Case No. S222732

IN THE SUPREME COURT OF CALIFORNIA

DYNAMEX OPERATIONS WEST, INC.,
Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

CHARLES LEE et al.,
Real Parties in Interest.

ON REVIEW FROM A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN, CASE NO. B249546

LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC 332016
MICHAEL L. STERN, JUDGE

PETITIONER DYNAMEX OPERATIONS WEST, INC.'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I.

INTRODUCTION

The Court has asked for supplemental briefing on the enforcement policies of the Division of Labor Standards ("DLSE"). The DLSE and its agents administer and interpret the California Labor Code and Wage Orders on a daily basis. In doing so, they rely upon the DLSE Enforcement Policies and Interpretations Manual (2002 update, revised again in March 20016) ("DLSE Manual"). Answering the specific question posed by the Court, Dynamex Operations West ("Dynamex") submits that the DLSE Manual is directly relevant to the issue on appeal here.

Over several decades, the DLSE has consistently directed that questions of independent contractor status be determined under the *Borello* standard. This guidance emerges from the DLSE Manual, which interprets employment as used in the Wage Orders and labor statutes. Beyond that, DLSE position letters and decisions have consistently echoed the language of *Borello*, including the primacy of control and the economic realities of the parties. Accordingly, the long-standing practice of the DLSE, which has been mirrored by other California agencies in the employment context, provides yet another reason why this Court should reaffirm that *Borello* remains the test for distinguishing employees from independent contractors in California.

II.

ARGUMENT

A. The DLSE Has, In Its Manual And In Practice, Consistently And Uniformly Directed The Application Of The *Borello* Standard When Distinguishing Employees From Independent Contractors.

S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 48 Cal. 3d 341 ("*Borello*") established the multi-factored test for determining whether an individual was an employee or independent contractor ("*Borello* standard"). In the nearly 30 years since *Borello* was decided, the DLSE has uniformly applied the *Borello* standard to disputes over independent contractor status. This is highly relevant to the present appeal because, as this Court has recently acknowledged, the DLSE is the state agency empowered to enforce Wage Orders and state labor statutes. (*Augustus v. ABM Sec. Servs., Inc.* (Dec. 22, 2016) No. S224853, 2016 WL 7407328, at *6.) From its enforcement role, the DLSE is in a unique position to accumulate both knowledge and experience relevant to the administration and enforcement of the Wage Orders and the Labor Code. Again and again, the DLSE has applied the *Borello* standard to differentiate between employees and independent contractors.

1. The DLSE Manual summarizes the DLSE's interpretation of the Labor Code and Wage Orders.

The DLSE Manual "summarizes the policies and interpretations which DLSE has followed in discharging its duty to administer and enforce the labor statutes and regulations of the State of California." (DLSE Manual ["Manual"] at § 1.1.6.) The DLSE derives its policies and interpretations from a multitude of sources, including: decisions by

California courts, California statutes and regulations which are clear and susceptible to only one reasonable interpretation, selected opinion letters issued by the DLSE, and selected prior decisions rendered by the Labor Commissioner in the course of adjudicating disputes arising under California's labor statutes and regulations. (Id.) As such, the DLSE Manual is the DLSE's primary resource tool when adjudicating disputes arising under the Labor Code or Wage Orders.

a. The DLSE Manual does not follow the Wage Orders' definition of "employer" when setting forth the standard by which to distinguish employees from independent contractors.

The Court of Appeal misread the scope and meaning of this Court's decision in *Martinez v. Combs* (2010) 49 Cal.4th 35 by relying on century-old language in the Wage Orders which defines an "employer." As explained extensively in prior briefing, the language of the Wage Orders assumes employee status, and defines what entities may be deemed "employers" of acknowledged employees. Where the issue instead is employee/independent contractor status, the "employer" definition in the Wage Orders is unworkable. It would mean that every independent contractor would essentially be converted into an employee.

The DLSE Manual takes a realistic approach consistent with long-standing precedent in California. The Manual correctly distinguishes between the Wage Order definition, which determines if an entity is an employer, and the *Borello* definition, which determines whether an individual is an employee.

The DLSE Manual sets forth the definition of an "employer" as

defined in the Wage Orders: "(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." (Manual at §§ 55.2 (citing *Martinez*), 2.2 (referencing § 52.2).) However, immediately after, in Section 2.3, the DLSE Manual implicitly acknowledges that this definition is to be used *only* for determining employer liability, not the more complex issue of employee/independent contractor classification:

> As explained in detail at Section 37.1.2 of this Manual, it is possible that two separate employer entities (joint employers) may share responsibility for the wages due an employee. Also, at Section 28 of this Manual, there is a detailed discussion on how to distinguish between an employee and an independent contractor.

(Id. at § 2.2.1.)

Clearly, the DLSE decided against citing Section 52.2, or *Martinez,* when laying out the standard for how to distinguish between employees and independent contractors. This was not because of lack of opportunity. The DLSE Manual was updated on January 14, 2014, almost four years after *Martinez* was decided. It includes *Martinez* in Section 52.2's definition of "employer." (Manual at p.9.) Crucially, the DLSE did not even mention *Martinez* in Section 28 (entitled "INDEPENDENT CONTRACTOR vs. EMPLOYEE"). Nor did the DLSE change the reference quoted above in Section 2.2.1, which unequivocally states that Section 28 controls disputes over independent contractor status.

As Dynamex has previously argued, the distinction between employees and independent contractors cannot turn merely on the Wage

Orders' definition of "employer." And clearly the Wage Orders offer no help in differentiating independent contractors from employees, given that the Wage Orders define the term "employee" as follows: "[g]enerally, the term means any person employed by an employer." (Manual at § 2.1.) Simply put, the Wage Orders' definitions of "employer" and "employee" do nothing to distinguish between employees and independent contractors.

In fact, the DLSE Manual provides a cogent explanation as to why the definitions of "employee" and "employer" contained in the Wage Orders can only be considered when an employment relationship already exists: "coverage of the IWC Orders extends only to employees. If the individual is not an 'employee,' there is no employment relationship with an employer and the Wage Orders do not apply. (O.L. 1988.10.27)." (Id. at § 43.6.5.) The DLSE Manual goes on to instruct that "independent contractors are not employees" and are not subject to the Wage Orders. (Id. at § 43.6.6.) It is here that the DLSE Manual again directs the reader to Section 28, which contains a "full discussion" of the complex threshold issue of whether an individual is subject to the Wage Orders and the definitions contained therein, i.e., whether the individual is an employee or an independent contractor. (Id.)

b. The DLSE Manual sets forth the *Borello* test as the proper standard to distinguish between an employee and an independent contractor.

Rather than rely on the Wage Orders' definition of "employer" to distinguish between an employee and an independent contractor, the DLSE Manual explicitly reserves an entire section to explain the alternative factors and considerations for making such a determination. Indeed, Section 28 is the only section of the DLSE Manual that sets forth the

standard to be used when determining whether an individual is an employee or an independent contractor.

Section 28 explicitly adopts the *Borello* standard:

> Multi-Factor Borello Test. In determining whether an individual providing service to another is an independent contractor or an employee, there is no single determinative factor. Rather, it is necessary to closely examine the facts of each service relationship and to then apply the "multi-factor" or "economic realities" test adopted by the California Supreme Court in Borello, supra, 48 Cal.3d 341.

(Manual at § 28.3 (no emphasis in original).) The DLSE Manual then explains in detail how to apply *Borello,* starting with the history and primacy of the common law right to control test. (See id. at § 28.3.1.) It subsequently lists the eleven other factors and provides further guidance on several of these factors as part of the non-mechanical *Borello* analysis. (See id. at §§ 28.3.2-28.3.3.5.) The DLSE Manual goes to great lengths to not merely recite, but to summarize and explain the applicable test under California law for determining employee or independent contractor status. Notably, neither the Wage Order's definition of "employer" nor *Martinez* are mentioned even once in Section 28.

In sum, there is no room for doubt: the DLSE Manual has unequivocally incorporated the *Borello* standard as part of "policies and interpretations which DLSE has followed in discharging its duty to administer and enforce the labor statutes and regulations of the State of California." (Manual at § 1.1.6.)

2. The DLSE, through its opinion letters and decisions, has consistently applied the *Borello* standard as set forth in the DLSE Manual.

As noted above, the DLSE Manual is not the only source of administrative authority. Through its advisory opinion letters and its administrative decisions, the DLSE has further elucidated its uniform policy and interpretation of the Wage Orders and labor statutes. Beyond relying on the *Borello* standard in its Manual, the DLSE also has historically provided advice and resolved legal controversies by applying the *Borello* standard.[1]

The DLSE has issued two opinion letters since *Borello* that have directly addressed the issue of employee/independent contractor classification. In both letters, the DLSE has consistently applied the *Borello* standard. (See O.L. 2000.05.17 (performing detailed analysis under *Borello* standard[2]); O.L. 1994.04.11 (referring to *Borello* standard for distinguishing between employees and independent contractors).

The DLSE has also consistently applied the *Borello* standard in its decisions, in accordance with the DLSE Manual. (See, e.g., *In re DMR Team, Inc.* (Aug. 4, 2016) 15-0227-PWH at 5-7 (reconsideration denied) (noting *Borello* "is the seminal case detailing the factors in determining

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[1] The DLSE's website even directs that the *Borello* standard be used to distinguish employees from independent contractors. (See "Independent contractor versus employee." State of California Department of Industrial Relations. http://www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm (last visited January 27, 2017).)

[2] While the DLSE acknowledged the Wage Order's definition of "employer" in its analysis, the DLSE in fact performed the multi-factored test in accordance with *Borello*. Notably, the DLSE weighed some of the secondary *Borello* factors even after finding the contractual terms between the parties established a right to control that was sufficient to conclude an employment relationship.

whether a worker is an employee or an independent contractor" and applying *Borello*); *In re Total Service* (Sept. 1, 2007) 05-0129-PWH at 14 (reconsideration denied) (noting the "question whether someone is an employee or an independent contractor is controlled by the Supreme Court's decision in [*Borello*]," and finding "no [*Borello*] factors that persuasively create an employment relationship"); *Day v. Models, Incorporated*, (Cal. Lab. Com. Jan. 24, 2002) TAC 37-00 at 5-6 (noting "[*Borello*] is the leading case on the issue of whether an employment relationship exists between the parties or whether an agency relationship exists," and applying *Borello*); *Kern, et al. v. Entertainers Direct, Inc., et al.*, (Cal. Lab. Com. Aug. 20, 1998) TAC 25-96 at 8-10 (applying *Borello*, citing it as "the leading case on the issue of whether a person engaged to provide services is an independent contractor or an employee.").)

JKH Enterprises, Inc. v. Dep't of Indus. Relations (2006) 142 Cal. App. 4th 1046 also provides insight into a written decision by the DLSE that addressed the issue of distinguishing between employees and independent contractors. The court noted that the Labor Commissioner (DLSE) decision below had stated that there was no single determinative factor in the determination of whether a worker is an employee or independent contractor, and that it applied the "multi-factor" or "economic realities" test enunciated in *Borello*. (Id. at 1053–54.) Notably, the court applied the same *Borello* standard and upheld the Labor Commissioner's decision. These decisions all demonstrate that the *Borello* standard has been and continues to be consistently applied in a workable fashion both before and after *Martinez* was decided.

The relevance and importance of the DLSE's enforcement practices (and, in turn, the DLSE Manual which summarizes the principles and

interpretations derived from the DLSE's enforcement) have long been recognized and relied upon by this Court, largely because:

> Long-standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous. . . . Moreover, this principle applies to administrative practices embodied in staff attorney opinions and other expressions short of formal, quasi-legislative regulations.

(*Morillion v. Royal Packing* (2000) 22 Cal.4th 575, 590 (citations omitted); *Augustus*, 2016 WL 7407328, at *6; Manual at § 1.1.4.) Further, "[w]hen an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757.) Thus, while not controlling on this Court, the DLSE's opinion letters and decisions "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14; Manual at § 1.1.5.)

3. The DLSE's reliance on *Borello* comports with the enforcement practices of other California agencies and the independent contractor tests across the nation.

The DLSE's application of *Borello* comports with other California agencies that must determine the existence of an employment relationship. While the Employment Development Department ("EDD") and DLSE perform different functions, they have overlapping statutory duties and

share a common goal of ensuring compliance with the laws regulating employment in California. Critical to such enforcement is the need to resolve the threshold question of whether an employment relationship exists. Both agencies have consistently applied the *Borello* standard. (See *SuperShuttle International Inc. v. EDD* (Feb. 13, 2013) Precedent Tax Decision No. P-T-502, at 16 (acknowledging "California decisions applying statutes for the protection of employees 'uniformly declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . .'" and deciding therefore, that CUIAB has power to "draw direct analogy to workers' compensation law and Labor Code statutes enforced by DIR.") (citing *Borello*) (emphasis added)); *NCM Direct Delivery v. EDD* (May 8, 2007) Precedent Tax Decision No. P-T-495, at 7-12 (extending application of *Borello* to the unemployment insurance context: "While recognizing the differences between worker's compensation and unemployment insurance laws, we find that the *Borello* case has strong applicability to cases arising under the Unemployment Insurance Code and that the reasoning of that decision provides important guidance. . ."); *RWI Transportation LLC v. EDD* (Sept. 13, 2016) Precedent Benefit Decision No. P-T-511, at 10-15 (relying on common law right to control test and *Borello* factors to determine employee/independent contractor status).)[3]

[3] A California federal court has also applied the *Borello* standard to decide a motion for summary judgment (*O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2015) 82 F. Supp. 3d 1133, 1138) and a motion for class certification (*O'Connor v. Uber Techs., Inc.* (N.D. Cal. Sept. 1, 2015) No. C-13-3826 EMC, 2015 WL 5138097, at *5, *16-*30). The underlying decision of the Court of Appeal here stands in direct contrast.

This Court's departure from *Borello* would not only abandon the long-standing practice of these two agencies, but it would also isolate California on a national scale. Businesses reasonably rely on long-standing interpretations of the law. This is particularly true in a fact-intensive area such as the determination of independent contractor status. As Dynamex has noted in prior briefing, it would be highly disruptive to multi-state businesses if California abruptly departed from its historical reliance on *Borello*, and instead adopted a standard at odds with those existing in the other 49 states.

III.

CONCLUSION

Based on its institutional knowledge and experience, the DLSE has always applied the *Borello* standard. Although *Martinez* issued prior to the DLSE's most recent update of its Manual, the DLSE chose not to apply *Martinez* to independent contractor determinations. To the contrary, the DLSE has explicitly directed that *Borello* is the sole standard for distinguishing employees from independent contractors. The trial court here has already concluded twice that the facts presented do not support class certification under the *Borello* standard. For these reasons, Dynamex respectfully urges the Court to reverse the decision of the Court of Appeal and order the case remanded to the trial court, with instructions to vacate the order denying decertification of the class, and to enter a new and different order decertifying the class based on the trial court's prior rulings.

DATED: February 21, 2017 LITTLER MENDELSON, P.C.

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to CRC 8.204(c) and 8.486(a)(6), the text of this Supplemental Brief, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and this certification, consists of 2799 words in 13-point Times New Roman type as counted by the word-processing program used to generate the text.

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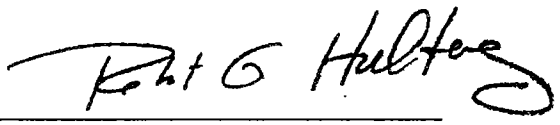
By: 

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BARBARA PALOMO

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