Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13106

KANIKA MISRA & others,
Plaintiffs-Appellants,

v.

CREDICO (USA) LLC & others,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE DEFENDANT-APPELLEE, CREDICO (USA) LLC

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

Ben Robbins
BBO No. 559918
Martin J. Newhouse, President
BBO No. 544755
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660
benjaminrobbins@nelfonline.org

Dated: September 7, 2021

CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT..... 2

TABLE OF AUTHORITIES..... 4

ISSUE PRESENTED..... 6

INTEREST OF AMICUS CURIAE..... 6

ARGUMENT..... 8

I. A PLAINTIFF CANNOT SUE MORE THAN ONE CORPORATE ENTITY AS HER ALLEGED EMPLOYER UNDER THE WAGE ACT, UNLESS SHE CAN OVERCOME THE STRONG PRESUMPTION OF CORPORATE SEPARATENESS BY PIERCING THE CORPORATE VEIL..... 8

II. ACCORDINGLY, THE SUPERIOR COURT ERRED WHEN IT RECOGNIZED A COMMON LAW OF JOINT EMPLOYER LIABILITY UNDER THE WAGE ACT, BASED ON ONE ENTITY'S MERE "RIGHT TO CONTROL" ANOTHER ENTITY'S WORKERS..... 19

III. THE INDEPENDENT CONTRACTOR STATUTE IS IRRELEVANT TO DECIDING THE ISSUE WHETHER A PLAINTIFF CAN SUE MORE THAN ONE CORPORATE ENTITY AS HER EMPLOYER UNDER THE WAGE ACT..... 25

CONCLUSION..... 28

CERTIFICATE OF COMPLIANCE..... 29

CERTIFICATE OF SERVICE..... 29

TABLE OF AUTHORITIES

Cases

Attorney Gen. v. M.C.K., Inc.,
432 Mass. 546 (2000) 9

Boire v. Greyhound Corp.,
376 U.S. 473 (1964) 24

Case of Whitman,
80 Mass. App. Ct. 348 (2011) 21

Cerulo v. Chambers, 2017 WL 11496924 (Mass. Super. Dec. 15, 2017), *transferred sua sponte*, SJC-12676 (Jan. 16, 2019) 10

Commodore v. Genesis Health Ventures, Inc.,
63 Mass. App. Ct. 57 (2005) 21, 23

Depianti v. Jan-Pro Franchising Intern., Inc.,
465 Mass. 607 (2013) ..... *passim*

Essex Reg'l Ret. Bd. v. Swallow,
481 Mass. 241 (2019) 17

In re McHoul,
445 Mass. 143 (2005) 14

Rogier v. Chambers,
2016 WL 5890024 (Mass. Super. Sept. 1, 2016) 10

Sebago v. Boston Cab Dispatch, Inc.,
471 Mass. 321 (2015) ..... *passim*

Stearns v. Metro. Life Ins. Co.,
481 Mass. 529 (2019) 22

United States v. Bestfoods,
524 U.S. 51 (1998) 12, 13

Statutes

29 U.S.C. § 152(2)..... 24

G. L. c. 4, § 7..... 15

G. L. c. 149, §§ 105A-105C..... 16, 24

G. L. c. 149, § 1..... 16

G. L. c. 149, § 148..... *passim*

G. L. c. 149, § 148B..... 6, 11, 25, 27

G. L. c. 149, § 148B(a)..... 26

G. L. c. 149, § 148B(a)(1)..... 25

G. L. c. 149, § 148B(a)(1)-(3)..... 26

G. L. c. 150A, § 2(2)..... 16

G. L. c. 150B, § 2..... 16

G. L. c. 151B..... 23

G. L. c. 151B, § 4(4A)..... 23

G. L. c. 151B, § 4(5)..... 23

G. L. c. 152, § 26B..... 21

Other Authorities

Black's Law Dictionary (10th ed. 2014)..... 14

1 W. M. Fletcher, Cyclopedia of Corporations § 43 (rev. ed 2006) 12

ISSUE PRESENTED

On April 27, 2021, the Court issued the following amicus announcement in this case:

> Whether the motion judge erred in applying the common law "right to control test" in determining whether the defendant was the plaintiffs' joint employer; including, whether the "right to control" test has been supplanted by the statutory test under G. L. c. 149, § 148B, in the joint employment context.

New England Legal Foundation (NELF) believes that this amicus announcement is based on certain erroneous legal conclusions that are, or at least *should be*, in contention in this case, and that are in urgent need of clarification by the Court.

Accordingly, NELF wishes to reframe the question that it will address in its amicus brief as follows:

> Under what circumstances, if any, can a plaintiff who alleges a violation of the Massachusetts Wage Act sue more than one corporate entity as her alleged employer?

NELF respectfully submits that this is the vital issue at the heart of this case that the Court should address.

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") is a nonprofit, public interest law firm,

incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to advancing a judicial interpretation of the Massachusetts Wage Act that is consistent with bedrock principles of corporate law. According to those core principles, the Wage Act should be interpreted to impose liability, if any at all, on the one entity that hires an individual and pays her for her work, unless the plaintiff can prove sufficient facts to warrant the equitable remedy of piercing the corporate veil that separates one corporate entity from another such entity.

NELF has appeared regularly as amicus curiae before this Court in other cases involving the interpretation

of the Wage Act.[1] Accordingly, NELF believes that its brief will assist the Court in deciding the central issue presented in this case.[2]

ARGUMENT

I. A PLAINTIFF CANNOT SUE MORE THAN ONE CORPORATE ENTITY AS HER ALLEGED EMPLOYER UNDER THE WAGE ACT, UNLESS SHE CAN OVERCOME THE STRONG PRESUMPTION OF CORPORATE SEPARATENESS BY PIERCING THE CORPORATE VEIL.

In NELF's view, the question actually presented in this case is whether, and if so under what circumstances, a plaintiff can sue more than one corporate entity as her alleged employer under the Wage Act, G. L. c. 149, § 148. In truth, this Court has already answered that question. A plaintiff who

---

[1] *See, e.g.*, *Donis v. Am. Waste Servs., LLC*, 485 Mass. 257 (2020); *Gammella v. P.F. Chang's China Bistro, Inc.*, 482 Mass. 1 (2019); *Calixto v. Coughlin*, 481 Mass. 157 (2018); *Segal v. Genitrix, LLC*, 478 Mass. 551 (2017).

[2] Pursuant to Mass. R. App. P. 17(a)(1)(5), NELF states that neither the defendant-appellee, Credico (USA) LLC, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), NELF also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

is hired and paid by one corporate entity cannot sue another corporate entity as her "joint employer" under the Wage Act unless she can establish sufficient facts to warrant the equitable remedy of piercing the corporate veil that separates those two entities. *See Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 328 (2015) (cab drivers suing under Wage Act for misclassification as independent contractors could not "characteriz[e] the defendants"--various affiliated companies within Boston's taxi cab industry--"as a singular employer exercising monolithic control over the taxicab industry," without first persuading court to "*disregard the corporate form*," under twelve veil-piercing factors announced in *Attorney Gen. v. M.C.K., Inc.*, 432 Mass. 546, 555 n. 19 (2000) (emphasis added)).[3] *See also Cerulo v. Chambers*, 2017 WL

---

[3] Those twelve veil-piercing factors are:

> (1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the

11496924, *at* *6-7 (Mass. Super. Dec. 15, 2017) (Billings, J.), *transferred sua sponte*, SJC-12676 (Jan. 16, 2019)[4] (applying *Sebago* and holding that affiliated corporation and its management were not joint employers of auto dealerships' employees under Wage Act, because employees *failed to pierce corporate veil* separating dealerships from those other defendants); *Rogier v. Chambers*, 2016 WL 5890024, at *4-5 (Mass. Super. Sept. 1, 2016) (Leibensperger, J) (applying *Sebago* and holding same).

Accordingly, the plaintiffs in this case must persuade a court to pierce the corporate veil that separates Credico (USA), LLC (Credico), from DFW Consultants, Inc. (DFW), in order to sue Credico as a joint employer under the Wage Act. Therefore, neither

---

> dominant shareholders; and (12) use of the corporation in promoting fraud.

Scott v. NG U.S. 1, Inc., 450 Mass. 760, 768 (2008) (citation and internal quotation marks omitted).

[4] This Court transferred the *Cerulo* case *sua sponte* from the Appeals Court, issued an amicus announcement concerning the appropriate test for deciding joint employer liability under the Wage Act, and ordered the case for oral argument. *See* https://www.ma-appellatecourts.org/docket/SJC-12676. However, oral argument did not take place, because the parties settled the case and filed a joint stipulation of dismissal. *Id.*

the "right to control" nor the independent contractor statute, G. L. c. 149, § 148B, is the correct test for deciding the issue, as NELF will discuss further in parts II and III, below.

Indeed, this Court has instructed that the Wage Act should be interpreted "to avoid doing violence to *bedrock principles of corporate law*." *Segal v. Genitrix, LLC*, 478 Mass. 551, 563 (2017) (citation and internal quotation marks omitted). And "[o]ne of the basic tenets of that body of law is that corporations --*notwithstanding relationships between or among them* --ordinarily are regarded as *separate and distinct entities*." *Scott v. NG U.S. 1, Inc.*, 450 Mass. 760, 766 (2008) (emphasis added). *See also id.*, 450 Mass. at 766-67 ("Indeed, the concept that 'a parent [or equivalent] corporation . . . is *not* liable for the acts of its subsidiaries [or other such affiliated entities],' is '*deeply ingrained* in our economic and legal systems.'" . . . 'There is a *presumption of separateness* that a plaintiff must overcome to establish liability by showing that a parent is employing a subsidiary to perpetrate a fraud or commit wrongdoing and that this was the proximate cause of the plaintiff's injury.'") (quoting *United States v.*

Bestfoods, 524 U.S. 51, 61 (1998); and 1 W. M. Fletcher, Cyclopedia of Corporations § 43, at 286-290 (rev. ed 2006)) (emphasis added).

What's more, this Court has recognized the very kind of contractual relationship that exists between Credico and DFW as being *consistent* with the principle of corporate separateness under the Wage Act. *See Depianti v. Jan-Pro Franchising Intern., Inc.*, 465 Mass. 607, 624 n.17 (2013) (discussing same). In this common, arms-length business arrangement, one entity (here, DFW) provides its own workforce to fulfill its contractual obligations to another entity (Credico). *See Depianti*, 465 Mass. at 624 n.17 (approving "the hypothetical situation that the dissent outlines[, in which] . . . company A contracts with company B for services, and company B enters into arrangements with third parties to perform the work it undertook under its contract with company A. *We agree that ordinarily*, in such circumstances, company A would not be liable [as a co-employer under the Wage Act]."). *See also id.* at 625-26 (Cordy, J., dissenting in part) ("If corporation A contracts with corporation B to manage a facility to certain specifications, and corporation B enters into arrangements with third

parties to perform the work it had undertaken under that contract," those third parties ordinarily perform services for corporation B only, whether as employees or as independent contractors.); *Bestfoods*, 524 U.S. at 61 ("Ordinarily, a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary [or an equivalent affiliated entity] will *not be penalized by a judicial determination of liability for the legal obligations of the subsidiary*.") (citation and internal quotation marks omitted) (emphasis added).

Under this efficient contractual arrangement between two separate corporate entities, only the entity that hires the workers and pays them for their services, here DFW, is potentially liable under the Wage Act as the plaintiffs' employer, *unless* the plaintiffs can persuade a court to pierce the corporate veil that separates the two entities. "Nothing we say today, then, is at odds with *the law of corporate disregard*." *Depianti*, 465 Mass. at 624 n.17 (emphasis added). *See also id.* at 625-26 (Cordy, J.) ("The only exceptions to such an obvious conclusion [that there is only one employer under this contractual relationship] would arise if corporation B

[here, DFW] was set up by corporation A [Credico] specifically for the purpose of evading the independent contractor law, or if corporation A were otherwise found to be the *alter ego* of corporation B, such that the *corporate veil* between them would be properly *pierced* and the work arrangement entered into by corporation B thereby attributed to corporation A.") (emphasis added).

Nowhere does the language of the Wage Act disturb these foundational principles of corporate law. Notably, the statute does not define the term "employer." The Wage Act therefore codifies the ordinary definition of that term, which is the *single* entity that hires an individual and pays her for her work.[5] *See* Black's Law Dictionary (10th ed. 2014) (defining "employer" as "[a] person, company, or organization for whom someone works; esp., one who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.")

---

[5] *See In re McHoul*, 445 Mass. 143, 154 (2005) ("Where a statutory term is undefined, it must be understood in accordance with its generally accepted plain meaning.") (citation and internal quotation marks omitted).

Consistent with this ordinary definition of the term, the Wage Act repeatedly refers to the employer as the person or entity that has the statutory duty to *pay* the employee for her work. *See, e.g.*, G. L. c. 149, § 148 ("Every person[6] having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him."); *id.* ("[A]n employer may make payment of wages prior to the time that they are required to be paid . . . ."). Accordingly, DFW, and DFW alone, was the plaintiffs' alleged employer under the Wage Act in this case.

Since the Wage Act does not define the term "employer," the statute should also be interpreted to leave undisturbed the foundational principle of corporate separateness, under which one entity (here, Credico) is ordinarily not held responsible for another entity's alleged misconduct. "This court accordingly will not attribute to the Legislature an intent to alter *the normal rules of corporate law* [in

---

[6] Of course, "person" includes a natural or corporate person. *See* G. L. c. 4, § 7 (23rd ¶) ("In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears: . . . '*Person*' or 'whoever' shall include *corporations*, societies, associations and partnerships.") (emphasis added).

the Wage Act] in the absence of plain or necessarily implied intent to change the pre-existing law." *Segal*, 478 Mass. at 563 (citation and internal punctuation marks omitted) (emphasis added).

In sharp contrast to the lack of a definition of "employer" in the Wage Act, another employment statute contained within the same chapter 149 *does* provide a precise and unusually expansive definition of that key term. *See* G. L. c. 149, § 1 ("'Employer,' as used in said sections one hundred and five A to one hundred and five C inclusive [Massachusetts Equal Pay Act, G. L. c. 149, §§ 105A-105C], shall include *any person acting in the interest of an employer directly or indirectly*.") (emphasis added).[7]

However, that expansive statutory definition does *not* apply to the Wage Act. The Legislature's omission of such a definition should therefore be deemed a deliberate policy choice to preserve ordinary principles of corporate law in the Wage Act. *See Essex Reg'l Ret. Bd. v. Swallow*, 481 Mass. 241, 252

---

[7] *See also* G. L. c. 150A, § 2(2) (The word "employer" shall include any person acting in the interest of an employer, directly or indirectly,); G. L. c. 150B, § 2 (same).

(2019) ("[W]e must [therefore] give the language effect consistent with its plain meaning and refrain from reading into the statute a provision which the Legislature *did not see fit to put there* or *words that the Legislature had an option to, but chose not to include*.") (citations and internal quotation marks omitted) (emphasis added).

Under the strong presumption of corporate separateness, which remains in tact in the Wage Act, "control, *even pervasive control*, without more, is not a sufficient basis for a court to ignore corporate formalities." *Scott*, 450 Mass. at 768 (emphasis added). After all, "pervasive control" is but one of twelve factors that a court should consider under the veil-piercing test. *See Sebago*, 471 Mass. at 328. For this reason alone, the Superior Court erred when it recognized a common law of joint employer liability under the Wage Act, based on one entity's mere "right to control" another entity's workers.

Accordingly, a plaintiff suing one corporate entity as its putative employer under the Wage Act cannot sue another entity, unless she can overcome the "bedrock principle" of corporate separateness and satisfy the demanding twelve-factor test for piercing

the corporate veil,[8] such as by showing that Credico had "concoct[ed] an artificial scheme to circumvent the wage laws," *Sebago*, 471 Mass. at 330, or had otherwise "perform[ed] an 'end run' around the Wage Act 'by virtue of an arrangement permitting it to distance itself from its employees.'" *Id.*, 471 Mass. at 328 (quoting *Depianti,* 465 Mass. at 621).

However, the plaintiffs cannot show that Credico, merely by entering into an arms-length contractual relationship with DFW--the very kind of business relationship that this Court has expressly endorsed under the Wage Act--engaged in any such nefarious activity, in order to evade any purported obligations under the Wage Act.[9] Therefore, the plaintiffs cannot

---

[8] *See* n.3 above.

[9] Indeed, this Court has declined to pierce the corporate veil under the Wage Act even when the third-party defendant has exercised far more direction and control over the putative employer's workers than what the plaintiffs allege in this case. *See Sebago*, 471 Mass. at 328-29 (applying veil-piercing test when Wage Act plaintiffs sought to sue multiple affiliated entities as joint employer, and concluding that, "[w]here, as here, the plaintiffs' allegations are limited to common ownership and control, there is *no cause to analyze the defendants as a single employer*.") (emphasis added). *See also Segal*, 478 Mass. at 562 (directors and investors of employer entity are generally not subject to liability as its "agents" under Wage Act because, "[m]uch like board

carry their considerable burden of persuading the Court to pierce the corporate veil that separates those two entities. In short, this Court should affirm the Superior Court's dismissal of Credico from the case.

II. ACCORDINGLY, THE SUPERIOR COURT ERRED WHEN IT RECOGNIZED A COMMON LAW OF JOINT EMPLOYER LIABILITY UNDER THE WAGE ACT, BASED ON ONE ENTITY'S MERE "RIGHT TO CONTROL" ANOTHER ENTITY'S WORKERS.

While the Superior Court correctly dismissed Credico from the case, it did so for the wrong reasons. In particular, the Superior Court erred when it concluded that there is a common law of joint employer liability in Massachusetts, which can subject a third-party entity to liability as a "joint employer" under the Wage Act if it has the "right to control" another entity's workers. Recognition of any such theory of liability would "do[] violence to bedrock principles of corporate law," *Segal*, 478 Mass. at 563, by contravening the robust principle of corporate separateness and its narrow exception, the multi-factor veil-piercing test, which this Court

---

members, investors *invariably exercise some control* over the businesses they invest in.") (emphasis added).

discussed in *DePianti* and expressly applied in *Sebago* to Wage Act claims.

Consistent with that demanding test, no theory of joint employer liability could be based on such a thin reed as the mere "right to control." After all, "[actual] control, *even pervasive control*, without more, is not a sufficient basis for a court to ignore corporate formalities." *Scott*, 450 Mass. at 768 (emphasis added). Instead, pervasive control is but one of *twelve* factors that a court should consider when applying the veil-piercing test.[10] See *Scott*, 450 Mass. at 767 ("A veil may be pierced where the parent exercises some form of pervasive control of the activities of the subsidiary *and there is some fraudulent or injurious consequence* of the intercorporate relationship (emphasis in original) (citations and internal quotations marks omitted).

Moreover, the Superior Court relied for support on decisions of the Appeals Court that are inapposite because those cases concerned statutes that, unlike the Wage Act, contain express language that imposes broad liability on employers *and* on third-party

---

[10] *See* n.3, above.

individuals and entities. In particular, the lower court relied on *Case of Whitman*, 80 Mass. App. Ct. 348 (2011) (joint employers under Workers' Compensation Act), and on *Commodore v. Genesis Health Ventures, Inc.*, 63 Mass. App. Ct. 57 (2005) (joint employers under G. L. c. 151B). Record Appendix, vol.II, p.279-80. Neither case is on point.

In *Case of Whitman*, the Appeals Court applied the joint employer liability provision that is unique to the Workers' Compensation Act, G. L. c. 152, § 26B (imposing joint and several liability "[w]hen an employee [is] employed in the *concurrent service of two or more insured employers*.") (emphasis added).[11] *See also Case of Whitman*, 80 Mass. App. Ct. at 355 ("Workers' compensation law in Massachusetts allows separate entities to constitute joint employers."). The Wage Act contains no such provision and, therefore

---

[11] In particular, § 26B of the Workers Compensation Act, titled "Concurrent service of two or more employers; joint and several liability of insurers," provides that "[w]hen an employee employed in the concurrent service of two or more insured employers receives a personal injury compensable under this chapter while performing a duty which is common to such employers, the liability of their insurers under this chapter shall be joint and several." G. L. c. 152, § 26B.

a court is not at liberty to supply it. "The omission of particular language from a statute is *deemed deliberate* where the Legislature included such omitted language in *related or similar statutes*." *Stearns v. Metro. Life Ins. Co.*, 481 Mass. 529, 536 (2019) (citation and internal quotation marks omitted) (emphasis added).

While the Superior Court acknowledged that the Wage Act does not contain any such joint liability provision, the court nonetheless concluded that "there is nothing in [the Wage Act] that supplants or bars application of the common law status of joint employment." R.A., vol.II, p.279.

Nothing could be further from the truth. There is no "common law status of joint employment" in Massachusetts. To the contrary, this Court has held that the Wage Act must be interpreted consistently with "bedrock principles of corporate law." *Segal*, 478 Mass. at 563. The recognition of any such porous doctrine would contravene the core principle of corporate separateness and its rigorous veil-piercing exception, along with the Court's own precedent interpreting the Wage Act. *See Sebago*, 471 Mass. at 328 (applying veil-piercing test to plaintiffs'

allegations of joint employer liability under Wage Act). See also *DePianti*, 465 Mass. at 624 n.17 ("Nothing we say today, then, is at odds with *the law of corporate disregard*.") (emphasis added).

The Superior Court's reliance on *Commodore v. Genesis Health Ventures* is also misplaced. In that case, the Appeals Court recognized joint employment liability under G. L. c. 151B. *See Commodore*, 63 Mass. App. Ct. at 62. To be sure, c. 151B does not contain a joint employer liability provision comparable to the Workers' Compensation Act. *Nevertheless*, c. 151B differs markedly from the Wage Act because it imposes liability on a wide swath of third parties, in addition to the employer, under several different statutorily specified circumstances.[12] The Wage Act contains none of those provisions.

Moreover, *Commodore*'s authority is undermined further because the Appeals Court in that case relied

---

[12] For example, § 4(5) of c. 151B prohibits "any person, *whether an employer or an employee or not*, to aid, abet, incite, compel or coerce" a violation of the statute. G. L. c. 151B, § 4(5) (emphasis added). Moreover, § 4(4A) prohibits "*any person* to coerce, intimidate, threaten, or interfere with" an employee in the exercise of her statutory rights. G. L. c. 151B, § 4(4A) (emphasis added).

for support on an inapposite United States Supreme Court decision, *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), which recognized joint employer liability under the NLRA. *See Commodore*, 63 Mass. App. Ct. at 61 (discussing same). However, the NLRA differs significantly from the Wage Act because it broadly defines the term "employer" as "any person acting as an agent of an employer, *directly or indirectly* . . . ." 29 U.S.C. § 152(2) (emphasis added). Indeed, this is virtually the *same* broad statutory definition of "employer" that occurs in other Massachusetts employment statutes, such as the Equal Pay Act, G. L. c. 149, §§ 105A-105C, but does *not* occur in the Wage Act, as NELF has discussed above.

In sum, the Superior Court's recognition of a common law of joint employer liability under the Wage Act is without any support in Massachusetts, and it in fact contravenes this Court's own clear precedent on the issue, especially in *DePianti* and *Sebago*.

III. THE INDEPENDENT CONTRACTOR STATUTE IS IRRELEVANT TO DECIDING THE ISSUE WHETHER A PLAINTIFF CAN SUE MORE THAN ONE CORPORATE ENTITY AS HER EMPLOYER UNDER THE WAGE ACT.

Finally, the Superior Court was correct to reject the application of the independent contractor statute, G. L. c. 149, § 148B,[13] to the resolution of the *intercorporate* issue in this case. That statute serves the entirely unrelated purpose of classifying the working relationship between an individual and the entity that has hired her, when such classification is in dispute, as is the case with two of three plaintiffs and DFW here.

By its own terms, the independent contractor statute begins with the *assumption* that an individual has a work arrangement with an entity, and it goes on

---

[13] That statute provides, in relevant part:

> (a) For the purpose of this chapter [149] and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:--
>
> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact . . . .

G. L. c. 149, § 148B(a)(1).

to create the rebuttable presumption that the worker is an employee. *See* G. L. c. 149, § 148B(a) ("An individual performing any service [for an entity] . . . shall be considered to be an employee," unless putative employer can prove all three prongs of § 148B(a)(1)-(3)). *See also Sebago*, 471 Mass. at 327 (discussing same).

By contrast, the issue here is *whether* the plaintiffs had any work arrangement whatsoever with Credico, in addition to their work arrangement with DFW, due to the alleged intercorporate relationship between Credico and DFW. Since the independent contractor statute presupposes the existence of such a work arrangement between an individual and an entity, that statute says nothing about *how* to decide that threshold issue. Therefore, that statute is irrelevant to the issue in this case. *See DePianti*, 465 Mass. at 625 (Cordy, J.) (application of independent contractor statute "depends first and foremost on *whether* there is a work arrangement of some type between the defendant and the person claiming misclassification. . . . In the absence of a work arrangement between the parties, be it a written or oral, implicit or explicit, contract, agreement, or

understanding, § 148B simply does not apply.") (emphasis added). *See also Sebago*, 471 Mass. at 329 ("[T]he statute has no application where the parties have neither an independent contractor nor an employment relationship.") (citation and internal quotation marks omitted). (emphasis added).

Moreover, the independent contractor statute has nothing whatsoever to do with evaluating the intercorporate relationship between Credico and DFW, to determine whether Credico became the "alter ego" of DFW with respect to directing and controlling DFW's workers. That issue is addressed solely by the veil-piercing doctrine and by this Court's own precedent, as amicus has discussed extensively above. *See DePianti*, 465 Mass. at 624 n.17, 625-26 (majority and partial dissent agreeing that, absent clear proof of abuse of the corporate form, company A, which hires company B to perform contractual services, has no liability under Wage Act for company B's treatment of its workers).

For these reasons, the Court should affirm the Superior Court's rejection of the independent contractor statute. That statute is simply irrelevant to deciding the issue presented in this case.

CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court affirm that part of the judgment of the Superior Court dismissing all Wage Act claims against Credico.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its counsel

/s/ Ben Robbins

Ben Robbins
BBO No. 559918
Martin J. Newhouse, President
BBO No. 544755
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
benjaminrobbins@nelfonline.org

Dated: September 7, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(3)(E) by composing this brief on Microsoft Word 2010 in 12-point Courier New. I further certify that the number of pages in this brief is 23.

/s/ Ben Robbins

Ben Robbins

CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this seventh day of September, 2021, I served the within Brief Of Amicus Curiae New England Legal Foundation In Support Of The Defendant-Appellee, Credico (USA) LLC, in *Misra & others v. Credico (USA) LLC & others*, SJC-13106, by causing it to be delivered by eFileMA.com to counsel for the Plaintiffs-Appellants, Harold L. Lichten, Lichten & Liss-Riordan, 729 Boylston Street, Suite 2000, Boston, MA 02116, hlichten@llrlaw.com; and to counsel for the Defendants-Appellees, Barry J. Miller, Seyfarth Shaw LLP, Two Seaport Lane, Suite 300, Boston, MA 02210, bmiller@seyfarth.com; and David B. Wilson, Hirsch Roberts Weinstein, LLP, 24 Federal Street, 12th floor Boston, MA 02110, dwilson@hrwlawyers.com.

Signed under penalties of perjury.

/s/ Ben Robbins

Ben Robbins
benjaminrobbins@nelfonline.org
BBO No. 559918
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Telephone: (617) 695-3660