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August 15, 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 reply to the letter brief submitted by Plaintiffs and Appellants. Plaintiffs barely acknowledge the key issues presented by the Court's request for briefing on *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*), and IWC wage order No. 1-2001, subdivision 2(D)-(F) (Cal. Code Regs., tit. 8, § 11010, subd. 2(D)-(F)) ("the Wage Order"). Put simply, those issues are (1) do *Martinez* and the Wage Order govern the determination of independent contractor status; and (2) if so, do they have any relevance to *this* appeal, given that plaintiffs failed to raise either of them below? The answer to both questions is no. *Martinez* is not relevant to the narrow issue before this Court, which is whether the Court of Appeal misapplied *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations* (1989) 48 Cal.3d 341 (*Borello*), in reversing the trial court's denial of plaintiffs' motion for class certification.

A. The Wage Order's definitions of "employ" do not govern the determination of independent contractor status

As AVP's letter brief explained, *Martinez* and *Borello* answer two different questions. To be an employer's employee, a person must (1) be employed by that employer, rather than exclusively by some other employer, and (2) be an employee and not an independent contractor. In *Martinez*, the Court construed the Wage Order to address the first of those issues. *Martinez* was not an independent contractor case, and it did not address the standard under which a person is determined to be an independent contractor or employee. That question is governed by *Borello*. While *Martinez* has an important role to play in many cases, it will not generally be relevant in

cases of alleged misclassification, in which the parties typically will not dispute that services were performed by the plaintiff for the defendant.

Nowhere in their letter brief do plaintiffs provide any analysis of how *Martinez* and *Borello* work together. Nor have plaintiffs provided such an analysis anywhere else, for they have never previously argued that either *Martinez* or the Wage Order has any relevance to the class certification decision at issue here. Instead, as both parties argued below, and as the trial court and Court of Appeal recognized in their respective orders, *Borello* controls the threshold dispute on the merits of this case, which is whether the plaintiffs are employees or independent contractors. The parties' treatment of the issue was consistent with decades of authority both before and after *Borello*.

Extending *Martinez* into the independent contractor context would upend that authority and would effectively forbid the use of independent contractors in California. That would be a radical change in the law, and it is in no way suggested, let alone mandated, by *Martinez*. It is thus no surprise that plaintiffs do not address the real implications of displacing the *Borello* test with the Wage Order definitions discussed in *Martinez*.

1. Plaintiffs do not even attempt to explain how the "suffer or permit" definition could apply in the independent contractor context

Under the Wage Order, as explained in *Martinez*, a person may be the "employee" of another under any of three definitions. "To employ", the Court said, "means: (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." (*Martinez*, *supra*, 49 Cal.4th at p. 64 [emphasis in original].) The Court emphasized the disjunctive relationship among the three components of the test not only by repeating—and italicizing—the word "or" but also by describing the three components as "alternative definitions." (*Ibid.*) Where the Wage Order definitions apply, each of the three must be applied in turn, and if any one is satisfied, then the worker is an "employee." (See, e.g., *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1190 [applying *Martinez*, and considering each of the three definitions to determine whether plaintiff was an "employee" of defendant]; *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1431-35 [same].)

Plaintiffs now assert that the Wage Order's "three definitions . . . control whether Plaintiffs are, in fact, Defendant's employees." (Pls.' Ltr. Br. at p. 2.) If that were true, one would expect plaintiffs to begin with the Wage Order's broadest and most sweeping definition of "employ"—to "suffer or permit" to work. There is no dispute that AVP entered into independent contractor agreements under which carriers performed services for AVP. If the "suffered" and "permitted" definition governed the determination of independent contractor status, one would expect plaintiffs to argue that fact alone shows AVP "suffered" and "permitted" carriers to work. But

plaintiffs apparently lack the courage of their convictions, for they do not discuss the "suffer or permit" definition or attempt to explain how it could be used to distinguish employees from independent contractors. Instead, they claim that *only* the two other alternative definitions of "employ" are of "importance to our case." (*Id.* at p. 12.) Plaintiffs' silence speaks volumes.

There is only one explanation for plaintiffs' unwillingness to address the "suffer or permit" definition. Plaintiffs must recognize that applying the "suffer or permit" definition in the independent contractor context would be absurd, because if "suffer or permit" defines "employee" status, then it is hard to see how *any* worker could *ever* be an independent contractor.

The touchstone of liability under the "suffer or permit" standard "is the defendant's knowledge of and failure to prevent the work from occurring." (*Martinez*, *supra*, 49 Cal.4th at p. 70 [emphasis omitted].) But whenever a service recipient enters into a contract with a service provider, it knows that the service provider will be performing work, and it chooses not to "prevent the work from occurring" because it specifically enters into a contract to have that work performed. For that reason, it is difficult to conceive of how an independent contractor could provide services without being "suffered or permitted" to do so.

As a result, if the Wage Order "suffer or permit" definition were construed to displace the common law *Borello* standard as the test of independent contractor status, it would foreclose the use of independent contractors in California. That result would be revolutionary, contrary to decades of practice in California, and, to AVP's knowledge, without counterpart anywhere else in the country.

It is no answer to say—as plaintiffs attempt to do—that only the Wage Order's other two definitions are relevant. Either the Wage Order governs the determination of independent contractor status, or it does not. And if the Wage Order definition determines, for a given claim, whether a person is an employee, then there is no logical reason to exclude "suffer or permit" while using the other two components of the definition. If "suffer or permit" does not make sense in this context (as plaintiffs implicitly recognize), then it does not make sense to look to the Wage Order at all.

2. Plaintiffs mischaracterize the "exercise control" standard and understate its dramatic breadth

Although plaintiffs do discuss the "exercise control" component of the Wage Order definition, their treatment of "exercise control" is of a piece with their refusal to engage with the "suffer or permit" definition—plaintiffs attempt to downplay how revolutionary it would be for this Court to adopt the Wage Order definitions as the test for independent contractor status. According to plaintiffs, the "exercise control" definition is simply *Borello*'s right to control test without the

secondary factors. (Pls.' Ltr. Br. at p. 13 ["This is a broader definition . . . than the common law's, as it does not require a plaintiff to address the common law's secondary factors" but only the "right to control."].) That is incorrect.

The common law right to control test addresses whether the putative employer has 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].) By contrast, the Wage Order defines a person as an employee if the putative employer exercises control over the worker's "wages, hours, *or* working conditions," a definition that is broader than the common law test. (*Martinez*, *supra*, 49 Cal.4th at p. 64 [emphasis added].) As the Court observed in *Martinez*, "[s]upervision of the work, in the specific sense of exercising control over how services are performed"—that is, control in the *Borello* sense—is just "*one* of the 'working conditions' mentioned in the wage order." (*Id.* at p. 76 [emphasis added].) Accordingly, one can control other kinds of "working conditions" and be an employer under the Wage Order definition but not under *Borello*. And one can also control "wages" or "hours," a form of "control" that would satisfy the Wage Order's definition but would not satisfy *Borello*.

The "exercise control" definition makes sense when one is attempting to determine—as in *Martinez*—whether a person is employed by Employer A, Employer B, or Employers A *and* B. (See *Martinez*, *supra*, 49 Cal.4th at p. 59 [The "exercise control" definition "has the obvious utility of reaching 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."].) But it does not make sense in determining whether a person is an independent contractor or an employee. As with the "suffer or permit" standard, it is difficult to conceive of how anyone directly performing services for another would *not* be an employee under that definition—including individuals who bear every indicium of bona fide independent contractor status under *Borello*. As AVP explained in its letter brief, one person cannot plausibly engage another to perform services without "exercising control" over that person's wages *or* hours *or* working conditions. The "exercise control" definition thus cannot control the independent contractor inquiry because its use would not permit the finding that *anyone* is an independent contractor.

But even if plaintiffs were correct, and "exercise control" were just the "common law test without the secondary factors," it still would not make sense to construe *Martinez* as silently overruling *Borello* and mandating the use of that definition to decide independent contractor status. In reiterating California's long-standing use of both the right of control *and* the secondary factors to evaluate independent contractor status, this Court soundly rejected the view that all that matters is the abstract right to control. (*Borello*, *supra*, 48 Cal.3d at p. 350 [explaining that the right to control, considered "in isolation," is of "little use in evaluating the infinite variety of service arrangements"].) Indeed, in *Martinez* itself, this Court applied the *Borello* test—

including the secondary factors—in concluding that the grower, Martinez, was an independent contractor of the other defendants and not their employee. (*Martinez*, *supra*, 49 Cal.4th at p. 73.)

This Court in *Borello* had good reason to recognize that the abstract right to control, standing alone, is not sufficient to distinguish independent contractors from employees. Consideration of the secondary factors—the full picture of a service relationship—may strongly suggest either employee or independent contractor status in a way that the abstract right to control does not.

Where the secondary factors point to employee status, a service recipient may be an employer even if it has relatively little "right to control." As an example, imagine a contractor who works largely free from direction but performs services only for a single client, uses tools and a workspace provided by that client, has a contract terminable at will, cannot use substitutes or helpers, and has no opportunity for profit or loss.

On the other hand, a service recipient may have a fairly robust "right to control" the manner and means by which a bona fide independent contractor provides services. Imagine that a business performing services for the Department of Defense must retain a contractor with special skills for one aspect of the project. For security reasons, the Department of Defense might require the business to exercise close control over some aspects of how the contractor performs the work. At the same time, the contractor could be a highly skilled subject matter expert who owns her own business, employs others, has been in business for many years, serves other clients, provides her own tools, is responsible for her own business expenses, and believes herself to be an independent contractor.

If the Wage Order's "exercise control" definition applied, the first person would not qualify as an employee under that definition, but would qualify under the common law test of *Borello*. On the other hand, the second person very likely would be an independent contractor under the *Borello* test, but nonetheless would be an "employee" under the "exercise control" standard. Even where the secondary factors would clearly show that a person is an independent contractor, as that term has always been understood, courts would have no power to recognize bona fide independent contractor status.

Reaching that outcome would require overruling an important part of *Borello* and the numerous cases that have followed it. (See, e.g., *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303 ["[T]he right of control is an important factor in determining whether a worker is an employee or an independent contractor, but it is not the only factor. . . . [T]he cases consistently endorse a multi-factor test that considers not only the right of control, but also secondary factors"].) Indeed, many courts have applied *Borello* to hold it is reversible error to instruct a jury that "the right of control, by itself, [gives] rise to an employer-employee relationship" and that the jury can therefore make the independent contractor determination without reference to the secondary factors. (*Id.* at pp. 303-04 [emphasis omitted]; see also *Cristler v. Express Messenger Sys., Inc.*

(2009) 171 Cal.App.4th 72, 86 [noting that in *Borello*, this Court "concluded that the control of the details factor was not necessarily dispositive in every circumstance"].)

As with the suffer or permit standard, using this Wage Order definition to make the independent contractor determination would upend settled understandings of the distinction between independent contractors and employees and would undermine numerous contractual relationships premised on that understanding. That is the real implication of plaintiffs' contention that *Martinez* governs here. Their unwillingness to squarely address those consequences is understandable—nothing in *Martinez* suggests this Court intended to take the radical step of effectively barring the use of independent contractors in California. The Court should decline plaintiffs' invitation to do so here.

B. Given the posture of this case, the Court need not address the relationship between *Martinez* and *Borello* or consider whether *Martinez* extends beyond Labor Code section 1194

As discussed above, applying *Martinez* outside the context in which that case arose and allowing it to displace *Borello* would dramatically change independent contractor law in California. This case is a particularly poor vehicle for considering the complex issues that would be raised by taking such a step because plaintiffs did not advocate the application of *Martinez* below, and neither the trial court nor Court of Appeal considered *Martinez* in the first instance. Even if this Court *can* consider the potential applicability of *Martinez* and the Wage Order sua sponte, plaintiffs do not explain why it *should* do so here without a fully developed record.

Plaintiffs instead devote nearly their entire letter to the proposition that the Court should extend *Martinez* beyond the Labor Code section 1194 claim that was at issue in that case. But that argument, too, was not preserved below. Plaintiffs concede, as they must, that *Martinez* holds only that the Wage Order definitions apply to claims brought under Labor Code section 1194 and that *Martinez* did not "rule upon whether other Labor Code Sections' definition of employer was controlled by complimentary IWC Wage Orders." (Pls.' Ltr. Br. at p. 5.) Whether the Wage Order definitions provide the definition of "employee" for purposes of particular Labor Code sections raises complex questions of statutory interpretation that are best left to a case where those issues were preserved below (which they were not), have been presented to this Court in a petition for review (which they were not), and are necessary to the disposition of the matter before the Court (which they are not).

Plaintiffs treat it as self-evident that the Wage Order definitions apply to their Labor Code claims. It is not. For example, with regard to Labor Code section 2802, plaintiffs claim that Labor Code section 2802 and section 1194 were both enacted by the same legislation in 1937, so the Wage Order definition must apply to section 2802 claims. But "[s]ection 1194 is the direct successor of, and its operative language comes immediately from, section 13 of the uncodified

1913 act[.]" (*Martinez*, *supra*, 49 Cal.4th at p. 52.) Labor Code section 2802 was, as plaintiffs state, enacted for the first time in 1937. The two sections have different legislative origins.

Moreover, Labor Code section 1194 and 2802 are in different Chapters of the Labor Code. Labor Code section 2802 is in a Chapter called "Employer and Employee" that contains its own specific definition of "employee." Section 2750 of that Chapter specifically provides: "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

That definition of "employee" is not coextensive with the Wage Order definitions. Accordingly, to determine whether the Wage Order definitions apply to the section 2802 claim, the Court would need to harmonize the Wage Order and the statute. Plaintiffs suggest that the IWC can trump the Legislature by promulgating its own definitions of "employee," but that is not true. (Pls.' Ltr. Br. at p. 8.) To the contrary, "to the extent a wage order and a statute overlap, [this Court] will seek to harmonize them, as [it] would with any two statutes." (*Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1027.) A complex set of rules govern this Court's efforts to harmonize conflicting statutes. The Court tries to harmonize the conflicting statutes so that each is given effect, but if it cannot do so "later enactments supersede earlier ones . . . and more specific provisions take precedence over more general ones." (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 [internal citations omitted].)

In the ordinary case, this Court could approach the matter with the benefit of thorough briefing by the parties and the opinions of the courts below. It cannot do so here because the first time plaintiffs argued that the Wage Order definitions apply to their claims was in the letter brief they submitted at this Court's request. Plaintiffs have forfeited the ability to argue that *Martinez* and the Wage Order bear on the narrow issues regarding the application of *Borello* that AVP petitioned this Court to address. They have further forfeited the ability to claim that the Wage Order definition applies to claims other than Labor Code section 1194. The Court need not consider those issues to resolve AVP's petition to the Court.

C. Conclusion

For the foregoing reasons and those stated in AVP's letter brief, the Court should resolve this case without reference to *Martinez* and the Wage Order definitions.

Respectfully submitted,

Sue J. Stott
Jenica D. Mariani

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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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.

August 15, 2013, I served the foregoing document(s) entitled:

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

on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 15, 2013, at San Francisco, California.

Elizabeth Carmichael

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