

**IN THE MISSOURI SUPREME COURT
SUPREME COURT NO. SC93379**

ANDRO TOLENTINO,

Appellant

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, et al.,

Respondents

**Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
Case No. 1016-CV12176
The Honorable W. Brent Powell, Judge**

APPELLANT'S SUPPLEMENTAL BRIEF

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POINT RELIED ON

- I. The trial court correctly found that, viewed in the light most favorable to Tolentino, genuine issues of material fact exist as to whether the Westin and Giant Labor Solutions, LLC (GLS), were joint employers of Tolentino in that the record evidence establishes that Tolentino was economically dependent on the Westin and that it was his primary employer.**

Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947)

Barfield v. New York City Health & Hosp. 's Corp., 537 F.3d 132 (2d Cir. 2008)

Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003)

Baystate v. Alternative Staffing, Inc. v. Herman, 163 F.3d 668 (1st Cir. 1998)

ARGUMENT

This Court requests additional briefing on the issue of whether the trial court's determination that, viewed in a light most favorable to Tolentino, genuine issues of material fact exist as to whether the Westin was Tolentino's joint employer. The record evidence overwhelmingly confirms that the Westin was a joint employer of Tolentino as he was economically dependent upon the Westin—not GLS—for his wages, as confirmed by the fact that he never performed work at or for GLS.

All work performed by Tolentino was done at and for the Westin using its equipment and supplies. The Westin hired and fired Tolentino, directly supervised him, set the terms and conditions of his employment, determined his rate and method of pay, and maintained records regarding his job performance. His work cleaning hotel rooms was integral to the operation of the Westin. Room Attendants, like Tolentino, who were hired through GLS did not shift as a unit from the Westin to any other hotels or locations. If anything, these facts confirm that the Westin was not just a joint employer of Tolentino, it was his primary employer.

I. The economic realities surrounding Tolentino's work at the Westin Hotel establish that the Westin, not GLS, was his primary employer.

In determining whether a company is a joint employer or whether an employer-employee relationship exists, courts look to the "economic reality" of the employment situation. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *see also Fields v. Advanced Health Care Mgmt. Servs., LLC*, 340 S.W.3d 648, 654 (Mo. App. S.D. 2011). This test looks at the "totality of the circumstances bearing on whether the

putative employee is *economically dependent* on the alleged employer.” *Baystate v. Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998) (economically dependent); *see also Aimable v. Long and Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994). The “economic reality” test has also been applied under the MMWL to determine whether an employment relationship exists. *See Fields*, 340 S.W.3d at 654. Accordingly, the overarching issue for this Court to determine is whether Tolentino was economically dependent on the Westin.

The economic realities test can be broken into two categories: 1) formal factors; and 2) functional factors. Courts regularly apply both types of factors to determine whether an entity is a joint employer under the FLSA or the MMWL. In considering both the formal and the functional factors, courts have stressed that no one factor is determinative. *See id.*; *Antenor v. D & S Farms*, 88 F.3d 925, 932 (9th Cir. 1996); *Flores v. Alberton’s Inc.*, No. 01-0515, 2003 WL 24216269, *3 (C.D. Cal. Dec. 9, 2003); *Beck v. Boce Group, L.C.*, 391 F. Supp. 2d 1183, 1187 (S.D. Fla. 2005). Applying both the formal and the functional factors here, there is no question that the Westin was Tolentino’s joint, if not primary, employer.

Even assuming this Court finds that some of the factors do not support joint employer status for the Westin, summary judgment must be denied as “the question [of] whether a defendant is a plaintiffs’ joint employer is a mixed question of law and fact” that is “especially well-suited for jury determination. . . .” *Zheng v. Liberty Apparel Co.*, 617 F.3d 182, 185-86 (2d Cir. 2010) (quoting *Mendell v. Greenberg*, 927 F.2d 667, 673 (2d. Cir. 1990)); *see also Barfield v. New York City Health & Hosp.’s Corp.*, 537 F.3d

132, 143-44 (2d Cir. 2008) (“Because of the fact-intensive character of a determination of joint employment, we rarely have occasion to review determinations made as a matter of law on an award of summary judgment.”). To overturn the trial court’s determination that genuine issues of material fact exist as to whether the Westin was Tolentino’s joint employer, this Court must find that even in a light most favorable to Tolentino, both the formal and functional factors overwhelmingly favor a finding that he was not economically dependent on the Westin and that it was not his joint employer—a result that cannot be supported by the record evidence.

A. The formal factors establish that the Westin was Tolentino’s joint employer.

The formal factors used to determine whether an entity is a joint employer are essentially a reiteration of the common law definition of an employer that focuses solely on the formal right to control the performance of another’s work. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003); *see also Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997). Those factors include whether the putative employer:

- (1) had the power to hire or fire the worker;
- (2) supervised the worker and controlled the worker’s schedule and conditions of employment;
- (3) set the rate of pay for the worker; and
- (4) maintained employment records on the worker.

See Fields, 340 S.W.3d at 654.

Although a positive finding on all four factors is *sufficient* to establish employer status, it is not *necessary* that each be met before an employment relationship is created. *See Zheng*, 355 F.3d at 69. That is because the joint employer doctrine assumes some division of responsibilities between both employers. Moreover, the fact that GLS may have exercised concurrent authority in any of these areas will not defeat a finding that the Westin was a joint employer. *See Barfield*, 537 F.3d at 144. Accordingly, even if the Court finds some factors weigh in favor of the Westin, that alone will not be enough to deprive Tolentino of his day in court. In any event, the record evidence overwhelming establishes that the Westin was Tolentino's employer under these factors.

1. The Westin had the power to hire and fire Tolentino.

The record evidence establishes that the Westin retained and exercised its power to hire and fire Tolentino. Tolentino was required to interview with the Westin prior to beginning work there. (LF1026, ¶ 130; LF1039, 13:3-4, 9-25; LF1040, 14:1-2.) During his job interview, the Westin informed Tolentino that he would be paid by the number of rooms he cleaned. (LF1027, ¶ 132; LF1043, 71:8-9, 25; 72:1-3, 17-25; 73:1-6.) The Westin, not GLS, made the final decision to hire Tolentino. (LF1026, ¶ 130; LF1039, 13:3-4, 9-25; LF1040, 14:1-2.) Prior to starting work, Tolentino also was required to sign the Westin's ABC's of Housekeeping checklist and the Westin's Room Cleanliness Standards policy. (LF1028, ¶ 138; LF1192-93; LF1087, 6:25-7:18; LF1091, 78:1-17; LF1106, 16:12-14, 17:6-12.)

Westin training for Room Attendants hired through GLS included watching the ABC's of Housekeeping video, being paired with a more experienced associate to follow

his or her work for a couple of days, and then being given between five or six of their own rooms to clean for a time, which were inspected by a Westin supervisor or manager. (LF1028, ¶¶ 138-39; LF1192-93; LF1087, 6:25-7:18; LF1091, 78:1-17; LF1106, 16:12-14, 17:6-12; LF1092, 85:3-20.) Tolentino's job training by the Westin lasted for two weeks. (LF1028, ¶ 140; LF1049, 122:13-18.) Needless to say, courts have held that employers retained and exercised hiring power on much less than what the Westin required of Tolentino prior to starting work.¹

In addition to hiring Tolentino, the Westin also made the decision to terminate his employment. (LF1019, ¶ 97; LF1044-45, 77:19-78:5; LF1027, ¶ 134; LF1044, 77:10-15.) Although someone at GLS informed Tolentino that he was being terminated from the Westin, he was told that it was because the Westin was not pleased with his performance. (LF1027, ¶ 134; LF1044, 77:10-15.) Indeed, the Westin concedes that the reason Tolentino was fired was because he failed to clean guest rooms in a timely manner. (LF1019, ¶ 97; LF1044-45, 77:19-78:5.) From these facts, it is apparent that GLS was

¹ See *Barfield*, 537 F.3d at 136, 144 (hospital had hiring power over nurses referred to work on hospital premises despite training from referral agency and no interview process); *Bastian v. Apt. Invest. and Mgmt. Co.*, No. 07c2069, 2008 WL 4671763 (N.D. Ill. Oct. 21, 2008) (joint employer status found even though defendant call center could not choose which of the staffing agencies' employees would work at the call center).

the messenger, not the decider, when it came to Tolentino's continued employment at the Westin.

The Westin also concedes that it had the power to direct GLS to no longer place a housekeeper at the Westin if it found the worker's job performance to be unsatisfactory. (LF1018, ¶ 96, LF0343, 87:4-88:10.) Courts have found such input sufficient to constitute firing power for purposes of joint employment determinations. *See Bastian*, 2008 U.S. WL 4671763 at *4; *Flores* 2003 WL 24216269 at *3. In the employment context, the term "fire" is commonly understood as meaning "to dismiss from a job,"² which is precisely what the Westin did. Indeed, the Westin's own policy states that contract labor may be subject to "immediate dismissal" if cleanliness standards are not met. (LF1035, ¶ 181; LF1186-87; LF1091, 78:1-12.) This economic reality confirms that the Westin retained and exercised the power to fire Tolentino.

2. The Westin supervised Tolentino and controlled his work schedule and conditions of work.

During his employment at the Westin, Tolentino was subject to daily supervision by the Westin, which also dictated his daily schedule and conditions of work. Every morning he worked, Tolentino was required to attend meetings directed by Westin management that would last between 15 to 30 minutes. (LF1032, ¶¶ 157-158; LF1057-58, 259:1-260:18; LF1104, 7:5-8:7; LF1124, 33:17-19; LF1125, 35:6-17; LF1113, 43:18-19.) At those meetings, Tolentino would receive his daily assignments and management

² *See Webster's New Universal Unabridged Dictionary*, 534 (1989).

would discuss projects for the day, various types of cleaning, what was going on in the hotel, occupancy, groups meeting at the hotel, the number of inspections management wanted supervisors to do, VIP guests, corporate numbers, and comparisons with other hotels. (LF1032, ¶ 159; LF1108, 24:12-19, LF1129, 4:19-24; LF1124-25, 33:17-34:4, 34:21-25; LF1113, 43:18-44:21.) In *Tumulty v. FedEx Ground Pkg. Sys., Inc.*, the court held that weekly meetings that drivers were required to attend weighed in favor of finding the supervision and control element met for purposes of joint employer status. No. 04-1425, 2005 U.S. Dist. LEXIS 26215, *9 (W.D. Wash. Mar. 7, 2005). The frequency of the Westin morning meetings more than exceeds the weekly supervision present in *Tumulty*.

In addition to the direction and supervision exercised by the Westin at the daily morning meetings, Westin supervisors also inspected the rooms cleaned by Tolentino and the other Room Attendants throughout the day. (LF1029, ¶¶ 141-42; LF1105, 12:15-17; LF1118-19, 9:5-9, 9:24-10:1; LF1130, 8:9-14.) If a guest room was not properly cleaned, Westin's supervisors would require Tolentino to return promptly to the room and clean it. (LF1030, ¶ 150; LF1059, 270:22-271:16; LF1106, 15:5-19; LF1120-21, 17:23-18:9; LF1131, 17:17-23.) The degree of supervision was such that Tolentino testified that most of the time he took less than 30 minutes for his lunch breaks because he felt "intimidated and pressured" by the Westin to finish cleaning the rooms. (LF1030, ¶ 149; LF1060, 276:15-278:3.)

Westin supervisors used a checklist for inspecting guest rooms that included approximately 28 items that Room Attendants were required to complete in course of

cleaning a room. (LF1029, ¶¶ 141-144; LF1105, 12:15-17; LF1118-19, 9:5-9, 9:24-10:1; LF1130, 8:9-14; LF1106, 14:24-15:4; LF1107, 18:6-11; LF1119, 11:20-12:12; LF1186-87; LF1131, 14:20-15:11.) Using this checklist as a measure of performance, Tolentino was required to meet the Westin’s 90 percent cleanliness standard. (LF1029, ¶ 144-45; LF1131, 14:20-15:11; LF1186-87.) If he fell below 80 percent, supervisors were required to report him to management, in which case he could be subject to retraining by Westin. (LF1030, ¶ 148; LF1121, 20:4-21:12; LF1107, 19:8-20:2.) As previously noted, the failure to meet Westin’s standards might result in “immediate dismissal.” (LF1186.) Significantly, these cleanliness standards were the same for Room Attendants hired directly by the Westin. (LF1030, ¶ 147; LF1109, 26:12-27:1; LF1121, 18:18-24.)

The Westin tracked the number of rooms completed by Tolentino and the other Room Attendants on a “room board,” which was then entered on what was called a “productivity sheet,” which was filled out by supervisors. (LF1030-31, ¶ 151; LF1120, 14:25-15:2, 15:10-15; LF1122, 24:23-25:5, LF1122-23, 25:18-26:2; LF1122, 23:13-25, 24:1-6; LF1109, 27:17-28:17; LF1122, 23:13-25, 24:1-6; LF1054, 210:11-21, LF1055, 228:13-25.) These productivity sheets were also loosely used to track the time of Room Attendants. (LF1031, ¶ 152; LF1033-34, ¶ 171; LF1110, 30:8-14, 15-21; LF1097, 123:21-124:23; LF1097-98, 125:25-126:25; LF1098-99, 129:15-131:10; LF1099, 132:2-133:1; LF1100, 147:6-8.) Westin supervisors regularly discussed the performance of Room Attendants hired through GLS with the Westin’s Director of Housekeeping and also gave her evaluations of their job performance. (LF1031, ¶ 153; LF1031-31, ¶ 156; LF1107, 21:8-13; LF1110, 32:12-33:13; LF1123, 26:4-7; LF1110, 31:11-20; LF1123,

27:2-8; LF1126, 39:23-40:23; LF1131, 15:12-14.) These facts demonstrate that the Westin exercised direct supervisory control over Tolentino and the other Room Attendants hired through GLS.

The Westin also exercised control over Tolentino's work schedule and his daily assignments. Typically, the Westin set the schedule for Tolentino and other Room Attendants 18 days ahead of when work was to commence. (LF1033, ¶ 163; LF1088, 30:11-31:23.) In addition, the Westin made the daily assignments of the rooms that were to be cleaned by Tolentino and the other Room Attendants. (LF1033, ¶ 164; LF1090, 67:18-68:2.) During his shift, Tolentino was expected to remain on the Westin premises. (LF1033, ¶ 165; LF1113, 42:11-13; LF1124, 32:18-25.) The Westin required Tolentino to wear a uniform provided by the Westin and wear a badge displaying: "Westin Crown Center." (LF1033, ¶ 167; LF1048, 119:1-6; LF1094-95, 93:14-21, 93:22-94:4.) The above facts establish that the Westin, not GLS, exerted primary control over Tolentino's schedule and conditions of work.

3. The Westin determined Tolentino's rate and method of payment.

The rate of pay refers the "amount of compensation to paid" and the "[m]ethod of payment refers to the basis upon which a worker is paid, for example, by the hour or by the piece." *Antenor v. D & S Farms*, 88 F.3d 925, 936 (11th Cir. 1996). During his initial interview with the Westin, Tolentino was told by the Westin's Director of Housekeeping that he was going to be paid by the number of rooms he cleaned. (LF1027, ¶ 132; LF1043, 71:8-9, 25; 72:1-3, 17-25; 73:1-6.) The Westin also concedes that it paid Room

Attendants by the number of rooms cleaned. (LF0998, ¶ 20; LF0193, ¶ 13; LF0336, 6:3-16.) Thus, the Westin determined the method of Tolentino's payment.

In *Torres-Lopez v. May*, the court held that an agricultural grower's increase in compensation to the farm labor contractor to allow farm workers to draw higher wages weighed in favor of joint employer status for the agricultural grower. 111 F.3d 633, 643 (9th Cir. 1997); *see also Flores*, 2003 WL 24216269 at *4 (increase in contract price is evidence of control over workers' pay rate). The Westin's decision to raise the rate that GLS was paid from \$4.87 per room to \$5.00 per room because of the increase in the minimum wage is essentially indistinguishable from the facts in *Torres*. (LF0998, ¶¶ 19-20; LF0368; LF0193, ¶ 13.) In both instances, the increased payments to the intermediary labor contractor demonstrate the necessary control over the rate of pay. This factor also weighs in favor of finding joint employer status for the Westin.

4. The Westin maintained work records tracking Tolentino's performance.

The Westin also maintained employment records on Tolentino and the other Room Attendants hired through GLS. The Westin required Room Attendants hired through GLS to sign its room cleanliness standards policy. (LF1029, ¶ 46; LF1107, 19:1-7; LF1121, 19:21-20:3; LF1091, 78:1-12.) The signed copies of the Westin's ABC's checklist were retained until GLS was indicted. (LF1029, ¶ 146, 78:1-79:18.) After the indictment, the copies were destroyed by the Westin. *Id.*

The Westin also created time sheets for Room Attendants that were sent to GLS. (LF1088, 33:5-8.) The time sheets were referred to as "productivity sheets," which were

filled out daily by supervisors for Room Attendants hired through employee staffing agencies. (LF1139-1165; LF1122, 23:13-24:6; LF1109, 27:17-28:17.) The completed time/productivity sheets were given to the Westin's Director of Housekeeping who then stored them. (LF1110, 30:15-21.) Westin supervisors also completed job performance evaluations on the Room Attendants hired through GLS that were given to the Director of Housekeeping. (LF1031-32, ¶ 156; LF1110, 31:11-20; LF1123, 27:2-8; LF1126, 39:23-40:23; LF1131, 15:12-14.)

In *Tumulty*, 2005 U.S. Dist. LEXIS 26215, *9, the court held that it considered “any records relating to employee performance to be employment records.”³ As Tolentino's pay was tied to the number of rooms he cleaned, the productivity/time sheets plainly measured his performance. In addition to those records, the Room Attendant Cleanliness Standards policy also constitutes an employment record because it relates to performance in that it is an agreement by the Room Attendants to perform specific tasks when cleaning a room for the Westin. Based on the time/productivity sheets, Room Attendant evaluations, and the cleanliness standards policy agreement, the employment records factor weighs heavily in favor of joint employer status.

³ Notably, in *Flores*, the court denied summary judgment on the joint employer question even though it was undisputed that the supermarket did not maintain employment records. 2003 WL 24216269 at *3.

B. The functional factors further establish the Westin as Tolentino’s joint employer.

In addition to the four formal factors, courts also apply six “functional” factors. The six functional factors were first articulated by the United States Supreme Court in a case arising out of a slaughterhouse located in Kansas City, Missouri. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).⁴ The employer in *Rutherford* sought to circumvent minimum wage and overtime laws by contracting with another company to provide employees to perform work on an assembly line alongside their own employees. In concluding that the contracted employees were employees of the slaughterhouse, the Court looked at six factors:

- (1) Whose premises and equipment were used to perform the work;
- (2) Whether contractor corporation had a business that could or did shift as a unit from one putative joint employer to another;
- (3) The extent to which the plaintiffs performed a discrete line-job that was integral to the process of production;
- (4) Whether responsibility under the contracts could pass from one subcontractor to another without material changes;

⁴ Although the Court did not use the language “joint employer,” the *Rutherford* case is now cited as the case establishing that doctrine. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) (applying six-factor test).

- (5) The degree to which the plaintiffs' work was supervised by the putative joint employer; and
- (6) Whether plaintiffs worked exclusively or predominately for the putative joint employer.

Id. at 730; *see also Barfield*, 537 F.3d at 143; *Zheng*, 355 F.3d at 72.

Although the functional test looks at six factors to determine whether an entity is a joint employer, because one of the factors (supervisory control) overlaps with the second factor of the formal test discussed above, it will not be considered below. That factor, along with the remaining five factors, supports a finding that the Westin was Tolentino's joint employer.

1. All of the work took place at the Westin and all work was completed with its equipment.

The first of the "functional" factors examines whether the uncompensated work took place on the putative joint employer's premises and whether the equipment used by workers was supplied by the putative joint employer. This factor undoubtedly weighs in favor of finding joint employer status and the Westin concedes as much, noting this factor "does not lean heavily toward a finding that Defendants did not jointly employ Tolentino . . . as there is no avoiding the fact that the Contract Room Attendants performed services on Defendants' property and used Defendants' equipment."

(LF0156.)

All of the uncompensated work at issue was performed by Tolentino on the Westin's premises. (LF1033, ¶ 165; LF1113, 42:11-13; LF1124, 32:18-25.) All of the

equipment used by Tolentino was supplied by the Westin. (LF1033, ¶ 169; LF1095, 95:25-96:12; LF1058, 262:2-25; LF1113, 44:22-45:4; LF1125, 37:17-20.) All Room Attendants, including Tolentino and others from GLS, were required to wear a uniform provided by the Westin and wear a badge displaying: “Westin Crown Center.” (LF1033, ¶ 167; LF1048, 119:1-6; LF1094-95, 93:14-94:4.)

In *Rutherford*, all of the work was likewise performed on the putative employers’ premises, but the *Rutherford* workers owned their own tools—unlike Tolentino. 331 U.S. at 725. Despite that ownership of equipment, the Court still held that the slaughterhouse was an employer of the workers under the FLSA. As the Westin supplied all of the equipment and supplies used by Tolentino and all of the work was performed at the Westin, the case for employer status is even stronger here than in *Rutherford*.

2. The Westin’s contract with GLS prevented GLS from shifting its business as a unit from the Westin to another hotel.

This factor requires the court to examine whether GLS could shift, *as a unit*, the workers it provided to the Westin to another hotel. Several factors, including the Westin’s contract, GLS’s practice of assigning the same workers, and the expectation that Tolentino and other Room Attendants would remain at the Westin, prevented GLS from making such a shift.

In order to terminate the contract entered into between the Westin and GLS without cause, either party had to provide the other with 30-days’ written notice. (LF1034, ¶ 176; LF1069-70, ¶ 15.) In order to terminate the contract for cause, the Westin still had to provide GLS written notice and an opportunity to cure within 10 days.

(LF1069, ¶ 15.) These facts mirror the contractual relationship between the slaughterhouse and its outside contractor in *Rutherford*. There, the parties initially entered into several written and verbal contracts to provide workers to the slaughterhouse. 331 U.S. at 724-25. The Court held that the company had no business organization that could or did shift as a unit from one slaughter-house to another. *Id.* at 730. Likewise, the contract in *Flores* between the supermarket and the contractor supplying janitors was considered to be one that would prevent the supermarkets from readily shifting from one contractor to another. 2003 WL 24216269 at *4. GLS's contractual arrangement to provide workers to the Westin also prevented the shifting of workers *as a unit* to other hotels.

In analyzing this factor, the court in *Barfield* found that the staffing agency's practice of assigning the same nurses to the hospital weighed in favor of finding joint employer status. 537 F.3d at 145. GLS likewise tended to assign the same Room Attendants to work at the Westin, who as previously mentioned were selected by the Westin. During the time of Tolentino's employment at the Westin from February 7 to April 22, no fewer than 11 workers supplied by GLS were consistently assigned to the Westin. (LF1034, ¶ 175; LF1139-65.) Indeed, some Room Attendants hired through GLS had worked at the Westin for more than a year, with one worker at least up to four years. (LF1034, ¶ 172; LF1096, 98:2-10; LF1124, 31:1-4.)

In *Tumulty*, the court held that although the drivers could service other companies during their off hours, they did not have the ability to service multiple carriers simultaneously and, as such, this factor supported a joint employer relationship. 2005

U.S. Dist. LEXIS 26215 at *16. Similarly, in *Torres-Lopez*, the fact that the farm workers arrived individually to work at the farm and did not shift *as a unit* from one farm to another weighed in favor of finding joint employer status. 111 F.3d at 644. The expectation was that Tolentino and the other Room Attendants hired through GLS would remain on the Westin premises during their shift. (LF1033, ¶ 165; LF1113, 42:11-13; LF1124, 32:18-25.) As such, shifting *as a unit* from the Westin to another hotel was not a possibility.

By way of contrast, it is instructive to discuss contractor corporations that actually do shift as a unit. For example, such companies would include an office building window washer company, a construction company, or a pest control company. And even though construction workers may be on a site for an extended period of time, once the construction is complete, the workers simply move on to the next job at a different site. For GLS Room Attendants, there was no other site to move on to *as a unit*. And unlike construction company workers building an annex, there was no endgame for Tolentino or other Room Attendants at the Westin. In other words, there was no finite task to be completed. As long as there were guests at the Westin, rooms would require cleaning.

In short, the Westin's contract, GLS's practice of assigning the same workers to the Westin, and the expectation that Tolentino and other Room Attendants would remain at the Westin, prevented the sort of shifts as a unit from one work site to another. These considerations, taken in a light most favorable to Tolentino, favor joint employer status for the Westin.

3. Tolentino performed a job that was integral to the Westin's business.

There can be no doubt that Tolentino's job of cleaning guest rooms was integral to the operation of the Westin's hotel and also a practical necessity. As noted by the Westin, the housekeeping services provided by Tolentino and the other Room Attendants through GLS were necessary to the efficient operation of the Westin. (LF0994, ¶ 5; LF0192, ¶ 6.) Moreover, a Room Attendant's failure to complete work consistent with contract specifications could impair the quality of service expected by the Westin's guests. (LF1017, ¶ 92; LF0196, ¶ 25.)

In *Flores*, the court held that this factor was met even though janitorial services are not integral to the business of selling food in supermarkets because of the practical necessity of cleanliness at a supermarket. 2003 WL 24216269 at *4. Tolentino's job of cleaning guest rooms was both integral to the operation of the Westin and a practical necessity. Indeed, it is difficult to imagine a hotel competing for business without clean rooms. This factor undoubtedly weighs in favor of finding that the Westin was Tolentino's employer.

4. Responsibility under the Westin's contract with GLS could pass from one subcontractor to another without material changes.

This factor examines whether a worker is "tied to an entity . . . rather than to an ostensible direct employer . . ." *Zheng*, 355 F.3d at 74. Put differently, it evaluates if "the *same* employees would continue to do the *same* work in the *same* place" if their ostensible direct employer's supervisor changed or abandoned his position. *Id.*; *see also*

Lopez v. Siverman, 14 F. Supp. 2d 405, 422 (S.D.N.Y. 1998) (no material change in relationship to putative joint employer when contractor went out of business).

Tolentino's work was primarily supervised by the Westin, not GLS. Although the Westin claims that GLS sent supervisors to the Westin,⁵ Tolentino and the other Room Attendants continued to do the same work in the same place regardless of who was supervising their work. (LF1034-35, ¶¶ 178-179; LF1189, ¶¶ 2-3.) It is also worth noting that after GLS's indictment, the Westin continued to employ Room Attendants who had been hired through GLS. (LF1096, 98:22-100:19.) Significantly, the job responsibilities of Room Attendants hired directly by the Westin were identical to those hired indirectly. (LF1029, ¶ 137; LF1090, 68:11-20; LF1114, 47:9-21.) Accordingly, this factor favors joint employer status for the Westin.

5. Tolentino worked predominately for the Westin.

Tolentino never performed work on GLS's premises and never received compensation from GLS unless he had done work for a hotel GLS placed him in. (LF1034-35, ¶¶ 178-179; LF1189, ¶¶ 2-3.) This fact goes straight to the heart of the matter because it establishes Tolentino's economic dependence on the Westin. When Tolentino's employment ended at the Westin, so did his paycheck. Thus, in relation to GLS, Tolentino worked exclusively for the Westin.

⁵ The extent of supervision is questionable as Tolentino was not even aware of GLS management making inspections. (LF1031, ¶ 155; LF1050, 168:14-17.)

In relation to other hotels, Tolentino worked predominately at the Westin. During his tenure at the Westin, Tolentino also worked at the Marriott Union Hill through GLS. (LF1034, ¶ 173; LF1170; LF1046, 82:10-14.) His work at the Marriott, however, only averaged between 16 to 24 hours every two weeks. (LF1034, ¶ 174; LF1046, 83:7-19.) In contrast, Tolentino averaged at least approximately 36 hours every two weeks while working at the Westin. (LF1034, ¶ 175; LF1139-65.) Based on these facts, it is fair to say that Tolentino worked predominately for the Westin.

Notably, when this factor was created in 1947, it was in a time when most people worked one job. In today's economy, it is not unusual for people to work two or even three jobs to survive. As the joint employer doctrine looks to the "economic realities" of the employment relationship, the economic realities of today's work world should also be taken into account, lest this factor become an anachronism. In other words, that Tolentino held two jobs at one time should not weigh against him when considering this factor.

CONCLUSION

The economic realities of the relationship between Tolentino and the Westin not only establish that the Westin was a joint employer of Tolentino, but that it was his primary employer. He was economically dependent upon the Westin—not GLS—for his wages, as confirmed by the fact that he never performed work at or for GLS. All of his work was performed at and for the Westin. These facts alone are sufficient to establish the employment relationship.

In today's economy, work performed by employees hired through employment staffing agencies is becoming more and more common. If the "economic realities" test is to have any teeth for the thousands of workers hired through these agencies, it must be flexible enough to recognize this reality and the hazards it poses for workers' right to a fair wage. Perhaps more importantly, it must provide a remedy for the wrongs arising from this reality. A rule permitting companies to not only outsource their labor, but also outsource their responsibilities under wage and hour law, is unacceptable. Only vigorous enforcement of the joint employer doctrine can prevent employee staffing agencies from becoming black markets for substandard wages.

For the foregoing reasons, Tolentino respectfully requests that this Court reverse the trial court's March 8, 2012 Order and Judgment granting the Westin's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, as required by Missouri Supreme Court Rule 84.06(c), that the foregoing Appellant’s Supplemental Brief fully complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Table of Contents and concluding with the last sentence before the signature block, Appellant’s Supplemental Brief contains 5,553 words. The word count was generated by Microsoft Word 2010, and complies with the word limitations contained in Rule 84.06(b).

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Appellant's Supplemental Brief was served, via the Missouri Casenet Electronic Filing System, this 21st day of January 2014 to:

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