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October 31, 2017

VIA CM/ECF

Molly C. Dwyer
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103

Re: ***Arias v. Raimondo***
Case No. 15-16120
June 22 panel opinion: Judges Trott, Wardlaw, and Gould

Dear Ms. Dwyer:

I am counsel for appellee Anthony Raimondo in this appeal. On August 10, 2017, the Court stayed the issuance of its mandate pending Mr. Raimondo's filing of a petition for a writ of certiorari with the Supreme Court.

Under Fed. R. App. P. 41(d)(2)(B), this Court's stay "continues until the Supreme Court's final disposition" provided that the petitioning party timely "files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay." By this letter, I am notifying you that a petition has been timely submitted to the Supreme Court for filing. An electronic copy of the petition is attached to this letter.

No further action from this Court is necessary at this time. You are welcome to contact me with any questions.

Respectfully submitted,

HORVITZ & LEVY LLP

By: s/Peder K. Batalden

cc: See attached Certificate of Service

No. 17-_____

In The
Supreme Court of the United States

ANTHONY P. RAIMONDO,
Petitioner,
v.
JOSE ARNULFO ARIAS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2012), provides employees with the rights to earn minimum wages and overtime compensation. *Id.* §§ 206-207. The FLSA prohibits "any person" from retaliating against an employee who invokes those rights. *Id.* § 215(a)(3). Under the FLSA's private right of action provision, *id.* § 216(b), only an "employer" can be liable for retaliation in violation of § 215(a)(3).

This Court and the majority of circuits have held that an "employer" subject to suit under § 216(b) is one who exercises economic control over the terms and conditions of the plaintiff's employment. Breaking from this consensus, the Ninth Circuit in this case held that any person—even an attorney representing the plaintiff's employer—can be sued as a "non-actual employer" if that person allegedly retaliated against the plaintiff.

The question presented is this:

Whether an individual who has no operational control over an employer (or the terms or conditions of its employees' employment) can be sued for retaliation under the FLSA.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Anthony Raimondo, petitioner on review, was the defendant-appellee below. Jose Arnulfo Arias, respondent on review, was the plaintiff-appellant below. There are no entities that need to be disclosed with respect to Anthony Raimondo under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony P. Raimondo petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 860 F.3d 1185 (9th Cir. 2017), and is reprinted in the appendix at App. 1a-19a. The order of the District Court dismissing respondent's FLSA retaliation claim is unpublished and is reprinted in the appendix at App. 20a-32a.

JURISDICTION

The Ninth Circuit entered judgment on June 22, 2017, App. 1a, and denied Raimondo's timely petition for rehearing en banc on August 2, 2017, App. 33a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2012).

STATUTORY PROVISIONS INVOLVED

Section 3(d) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 203(d) (2012), provides:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Section 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3) (2012), provides:

> After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
>
> . . . .
>
> **(3)** to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]

Section 16(b) of the FLSA, 29 U.S.C. § 216(b) (2012), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case

may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid

> overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2012), governs important aspects of the employer-employee relationship, including the payment of wages. One of the Act's provisions, *id.* § 216(b), permits an employee to file a civil action if his or her "employer" engages in retaliation. In this case, the Ninth Circuit held that outside counsel for an employer qualifies as an "employer" under the Act, meaning that a lawyer can be sued for retaliating against the employer's employee. The text of the FLSA does not permit that result. The Ninth Circuit's decision here has split the circuits on this issue of nationwide importance, and this Court's review is necessary to resolve the split.

The FLSA broadly prohibits "any person" from retaliating against an employee for invoking his or her FLSA rights. *Id.* § 215(a)(3). But the FLSA provision creating a private right of action limits the class of defendants whom employees may sue for retaliation to "any employer." *Id.* § 216(b).

This Court and the lower courts have developed and applied a test to determine whether a defendant in an FLSA case is the plaintiff's "employer." The test scrutinizes the economic reality of the relationship between the plaintiff and the defendant to determine whether the defendant exercised operational control over the terms and conditions of the plaintiff's employment.

The Ninth Circuit has diverged from other courts by refusing to apply the operational control test in this case. The Ninth Circuit held that, under § 216(b), an employee can sue any person who retaliates against him or her, whether or not the defendant is truly an "employer" under the FLSA. In the words of the Ninth Circuit, even the "non-actual employer" defendant here could be sued for retaliation.

This circuit split sows confusion for employers (and for independent contractors who work with employers). The outcome of an FLSA retaliation case against a "non-actual employer" now depends on the circuit in which the lawsuit is filed. The resulting unpredictability interferes with employers' relationships with professionals and other vendors that supply services to employers. They now fear being sued as if they were employers themselves.

The Ninth Circuit's decision also intrudes on the relationship between employers and their attorneys. Every FLSA plaintiff who sues his or her employer for retaliation may now join a claim against the attorney who advised the employer. Attorneys will be reluctant

to provide needed counsel to employers, and employers will find it increasingly difficult to hire counsel in employment cases. Employees who bring such claims could strategically disqualify attorneys who agree to represent the employer in the retaliation litigation by making those attorneys targets of the suit.

The important question presented here has squarely split the Ninth Circuit from the rest of the country. This Court's intervention is urgently needed to resolve the split and correct the Ninth Circuit's wayward course. The petition should be granted.

STATEMENT

1. Petitioner Anthony Raimondo is an attorney who primarily represents employers in the agricultural industry. In 2006, respondent Jose Arias filed suit in California state court against his former employer, Angelo Dairy, as well as its owners, alleging violations of California's wage and hour laws. App. 5a, 20a-21a. Raimondo was retained to represent Angelo Dairy and its owners in that lawsuit; Raimondo was not himself a party to it. App. 21a. The case was extensively litigated during pretrial proceedings, including a trip to the California Supreme Court. App. 5a, 21a n.1; *see Arias v. Superior Court*, 46 Cal. 4th 969, 209 P.3d 923 (2009).

With trial approaching, Raimondo contacted United States Immigration and Customs Enforcement (ICE) and inquired about Arias's immigration status.

App. 5a-6a, 21a. There are legitimate reasons for a defense attorney to investigate an employee's immigration status. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140, 151-52 (2002) (holding employee's immigration status relevant to whether National Labor Relations Board can award backpay for unfair labor practice); *Rodriguez v. Kline*, 186 Cal. App. 3d 1145, 1149, 292 Cal. Rptr. 157, 158 (1986) (holding plaintiff's immigration status relevant to determination of lost future earnings). In addition here, Raimondo explained to ICE that Arias's attorneys worked at California Rural Legal Assistance, Inc., which is funded by the Legal Services Corporation (LSC) and is therefore barred from representing undocumented aliens. App. 6a; *see* 45 C.F.R. §§ 1626.3, 1626.5 (2016).

Arias ultimately settled his wage and hour lawsuit before trial. App. 8a.

2. Arias later filed this lawsuit in federal district court against Angelo Dairy, its owners, and Raimondo. App. 9a, 21a. Arias settled with Angelo Dairy and its owners, but continued to assert claims against Raimondo. App. 9a, 21a-22a. Arias's amended complaint pleaded a claim against Raimondo for retaliation in violation of the FLSA, along with two state law claims, alleging that Raimondo contacted ICE to try to arrange for Arias's deportation in retaliation for his filing the underlying wage and hour lawsuit. App. 9a, 21a-22a.

Raimondo moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Arias's complaint failed to state a claim under any of his theories. App. 10a, 21a-22a, 25a. Following established precedent of the Ninth Circuit and other circuits, the District Court twice dismissed Arias's complaints, ruling that his allegations were insufficient to show that Raimondo was his employer, and that such a showing is required to bring a retaliation claim under the FLSA. App. 10a, 25a-31a.

3. Arias appealed, and the Ninth Circuit reversed. App. 3a. The Ninth Circuit did not apply the established test for determining employer status under the FLSA, which entails an examination of the economic realities of the relationship between the plaintiff and defendant to evaluate whether the defendant had operational control over the terms and conditions of the plaintiff's employment. *See Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009); *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999) (en banc); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). The Ninth Circuit divided retaliation claims from nonretaliation claims and confined the economic control test to nonretaliation claims, primarily those for unpaid minimum wages or overtime compensation. The court explained that "[r]etaliation is a different animal altogether" and is "as different" from substantive wage and hour claims "as chalk is from cheese." App. 11a. The Ninth Circuit did not acknowledge the tension between its division and the FLSA's provision of a single definition of "employer" applicable to all sections

of the Act, 29 U.S.C. § 203(d), including the private right of action provision, *id*. § 216(b).

The Ninth Circuit held that the FLSA antiretaliation provision's "distinctive purpose is not served by importing an 'economic control' or an 'economic realities' test as a line of demarcation into the issue of who may be held liable for retaliation." App. 11a-12a. Instead, the court found that "the FLSA itself recognizes this sensible distinction in section 215(a)(3) by prohibiting 'any person'—not just an actual employer—from engaging in retaliatory conduct." App. 12a. According to the court, "Congress clearly means to extend section 215(a)(3)'s reach beyond actual employers." App. 16a. The court concluded that "non-actual employers," "like Raimondo[,] may become secondarily liable pursuant to section 216(b) for economic reparations, but only as a measure of penalties for his transgressions." App. 18a-19a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS DISAGREE ABOUT THE MEANING OF "EMPLOYER" UNDER THE FLSA'S PRIVATE RIGHT OF ACTION.

A. The FLSA proscribes retaliation, but does not permit every alleged retaliator to be sued.

The FLSA makes it "unlawful for any person . . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . . ." 29 U.S.C. § 215(a)(3). However, the FLSA does not make "any person" liable for such retaliation in a private civil action. Congress narrowed the universe of possible retaliation defendants to "employers": "Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate . . . ." *Id*. § 216(b). And Congress chose not to define an "employer" as "any person." *See id*. § 203(d) (defining "employer").

This Court has construed the FLSA's definition of "employer," holding that "the 'economic reality' rather than 'technical concepts' is to be the test of employment" under the FLSA. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (under the FLSA, "the determination of the [employer-employee] relationship does not depend

on . . . isolated factors but rather upon the circumstances of the whole activity"). As we explain below, until this case, lower courts have uniformly applied this economic reality test to determine "employer" status—both in substantive wage and hour cases and in retaliation cases.

B. Courts of appeals apply an economic reality test to assess whether a defendant counts as an "employer" under the FLSA.

In *Moore v. Appliance Direct, Inc.*, 708 F.3d 1233, 1237 (11th Cir. 2013), a retaliation case, the Eleventh Circuit applied the FLSA's definition of "employer" and held that a defendant "is personally liable as an FLSA employer if he has 'operational control of a corporation's covered enterprise,' which may be involvement in the day-to-day operation of the company or direct supervision of the employee at issue." The court pointed to the fact that the defendant in *Moore* was the chief executive and seventy-five percent owner of the corporation for which the plaintiff worked. The court also examined "evidence showing him to have guided company policy and to have given instructions to managers regarding job duties; that he was the ultimate decision maker at the company; that he negotiated leases and vendor contracts; and significantly, that he directed that the Plaintiffs not be given subcontracts for delivery services." *Id.* The court therefore concluded that the defendant qualified as an "employer" under the FLSA. *Id.*

Similarly, in *Irizarry v. Catsimatidis*, 722 F.3d 99, 103-05 (2d Cir. 2013), the Second Circuit applied this Court's economic reality test for employer status in a case involving both substantive wage and hour and retaliation claims. The court focused on operational control as the touchstone for employer status, explaining that "[a] person exercises operational control over employees if his or her role within the company, and the decisions it entails, directly affect the nature or conditions of the employees' employment." *Id.* at 110. The court identified "four factors to determine the 'economic reality' of an employment relationship: 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Id.* at 104-05. After exhaustively reviewing the evidence in the case in conjunction with these factors, *id.* at 114-17, the court concluded that the defendant's "actions and responsibilities—particularly as demonstrated by his active exercise of overall control over the company, his ultimate responsibility for the plaintiffs' wages, his supervision of managerial employees, and his actions in individual stores—demonstrate that he was an 'employer' for purposes of the FLSA." *Id.* at 117.

So too, in *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 33-34 (1st Cir. 2007), the First Circuit applied the economic reality/operational control test to determine whether an individual defendant was an "employer" under the FLSA. The court noted the defendant "was

the president of the corporation, . . . had ultimate control over the business's day-to-day operations[, and] . . . was the corporate officer principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees' wages and schedules" *Id.* at 34. Accordingly, the court concluded that the defendant exercised operational control over the plaintiff's terms and conditions of employment and was an "employer" under the FLSA.

The Sixth Circuit followed the same course in *United States Department of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 778-79 (6th Cir. 1995), to determine that a company executive counted as an "employer" under the FLSA. Citing the FLSA's definition of "employer," 29 U.S.C. § 203(d), and the economic reality test for employer status, the court held that "a corporate officer who has operational control of the corporation's covered enterprise is an 'employer' under FLSA, along with the corporation itself. One who is the chief executive officer of a corporation, has a significant ownership interest in it, controls significant functions of the business, and determines salaries and makes hiring decisions has operational control and qualifies as an 'employer' for the purposes of FLSA." *Cole Enters.*, 62 F.3d at 778 (citation omitted).

C. The Ninth Circuit splits from other circuit courts by distinguishing retaliation cases from substantive wage and hour cases.

Breaking from the other circuits, the Ninth Circuit in this case repudiated the economic reality/operational control test for assessing "employer" status in FLSA retaliation cases. App. 10a-19a. Observing that "[r]etaliation is a different animal altogether," whose "purpose is to enable workers to avail themselves of their statutory rights in court," the Ninth Circuit held that "[t]his distinctive purpose is not served by importing an 'economic control' or an 'economic realities' test as a line of demarcation into the issue of who may be held liable for retaliation." App. 11a-12a. The court cast aside precedent describing the economic reality test on the ground that it addressed "whether a person was an employer for purposes of the FLSA's substantive economic provisions, *i.e.*, those involving wages and hours, etc., not section 215(a)(3) retaliation." App. 12a.

The court fixated on the language of the FLSA's substantive antiretaliation provision, 29 U.S.C. § 215(a)(3), and relied on that provision to justify its newly invented distinction between FLSA retaliation claims and other FLSA claims. App. 12a (observing that "section 215(a)(3) . . . prohibit[s] 'any person'—not just an actual employer—from engaging in retaliatory conduct"), 16a ("The wage and hours provisions focus on de facto employers, but the anti-retaliation provision refers to 'any person' who retaliates. . . . Thus, Congress clearly means to extend section 215(a)(3)'s reach beyond actual employers."). In

extending the FLSA's private right of action for retaliation to include so-called "non-actual employers," App. 18a, the Ninth Circuit diverged from circuits that have uniformly applied the economic reality/operational control test to gauge FLSA employer status for all claims. The Ninth Circuit also created a circuit split regarding whether anyone but an employer can be liable for retaliation under the FLSA.

D. The Ninth Circuit adopts the minority position in a split over whether a retaliation claim may be brought directly under 29 U.S.C. § 215(a)(3), enabling an employee to sue "any person" who retaliates, not merely an "employer" under 29 U.S.C. § 216(b).

For decades, most courts of appeals (but not all) have held that the FLSA's substantive prohibition on retaliation, 29 U.S.C. § 215(a)(3), does not itself create a private right of action for retaliation. *See Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703, 705 (2d Cir. 1949) (holding that § 215(a)(3) "confers no jurisdiction upon the court over a civil action to recover damages for the discharge of an employee in violation of the statute"); *Powell v. Wash. Post Co.*, 267 F.2d 651, 652 (D.C. Cir. 1959) (holding that § 215(a)(3) "makes no provision for a civil action by an employee to recover damages for discharge in violation of the Act or for reinstatement"); *Martinez v. Behring's Bearings Serv., Inc.*, 501 F.2d 104, 105 (5th Cir. 1974) (holding that "Congress did not see fit to provide any right of action for damages for wrongful discharge of an employee" under § 215(a)(3));

Bush v. State Indus., Inc., 599 F.2d 780, 783, 786-87 (6th Cir. 1979) (refusing to recognize an implied private right of action for retaliation under § 215(a)(3), but acknowledging express right of action for retaliation against an "employer" under recently-enacted § 216(b)); *Crowley v. Pace Suburban Bus. Div. of Reg'l Transp. Auth.*, 938 F.2d 797, 799 & n.5 (7th Cir. 1991) (noting that § 215(a)(3) "does not create a private right of action," but that § 216(b) does create a private right of action against "the employer"); *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 931 (11th Cir. 2000) (explaining that § 215(a)(3) does not create a private right of action for retaliation and that "Congress added the language [to § 216(b)] allowing suits against employers for violations of section 215(a)(3)'s anti-retaliation provision in 1977"); *see generally Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 21 (2011) (Scalia, J., dissenting) ("[T]he 1938 version of the FLSA, while creating private rights of action for other employer violations, did not create a private right of action for retaliation. That was added in 1977. Until then, only the Administrator of the Wage and Hour Division of the Department of Labor could enforce the retaliation provision." (citations omitted)).

The Third Circuit took the opposite approach in *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 38-39 (3d Cir. 1943), indicating that a labor union could be sued for retaliation directly under § 215(a)(3). The plaintiffs in *Bowe* claimed that their employer conspired with their labor union to retaliate against them for filing a wage and hour lawsuit against the employer under the

FLSA. *Id.* at 37-38. The Third Circuit held that the labor union and its officers were proper defendants in the plaintiffs' ensuing retaliation action under § 215(a)(3). *Id.* at 38-39. The Ninth Circuit in this case embraced the Third Circuit's view in *Bowe* and aligned itself with that approach against the other circuits. App. 16a (explaining that "the Third Circuit's opinion in *Bowe*—in which a private right of action for such violations was implied—reinforces our interpretation of this statute" (citation omitted)).

The Fourth Circuit comprehensively analyzed this issue recently. *Dellinger v. Sci. Applications Int'l Corp.*, 649 F.3d 226 (4th Cir. 2011). The plaintiff in *Dellinger* sued a *prospective* employer alleging that it withdrew an offer of employment in retaliation for the plaintiff's FLSA lawsuit against her *former* employer. *Id.* at 227. The question presented was whether the plaintiff qualified as an "employee" under the FLSA. The Fourth Circuit explained that, "by using the term 'employee' in the anti-retaliation provision, Congress was referring to the employer-employee relationship, the regulation of which underlies the Act as a whole, and was therefore providing protection to those in an employment relationship with their employer." *Id.* at 229.[1]

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[1] The Ninth Circuit in this case distinguished Dellinger on the ground that it concerned only the meaning of the term "employee" and only situations where the plaintiff never worked for the defendant. App. 12a-13a. But Dellinger explicates how the determination of "employee" status is inextricably bound up (continued...)

The Fourth Circuit rejected the plaintiff's argument that she could sue the defendant regardless of whether it was her employer simply because the FLSA's antiretaliation provision prohibits "any person" from retaliating. The court explained "there is . . . no remedy for an employee to sue anyone but his employer for violations of the anti-retaliation provision. Accordingly, if the person retaliating against an employee is not an employer, the person is not subject to a private civil action by an employee under § 216(b)." *Dellinger*, 649 F.3d at 230. The court explained that "[t]he anti-retaliation provision is included, not as a free-standing protection against any societal retaliation, but rather as an effort 'to foster a climate in which compliance with the substantive provisions of the [FLSA] would be enhanced.' . . . This purpose is inherent in the employment relationship, which is the context in which the substantive provisions operate." *Id.* (citation omitted).

The Ninth Circuit here sharply disagreed with the Fourth Circuit's analysis. The Ninth Circuit created a private right of action for retaliation against "any person," not just employers, under the FLSA by construing the private right of action under 29 U.S.C. § 216(b)—which, as the majority of circuits has recognized, is limited to employers—as coterminous with the prohibition against retaliation by "any person"

(…continued)
with the determination of "employer" status under the FLSA. The Ninth Circuit's attempt to distinguish Dellinger is unworkable.

under 29 U.S.C. § 215(a)(3). The Ninth Circuit thus expanded § 216(b)'s private right of action against employers for retaliation to include any person who retaliates against an employee, contrary to the views of almost every other circuit that has addressed the question. App. 12a ("[T]he FLSA itself recognizes this sensible distinction in section 215(a)(3) by prohibiting 'any person'—not just an actual employer—from engaging in retaliatory conduct. By contrast, the FLSA's primary wage and hour obligations are unambiguously imposed only on an employee's de facto 'employer,' as that term is defined in the statute."), 16a ("The wage and hours provisions focus on de facto employers, but the anti-retaliation provision refers to 'any person' who retaliates. . . . Thus, Congress clearly means to extend section 215(a)(3)'s reach beyond actual employers." (citations omitted)), 18a ("[W]e conclude that Arias may proceed with this retaliation action against Raimondo under FLSA sections 215(a)(3) and 216(b).").

Thus, the circuits are in conflict regarding the proper test for employer status under the FLSA's private right of action for retaliation, as well as whether a "non-actual employer" can be liable under the FLSA. This Court's review is required.

II. THE NINTH CIRCUIT'S DECISION HERE IS INCORRECT.

The Ninth Circuit's opinion flouts this Court's precedent on the definition of "employer" under the FLSA. This Court's economic reality test for FLSA employer status requires courts to examine factors such as whether the defendant had the power to hire and fire employees, supervised and controlled work schedules or other conditions of employment, determined the rate and method of payment, and maintained employment records. The ultimate touchstone for whether a defendant is an employer under the FLSA is whether, in light of all the relevant circumstances, he or she exercises operational control over the employees as a matter of economic reality. *Supra* pp. 10-13.

This Court has never said this economic reality test may be bypassed in retaliation cases. Yet that is precisely what the Ninth Circuit did here. The Ninth Circuit held that the FLSA's private right of action extends to "non-actual employers" who "may become secondarily liable pursuant to section 216(b) for economic reparations"—but only in cases of retaliation. App. 18a-19a. Even though § 216(b) authorizes FLSA plaintiffs to sue only their "employer" for retaliation, the Ninth Circuit relied instead on § 215(a)(3)'s prohibition against retaliation by "any person," App. 12a, thereby equating the statutory term "employer" with "any person" who retaliates against an employee.

The Ninth Circuit disregarded a cardinal rule of statutory construction that "'identical words used in different parts of the same statute' carry 'the same meaning.'" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (citation omitted); *see also Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (holding that the "interrelationship and close proximity of [two] provisions of the statute 'presents a classic case for application of'" this rule). That rule carries even greater force when (as here) the word used in different parts of the same statute was expressly defined by Congress. The FLSA defines "employer" and states that the definition applies wherever the term is "used in this chapter" (i.e., the FLSA). 29 U.S.C. § 203. The Ninth Circuit acknowledged that the economic reality/operational control test of employer status applies to FLSA claims for unpaid wages or overtime compensation. App. 11a-12a; *see Goldberg*, 366 U.S. at 33; *Boucher*, 572 F.3d at 1090-91; *Lambert*, 180 F.3d at 1011-12; *Bonnette*, 704 F.2d at 1470. The Ninth Circuit erred, however, in holding that the same statutory term, "employer," assumes a different meaning in FLSA retaliation cases. Nothing in § 216(b) warrants an exception to the statutory definition. The Ninth Circuit's reasoning thus embodies the "dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005).

The Ninth Circuit claimed to find its distinction between retaliation claims and substantive wage and hour claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). App. 13a-

16a. But the context in *Burlington Northern* was different. In *Burlington Northern*, this Court construed the term "discriminate against" in the antiretaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012), and compared it to the same term in Title VII's substantive antidiscrimination provision, 42 U.S.C. § 2000e-2(a) (2012), concluding that the antiretaliation provision has a broader scope. *Burlington Northern*, 548 U.S. at 61-63. That conclusion was dictated by different language in the two provisions (unlike the FLSA provisions here). Title VII's substantive antidiscrimination provision limits the scope of the term "discriminate against" to employer acts affecting the employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), or "which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee," *id.* § 2000e-2(a)(2). Title VII's antiretaliation provision, by contrast, prohibits an employer from "discriminat[ing] against any of his [or her] employees or applicants for employment . . . because he [or she] has opposed any practice made an unlawful employment practice by this subchapter, or because he [or she] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Id.* § 2000e-3(a). This Court made clear that the differences in the surrounding language in the two provisions imparted different meanings to the term "discriminate against" in the substantive discrimination and the retaliation contexts. *Burlington Northern*, 548 U.S. at 61-63.

The FLSA is dissimilar. The different purposes of Title VII's antiretaliation and antidiscrimination provisions, *id.* at 63-67, on which the Ninth Circuit placed weight here, is not replicated in the FLSA. This case concerns identical language appearing in several spots across the FLSA. The analogy to *Burlington Northern* cannot bear the weight the Ninth Circuit placed on it.

III. THE NINTH CIRCUIT'S DECISION WILL HAVE WIDESPREAD, HARMFUL CONSEQUENCES.

If left standing, the Ninth Circuit's opinion threatens harmful consequences for ordinary relationships among employers, attorneys, and other independent contractors. The opinion dissuades attorneys and others who provide services to employers from continuing to work with employers by making them potential defendants in FLSA retaliation actions.

The Ninth Circuit's opinion allows an employee to sue literally "any person" connected to an employer's adverse employment action that is allegedly based on a retaliatory motive. Imagine a gardener who provides landscaping services to a company that employs the plaintiff. If the gardener reports to ICE that the plaintiff is an undocumented immigrant, or to the plaintiff's employer that the plaintiff sued his previous employer for FLSA violations, and the employer subsequently terminates or takes another adverse action against the plaintiff as a result, the plaintiff can

now sue that gardener for retaliation under the FLSA, even though the gardener had no economic control over the terms and conditions of the plaintiff's employment. Likewise, a plaintiff can sue an accountant or human resources employee who works for the plaintiff's employer for playing a role in processing the paperwork for the plaintiff's termination or otherwise participating in an adverse employment action by the employer against the plaintiff.

More perniciously, attorneys representing employers will become routine targets of FLSA retaliation claims for their everyday actions in advising their employer clients. The Ninth Circuit's opinion will ensure that attorneys like Raimondo are harassed with FLSA retaliation claims for inquiring about the immigration status of their clients' employees—a legitimate inquiry. Raimondo's inquiry to ICE about Arias's immigration status was meant to ensure that Arias's counsel were honoring federal funding restrictions prohibiting them from representing undocumented immigrants. *Supra* p. 7. Other legitimate reasons for such inquiries exist as well. *Id*.

FLSA retaliation liability under the Ninth Circuit's opinion will extend well beyond attorneys in Raimondo's position. Attorneys for employers will be exposed to such claims for advising their clients regarding the legality of a contemplated termination or other adverse employment action, or even for their advocacy on behalf of clients in pending litigation. *Cf. Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 748-49 (1983) (holding that employer's lawsuit against

employee may be found to be unfair labor practice where lawsuit lacks reasonable basis). Whether or not such FLSA retaliation claims are meritorious, the exposure to potential claims will chill attorneys from representing employers and will hamper employers' efforts to secure counsel. These detrimental consequences compel this Court's attention.

In contrast, the concerns Arias expressed below about a contrary rule are overblown. Employees would not be left without a remedy for retaliation if the Ninth Circuit's opinion were reversed. An employee may still sue his or her actual "employer"—the person with economic control over the terms and conditions of employment—for retaliation. *See* 29 U.S.C. § 216(b). In this very case, Arias availed himself of this remedy by suing Angelo Dairy and its owners for retaliation and obtaining a monetary settlement against them. App. 9a.

Additionally, employees may seek the assistance of the government, which can institute criminal proceedings against anyone (not just employers) for retaliating in violation of § 215(a)(3), *see* 29 U.S.C. § 216(a), and can bring civil enforcement proceedings against nonemployers for violations of § 215(a)(3), *see id*. §§ 216(b), 217; *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 296 (1960) (holding that § 217 authorizes reimbursement of lost wages, along with reinstatement and injunction against future violations, "in an action by the Secretary [of Labor] to restrain violations of [§ 215(a)(3)]").

This Court's intervention is required to avert harmful consequences to employers, attorneys representing employers, and the many independent contractors and service providers who could be pulled into a thicket of retaliation liability created by the Ninth Circuit's opinion.

IV. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE QUESTION PRESENTED.

This Court should grant review in this case because the question presented is squarely at issue here and reversal of the Ninth Circuit's opinion would end the litigation.

Raimondo seeks this Court's review of the lower courts' rulings on his motion to dismiss. In this posture, the allegations of Arias's complaint are taken as true, and only the purely legal issue of whether Raimondo is a proper defendant is presented. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009). There are no factual disputes or complicating factors impeding the clean presentation of the issue whether a defendant lacking economic control over the terms and conditions of the plaintiff's employment can be an "employer" sued for retaliation under the FLSA.

While the Ninth Circuit remanded for further proceedings, App. 3a, 19a, a reversal by this Court will end this lawsuit now. There should be no concern about ruling in an interlocutory posture, especially given the issue's clean presentation here. This Court

has decided numerous cases in an identical posture in recent years. *See Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2464-65 (2014); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1427-28 (2014); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 36-37 (2011); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 7-8 (2010); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 316-18 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 552-53 (2007); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 455-56 (2006); *see also* Steven M. Shapiro et al., *Supreme Court Practice* § 4.18, at 285 (10th ed. 2013).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2017

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ARNULFO ARIAS, *Plaintiff-Appellant*, v. ANTHONY RAIMONDO, *Defendant-Appellee*.	No. 15-16120 D.C. No. 2:13-cv-00904-TLN-EFB OPINION

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Argued and Submitted March 14, 2017
San Francisco, California

Filed June 22, 2017

Before: Stephen S. Trott, Kim McLane Wardlaw,
and Ronald M. Gould, Circuit Judges.

Opinion by Judge Trott

SUMMARY*

Labor Law

The panel reversed the district court's dismissal of a retaliation claim under the Fair Labor Standards Act.

The plaintiff alleged that after he filed suit against his employers in state court, the employers' attorney, acting as their agent, retaliated against him by planning for U.S. Immigration and Customs Enforcement to take him into custody at a scheduled deposition and then to remove him from the United States. The panel held that unlike the Fair Labor Standards Act's wage and hour provisions, its retaliation provisions apply to "any person" and do not require that a defendant be the plaintiff's employer. The panel remanded the case to the district court for further proceedings.

COUNSEL

Christopher Ho (argued) and Stacy Villalobos, The Legal Aid Society – Employment Law Center, San Francisco, California; Esmeralda Zendejas and Blanca A. Bañuelos, California Rural Legal Assistance, Inc., Stockton, California; Michael L. Meuter, California

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Rural Legal Assistance, Inc., Salinas, California; for Plaintiff-Appellant. Scott P. Dixler (argued) and Peder K. Batalden, Horvitz & Levy LLP, Burbank, California, for Defendant-Appellee.

Nora A. Preciado and Joshua T. Stehlik, National Immigration Law Center, Los Angeles, California; Jessica Hahn, National Immigration Law Center, Washington, D.C.; for Amicus Curiae National Immigration Law Center, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Los Angeles, Bet Tzedek Legal Services, Centro Legal de la Raza, Farmworker Justice, Jobs with Justice, National Employment Law Project, New Orleans Workers' Center for Racial Justice, UCLA Center for Labor Research and Education, United Food and Commercial Workers International Union, and Worksafe Inc.

OPINION

TROTT, Circuit Judge:

Can an employer's attorney be held liable for retaliating against his client's employee because the employee sued his client for violations of workplace laws? The district court's answer was no. We respectfully disagree.

We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291, and we reverse and remand.

I

Background

In 1995, plaintiff José Arnulfo Arias went to work as a milker for Angelo Dairy. Three Angelos owned and operated the dairy: Luis, Maria, and Joe ("Angelos"). When the Angelos hired Arias, they did not complete and file a Form I-9 ("I-9") regarding his employment eligibility in the United States.

An I-9 is a document required by U.S. Citizenship and Immigration Services ("USCIS"), a component of our Department of Homeland Security. USCIS explains the purpose of the I-9 and process as follows:

> Form I-9 is used for verifying the identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must ensure proper completion of Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. . . . Employers must retain Form I-9 for a designated period and make it available for inspection by authorized government officers.

U.S. Citizenship and Immigration Services, *I-9, Employment Eligibility Verification*, https://www.uscis.gov/i-9 (last updated Jan. 23, 2017).

Instead of complying with federal law, the Angelos wielded it as a weapon to confine Arias in their employ. When Arias informed Luis Angelo in 1997 that he had been offered a position with another dairy, Luis "responded that if [Arias] left to work at the other dairy,

[Luis] would report the other dairy to federal immigration authorities as an employer of undocumented workers," which Arias was. This threat caused Arias to forego his other employment opportunity and to remain with the Angelos.

In 2006, Arias sued Angelo Dairy in California state court. Arias alleged causes of action on behalf of himself and other employees under California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE § 17200 *et seq.*, for a variety of workplace violations, including failure to provide overtime pay and rest and meal periods. Later, he added a cause of action under California's Private Attorneys General Act of 2004 ("PAGA"), CAL. LAB. CODE § 2698 *et seq*. The Superior Court struck his representative claims in the UCL and PAGA causes of action. The Court of Appeal later issued a peremptory writ of mandate directing the Superior Court to vacate its order as to the PAGA cause of action. *See Arias v. Superior Court*, 63 Cal. Rptr. 3d 272 (Cal. Ct. App. 2007), *aff'd*, 46 Cal. 4th 969 (2009). The Superior Court then set a trial date of August 15, 2011.

II

The Plot Thickens

On June 1, 2011, ten weeks before the state court trial, the Angelos' attorney, Anthony Raimondo, set in motion an underhanded plan to derail Arias's lawsuit. Raimondo's plan involved enlisting the services of U.S. Immigration and Customs Enforcement ("ICE") to take Arias into custody at a scheduled deposition and

then to remove him from the United States. A second part of Raimondo's plan was to block Arias's California Rural Legal Assistance attorney from representing him. This double barrel plan was captured in email messages back and forth between Raimondo, Joe Angelo, and ICE's forensic auditor Kulwinder Brar. Arias quoted these revealing exchanges in his current complaint:

> 23. On June 1, 2011, Defendant RAIMONDO emailed Immigration and Custom Enforcement ("ICE") Forensic Auditor Kulwinder Brar, an employee of the U.S. Department of Homeland Security. In this email, Defendant RAIMONDO supplied Brar with information about Plaintiff's identity, and asked Brar to "[l]et me know if there is anything that you can do. . . ."
>
> 24. On the same day, June 1, 2011, all parties to the 2006 Lawsuit attended a mediation in Stockton, California. The mediation was unsuccessful.
>
> 25. On June 14, 2011, Defendant RAIMONDO sent Joe Angelo a text message stating, "Immigration is trying to verify Arias [sic] status – let me know if you have any more info on him." Joe Angelo responded by providing Defendant RAIMONDO with Plaintiff's driver's license number. . . .
>
> 26. On June 15, 2011, Defendant RAIMONDO emailed to ICE Auditor Brar the information Joe Angelo had provided. In doing so, Defendant RAIMONDO stated, "I hope this helps.

> [Plaintiff] will be attending a deposition next week. If there is an interest in apprehending him, please let me know so that we can make the necessary arrangements. . . . "
>
> 27. On June 16, 2011, ICE Auditor Brar responded to Defendant RAIMONDO's email of June 1, 2011, stating that "[b]ased on our records he [Plaintiff] has no legal status. We will be forwarding this information to ERO [Enforcement and Removal Operations] and your contact information if they want to proceed with this matter. . . ."
>
> 28. Defendant RAIMONDO replied to ICE Auditor Brar, asking her to "[p]lease let ERO know that they can expect our full cooperation and assistance", and to "let me know if there is anything I can do to be of assistance to you." Brar responded, "No problem and we will get your contact information as soon as contact is made."

Arias's current complaint also alleged the impact of Raimondo's actions on him and his case, and Raimondo's pattern and practice of similar conduct in other cases:

> 29. Plaintiff became aware on June 22, 2011 that Defendant had provided information concerning Plaintiff to the immigration authorities. Fearing that he would be deported and separated from his family, Plaintiff suffered anxiety, mental anguish, and other emotional distress from Defendant's retaliatory action.

30. On July 11, 2011, one month before trial, the parties participated in a settlement conference. In lieu of proceeding to trial on the wage and hour claims comprised within the 2006 Lawsuit, Plaintiff entered into a settlement and release of those claims, due in substantial part to the threat of deportation created by Defendant's communications with ICE.

31. On information and belief, Defendant RAIMONDO's actions against Plaintiff are reflective of and consistent with his pattern and practice of retaliating against employees who assert their workplace rights. In fact, Defendant RAIMONDO has stated in a declaration filed in a court action that it is his practice to investigate the immigration status of plaintiffs who have brought legal claims against his clients. . . .

32. On at least five additional occasions, and consistent with his pattern and practice, Defendant RAIMONDO has contacted ICE with respect to employees who have asserted their workplace rights against employers whom Defendant RAIMONDO has represented, and has offered his assistance to ICE in apprehending those employees. . . .

33. On May 2, 2013, Defendant RAIMONDO confirmed the above pattern and practice in an email he sent to Thomas Hester of the Office of Inspector General at the Legal Services Corporation, in which he stated, "*The time when I have had litigants deported, I have*

always simply taken action rather than make any threats. The attorneys find out when their clients are already gone."

III

Arias's Complaint

On May 8, 2013, Arias filed this lawsuit against Angelo Dairy, the Angelos, and Raimondo in the Eastern District of California. Arias alleged that the defendants violated section 215(a)(3) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*[1]

Arias's theory of his case is that Raimondo, acting as the Angelos' agent, retaliated against him in violation of section 215(a)(3) for filing his original case against Raimondo's clients in state court. Raimondo's sole legal defense is that because he was never Arias's actual employer, he cannot be held liable under the FLSA for retaliation against someone who was never his employee.

Angelo Dairy and its owners settled their part of this case at the early stages of its existence.

[1] Arias's current complaint also contains claims for intentional infliction of emotional distress and unfair competition.

IV

A.

The District Court's Dismissal

Notwithstanding section 215(a)(3)'s reference to "any person," section 203(a)'s inclusion of a legal representative as a "person," and section 203(d)'s plain language defining "employer," the district court granted Raimondo's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The court did so without the benefit of oral argument, concluding that because Arias "ha[d] not alleged that [Raimondo] exercised any control over [his] employment relationship," Raimondo as a matter of law could not be Arias's employer.

B.

Standard of Review

We review de novo a Rule 12(b)(6) dismissal for failure to state a claim, and we take all allegations of material fact as true, construing them in the light most favorable to the nonmoving party, here Arias.

V

Discussion

Section 215(a)(3), an anti-retaliation provision, makes it unlawful "for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter." The FLSA defines

the term "person" to include a "legal representative." *Id.* § 203(a). Section 216(b) in turn creates a private right of action against any "employer" who violates section 215(a)(3); and the FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* §§ 203(d), 216(b).

Controversies under FLSA sections 206 and 207 that require a determination of primary workplace liability for wage and hour responsibilities and violations, on one hand, and controversies arising from retaliation against employees for asserting their legal rights, on the other, are as different as chalk is from cheese. Each category has a different purpose. It stands to reason that the former relies in application on tests involving economic control and economic realities to determine who is an employer, because by definition it is the actual employer who controls substantive wage and hours issues.

Retaliation is a different animal altogether. Its purpose is to enable workers to avail themselves of their statutory rights in court by invoking the legal process designed by Congress to protect them. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (the "primary purpose of antiretaliation provisions" is to "[m]aintai[n] unfettered access to statutory remedial mechanisms").

This distinctive purpose is not served by importing an "economic control" or an "economic realities" test as a line of demarcation into the issue of who may be held

liable for retaliation. To the contrary, the FLSA itself recognizes this sensible distinction in section 215(a)(3) by prohibiting "any person" – not just an actual employer – from engaging in retaliatory conduct. By contrast, the FLSA's primary wage and hour obligations are unambiguously imposed only on an employee's de facto "employer," as that term is defined in the statute. Treating "any person" who was not a worker's actual employer as primarily responsible for wage and hour violations would be nonsensical.

The district court based its decision on precedent pertaining to whether a person was an employer for purposes of the FLSA's substantive economic provisions, *i.e.*, those involving wages and hours, etc., not section 215(a)(3) retaliation. *See Boucher v. Shaw*, 572 F.3d 1087, 1090-93 (9th Cir. 2009) (holding that an employer's individual managers were personally liable under the FLSA for unpaid wages, pursuant to an "economic control" test); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (holding that state and county agencies were employers of in-home chore workers who alleged violations of minimum wage provisions).

The district court also relied on *Dellinger v. Science Applications International Corp.*, 649 F.3d 226 (4th Cir. 2011). However, *Dellinger* is inapposite because Dellinger was never officially hired by the defendant. All *Dellinger* stands for is that "the FLSA gives an employee the right to sue only his or her current or former employer and that a prospective employee cannot sue

a *prospective* employer for retaliation." *Id.* at 227 (emphasis added). In other words, a person who never worked for the employer – in our case Angelo Dairy – does not fit anywhere in the FLSA. *See id.* at 230 n.2. Because Angelo Dairy was Arias's actual employer, Arias is indisputably an employee, as section 215(a)(3) uses that term.

These cases and the others the district court relied on are not in tension with our decision. The cases are simply inapposite in the context of an allegation of retaliation.

The Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), supports our analysis, albeit in a different context: Title VII of the Civil Rights Act of 1964's ("Title VII") anti-retaliation provision, 42 U.S.C. § 2000e-3(a). *See Darveau v. Detecon, Inc.*, 515 F.3d 334, 342 (4th Cir. 2008) (recognizing "the almost uniform practice of courts in considering the authoritative body of Title VII case law when interpreting the comparable provisions of other federal statutes" and noting in particular that "courts have looked to Title VII cases in interpreting the FLSA" (citations omitted)).

The issue in *Burlington* was whether the actions and harms forbidden by Title VII's anti-retaliation provision are confined to those that are related to employment or occur at the workplace. 548 U.S. at 57. Focusing on differences in language and purpose between the substantive provisions of Title VII and the

anti-retaliation provision, the Court held that Title VII's anti-retaliation provision is not so confined.

> There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.
>
> To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments," would be achieved were all employment-related discrimination miraculously eliminated.
>
> But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated,

the antiretaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. . . .

Thus, purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. . . .

In any event, as we have explained, differences in the purpose of the two provisions remove any perceived "anomaly," for they justify this difference of interpretation. Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.

For these reasons, we conclude that Title VII's substantive provision and its antiretaliation provision are not coterminous. The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject

> the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions."

Id. at 63-67 (citations omitted).

In our case, the difference in reach between FLSA's substantive economic provisions and its anti-retaliation provision is unmistakable. The wage and hours provisions focus on de facto employers, but the anti-retaliation provision refers to "any person" who retaliates. *See* 29 U.S.C. § 215(a)(3). In turn, section 203(d) extends this concept to "any person acting directly or indirectly in the interest of an employer in relation to an employee." *See Id.* § 203(d). Thus, Congress clearly means to extend section 215(a)(3)'s reach beyond actual employers. Raimondo's activity in this case on behalf of his clients illustrates the wisdom of this extension.

Although decided before Congress amended the FLSA in 1977 to explicitly create a private right of action for violations of section 215(a)(3), the Third Circuit's opinion in *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943) – in which a private right of action for such violations was implied – reinforces our interpretation of this statute. The Third Circuit rejected a union's contention that it could not be liable under section 215(a)(3) for retaliation against its members because the union was not the members' actual employer. The court said,

> Legislative intent must be drawn from the Act as a whole. Those portions of the Act . . . relating to wages and to hours *do apply only to employers*. The prohibitions expressed in Section 15, 29 U.S.C.A. § 215, however, are applicable "to any person[.]" Section 15(a)(3) makes it unlawful for "any person" . . . whether or not he is an employer, to discriminate against any employee.

Id. at 38 (emphasis added).

In *Sapperstein v. Hager*, 188 F.3d 852, 856-57 (7th Cir. 1999), the Seventh Circuit interpreted and applied this "any person" distinction in a manner that supports our analysis. The court concluded that section 215(a)(3) provides an "alternative basis for subject matter jurisdiction" where the employer's gross annual sales amount appeared to fall short of the jurisdictional amount required to bring the employer within the purview of the FLSA's wage and hour provisions set forth in sections 206 and 207. The court held that:

> Congress made it illegal for any person, not just an "employer" as defined under the statute, to retaliate against any employee for reporting conduct "under" or "related to" violations of the federal minimum wage or maximum hour laws, whether or not the employer's conduct does in fact violate those laws. . . . Moreover, "the remedial nature of the statute further warrants an expansive interpretation of its provisions. . . ."

Id. at 857 (second omission in original) (quoting *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999)).

VI

Conclusion

The FLSA is "remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. . . . Such a statute must not be interpreted or applied in a narrow, grudging manner." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

Accordingly, we conclude that Arias may proceed with this retaliation action against Raimondo under FLSA sections 215(a)(3) and 216(b). Raimondo's behavior as alleged in Arias's complaint manifestly falls within the purview, the purpose, and the plain language of FLSA sections 203(a), 203(d), and 215(a)(3).

Our interpretation of these provisions is limited to retaliation claims. It does not make non-actual employers like Raimondo liable in the first instance for any of the substantive wage and hour economic provisions listed in the FLSA. As illustrated by the Court's opinion in *Burlington*, the substantive provisions of statutes like Title VII and the FLSA, and their respective anti-retaliation provisions, stand on distinctive

grounds and shall be treated differently in interpretation and application. Ultimately a retaliator like Raimondo may become secondarily liable pursuant to section 216(b) for economic reparations, but only as a measure of penalties for his transgressions.

REVERSED and REMANDED for further proceedings.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Jose Arnulfo Arias, Plaintiff, v. Anthony Raimondo; and DOES 1-20, inclusive, Defendants.	No. 2:13-cv-00904-TLN-EFB **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** (Filed Mar. 30, 2015)

This matter is before the Court pursuant to Defendant Anthony Raimondo's ("Defendant") Motion to Dismiss Plaintiff's First Amended Complaint. (ECF No. 35.) Plaintiff Jose Arnulfo Arias ("Plaintiff") filed an opposition to Defendant's motion. (ECF No. 45.) The Court has reviewed and considered the arguments raised in Defendant's Motion to Dismiss and Reply, along with Plaintiff's Opposition. The Court hereby grants Defendant's Motion to Dismiss with leave to amend.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a lawsuit in 2006 in California Superior Court, San Joaquin County against his former employers, Angelo Dairy owners Luis M. Angelo, Maria D. Angelo, and Joe Angelo ("Dairy Defendants"). (ECF No. 34 at ¶ 17.) The lawsuit alleged that the Dairy Defendants violated wage-and-hour laws under the

California Labor Code.[1] (ECF No. 34 at ¶ 17.) Defendant Raimondo was the attorney representing the Dairy Defendants in that previous litigation and was not named as a defendant. (ECF No. 34 at ¶ 18.) In 2011, as the trial date approached, Defendant Raimondo reported Plaintiff to the United States Immigration and Customers [sic] Enforcement ("ICE"), allegedly in retaliation for Plaintiff's assertion of his legally protected workplace rights. (ECF No. 34 at ¶ 23.)

Plaintiff filed his original complaint with this Court on May 8, 2013, against the Dairy Defendants and Defendant Raimondo alleging (1) retaliation in violation of the Fair Labor Standards Act ("FLSA"); and (2) intentional infliction of emotional distress. (ECF. No. 1.) Dairy Defendants and Defendant Raimondo filed a Motion to Dismiss Plaintiff's complaint on June 5, 2013. (ECF No. 11.) On October 9, 2013, Plaintiff voluntarily dismissed the Dairy Defendants from the original complaint with prejudice, leaving Defendant

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[1] Plaintiff filed a lawsuit against his former employers in 2006 alleging violations of California's Unfair Competition Law ("UCL"), violations of California's Private Attorney General Act ("PAGA"), and violations of California Labor Code Sections 2698 *et seq*. (ECF No. 34 at ¶ 17 & 19.) Plaintiff brought the 2006 case on behalf of himself and others employed by the Dairy Defendants. (ECF No. 34 at ¶ 17.) The Dairy Defendants moved to strike the UCL and PAGA causes of action, arguing that certain class certification requirements were necessary to pursue those causes of action. (ECF No. 34 at ¶ 20.) The California Supreme Court ultimately ruled that the UCL required Plaintiff to satisfy class action requirements, but the PAGA cause of action did not. (ECF No. 34 at ¶ 21.) The case was remanded for trial. (ECF No. 34 at ¶ 21.)

Raimondo as the sole defendant. (ECF No. 23.) The Court dismissed Plaintiff's complaint with leave to amend, finding that Plaintiff failed to adequately plead that Defendant Raimondo, the only remaining defendant in the action, was Plaintiff's employer for the purposes of his FLSA claim. (ECF No. 33 at 6.) The Court also dismissed Plaintiff's intentional infliction of emotional distress claim with leave to amend. (ECF No. 33 at 6.)

Plaintiff filed the First Amended Complaint on July 10, 2014. (ECF No. 34.) Plaintiff alleges three claims for relief in said complaint: (1) retaliation in violation of the FLSA; (2) intentional infliction of emotional distress; and (3) unfair competition in violation of California Business and Professions Code §§ 17200, *et seq*. (ECF No. 34.) Plaintiff seeks declaratory relief, compensatory and punitive damages, attorney's fees, pre- and post-judgment interest, and any other relief the Court deems just and proper. (ECF No. 34.)

II. STANDARD OF LAW

Federal Rule of Civil Procedure 8(a) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim . . . is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations

omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. 544, 556 (2007)).

Nevertheless, a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 697 (quoting *Twombly*, 550 U.S. at 570). Only where a plaintiff fails to "nudge[ ] [his or her] claims . . . across the line from conceivable to plausible[,]" is the complaint properly dismissed. *Id.* at 680. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. This plausibility inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

If a complaint fails to state a plausible claim, "'[a] district court should grant leave to amend even if no

request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995)); *see also Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in denying leave to amend when amendment would be futile). Although a district court should freely give leave to amend when justice so requires under Rule 15(a)(2), "the court's discretion to deny such leave is 'particularly broad' where the plaintiff has previously amended its complaint[.]" *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).

III. ANALYSIS

Plaintiff's complaint alleges that Defendant retaliated against Plaintiff by contacting ICE to inquire about Plaintiff's immigration status. (ECF No. 34 at ¶ 34-44.) Plaintiff alleges that Defendant is an "employer" within the meaning of Section 203(d) for purposes of liability to sue under Section 216(b). (ECF No. 34 at ¶ 38.) Defendant, however, asserts that Plaintiff cannot maintain a private right of action for retaliation because there is no employer-employee relationship between Defendant and Plaintiff. (ECF No. 48 at 2.) The Court agrees and dismisses Plaintiff's FLSA anti-retaliation claim with leave to amend.

The Court previously dismissed Plaintiff's nearly identical claim on June 25, 2014. (ECF No. 33.) The Court emphasized that in order to maintain a cause of action under the FLSA, Plaintiff must allege that Defendant was Plaintiff's employer. (ECF No. 33 at 4.) Plaintiff's First Amended Complaint added two paragraphs alleging that Defendant is an "employer" within the meaning of Section 216(b), as well as emphasizing the "any person" language of Section 215(a)(3). (ECF No. 34 at ¶ 36-38.) However, Plaintiff still failed to establish that Defendant was an employer for the purposes of FLSA liability. Further, Plaintiff continues to argue that the "any person" language of Section 215(a)(3) allows private actions against third-party retaliators. (ECF No. 45 at 7.) The Court rejected this argument in its previous order stating, "by the FLSA's plain language an employee *may only sue employers* for retaliation, as explicitly provided in § 216(b)." (ECF No. 33 at 4) (emphasis added).

The FLSA's anti-retaliation provision, 29 U.S.C. Section 215(a)(3), provides that it shall be unlawful for "any person" to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . " 29 U.S.C. Section 216(b) states that "[a]ny employer who violates the provisions of section 15(a)(3) . . . shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3)." Further, 29 U.S.C. Section 203(d) provides that an "'[e]mployer' includes any person acting

directly or indirectly in the interest of an employer in relation to an employee . . . "

Plaintiff argues that the "any person" language of Section 215(a)(3) makes it unlawful for *anyone* to retaliate against an employee for asserting his or her FLSA rights. (ECF No. 45 at 6.) However, the causes of action for violations of the statute are expressly provided by Section 216(b). As stated in the Court's previous Order (ECF No. 33 at 4), the FLSA's plain language within Section 216 explicitly provides that an employee may only sue employers for retaliation.[2] *Dellinger v. Sci. Applications Int'l Corp.*, 649 F.3d 226, 229-230 (4th Cir. 2011); *Rodriguez v. SGLC, Inc.*, 2012 U.S. Dist. LEXIS 164383, at *22 (E.D. Cal. Nov. 15, 2012) (finding that pursuant to 29 U.S.C. § 216(b), employees may only seek redress from "employers"); *see also Boddy v. Astec, Inc.*, No. 1:11-CV-123, 2012 WL 5507298, at *6 (E.D. Tenn. Nov. 13, 2012) ("the retaliation provisions of the FLSA do not apply to

[2] Plaintiff is incorrect in arguing that *Dellinger* is inapplicable to Plaintiff's case. The reasoning in *Dellinger* was followed in the Court's previous Order. (ECF No. 33 at 4-6.) *Dellinger* correctly articulates that although "§ 215(a)(3) does prohibit all 'persons' from engaging in certain acts . . . it does not authorize employees to sue 'any person.'" *Dellinger*, 649 F.3d at 229. *Dellinger* has been cited approvingly within the Ninth Circuit. *See, e.g.*, *Rodriguez v. SGLC, Inc.*, No. 2:08-cv-01971-MCE-KJN, 2012 WL 5705992, at *10 (E.D. Cal. Nov. 15, 2012); *Gessele v. Jack in the Box, Inc.*, 6 F.Supp.3d 1141, 1150 (D. Or. Mar. 19, 2014); *Fontes v. Drywood Plus, Inc.*, No. CV-13-1901-PHX-LOA, 2013 WL 6228652, at *4 (D. Ariz. Dec. 2, 2013); *Juvera v. Salcido*, No. CV-11-2119-PHX-LOA, 2013 WL 6628039, at *6 (D. Ariz. Dec. 17, 2013).

non-employers."). The court in *Dellinger* determined that "by using the term 'employee' in the anti-retaliation provision [29 U.S.C. § 216(b)], Congress was referring to the employer-employee relationship, the regulation of which underlies the Act as a whole, and was therefore providing protection to those in an employment relationship with their employer." 649 F.3d at 229.

Plaintiff argues that Section 203(d) defines "employer" for FLSA purposes to include "any person acting directly or indirectly in the interest of an employer." (ECF No. 45 at 6.) However, the Ninth Circuit has held that the definition of employer under the FLSA should be construed to mean that an individual is subject to liability under the FLSA "[w]here an individual exercises control over the nature and structure of the employment relationship, or economic control over the relationship." *Sutton v. Derosia*, 2012 U.S. Dist. LEXIS 147434, at *17 (E.D. Cal. Oct. 12, 2012) (citations omitted); *see also Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th [sic] 1999); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983). Plaintiff has not alleged that Defendant exercised any control over Plaintiff's employment relationship.

Courts have used an "economic reality" test to determine whether a "person" is "acting directly or indirectly in the interest of an employer" in employment matters. *See* 29 USC § 203 (d); *see also Hale v. State of Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993). In *Bonnette v. Cal. Health & Welfare Agency*, the Ninth Circuit

court acknowledged that its determination of what an employer is must be based on "a consideration of the total employment situation and the economic realities of the work relationship." *Bonnette*, 704 F.2d at 1470. The court looked in particular to four factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.*

Plaintiff has not alleged that Defendant met any of these factors or had any supervisory authority over Plaintiff. Instead, Plaintiff argues, despite the Court's clear ruling on this issue, that numerous decisions have permitted private actions under Section 215(a)(3) against third party retaliators. (ECF No. 45 at 7.) However, the Ninth Circuit has explicitly stated that "individual [defendants are] liable *only if* it [is] determined that they had a 'significant ownership interest with operational control of significant aspects of the corporation's day-to-day functions; the power to hire and fire employees; [the power to] determine []salaries; [and the responsibility to] maintain[] employment records." *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (citing the economic realities test in *Bonnette*, 704 F.2d at 1469) (emphasis added); *see also* 29 U.S.C. § 215(a)(3).

Further, an overwhelming body of authority suggests that in order to find the defendant liable under FLSA, the defendant must be considered an "employer". *See Boucher v. Shaw*, 572 F.3d 1087, 1094 (9th

Cir. 2009) (finding individual managers liable under the FLSA when it was established that they were employers); *Solis v. Best Miracle*, 709 F. Supp. 2d 843, 849-50 (E.D. Cal. 2010) (finding that a manager who played a significant role in the operations of company, had the power to hire and fire employees, prepared fraudulent time cards, and maintained employment records was an "employer" under the FLSA); *Alvarez Perez v. Sanford–Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160 (11th Cir. 2008) ("to qualify as an employer for [FLSA liability], an officer must either be involved in the day-to-day operation or have some direct responsibility for the supervision of the employee"); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007) (finding that a corporation's president was individually liable where he had authority to control business' day-to-day operations and was in charge of directing employment practices); *Ulin v. ALAEA-72, Inc.*, 2011 U.S. Dist. LEXIS 17468, at *21 (N.D. Cal. Feb. 23, 2011) (finding an individual personally liable as an employer under the FLSA when the individual "was responsible for posting, calculating, measuring, estimating, recording, or otherwise determining the hours worked by Plaintiff, and wages paid [to] him").

Though Plaintiff alleged that Defendant is an employer[3] (ECF No. 34 at ¶ 38), a court "need not assume

[3] Plaintiff asserts that as the Dairy Defendant's attorney, Defendant was acting in the interest of the Dairy Defendants in relation to Plaintiff. (ECF No. 34 at ¶ 38.) Plaintiff states that Defendant "is an 'employer' within the meaning of Section 203(d) for purposes of liability to suit under Section 216(b)." (ECF No. 34

the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie*, 788 F.2d at 643 n.2. While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Here, Plaintiff has not alleged that Defendant has exercised any control over Plaintiff's employment relationship. Further, Plaintiff has not alleged that Defendant had any supervisory authority over Plaintiff. Thus, Plaintiff has not established that Defendant is an employer within the meaning of the FLSA. Plaintiff will be permitted leave to amend solely with respect to the issue of whether Defendant meets the definition of an employer under the Ninth Circuit's test.

IV. CONCLUSION

The Court finds that Plaintiff's FLSA claim remains deficient since Plaintiff has failed to demonstrate that Defendant is an employer pursuant to controlling precedent. Plaintiff has 14 days to amend his complaint with respect to this claim only. Given Plaintiff's previous opportunities to amend on this issue, further leave to amend will not be granted if Plaintiff's amendment does not allege plausible facts supporting his assertion that Defendant is an employer within the definition of the FLSA. The Court

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at ¶ 38.) However, Plaintiff fails to provide any support for such conclusions.

shall reserve ruling on the remaining claims in Plaintiff's complaint pending Plaintiff's amendment of his FLSA allegation. The briefing on those claims shall stand as submitted. The parties will not be required to resubmit any further briefing on those issues.

IT IS SO ORDERED.

Dated: March 27, 2015

/s/ Troy L. Nunley
Troy L. Nunley
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE ARNULFO ARIAS, Plaintiff-Appellant, v. ANTHONY RAIMONDO, Defendant-Appellee.	No. 15-16120 D.C. No. 2:13-cv-00904-TLN-EFB Eastern District of California, Sacramento ORDER (Filed Aug. 2, 2017)

Before: TROTT, WARDLAW, and GOULD, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Wardlaw and Gould have voted to deny the petition for rehearing en banc and Judge Trott so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

9th Circuit Case Number(s)	15-16120

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