly liable for the misclassification of employees.

As discussed below, the Petitioner's interpretation is contrary to the plain meaning of the statute, and federal and state cases interpreting the term "willful." In order to incur liability, a person or employer must willfully misclassify an employee as an independent contractor. That misclassification requires a voluntary act on the part of the person or employer in conjunction with the intent to knowingly avoid employee status. Even if a business is a joint employer, it can never be automatically liable for another businesses' willful misclassification under the Labor Code without that showing of specific intent.

The Chamber, CalChamber and CJAC have reviewed the rulings of the trial court, the alternative writ, and the parties' briefs before this Court. We believe we can assist this Court in reaching a decision by (1) discussing the proper interpretation of "willful" and "knowing" under California Labor Code Section 226.8 based on the plain language of the statute, other state and federal authorities, and policy considerations; (2) clarifying the current California joint employment standard; and (3) reviewing why Labor Code Section 226.8 does not create a private cause of action for employees. For the above reasons, the Amici respectfully request leave to file the attached *amici curiae* brief.

Dated: February 17, 2015

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF REAL PARTIES IN INTEREST

A. UNDER THE LABOR CODE, LIABILITY FOR CIVIL PENALTIES FOR "WILLFUL MISCLASSIFICATION" REQUIRES A KNOWING AND VOLUNTARY ACT.

The trial court correctly determined that to trigger liability under California Labor Code Section 226.8 an employer must have engaged in an independent "affirmative act" of misclassifying the members of its workforce as independent contractors. This reading

of Labor Code Section 226.8 is consistent with the ordinary, plain meaning of the statute. Labor Code Section 226.8(a) provides:

> (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.

Cal. Lab. Code §226.8. Labor Code Section 226.8(i)(4) defines "willful misclassification" as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." Cal. Lab. Code §226.8(i)(4). Thus, under the ordinary words of the statute, a willful misclassification requires two parts: (1) a voluntary act of misclassification, and (2) a specific intent to knowingly "avoid employee status" through misclassification as an independent contractor.

In determining whether the Legislature intended for Section 226.8 to apply only to affirmative acts, the Court must first look to the language of the statute and give effect to its "plain meaning." *Kimmel v. Goland* (1990) 51 Cal.3d 202, 208-09. The words of the statute generally provide the most reliable indicator of legislative intent. *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871. The words of the statute should be given their ordinary and commonsense meaning. *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *People v. Scott* (2014) 58 Cal.4th 1415, 1421; *Polster v. Sacramento County Office of Education* (2009) 180 Cal.App.4th 649, 663. If the statutory language is clear and unambiguous, the Court's inquiry ends and the plain meaning of the statute governs. *Mendiola v. CPS Sec. Solutions, Inc.* (2015) 60 Cal.4th 833.

Here, the plain language of Section 226.8 indicates that the Legislature never intended a person or employer to be automatically and vicariously liable for the willful acts of another; rather, a person or employer must "knowingly" misclassify an independent contractor. Cal. Lab. Code §226.8(i)(4). The Petitioners advocate that the Legislature's use of the word "person," in addition to "employer" in Labor Code Section 226.8(a) establishes that the Legislature meant to police the actions of persons who indirectly "influence or effectively control" the classification activities. The inclusion of the term "person," of course, imposes liability on individuals who do not themselves employ a worker, but nonetheless engage in willful misclassification. However, the plain text imposes liability only where there is a "willful misclassification," which in turn requires a "knowing misclassification."

Petitioners appear to assume that the Legislature intended to impose vicarious liability on joint and secondary employers. But that assumption finds no support in the statutory text, and the Legislature clearly knows how to impose such liability when it wishes. If the Legislature envisioned misclassification to include automatic joint liability under Labor Code Section 226.8, it would have incorporated specific language into the statute. It is the role of the Court to ascertain the meaning of the words used, "not to insert what has been omitted or otherwise rewrite the law to conform to an intention that has not been expressed." *Herrera v. Hernandez* (2008) 164 Cal.App.4th 1386, 1391 (internal quotation marks omitted). When language is not inserted into the statute, the Court should not rewrite the statute to include that language. *Id.* at pp. 1391-92.

A comparison of Labor Code Section 226.8 and Labor Code Section 2753 confirms that the Legislature intended to impose liability only on those businesses who participated in the misclassification with a complete understanding of the facts and circumstances and also intended to misclassify the employees as independent contractors. The same legislation enacted both Section 226.8 and Section 2753. Stats. 2011, ch. 706, §§ 1-2 (eff. Jan. 1, 2012). Under the language of both sections, a person or employer may only be liable for that misclassification if they acted "knowingly."

Section 2753 states that "a person who ... **knowingly** advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor." Cal. Lab. Code § 2753 (emphasis added). Section 226.8 defines "willful misclassification" as "avoiding employee status for an individual by voluntarily and **knowingly** misclassifying that individual as an independent contractor," with no mention of joint and several liability. Cal. Lab. Code § 226.8 (emphasis added). Both sections address a related subject, misclassification, and under the language of either section, the statutes only impose liability for the misclassification, or advice regarding misclassification, if a party acted "knowingly." This language consistently forecloses the imposition of automatic vicarious liability regarding intentional misclassification.

There is no appellate authority regarding the interpretation of "willful" under Section 226.8. However, the meaning of "willful" under other California Labor Code provisions is well settled. "Willful" means that an employer has **intentionally** failed or

refused to perform an act that was required to be done. *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7–8 (interpreting willful under Labor Code Section 203; emphasis added); *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274.

A finding of willfulness is always based on the employer's own intent and actions, not the actions of others. Courts have found willfulness when employers were inconsistent in the application of their own policies instituted to ensure compliance with Labor Code provisions. *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36. In *Gonzalez,* the employer's policy was to supplement employees' pay when their piece rate compensation fell below minimum wage. However, contrary to the policy, the employer failed to cover short falls in several instances. *Id.* at pp. 54-55. The Court found that the employer had acted willfully in not paying the employees their appropriate wages.

A subcontractor has also been found liable for its misclassification of employees to avoid paying prevailing wage rates. *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 782-83. In *G & G Fire Sprinklers,* the court concluded the subcontractor acted willfully by classifying workers as pipe tradesmen, rather than sprinkler fitters, and paying them a lower wage rate. The court found the employer did not act in good faith and applied the appropriate penalties under Labor Code Section 203. Cal. Lab. Code §203.

In contrast, courts refuse to find willfulness when the employer lacked specific intent. A good faith belief that the actions are not in violation of the law will preclude a finding of willfulness. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 325. For

instance, there is no willfulness when the employer and employee have a good faith dispute over the amount of wages owed. *Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 583. In *Nordstrom,* the employer calculated and paid employees' commissions under written agreements with employees. A federal court approved the agreements under a settlement in a different case. Despite the differences between federal and California law, the court found Nordstrom had a good faith belief in the validity of the agreements and found no willful failure to pay wages. *Id.* at p. 583.

When there is uncertainty in the state of the law, courts conclude the employer should not be penalized for believing its actions were proper. *Barnhill v. Robert Saunders & Co., supra,* 125 Cal.App.3d at pp. 7-9. In *Barnhill,* the employer owed the employee wages on her discharge, but she owed the employer a debt. The employer set-off the debt against the employee's wages, bringing the amount due to the employee to zero. The Court held the employer did not have a right to set-off and was, therefore, liable to the employee for wages due at the time of her discharge. Nevertheless, because the question of set-off was one of law, and the law was not clear at the time of the employee's discharge, the employer's good faith belief regarding his set-off rights negated a finding that the nonpayment of wages was willful. *Id.* at pp. 8–9. These cases show that a lack of intent will excuse liability under the Labor Code.

In cases of automatic joint liability, there would be no question of intent. A business entity that plays no role in the misclassification of workers as an independent contractor can have no intent to misclassify to "avoid employee status." That entity remains outside the reach of the statute. Absent specific intentional misclassification, it

is entitled to rely on its good faith belief that the subcontractor is following all applicable employment laws.

This reading of "willful" is also consistent with federal employment laws. In disparate treatment cases under the Age Discrimination in Employment Act, "willful" means that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 617. Similarly, under the Fair Labor Standards Act ("FLSA"), the U.S. Supreme Court found that in "common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional.'" *McLaughlin v. Richland Shoe Co.* (1988) 486 U.S. 128, 133. In *Richland Shoe*, the U.S. Supreme Court rejected an imposition of an additional penalty for conduct that was merely negligent, or for a showing of the mere possibility that the employer suspected its action might violate the FLSA. Instead, to be willful, the Court required the conduct to be in "reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Id.* at p. 130.

Petitioners contend that a federal regulation interpreting the FLSA supports automatic joint liability without a finding of willfulness. This regulation provides that, where "the facts establish that the employee is employed jointly by two or more employers," then "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions" of the FLSA. 29 C.F.R. § 791.2(a). This regulation simply determines who is an "employer" responsible for compliance with

the FLSA.[4] Where a provision of the FLSA imposes requirements with no mens rea, any "employer" who fails to satisfy them will have violated the statute. But that hardly means that, where the FLSA *does* impose a mens rea requirement, a joint employer could violate the statute without meeting it. Compare, *e.g.*, 29 U.S.C. § 206(a) (stating that every employer "shall pay" a minimum wage) *and* 29 U.S.C. § 207(a) (stating that "no employer shall" employ a person for more than a 40-hour workweek without paying overtime) *with* 29 U.S.C. § 216(a) (providing heightened penalties for "[a]ny person who willfully violates" the FLSA). Moreover, the absence of language akin to the federal joint employer regulation in Labor Code 226.8 only drives home that the Legislature did not intend to impose automatic joint liability in that provision.

The Legislature's choice was, moreover, consistent with longstanding common law, which imposes no duty on businesses with subcontractors to safeguard the subcontractor's employees from the Labor Code violations of their employer. In *Toll Brothers,* for example, the Plaintiffs joined a homebuilder in two wage and hour lawsuits brought by employees of its subcontractors. *Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1183. Although the Court remanded the Labor Code issues back to the trial court, the Court flatly rejected imposing a general negligence theory of joint and several liability on the contractor for the subcontractor's Labor Code violations. The court explained that even if a violation of the Labor Code Section established a failure to exercise due care, that failure is insignificant unless Toll Brothers had a duty to plaintiffs

[4] Labor Code Section 226.8 contains no provision authorizing joint liability. The California Supreme Court rejected the argument that California employment law incorporates this federal regulation. *Martinez v. Combs* (2010) 49 Cal.4th 35, 51-52, 66-68 (*"Martinez"*).

to exercise care. The court found no reason to find a duty of care for a general contractor to safeguard its subcontractor's employees against the economic harm resulting from labor law violations by their employer. *Id.* at pp. 1210-1211.

Outside the employment context, other courts have found that "willfulness" requires "that the person knows what he is doing, intends to do what he is doing, and is a free agent." *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 citing *May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 404; *Wilson v. Security-First National Bank* (1948) 84 Cal.App.2d 427, 431. Clearly, nothing in the language of the statute, or in any state or federal case law or statute, supports reading absolute joint liability into Labor Code Section 226.8 for the "willful misclassification" of employees as independent contractors by a contractor's subcontractor.

B. THE LEGISLATIVE HISTORY CONFIRMS THAT EACH BUSINESS MUST ACT KNOWINGLY TO INCUR LIABILITY FOR WILLFUL MISCLASSIFICATION.

The Legislature plainly defined "willful" to mean "voluntarily and knowingly misclassifying." Since the language is clear, there is no need for the Court to delve into the legislative history to interpret its meaning. Only when the statute's language is ambiguous, or susceptible of more than one reasonable interpretation, can the court turn to extrinsic aids to assist in interpretation. *People v. Jefferson* (1999) 21 Cal.4th 86, 94; *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1103. In this case, the statutory language shows that the Legislature did not intend to impose automatic joint liability on all participants in contractual business relationships without a showing that

the person or employer voluntarily and knowingly misclassified with the intent to "avoid employee status."

The Legislative history, although not necessary in this case, confirms this reading of the plain language of the statute. The Legislature enacted Labor Code Sections 226.8 and 2753 as part of Senate Bill 459 in the regular session of 2011.[5] The Bill's sponsors intended the Bill to remedy the lack of civil penalties for "willful" violations.[6] The last version of the Bill amended SB 459 to define "willful" as "voluntary and knowingly."[7] The language of the Bill differed from earlier versions by emphasizing that the term "willful" imposed a stringent standard, not automatic liability. In the Fiscal Summary of the Bill, Legislative Staff notified the Committee that "willful, generally an intentional or voluntary violation of a known legal duty, is a higher test and may make it more difficult to find a violation, thereby constraining the number of enforcement actions."[8] The comments and analysis surrounding the Bill's enactment establish that the Legislature intended to create a statute with severe penalties only for those that knowingly and voluntarily violated the statute with the intent to misclassify workers as independent contractors to "avoid employee status."

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[5] Legislative Counsel's Digest, Senate Bill 459 (2010-2011 Reg. Sess.).
[6] Bill Analysis of Senate Bill 459, Assembly Committee on Labor and Employment, as amended May 27, 2011 (2010-2011 Reg. Sess.) June 22, 2011.
[7] Id.
[8] Senate Appropriations Committee Fiscal Summary of Senate Bill 459, as amended March 23, 2011 (2010-2011 Reg. Sess.) May 9, 2011.

C. CALIFORNIA'S JOINT EMPLOYMENT STANDARD CANNOT BE APPLIED MECHANICALLY TO ASSIGN JOINT LIABILITY TO SEPARATE BUSINESSES FOR WILLFUL MISCLASSIFICATION.

Petitioners' primary argument is that once an employee proves willful misclassification by at least one employer, liability applies automatically to all the involved contractually related businesses as joint employers. Although the trial court has yet to rule on the evidence regarding the Real Parties' joint employment, Petitioners misstate California's joint employer standard in the independent contractor context.

The test for determining a joint employment relationship is fact based and cannot be mechanically applied. To determine whether an employment relationship exists among separate businesses, the Court considers the totality of the circumstances, reflecting upon the nature of the work relationship between the parties, and placing emphasis on the control exercised by the employer over the employee's performance of employment duties. *Bradley v. California Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1626-28.

Petitioners base their mischaracterization of the joint employer standard on the California Supreme Court's decision in *Martinez v. Combs. Martinez, supra,* 49 Cal.4th 35. In *Martinez,* for purposes of the California Labor Code, the California Supreme Court defined an "employer" as one who, directly or indirectly, or through an agent or any other person, engages, suffers, or permits any person to work or exercises control over the wages, hours, or working conditions of any person as outlined by the Industrial Welfare Commission's (IWC) Wage Order 14-2001. *Id.* at p. 76.

Martinez involved strawberry pickers who sued their employer, strawberry harvester Isidoro Munoz, and the brokers that sold Munoz's strawberries, as employers for unpaid minimum wages under the Labor Code. The contracts gave the broker the right to direct the employees' work. However, the court found that the fact that the broker's field representatives oversaw quality control and contract compliance, told the farmer and workers how they wanted strawberries packed and pointed out mistakes in packing did not show that brokers exercised control over workers' working conditions. *Martinez, supra,* 49 Cal.4th at p. 75.

The court found that the brokers were not employers because they lacked the power to prevent individuals from working. The underlying contract required the employer to be "solely responsible for the selection, hiring, firing, supervision, assignment, direction, setting of wages, hours, and working conditions" of his employees. The employer also agreed to comply with all provisions of federal, state and local laws applicable to his operations. The Court refused to imply an obligation in the contract for the broker to pay wages that it never agreed to. *Martinez, supra,* 49 Cal.4th at p. 77. The mere presence of a downstream benefit to the broker was insufficient to establish an employment relationship. Instead, *Martinez* specifically reviewed the level of control exercised by the alleged joint employer over the other entity's employees to find there was no employment liability assess whether or not the defendants could be deemed joint employers.

The courts have not found a third party to be an employer when it has no authority to prevent the workers from working. When the contractor and its supervisors have the

exclusive power to hire and fire the workers, set their wages and hours, and tell them when and where to report to work, there is no control by the third party. Even if, as a practical matter the third party could choose not to buy their products, which may force the contractor to lay off workers, or divert labor to other projects, that business relationship standing alone does not transform the purchaser into the employer of the supplier's workforce. *Martinez, supra,* 49 Cal.4th at p. 70; *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419. The purchase of a contractor's services does not transform the Real Parties into liable parties under Labor Code Section 226.8.

Similarly, in *Aleksick v. 7-Eleven, Inc.*, the Court concluded that the franchisor was not liable for the acts of a franchisee under an employee's class action alleging violations of the Unfair Competition Law. *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176. A franchise agreement governed the relationship between the franchisor and the franchisee and designated the franchisee as an independent contractor. He was responsible for overall store operations, including hiring and firing employees, setting rates of pay and raises, scheduling work and vacations, and giving performance reviews. At the end of each week, the franchisee submitted the hourly rate and number of hours worked by his employees to 7–Eleven to process its payroll checks. The court concluded that 7-Eleven was not the employer under any definition of the employment relationship, whether based strictly on common law or on the additional wage order definitions. 7–Eleven exercised no control over Tucker's employees. 7–Eleven did not "suffer or permit" the employees to work and it did not engage them in work." *Id.* at p. 1190.

Last year, the California Supreme Court also rejected a proposed agency standard for franchisor vicarious liability when the franchisee exerted exclusive control over the employees' employment conditions. *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474. Imposition and enforcement of a uniform marketing and operational plan does not automatically saddle the franchisor with liability for the franchisee's employment practices. Liability only attaches if the franchisor retains the employer's traditional rights of general control over day-to-day hiring, direction, supervision, discipline and discharge of the franchisee's employees. Since there was no evidence of this day-to-day control, the court dismissed the claims against the franchisor. *Id.* at p. 478. A finding of joint employment requires a case by case factual analysis of the level of control exerted by each business entity and cannot be found automatically under Labor Code Section 226.8. Contractual relationships alone will never trigger liability under Labor Code Section 226.8.

Other cases cited by the Petitioners do not support the imposition of strict liability under Labor Code Section 226.8. In *Mathieu*, after a temporary employment agency placed an employee with its client, another employee of the client harassed her. *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174. When the employee was terminated, she sued the agency and the client for sexual harassment under California's Fair Employment and Housing Act ("FEHA"). In concluding the trial court properly granted summary judgment for the agency on the plaintiff's sexual harassment claim, *Mathieu* assessed only the temporary agency's conduct after it learned of the harassment. The client's conduct was not assessed to determine the agency's liability. *Id.* at pp. 1184-1185. See

also *January v. Dr. Pepper Snapple Group, Inc.* (9th Cir. Dec. 3, 2014) 2014 WL 6790454 at p. *1(unpublished opinion). Nothing in *Mathieu* supports Petitioners' demand for automatic joint liability for the alleged misclassification.

Petitioners also point to a class certification case to assert that joint employers are liable for each other's conduct. See *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701. In reviewing the denial of class certification, the Court found that "[i]f" a defendant "violated wage and hour laws by failing to ensure its staffing companies paid ... overtime wages, it would be liable to the class." *Id.* at p. 731. The Court did not determine the plaintiff's theory was legally viable. Class certification is a procedural question and "does not ask whether an action is legally or factually meritorious." *Id.* at p. 715-716. At the class certification stage, as long as the plaintiff's theory of liability may be resolved on a class-wide basis, the court will certify the action for class treatment, even if the plaintiff's theory is ultimately substantively incorrect. *Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278, 293. Accordingly, a case pointing to class certification does not support the Petitioner's assertion that joint employers will be held vicariously liable for each other's conduct.

D. LABOR CODE SECTION 226.8 DOES NOT CREATE A PRIVATE CAUSE OF ACTION.

Labor Code Section 226.8 grants no express right to sue. Cal. Lab. Code §226.8. When the Legislature intends to create a private cause of action, it will do so in clear, unmistakable terms. *Calop Business Systems, Inc. v. City of Los Angeles* (C.D. Cal. 2013) 984 F.Supp.2d 981, 1014 (citations omitted). The absence of language granting an explicit right to sue creates an almost insurmountable burden for the plaintiff to gain

judicial recognition of that right. *Lu v. Hawaiian Garden Casino, Inc.* (2010) 50 Cal.4th 592.

Petitioners contend that Labor Code Section 218 grants them a private right of action to pursue a claim under Labor Code section 226.8. Section 218 provides:

> Nothing in this article shall limit the authority of the district attorney of any county or prosecuting attorney of any city to prosecute actions, either civil or criminal, for violations of this article or to enforce the provisions thereof independently and without specific direction of the division. Nothing in this article shall limit the right of any **wage claimant to sue directly or through an assignee for any wages or penalty due him under this article.**"

Cal. Lab. Code §218 (emphasis added).

Section 218 empowers a wage claimant to sue directly to recover any wages or penalties personally due to the employee. *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 336. Section 218 creates a private right to economic damages only. *Bender v. Darden Restaurants Inc. (9th Cir. 2002) 26 Fed.Appx. 726, 729.* Labor Code Section 226.8 provides for civil penalties paid to the Labor Workforce Development Agency, not "any wages or penalty due [the employee]." Cal. Lab. Code §§226.8(b) & (c). Section 226.8 "does not give rise to a wage claim per se as the text of this provision does not give rise to any unpaid wages. Consequently, §218 does not reveal a clear legislative intent to create a private right of action under §226.8. *Villalpando v. Exel Direct Inc.* (N.D.Cal., Mar. 28, 2014) 2014 WL 1338297 at p. *19; *Rosset v. Hunter Engineering Co.* (N.D. Cal., July 17, 2014) 2014 WL 3569332 at p. *8. Section 218 creates a private right of action only to enforce Labor Code provisions that specifically create a wage entitlement. *Mouchati v. Bonnie Plants, Inc.* (C.D.Cal., Mar. 6, 2014) 2014

WL 1661245 at p. *7. See also *Gunawan v. Howroyd-Wright Employment Agency* (C.D.Cal., 2014) 997 F.Supp.2d 1058, 1067-1069. Labor Code Section 226.8 creates civil penalties, which are not wages, penalties or economic damages due directly to employees, so no private right of action exists to enforce these non-wage claims.

E. CONCLUSION

To incur liability under Labor Code Section 226.8, a person or employer must "willfully misclassify" an employee as an independent contractor. That misclassification requires a voluntary act on the part of the person or employer in conjunction with the intent to misclassify workers as independent contractors for the purpose of knowingly avoiding employee status. Even if a business is a joint employer, it can never be automatically liable for another businesses' willful misclassification under the Labor Code without a showing of specific intent to misclassify. This Court should withdraw its alternative writ, deny the Petitioners' petition, and allow the trial court's ruling on the application of Labor Code Section 226.8 to stand.

Dated: February 17, 2015

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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.)

[PROPOSED] ORDER GRANTING LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF REAL PARTIES

The court has considered the application of the Chamber of Commerce of the United States of America ("Chamber"), CalChamber and Civil Justice Association of California under Rule 8.200(c), California Rules of Court, for leave to file an *amici curiae* brief in support of Real Parties, and good cause appearing, the application is hereby **GRANTED.**

The *amici curiae* brief which accompanied the application, having been served on all parties, shall be filed upon entry of this Order. Any party may file an answer to the *amici curiae* brief within 30 days from the entry of the Order. **IT IS SO ORDERED.**

Dated: _____

PRESIDING JUSTICE

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Application for Permission to File *Amici Curiae* Brief and Brief of *Amici Curiae* in Support of Real Parties in Interest, together, contain 6,022 words as indicated by the word count utility found on the computer program used to prepare the brief.

Dated: February 17, 2015

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PROOF OF SERVICE BY MAIL

I am employed in Contra Costa County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Treat Towers, 1255 Treat Boulevard, Suite 600, Walnut Creek, California 94597. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On February 17, 2015, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF: BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

in a sealed envelope, postage fully paid, addressed as follows:

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 17, 2015, at Walnut Creek, California.

Gina Camacho

Gina R. Camacho

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