S206874

Perkins Coie

Four Embarcadero Center, Suite 2400
San Francisco, CA 94111-4131
PHONE: 415-344-7000
FAX: 415-344-7050
www.perkinscoie.com

Sue J. Stott
PHONE: 415.344.7061
FAX: 415.344.7261
EMAIL: sstott@perkinscoie.com

SUPREME COURT
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Frank A. McGuire Clerk

Deputy

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July 26, 2013

Honorable Chief Justice Tani Cantil-Sakauye
And Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Maria Ayala et al. v. Antelope Valley Newspapers, Inc., No. S206874

To the Honorable Chief Justice and Associate Justices:

Defendant and Respondent Antelope Valley Newspapers, Inc. ("AVP") respectfully submits this supplemental letter brief in response to the Court's order of June 26, 2013, which directed the parties to "discuss[] the relevance of *Martinez v. Combs*, (2010) 49 Cal.4th 35, 52-57, 73, and IWC wage order No. 1-2001, subdivision 2(D)-(F) (Cal. Code Regs., tit. 8, § 11010, subd. 2(D)-(F)) ["the Wage Order"], to the issues in this case." As explained below, neither *Martinez* nor the Wage Order is relevant to the issue before the Court, which is whether the Court of Appeal misapplied the test for independent contractor status set out in *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341, 350 (*Borello*), in reversing the trial court's denial of class certification.

A. Plaintiffs have forfeited any argument that *Martinez* provides a basis for reversing the trial court's ruling denying class certification

This Court should not consider the application of *Martinez* to this case because plaintiffs did not rely on *Martinez* or the Wage Order, either in the trial court or in the Court of Appeal. Instead, in their class certification briefing before the trial court, both parties agreed that the common law test set out in *Borello* governs the merits of plaintiffs' claim that AVP carriers are employees rather than independent contractors. (See, e.g., 1 AA 51-52 (Plaintiff's Memorandum of Points and Authorities in Support of Motion for Class Certification) [calling *Borello* the "seminal case on the distinction between independent contractors and employees"]; accord 10 AA 2044-45 (Defendant's Opposition to Plaintiffs' Motion for Class Certification).) Both parties took the same position before the Court of Appeal. (See, e.g., Appellants' Reply Brief, at p. 27

["Common law . . . Controls Whether the Carriers Are Defendant's Employees"]; Respondent's Brief, at pp. 19-20 [discussing common law test].)

It is well-established that a party may not raise a new issue on appeal. (See, e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 854 fn. 6 [declining to consider issue raised for first time on appeal]; accord *Estate of Leslie v. Garvin* (1984) 37 Cal.3d 186, 202.) Here, plaintiffs have forfeited any claim that the trial court erred by resolving their class certification motion without considering *Martinez* or the Wage Order definitions of "employee," "employer," and "employ." Whether or not this Court has discretion to consider the potential applicability of *Martinez* and the Wage Order *sua sponte*, it would be better served by waiting to resolve those issues in a case where they were addressed below, thus giving the Court the benefit not only of full consideration by the Court of Appeal but also of the views of *amici curiae*. The Court should therefore decide this case on the basis of the *Borello* standard that the parties relied upon below. (See *People v. Holloway* (2004) 33 Cal.4th 96, 129 [declining to consider overruling a case because a party had failed to preserve an argument for doing so].)

B. *Martinez* is not relevant to this case because the common law test of *Borello*, not the test applied in *Martinez*, governs whether a putative employee is an independent contractor

Even if plaintiffs had preserved an argument based on *Martinez*, the case is not relevant here. As an initial matter, *Martinez* is inapplicable because it resolved only the application of the Wage Order to wage claims under Labor Code section 1194. (See *Martinez*, *supra*, 49 Cal.4th at 52 ["We hold as follows: In actions under section 1194 to recover unpaid minimum wages, the IWC's wage orders do generally define the employment relationship, and thus who may be liable."].) In this case, plaintiffs did assert a section 1194 claim, but the Court of Appeal affirmed the trial court's denial of certification as to that claim because it determined that the need for individualized fact determinations would preclude class certification even if the threshold classification question were amenable to class treatment. (Opn. at pp. 20-21.) Plaintiffs did not cross-petition to seek review of that holding, so as the case comes to this Court, section 1194 is no longer at issue. For that reason alone, *Martinez* has no bearing on this case.

Martinez is also inapplicable for the more fundamental reason that it did not involve putative independent contractors. The question in *Martinez* was whether the plaintiff workers had any legal relationship at all with the defendants, rather than, as here, whether workers who undisputedly do perform services for the defendant are employees or independent contractors. As to that latter question, the *Borello* common law test controls.

1. In *Martinez*, the Court resolved a question of joint employment, not independent contractor status

In *Martinez*, the Court considered wage claims asserted by agricultural workers who all parties agreed were employees of Munoz, a strawberry grower. (*Martinez*, *supra*, 49 Cal.4th at pp. 42-43.) Munoz declared bankruptcy, having failed to pay the workers their wages. (*Id.* at pp. 42, 46-48.) The workers then filed suit against the produce merchants with whom Munoz did business, asserting claims under Labor Code section 1194 and derivative claims under other statutes. (*Id.* at pp. 42-43, 48.) No party contended that the workers were independent contractors. Instead, the parties disputed who the workers' employer was—the merchants argued that only Munoz was the employer, while the workers argued that Munoz and the merchants were joint employers. The resolution of that dispute controlled the outcome of the case because, as the Court observed, "only an employer can be liable" for unpaid minimum wages. (*Id.* at p. 49.)

In resolving the workers' claims, the Court noted that section 1194 itself does not "define[] the employment relationship or identif[y] the persons who are liable under the statute for unpaid wages." (*Martinez*, *supra*, 49 Cal.4th at p. 52.) Acknowledging the history of judicial deference to the IWC's orders (*id.* at pp. 60-62), the Court therefore looked to the terms of the Wage Order (*id.* at p. 64). As the Court explained, the wage Order defines an "employer" as "any person . . . who . . . *employs* or exercise control over the wages, hours, or working conditions of any person," and it defines "employ" as "to *engage*, suffer, or permit to work." (*Ibid.* [emphasis in original] [quoting Wage Order No. 14, Cal. Code Regs., tit. 8, § 11140, subd. 2(C), (F)].) Noting that the word "engage" "has no other apparent meaning in the present context than its plain, ordinary sense of 'to employ,'" the Court concluded that, under the IWC's definition, "employ" has three alternative meanings: "(a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Ibid.* [emphasis in original].) A person who claims that he or she does not "employ" the plaintiff at all—that some other entity is the real "employer"—can be liable for unpaid wages under any one of those three alternative definitions.

Applying those alternative standards, the Court in *Martinez* concluded that the produce merchants did not "employ" the plaintiffs. The merchants had no control over the plaintiffs' wages, hours, and working conditions, which were determined by Munoz alone. (*Martinez*, *supra*, 49 Cal.4th at p. 71.) Nor did they suffer or permit the plaintiffs to work, for they had no power to prevent the plaintiffs from working. (*Id.* at p. 70.) And plaintiffs made no effort to show that they were common law employees of the merchants. The Court thus concluded that the evidence did not establish that the merchants' mere "business relationship, standing alone, . . . transform[ed] the purchaser into the employer of the supplier's workforce." (*Ibid.*)

2. *Martinez* has no bearing on the proper application of the *Borello* test

The threshold merits question in this case is whether plaintiffs should have been classified as employees rather than independent contractors. *Martinez* has no bearing on that question. As explained above, the Court in *Martinez* construed the Wage Order's definition of "employer," thus answering the question, "who is an employee's employer?" In cases where there is no claim of independent contractor status, that may be the only question relevant to the determination of the status of the parties in an employment dispute.

In a case of alleged misclassification, however, the parties generally will not dispute that services were performed by the plaintiff for the defendant. Their dispute will instead turn on the nature of those services. In such a case, while the plaintiff can meet her prima facie burden of establishing employment status using any of *Martinez*'s alternative definitions for a Labor Code section 1194 claim, there will be little practical need for her to do so. Instead, an independent contractor case turns most often on a second-stage inquiry in which a unique question about the meaning of "employee" is considered—whether the plaintiff is an employee or an independent contractor. As explained in the briefs filed by both parties, that inquiry is governed by *Borello* and its common law test, which looks to both the right to control and the secondary factors.

Practically speaking, then, *Martinez* has little significance to the actual issues that will be litigated in an independent contractor case such as this one. Here, for example, there is no question that the carriers in the putative class provided services to AVP and were compensated for doing so. If the carriers were not independent contractors, the *Martinez* test would allow a court to determine who the carriers' employer was. In reality, however, what will be litigated at trial is the question of independent contractor status. And the specific issue before the Court is whether the Court of Appeal misconstrued and misapplied the *Borello* test in concluding that the trial court abused its discretion by denying class certification. *Martinez*—and the Wage Order definitions of "employer" that it discusses—do not bear on that question.

3. The wage order definitions of "employ" do not displace *Borello*

Nothing in *Martinez* suggests that the Wage Order definition of "employer" somehow displaces the *Borello* common law independent contractor test. To the contrary, the Court in *Martinez* applied the *Borello* test—not the Wage Order definitions—in holding that that Munoz was an independent contractor rather than an employee of the produce merchants. The Court stated categorically that "Munoz was not [the merchant's] employee" because, unlike the employees in *Borello*, he "held himself out in business, invested substantial capital and equipment, employed over 180 workers, sold produce through four unrelated merchants, enjoyed an opportunity for profit or loss dependent on his business acumen and market conditions, and had indeed made a profit in prior years operating in the same manner." (*Martinez*, *supra*, 49 Cal.4th at p. 73.) That discussion would have been entirely irrelevant if the Wage Order governed the determination of independent contractor status. Thus, whether a Labor Code section 1194 claim is involved or

not, it is the right to control test and the secondary factors that govern the determination of whether a given worker is an employee or an independent contractor—not the Wage Order's basic, generic definitions of "employer" and "employ."

Construing *Martinez* otherwise would lead to absurd results. That is perhaps most clearly seen with regard to the "suffer or permit" component of the Wage Order's definition, for there cannot be an independent contractor relationship unless the service recipient "suffers or permits" an independent contractor to provide services. That is the entire point of the contractual relationship between the parties: compensation in exchange for the performance of services.

The "suffer or permit" standard was not intended to distinguish employees from independent contractors. Instead, as the Court explained in *Martinez*, the standard had its origins in child labor laws and was designed to apply to situations in which a child was not formally "employed" in the ordinary sense of that word but was nevertheless "permitted" to provide labor, such as a child "paid by coal miners to carry water" or "a boy hired by his father to oil machinery." (*Martinez*, *supra*, 49 Cal.4th at p. 58; see also *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1434 ["[T]he proprietor was liable when he or she knew that child labor was occurring but . . . permitted the child to work."].) That definition facilitated the imposition of criminal sanctions for employing children and of civil liability for injuries suffered by child workers. (See *Martinez*, *supra*, 49 Cal.4th at p. 58.) Under that definition, "[a] proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." (*Id.* at p. 69.)

The "suffer or permit" standard is too blunt an instrument to distinguish employees from independent contractors because both employees and independent contractors are suffered or permitted to work by the recipient of the provided services. (*See Silent Woman, Ltd. v. Donovan* (E.D.Wis. 1984) 585 F.Supp. 447, 450 [discussing federal law, and observing that the "FLSA definition of employ, 'to suffer or permit to work,' 29 U.S.C. § 203(g), is too broad to be useful in distinguishing an employee from an independent contractor."].) For example, consider a homeowner who hires a painter to spend a week painting her house. The painter has his own employees, supplies his own tools, advertises his business, serves many different customers, and comes for a few hours each day at times of his choice. The homeowner plainly "suffers or permits" the painter to work because she knows that he is providing services, and she could prevent him from doing so if she wished. While the *Borello* test deals with all the variables presented by a particular service relationship and would lead to the conclusion that the painter is an independent contractor, the "suffer or permit" test would make him an employee—a result at odds with common sense. As a means of identifying employees, the "suffer or permit" standard makes sense only in the context in which it arose—for addressing child labor or other "irregular working relationships." (*Martinez*, *supra*, 49 Cal.4th at p. 58 [explaining that "suffer or permit" standard was intended to prevent putative employers from claiming that "the child was not

employed to do the work which caused the injury, but that he did it of his own choice and at his own risk"].)

Much the same is true of the "control over wages, hours, or working conditions" component of the Wage Order definition. That standard was intended by the IWC to describe situations of joint employment, that is, "situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work." (*Martinez*, *supra*, 49 Cal.4th at p. 59.) In particular, the IWC intended the definition to identify as "employers" both "temporary employment agencies and employers who contract with such agencies to obtain employees." (*Ibid.* [quoting Statement as to the Basis for Wage Order No. 16 Regarding Certain On-site Occupations in the Construction, Drilling, Mining, and Logging Industries (Jan. 2001), at p. 5].)

The test is far broader than *Borello*'s control test, which refers to the "right to control the manner and means of accomplishing the result desired." (*Borello*, *supra*, 48 Cal.3d at p. 350 [quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946].) All service recipients control the remuneration their vendors receive, at least indirectly. Likewise, a service recipient's right to define the bargained-for service that the independent contractor will provide inevitably bears, at least indirectly, on the independent contractor's working conditions. For example, suppose a business hires a freelance web designer to redesign its website. During negotiations, the business rejects the designer's initial contract price and negotiates a better deal, agreeing to pay a fixed fee, perhaps with the understanding that project will take a certain number of hours. The designer then provides the services without any supervision and entirely controls the manner and means by which she performs the bargained-for service. In that example, the business would in some sense have "control" over both the designer's compensation and his hours of work. The flexible *Borello* standard would allow consideration of the full range of facts relevant to the nature of that service relationship. The "control over wages, hours, or working conditions" test would not.

Accordingly, if the Wage Order's definitions were applied as alternative means of deciding whether a worker is an employee or independent contractor, there would be no such thing as an independent contractor in California for wage law purposes—everyone providing services to another would be an employee. That has never been the law in California or, as far as we are aware, in any other state. Because *Martinez* did not involve a question of independent contractor status, its broad language about the definition of "employee" should not be read to have effected, sub silentio, such an drastic change in independent contractor law. (See *Cohens v. Virginia* (1821) 19 U.S. (6 Wheat.) 264, 399 ["It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."].)

4. Courts have not found *Martinez* to require different outcomes in putative independent contractor class actions

In its Order calling for supplemental briefing, the Court cited two decisions of the Court of Appeal discussing the relationship between *Martinez* and *Borello*. Those cases bolster the conclusion stated above: While the Wage Order definitions govern Labor Code section 1194 claims, they do not replace the common law test that governs whether a putative employee is instead an independent contractor.

In *Bradley v. Networkers Int'l, LLC* (2012) 211 Cal.App.4th 1129, the Court of Appeal discussed the *Martinez* and *Borello* standards separately, but it treated them as interchangeable for purposes of the class certification analysis. Because the Court determined that "the evidence likely to be relied upon by the parties would be largely uniform throughout the class," it had no need to comment further on whether or how either test might apply. (*Id.* at p. 1147.) *Bradley* is thus entirely consistent with the analysis set out above.

In *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, the plaintiffs had defined the class to include both individuals who had entered into an independent contractor agreement with the defendant newspapers *and* an unknown number of individuals who had not entered into such an agreement with defendants and instead provided services to distributors who *did* have a contract with one of the defendants. (*Id.* at p. 646.) The case thus presented a threshold question as to whether the plaintiffs could make a showing that those in that secondary category of putative class members had provided services to the defendant at all and were even arguably "employees." Given the timing of class certification briefing, the parties in *Sotelo* (and the trial court) did not address *Martinez*, which had not yet been decided. In the course of affirming the trial court's denial of class certification, the Court of Appeal noted briefly that the trial court should have considered the plaintiffs' Labor Code section 1194 claim under the *Martinez* definitions, but that any failure to do so was harmless because "consideration of *Martinez* would not have affected the trial court's conclusions." (*Id.* at pp. 661-62.) That dictum made sense given how broadly and nebulously the plaintiffs had defined the class.

Here, by contrast, plaintiffs defined the class to encompass only those who signed an Independent Contractor Distribution Agreement with AVP and performed services for AVP thereafter. (1 AA 6) The focus on class certification in this case was squarely on whether plaintiffs could meet their burden of showing that common proof could provide a common answer to whether members of the putative class were employees or independent contractors under the *Borello* test. *Martinez* was not germane to these issues.

C. The common law right to control test set out in *Borello* has shaped parties' expectations for years, and it should not be overturned

Even if the Court were to conclude that the Wage Order definition is in some sense superior to the *Borello* test and that the Wage Order ought to be applied in determining independent contractor status, the Court should nevertheless not overrule *Borello*. The *Borello* test is not of recent vintage. *Borello* itself is already more than 20 years old, and the *Borello* Court "adopt[ed] no detailed new standards for examination of the issue," but simply articulated California's version of the traditional common law independent contractor standards. (*Borello*, *supra*, 48 Cal.3d at 354.) Those standards were prescribed by the Court years before. (See, e.g., *S. A. Gerrard Co. v. Indus. Accident Comm'n* (1941) 17 Cal.2d 411, 413-14 [discussing right to control test]; *Tieberg*, *supra*, 2 Cal.3d at p. 946 [same].)

It is not only courts that have resolved questions of independent contractor status using the common law test; administrative agencies have done the same. For example, on its website, the Division of Labor Standards Enforcement ("DLSE") provides answers to "[f]requently asked questions regarding wage and hours laws," including its guidance that it applies the *Borello* test to distinguish between employees and independent contractors. (See California Department of Industrial Relations, Division of Labor Standards Enforcement, *Independent contractor versus* employee [available at http://www.dir.ca.gov/dlse/dlseWagesAndHours.html (last visited July 25, 2013)].) Likewise, Section 28 of the DLSE's Enforcement Policies and Interpretation Manual discusses, at length, how the DLSE uses the *Borello* test to determine "whether an individual providing service to another is an independent contractor or an employee." (California Department of Industrial Relations, Division of Labor Standards Enforcement, *Enforcement Policies and Interpretation Manual* (2002) [available at http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf (last visited July 25, 2013)].)

The *Borello* test is thus familiar to the administrative agencies that enforce California's labor laws. It has provided the background rule upon which AVP and other businesses have relied for many years in ordering their employee and independent contractor relationships. In entering into independent contractor agreements, businesses in California have understood that courts and administrative agencies examining the relationship will apply the *Borello* test. Revisiting that determination and replacing *Borello* with the alternative definitions discussed in *Martinez* would be a drastic departure from settled law that would upend decades of precedent and wreak havoc on existing contracts throughout California.

Principles of stare decisis weigh heavily against such a result. This Court has recognized that "a court usually should follow prior judicial precedent even if the current court might have decided the issue differently if it had been the first to consider it." (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 327.) In other words, "a court should be reluctant to overrule precedent and should do so only for good reason." (*Ibid.*) And that rule applies with even greater force where, as here, "the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a

previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." (*Sierra Club v. San Joaquin Local Agency Formation Comm'n* (1999) 21 Cal.4th 489, 504 [quoting *Hilton v. South Carolina Public Railways Comm'n* (1991) 502 U.S. 197, 202]; see also *Moradi–Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 296 ["This policy . . . is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law."] [internal quotation marks and citations omitted].) This Court should not take a step that would so upset settled rights, and it certainly should not do so in a case where it does not have the benefit of full briefing by the parties and *amici* and consideration of the issue by the Court of Appeal.

D. Conclusion

For the reasons stated above, *Martinez* and the Wage Order definitions of "employee," "employer," and "employ" have little bearing on the issue before the Court, which involves the proper application of *Borello*. Where the question is whether a worker is "employed" at all for purposes of a Labor Code section 1194 claim, *Martinez* sets out definitions to guide that determination. Where, as here, the question is whether a worker is an employee or independent contractor, the *Borello* test governs. The Court should resolve this case without reference to *Martinez* and the Wage Order definitions.

Respectfully submitted,

Sue J. Stott

cc: See attached certificate of service

IN THE CALIFORNIA SUPREME COURT

No. S206874

MARIA AYALA et al.,

Plaintiffs and Appellants,

v.

ANTELOPE VALLEY NEWSPAPERS, INC.

Defendant and Respondent.

After a Decision by the California Court of Appeal,
Second Appellate District, Division Four
Case No. B235484

Appeal from the California Superior Court, Los Angeles County
Case No. BC403405 (Judge Carl J. West)

CERTIFICATE OF SERVICE

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*Sue J. Stott, State Bar No. 91144 PERKINS COIE LLP Four Embarcadero Center, Suite 2400 San Francisco, CA 94111-4131 Telephone: 415-344-7000 Facsimile: 415-344-7050 SStott@perkinscoie.com	Eric D. Miller, State Bar No. 218416 PERKINS COIE LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 Telephone: 206-359-8000 Facsimile: 206-359-9000 EMiller@perkinscoie.com

Attorneys for Defendant-Respondent

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Four Embarcadero Center, Suite 2400, San Francisco, California 94111.

On July 26, 2013, I served the foregoing document(s) entitled:

SUPPLEMENTAL LETTER BRIEF IN RESPONSE TO THE COURT'S ORDER OF JUNE 26, 2013

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Executed on July 26, 2013, at San Francisco, California.

Elizabeth Carmichael

SERVICE LIST

Daniel J. Callahan
Michael J. Sachs
Kathleen L. Dunham
Michael John Wright
CALLAHAN & BLAINE, APLC
3 Hutton Center Drive, Suite 900
Santa Ana, CA 92707

Attorneys for Plaintiffs and Appellants MARIA AYALA, ROSA DURAN and OSMAN NUNEZ

(1 copy)
VIA FEDERAL EXPRESS

Camille Olson
Seyfarth Shaw LLP
131 South Dearborn Street
Suite 2400
Chicago, IL 60603-5577

VIA U.S. MAIL

David D. Kadue
Seyfarth Shaw, LLP
One Century Plaza, Suite 3500
2029 Century Park East
Los Angeles, CA 90067-3021

VIA U.S. MAIL

Della Barnett
Impact Fund
125 University Avenue, Suite 102
Berkeley, CA 94710

VIA U.S. MAIL

Fernando Flores
Legal Aid Society
180 Montgomery Street, Suite 600
San Francisco, CA 94104

VIA U.S. MAIL

Aaron David Kaufmann
1330 Broadway, Suite 1450
Oakland, CA 94612

VIA U.S. MAIL

Paul Grossman
General Counsel of the
California Employment Law Council
515 S. Flower Street, 25th Floor
Los Angeles, CA 90071

VIA U.S. MAIL

Heather Wallace
Associate General Counsel
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814

VIA U.S. MAIL

Clerk of the Court
California Court of Appeal
Second Appellate District, 4th Division
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

VIA U.S. MAIL

Clerk of the Court
California Superior Court
County of Los Angeles
111 North Hill St.
Los Angeles, CA 90012-3014

VIA U.S. MAIL

Attorney General of California
Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230

VIA U.S. MAIL

Los Angeles County District Attorney's Office
210 West Temple Street, Suite 18000
Los Angeles, CA 90012-3210

VIA U.S. MAIL