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OUR FILE NUMBER:

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August 15, 2013

Attention: Clerk of the Court
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

All Counsel (*see attached Proof of Service and Service List*)

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

To the Honorable Chief Justice and Associate Justices:

This letter will serve as Plaintiffs and Respondents' ("Plaintiffs") reply letter brief discussing the relevance of *Martinez v. Combs* (2010) 49 Cal.4th 35, 52-57, 73 ("*Martinez*") and IWC Wage Order No. 1-2001, subdivision 2(D)-(F) (Cal. Code Regs., tit. 8, Section 11010, subd. 2(D)-(F) ("Wage Order 1-2001").

I. INTRODUCTION

In its Brief, Defendant and Respondent Antelope Valley Newspapers, Inc. ("Defendant") argues that "neither *Martinez* nor the Wage Order is relevant" because only the common law test enunciated in *S.G. Borello & Sons, Inc. v. Dept. Of Indus. Relations* (1989) 48 Cal.3d 341 ("*Borello*") controls whether the Plaintiffs were misclassified as independent contractors. This argument is without merit as *Martinez* holds that the IWC's Wage Orders define who is an employer and who is an employee. Further, *Martinez* made clear that the IWC's Wage Orders' definition of employer is not limited to the common law definition. Instead, the Wage Orders were intentionally designed "to reach **irregular working arrangements** that f[a]ll outside of the common law." *Martinez*, 49 Cal.4th at 58 (Emphasis added). Cases such as ours are exactly the type of irregular working arrangement the IWC Wage Orders should have authority over to ensure that workers are protected, that their wages are paid, and to prevent evasion and subterfuge. The Plaintiffs are newspaper carriers who performed essential, arduous work for Defendant for very little pay. They constituted Defendant's labor force and performed the exact same services that

employees would provide. Defendant and numerous other businesses, however, have avoided providing such workers the protections of California law and evaded substantial tax obligations by labeling this essential workforce as independent contractors. *Martinez* recognizes that the Wage Orders were designed to prevent such schemes, and workers should not be denied the protections of the Labor Code and Wage Orders simply because they do not meet the common law definition of employee.

Contrary to Defendant's claim, a ruling that the IWC Wage Order controls would not sound the death knell of the independent contractor relationship in California. The IWC Wage Orders are intended to govern over "irregular *working* relationships", i.e., relationships such as we have here where plaintiffs are performing the same work that an employee would perform for his or her employer. The IWC wage orders would not apply to a traditional independent contractor relationship, such as the house painter described in Defendant's Answer Brief. This painter is not serving the same function as an employee, and he/she is not in an irregular *working* relationship. Instead, he/she is providing a temporary, one-time service. In contrast, here, Defendant used hundreds of carriers on a daily basis, with the expectation that they would work for an extended period of time and perform an essential function of Defendant's business. Although the Plaintiffs performed the exact same function as employees, Defendant labeled them as independent contractors not only to avoid providing Plaintiffs with the protections of California's labor laws, but also to: (1) escape numerous tax obligations; (2) evade workers' compensations laws; and (3) to avoid liability for any damages or injuries caused by the carriers to third parties. This is exactly the type of irregular working relationship that reeks of subterfuge and evasion and which the IWC Wage Orders govern.

In sum, the IWC provided three alternative definitions of employer. Defendant's argument that two of the definitions must be ignored is in direct contravention of *Martinez*:

> One cannot overstate the impact of such a holding on the IWC's powers. *Were we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the commission's definitions effectively meaningless.*

Id. at 65 (Emphasis added).

The IWC Wage Orders were intended to govern over not only common law employment relationships, but also irregular working relationships such as that involved here where a business designates an essential component of its labor force as independent contractors.

II. ARGUMENT

A. The Supreme Court Has the Authority to Decide the Issue Presented

Contrary to Defendant's argument, the Court has the authority to address the relevance of *Martinez* and the applicable Wage Orders:

> The [S]upreme [C]ourt's power of decision extends to any issues presented by the case (CRC 8.516(b)(2)); hence; whether new issues will be considered lies completely within the court's discretion. [*See People v. Braxton* (2004) 34 C4th 798, 809; *Cedars-Sinai Med. Ctr. v. Super. Ct.* (*Bowyer*) (1998) 18 Cal.4th 1, 5-7; *see also People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 – argument that supreme court precedent should be overruled not waived by failing to raise argument in court of appeal, because court of appeal cannot overrule supreme court precedent]

Eisenberg, Horvitz, Wiener, Cal. Prac. Guide: Civ. Appeals & Writs, Ch. 13-A, § 13:14.

Further, the Court can also order review *sua sponte*. *Id.* at § 13:22.

As explained below, the significance of *Martinez* regarding both the protections that California's workers are provided and also the impact it has on class actions involving the issue of independent contractor versus employee misclassification is tremendous. As such, Plaintiffs respectfully submit that this issue should be addressed by the Court.

B. Plaintiffs Do Not Dispute that the Common Law Test Is One of Three Definitions of "Employer" Under the Applicable IWC Wage Order, And the Court of Appeal Properly Held that the Class Should Have Been Certified Under this Definition

As explained in Plaintiffs' Opening Brief, Plaintiffs do not argue that the common law definition of employer is not incorporated into the applicable IWC Wage Order. Under *Martinez*, however, it is only one of three *alternative* tests that can be used. *See Martinez*, 49 Cal.4th at 64 ("This conclusion makes sense because the IWC, even while extending its regulatory protection to workers whose employment status the common law did not recognize, could not have intended to withhold protection from the regularly hired employees who undoubtedly comprise the vast majority of the state's workforce."). Thus, *Martinez* held that the IWC Wage Orders' definition of employer is not limited to the common law definition. As explained below, *Martinez* recognized that the Wage Orders were intentionally designed "to reach **irregular working arrangements** that f[a]ll outside of the common law." *Id.* at 58 (Emphasis added).

C. *Martinez* Holds that the IWC Wage Orders Apply Broadly to Reach Irregular Working Relationships, Such as Where A Business Labels Its Workforce as Independent Contractors

Martinez recognized that IWC Wage Orders were intended to be applied broadly:

> Section 1194 is the direct successor of, and its operative language comes immediately from, section 13 of the uncodified 1913 act (Stats, 1913, ch. 324, Section 13, p. 637) that created the IWC and delegated to it the power to fix minimum wages, maximum hours and standard conditions of labor ***for workers*** in California.

Id. at 52 (Emphasis added).[1]

[1] In particular, the IWC was created and given "broad authority to regulate the hours, wages and labor conditions of women and minors. (Stats. 1913, Ch. 324)..." *Martinez,* 49 Cal.4th at 54. Eventually, its protections were expanded to apply to all workers in California.

Under this broad authority, the IWC has the power to define the employment relationship:

> Consistent with these deferential principles of review, *we have repeatedly enforced definitional provisions the IWC has deemed necessary*, in the exercise of its statutory and constitutional authority [Citations], *to make its wage orders effective, to ensure that wages are actually received, and to prevent evasion and subterfuge*. [Citation].
>
> ***
>
> As we have now shown, an examination of section 1194 in its full historical and statutory context shows unmistakably that *the Legislature intended to defer to the IWC's definition of the employment relationship* in actions under the statute. *The Legislature has delegated to the IWC broad authority over wages, hours and working conditions* [Citation], the voters have repeatedly ratified that delegation [Citations], and we have confirmed that "[t]he power to fix [the minimum] wage does not confine the [IWC] to the single act. It may adopt rules to make it effective" [Citation]. *The power to adopt rules to make the minimum wage effective includes the power to define the employment relationship as necessary "to insure the receipt of the minimum wage and to prevent evasion and subterfuge..."* [Citation].

Id. at 61-62, 64 (Emphasis added).

Given this broad authority, the IWC Wage Orders were designed to reach well beyond the traditional common law employee/employer relationship:

> The IWC's first wage order, adopted in 1916, contained no separate definition of the term "employ," but various substantive provisions imposing duties on employers began with language like that the IWC still uses today in all of its industry and occupation wage orders to define the term. For example: "No person, firm or corporation *shall employ or suffer to permit* any woman or minors to work in the fruit and vegetable canning

> industry in any occupation at time rates less than the following...." (IWC former wage order No. 1, Section 2, italics added; *see, e.g.*, Wage Order No. 14, Cal. Code Regs, tit. 8, Section 11140 2(c) [" 'Employ' means *to engage suffer or permit to work*"] (italics added).) The chosen language was especially apt in an order intended to regulate the employment of women and minors because it was already in use throughout the country in statutes regulating and prohibiting child labor (and occasionally that of women)[Footnote omitted] having been recommended for that purpose in several model child labor laws published between 1904 and 1912 (*see Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722, 728 n. 7.) *The language had been interpreted to impose criminal liability for employing children, or civil liability for their industrial injuries,* ***even when no common law employment relationship existed between the minor and the defendant,*** based on the defendant's failure to exercise reasonable care to prevent child labor from occurring.
>
> ***Not requiring a common law master and servant relationship, the widely used "employ, suffer or permit" standard reached irregular working arrangements the proprietor of a business might otherwise disavow with impunity***.

Id. at 57-58 (Emphasis added in part).

The *Martinez* court further explained that the IWC Wage Orders were designed to insure the protection of California's workers regardless of how an employer labeled them:

> Results such as these, while foreign to the common law, were generally understood as appropriate under child labor statutes that included the "employ, suffer or permit" standard. As one state supreme court explained, "*[i]f the statute went no farther than to prohibit employment, then it could be easily evaded by the claim 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; and if it prohibited only the employment and permitting a child to do such things, then it might still be evaded

> by the claim that he was not employed to do such work, nor was permission given him to do so. But the statute goes farther, and makes use of a term even strong than the term "permitted." It says that he shall be neither employed, permitted, *nor suffered* to engage in certain works." [Citation]. *The standard thus meant that the employer* ***"shall not employ by contract****, nor shall he permit by acquiescence, nor suffer by a failure to hinder."* [Citation]. Similarly, another state supreme court rejected the employer's argument that the standard could "only apply when the relation of master and servant actually exists." [Citation]. "*To put [such a] construction on this statute ... would leave the words 'permitted or suffered to work' practically without meaning. It is the child's working that is forbidden by the statute, and not his hiring....*

Id. at 58-59 (Emphasis added in part).

Thus, *Martinez* clearly held that the IWC's definition of employer is far broader than that of the common law, and that broad definition must be enforced:

> While the common law definition of employment plays an important role in the wage orders' definition, and thus also in actions under section 1194, to apply only the common law definition while ignoring the rest of the IWC's broad regulatory definition would substantially impair the commission's authority and the effectiveness of its wage orders. The commission, as noted, has the power to adopt rules to make the minimum wage "effective" by "prevent[ing] evasion and subterfuge...." [Citation]. We have repeatedly upheld the commission's exercise of this authority. [Citation]. *Furthermore, language consistently used by the IWC to define the employment relationship, beginning with its first wage order in 1916 ("suffer, or permit") was commonly understood* ***to reach irregular working arrangements*** *that fell outside the common law*, having been drawn from statutes governing child labor and occasionally that of women. [citation]. *For the IWC, created as it was to regulate the employment of women and minors, to use this language to define the employment relations was thus uniquely*

> *appropriate. To adopt such a definitional provision also lay squarely within the IWC's power*, as the provision has "a direct relation to minimum wages" [Citation] and is reasonably necessary to effectuate the purposes of the statute [Citations]. *For a court to refuse to enforce such a provision in a presumptively valid wage order [Citation] simply because it differs from the common law would thus endanger the commission's ability to achieve its statutory purposes.*

Id. at 65 (Emphasis added).

Martinez emphasized the tremendous scope of the definition of employer under the IWC Wage Orders and the significance it has on the protections afforded to all workers, not just common law employees:

> *One cannot overstate the impact of such a holding on the IWC's powers*. Were we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the commission's definitions effectively meaningless.

Id. (Emphasis added).

In cases such as ours involving independent contractor misclassification, the impact is clear. When a business labels all or a significant portion of its labor force as independent contractors, these workers fall under the protections of the IWC's Wage Orders. As explained in more detail below, the business clearly exercises control over the wages, hours or working conditions of the workers, and it suffers or permits them to work. Therefore, they are employees under the IWC's definition and are entitled to the protections of the IWC's Wage Orders.

Here, the subterfuge and evasion that Defendant has engaged in are exactly what the Wage Orders are designed to prevent. Defendant has ignored findings by an administrative law judge and the California Court of Appeal that its carriers are employees. Defendant knowingly continues to deny its carriers the protections they are entitled to under the Labor Code and the IWC Wage Orders. The IWC Wage Orders' broad definition of employer must be respected such that employees can participate in class actions such as ours in order to prevent businesses from evading the obligations they have to comply with California's labor laws.

D. The IWC's Wage Orders Are Not Too Blunt of Instruments

Defendant argues that the IWC Wage Order's definition of employment is "too blunt an instrument" to regulate California workers. This argument fails as it is based upon an incorrect statement of the purpose and scope of the IWC's Wage Orders' three alternative definitions.

Defendant's argument is based on the faulty premise that independent contractors could never fall under the auspices of the IWC's Wage Orders. This is incorrect. *Martinez* makes clear that the IWC was designed to govern not only common law employment relationships, but also other "irregular working relationships." Thus, the IWC Wage Orders' two alternative definitions of who is an employer, i.e., "(a) to exercise control over the wages, hours or working conditions, (b) to suffer or permit to work" are designed to protect a broad spectrum of workers. This would include independent contractors that serve as a business' substantial workforce and provide the same services as employees would provide. The IWC Wage Orders recognize that these workers are entitled to the same protections as traditional common law employees, and that schemes to avoid these protections will not be tolerated.

Contrary to Defendant's argument, however, the fact that the IWC's three alternative definitions are applicable to the facts of our case does not mean that "there would be no such thing as an independent contractor in California for wage law purposes..." The statutory history of the Wage Orders' definition detailed the type of independent contractor relationships that the IWC would have authority over, and those it would not.

For example, the "suffer or permit" standard is intended to "reach[] irregular *working* arrangements the proprietor of a business might otherwise disavow with impunity." *Martinez,* 49 Cal.4th at 58 (Emphasis added). Thus, the definitions are intended to reach "working arrangements" where a worker assumes the responsibilities that an employee would. For example, in our case we have an entire workforce of carriers that perform the essential task of delivering Defendant's newspaper. These carriers serve the same purpose as an employee workforce.

In contrast, using Defendant's example, a house painter who is hired to spend a week painting a house and 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" does not fall under the "suffers or permits" standard. This is a

one-time service relationship, and not the "irregular working relationship" where the painter is hired to serve as part of a large workforce and as the equivalent of an employee.

The same limitation logically extends to the "control over wages, hours, or working conditions" alternative definition. It does not apply to a contractor who is hired to perform a discrete task. Instead, the definition uses the terms "wages" and "working conditions" that are indicative of a working relationship where the laborer is performing tasks that an employee would. Thus, Defendant's example of the freelance web designer who was contracted to redesign a company's website with the understanding that this was "a project" that would take "a certain number of hours" would not be an employee. This again would be a limited one-time service relationship.

In contrast, where the newspaper carriers are expected to serve as the permanent workforce of Defendant, and where Defendant is involved in every aspect of the carriers' job, including the hours they work, the money they are paid, and the working conditions of their difficult job, this is exactly they type of working relationship the IWC Wage Orders are intended to govern.

In sum, the IWC Wage Orders are designed to protect California's workers. This is true whether the workers are common law employees or whether they are independent contractors who serve as a business' workforce.

E. To Hold Otherwise Would Prevent the IWC's Wage Orders from Effectuating Their Statutory Purposes And Would Render the Wage Orders' Definitions Meaningless

As the *Martinez* Court explained, the IWC's definition of employer cannot be ignored, "[w]ere we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the Commission's definitions effectively meaningless." *Id.* at 65. The Court recognized that the IWC has broad authority and as such, it has "repeatedly enforced definitional provisions the IWC has deemed necessary, in the exercise of its statutory and constitutional authority [Citations], to make its wage orders effective...and to prevent evasion and subterfuge. [Citation]." *Id.* at 61-62. As explained in Plaintiffs' Opening Brief on the Merits and the *Amicus Curiae* Brief of the Asian Law Caucus *et al.*, evasion and subterfuge are exactly what Defendant has engaged in for years. To allow Defendant to proceed

with its evasion of California's labor laws would be directly contrary to the purpose of the Wage Orders. Thus, the Court cannot limit the IWC's authority to only common law employment relationships and ignore the other alternative tests as Defendant argues:

> As we have now shown, an examination of section 1194 in its full historical and statutory context shows unmistakably that the Legislature intended to defer to the IWC's definition of the employment relationship... The Legislature has delegated to the IWC broad authority over wages, hours and working conditions [Citation], the voters have repeatedly ratified that delegation [Citations]... The power to adopt rules to make the minimum wage effective includes the power to define the employment relationship as necessary "to insure the receipt of the minimum wage and to prevent evasion and subterfuge...." [Citation].

Here, Defendant is asking the Court to ignore two of the three alternative definitions of employer provided by the IWC Wage Order. Such an argument directly conflicts with the Court's pronouncement in *Martinez*, and would render the IWC Wage Orders' definition of "employer" meaningless. Such an argument, if adopted, would give the green light to businesses, such as Defendant, to carry on with impunity their illegal schemes and their evasion of the law.

F. *Martinez* Recognized the Limitations of Each Definition

The *Martinez* Court recognized that the IWC Wage Orders' definitions are not limitless and have to be viewed with both their historical meaning and their statutory purpose. For the "suffer, or permit to work test", the Court described its "highly relevant" "historical meaning" as, "[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 69 (Emphasis added). The Court thus found that there were clear limits to who can suffer or permit a laborer to work and rejected the "downstream-benefit theory of liability" under which any substantial purchaser of commodities who might be able to force others to change how they treat their workers by withdrawing their business would be held liable as employers. *Id.* at 70-71.

With regard to the "exercises control over ... wages, hours, or working conditions....", the *Martinez* Court also recognized that a mere business relationship with an employer was not enough to be able to "exercise control" over wages, hours, or working conditions. Instead, the *Martinez* Court looked at the facts and found that it was the actual employer, not the business partner, who controlled all of these aspects. *Id.* at 72-73.

In sum, *Martinez* does not create endless liability or hold that no independent contractor relationships can exist free of the IWC's governance. Instead, it provided definitions which delineate who is an employer and serve the purpose of allowing the IWC Wage Orders to protect California's workers. As always, in the end it will be left to the trier of fact to determine if an employment relationship exists. A plaintiff, however, can meet its burden by establishing employment under one of three of the IWC's alternative definitions of "employer."

G. Employers in 1918 Who Designated Their Female Employees as Independent Contractors Would Not Escape the IWC Wage Orders

The following hypothetical illustrates that the Legislature intended the IWC Wage Orders to apply to independent contractors when it enacted the IWC in 1916.

In 1918, two years after the IWC's first wage order, a fruit cannery business ("the business") decided that it would label all of its female employees as independent contractors and then pay them 33% less than the minimum wage. These women continued to perform the same essential function for the fruit cannery, but now were independent contractors making less than the minimum wage. One brave female worker complains to the IWC and, in response to the IWC's investigation, the business says that the IWC has no jurisdiction over its female workers because they are all independent contractors. They are not employees, and we do not have to provide any protections under the Labor Code or IWC Wage Orders, let alone pay them a minimum wage. If these women want to make the same as men, they can work a 65 hour work week.[2]

[2] This example is not all that different than the actions of Defendant who has ignored a Court of Appeal decision finding that it has misclassified all of its carriers as independent contractors.

As the *Martinez* Court so painstakingly explained, there is no way the IWC would have agreed with this position. The IWC made sure that its definition of employer would reach irregular working relationships and that it would have the broad authority to regulate the hours, wages and labor conditions of women and minors. *Id.* at 54. The Wage Orders were designed to protect "this weakest and helpless class" as the "substandard wages [they were paid] frequently led to ill health and moral degeneracy." *Id.* The IWC was charged with "ascertain[ing] the wages paid, the hours and conditions of labor" of women in the State and to make sure they were paid a sufficient wage to "maintain their health and welfare" and also to regulate their hours to ensure that their health and well-being were protected. Thus, it would be of no consequence that these women were classified as independent contractors. This would be exactly the type of "evasion", "subterfuge", and "sham" arrangement that the Wage Orders were designed to prevent, and why the IWC defined employer so broadly.[3]

Now, travel forward to today where the IWC applies to all persons; men or women.[4] We have entire industries, such as the newspaper industry, where businesses have labeled all of their work force as independent contractors for the purpose of avoiding having to pay taxes, to evade having to provide the protections of California's labor laws, and to avoid liability when their workers harm innocent third parties (for example, when a newspaper carrier crashes their car into a pedestrian). In other instances, entire industries have, overnight, converted whole workforces from employees to independent contractors, all for the sake of profit. These workers, however, provide the exact same services that employees would. In our case, these newspaper carriers serve the vital function of delivering Defendant's newspaper.

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[3] "Once the IWC determined that 'in any occupation, trade, or industry, the wages paid to employees [were] inadequate to supply the cost of proper living' or that 'the hours or conditions of labor [were] prejudicial to the health, morals, or welfare of employees' [Citation], it was empowered to formulate wage orders to govern minimum wages, maximum hours, and overtime pay for such occupation, trade or industry. [Citations]." *See Mendiola v. CPS Security Solutions, Inc.*, - - - Cal.Rptr.3d - - -, 2013 WL 3356998 * 6 (2013)

[4] *See Mendiola*, 2013 WL 3356998 * 5 ("Legislation enacted in 1973 directed the IWC to 'continually ... review and ... update its rules, regulations and policies to the extent found by [it] to be necessary to provide adequate and reasonable wages, hours, and working conditions appropriate for all employees in the modern society.' [Citation]."). Of course, this is left up to the DLSE and private parties as the IWC was defunded in 2004. *Id.* at * 1, fn. 3.

Without this reliable, hardworking labor force, Defendant's business could never function. Instead of valuing this work, however, Defendant classifies these carriers as independent contractors for the sole purpose of saving a buck. They provide them with none of the protections of California's labor laws, such as a guaranteed minimum wage, meal and rest breaks, overtime, or reimbursement for their business expenses. Such an arrangement is exactly what the IWC's broad definition of employer is designed to prevent – the irregular working relationship where the business reaps all of the benefits of having a steady workforce without having to provide any benefits or protections. Instead, these carriers are employees under either the "suffer or permit" test, or the "exercises control over the wages, hours, or working conditions..." test. In sum, these independent contractors fall under the IWC's authority to ensure that California's workers are provided fair wages, work reasonable hours, and are not subjected to harsh working conditions.[5]

H. Upon Further Examination, Plaintiffs Conclude that *Borello* Really Plays No Part In the Employee Versus Independent Contractor Determination Where There Is an Applicable Wage Order

Plaintiffs moved for class certification under *Borello*, and the Court of Appeal correctly recognized that Plaintiffs provided substantial common evidence to determine whether Plaintiffs were misclassified as independent contractors under *Borello's* principal right to control test and the various secondary factors. Plaintiffs concede, however, that this was unnecessary. The IWC Wage Order is comprised of three alternative tests, one of which is the traditional common law test of employment. This common law employment test, however, was only provided as a point of clarification in order to make expressly clear that the IWC applied to traditional employees. The two alternative tests were intended to be much broader:

> This conclusion makes sense because the IWC, even while extending its regulatory protection to workers whose employment status the common did not recognize, could not have intended to withhold protection from the regularly hired employees who undoubtedly comprise the vast majority of the

[5] As the Court can well imagine, newspaper carriers are generally of a low socio-economic status and are an easy target to exploit. Just like women and children in the early 1900's, they need the protections of the IWC's Wage Orders.

> state's workforce. To employ, then, under the IWC's definition, has three alternative definitions. It 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.

Id. at 64 (Emphasis in original).

Plaintiffs, by providing substantial common evidence on the *Borello* factors, clearly showed that class certification was warranted under the much broader alternative tests, along with the common law definition.[6]

I. *Martinez* Makes Clear that Class Certification Cases Involving the Independent Contractor Versus Employee Misclassification Issue Should Be Certified

Martinez' impact on class actions involving the issue of independent contractor misclassification is tremendous. *Martinez* holds that when businesses utilize an independent contractor work force, those independent contractors are considered employees under the IWC Wage Orders. Thus, plaintiffs at the class certification stage do not have to present evidence to show that a common law employment relationships exists. Instead, if they so chose, they can present common evidence in support of *Martinez'* two alternative definitions of employment: (1) "to exercise control over the wages, hours or working conditions" or (2) "to suffer or permit to work". Providing common evidence in support of either of these broad definitions is much less burdensome than that required to show an employment relationship under the common law test and, therefore, the class certification standards will be much easier to satisfy.

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[6] Plaintiffs understand the *Martinez* Court's caution that it was not deciding whether *Borello* has any relevance to wage claims, and that any argument that workers were employees under the *Borello* test is an "approach not based on the applicable wage order." *Id.* at 72-73. The reality is that there is no need to apply the *Borello* test, as a plaintiff will almost certainly proceed under the much more broadly defined alternative tests.

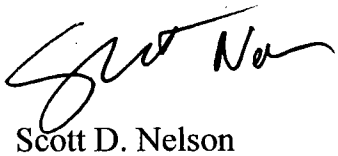
J. Plaintiffs Believe All Three of the Alternative Definitions Are Relevant

In their Opening Brief, Plaintiffs stated that only two of the IWC's alternative definitions were relevant to the issues involved in this case. Plaintiffs have reconsidered this position and now believe all three alternative definitions apply and that Plaintiffs would be employees under all three of the definitions. More importantly, in the future plaintiffs in class actions involving the issue of independent contractor misclassification will almost certainly seek class certification under all three alternative definitions.

III. CONCLUSION

Martinez holds that the IWC's wage orders are intended to reach irregular working relationships such as ones where a defendant has labeled its workforce as independent contractors. These broad definitions must be enforced, and the protections of the IWC Wage Orders should be provided to all workers in California as the IWC intended.

Very truly yours,



Scott D. Nelson

SDN:er

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PROOF OF SERVICE

Ayala, et al., v. Antelope Valley Newspapers, et al.
Court of Appeal Case No. B235484
Supreme Court Case No. S206874

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3 Hutton Centre Drive, Ninth Floor, Santa Ana, California 92707.

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

PLAINTIFFS' REPLY LETTER BRIEF TO THE SUPREME COURT OF CALIFORNIA RE: *MARTINEZ V. COMBS*

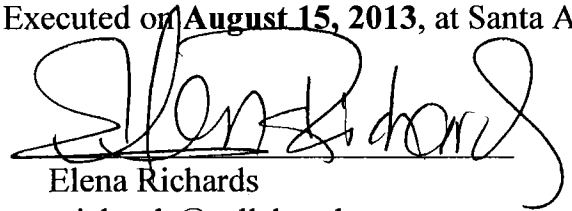
on the interested parties in this action by placing [ ] the original **[X]** a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[X] **BY FEDEX:** I deposited such envelope at Santa Ana, California for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing packages for overnight delivery by Federal Express. They are deposited with a facility regularly maintained by Federal Express for receipt on the same day in the ordinary course of business.

[X] **BY MAIL:** I deposited such envelope in the mail at Santa Ana, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

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 Santa Ana, California.



Elena Richards
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Ayala, et al., v. Antelope Valley Newspapers, et al.
Court of Appeal Case No. B235484
Supreme Court Case No. S206874

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