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January 23, 2018

VIA OVERNIGHT DELIVERY

Chief Justice Tani Cantil-Sakauye
Associate Justices
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102

RE: Case Reference: No. S222732
Dynamex Operations West, Inc. v. Superior Court

Our Clients: Plaintiffs and Real Parties in Interest, Charles Lee and Pedro Chevez, individually and on behalf of all others similarly situated,

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Real Parties in Interest Charles Lee and Pedro Chevez ("Plaintiffs") submit this reply to the letter briefs filed by Petitioner Dynamex, Inc. ("Dynamex") and its amici with respect to whether the pertinent wage order's suffer-or-permit-to-work definition of 'employ' [is] properly construed as embodying a test similar to the 'ABC' test that the New Jersey Supreme Court in *Hargrove v. Sleepy's LLC* (N.J 2015) 106 A.3d 449, 462-65.

Plaintiffs believe that the three ABC criteria are factors for courts to consider in determining whether a principal has "employed" a worker, or here, a class of workers, within the meaning of the IWC's wage orders. In contrast, Dynamex and its amici insist that the analysis set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 provides the *only* test

that courts may use in evaluating a principal's legal responsibility for Wage Order and Labor Code violations, notwithstanding the clear holding in *Martinez v. Combs* (2010) 49 Cal.4th 35 that "employ" has three distinct definitions under California law. The position of Dynamex and its amici cannot be reconciled with *Martinez* itself, in which this Court emphasized that using *only* the common law test for determining the existence of an employment relationship would "render the [IWC's] definitions effectively meaningless." *Id.* at 65.

A. The "Suffer Or Permit" Standard Was Intended By The IWC To Reach Irregular Working Arrangements That Fell Outside The Common Law

In prior briefing, Plaintiffs and their amici have placed the IWC's various definitions into their historical and practical context, principally through this Court's detailed historical analysis in *Martinez*.[1] Thus, we know that the "suffer or permit" definition was designed to reach "irregular working arrangements the proprietor of a business might otherwise disavow with impunity," just as we know that it was designed to extend beyond the "common law master and servant relationship to reach workers who were *not* "employees" at common law. *Id.* at 57-59. We also know that the third *Martinez* prong, focusing on "control over wages, hours or working conditions," was similarly designed to expand Wage Order protections beyond the common law, to be "broad enough to reach through straw men and other sham arrangements to impose liability for wages on the actual employer." *Id.* at 59.

As set forth in Plaintiff's Answering Brief on the Merits (PAB), these alternative definitions of what it means to "employ" in California – and the IWC's use of those definitions to pierce straw men, shams and irregular working arrangements – are of particular importance in today's economic environment, where, as in the instant case, an employer may attempt to "convert" an entire workforce from protected employees into purported "independent contractors" and

[1] As this Court stated in *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235: "on this question we agree with Justice Holmes that 'a page of history is worth a volume of logic.'" (Citation omitted.)

thereby to deny them any access to California's robust scheme of worker protections.[2]

In affirming the class certification order, the Court of Appeal rejected Dynamex's argument that the IWC intended the three separate definitions of "employ" under California law to be limited to disputes over whether an "employer" is a joint employer. The Court of Appeal correctly explained that "[a]lthough that was the precise factual context in which the issue arose in *Martinez*, nothing in the case supports a limitation of this nature..." *Dynamex Operations West, Inc. v. Superior Court* (2014) 179 Cal.Rptr.3d 69,81, fn.14.

While much of the briefing thus far has focused on whether all three *Martinez* prongs are relevant to determining Dynamex's statutory responsibility to Plaintiffs and members of the plaintiff class, this supplemental briefing has focused more narrowly on how the Court should apply the "suffer or permit" prong to an employer that contends it has no Labor Code or Wage Order obligations to its workforce. As Plaintiffs explained in their opening letter brief filed January 17, 2018, just as this Court has previously borrowed criteria from other sources, including the secondary considerations under the Restatements of Agency, so may it consider the criteria set forth in New Jersey's ABC test as long as doing so would promote the remedial purposes of the Labor Code's worker protections.

B. The ABC Test Offers Practical Guidance When Applying the "Suffer-Or-Permit-To-Work" Definition Of Employ

Because the ABC test set forth in *Hargrove* has been incorporated into New Jersey's own "suffer or permit to work" definition of employ, this Court appropriately sought input on the use of a similar test when applying California's comparable definition. No one contends that the ABC test should serve as a

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[2] "Indeed, perhaps presaging the need for this Court's later decision in [*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522], misclassifying employers, knowing that control is the most important indicia in the *Borello* factors, intentionally structure their relationships with their workforce (usually through one-sided "independent contractor agreements") to avoid detailed control." PAB at

complete *substitute* for the longstanding "suffer or permit" definition in the plain language of the Wage Orders, whose historical meaning and application to non-traditional employment relationships is well established. Nonetheless, the ABC criteria provide useful practical guides for determining, in the context of an "independent contractor defense," whether the employer has suffered or permitted a particular violation. Given that the "suffer or permit" definition is designed to reach "irregular working arrangements" that a principal might otherwise seek to "disavow," part C of the test properly requires that the worker's independent contractor status – i.e., its existence as a truly separate, independent economic entity – be *bona fide.* "This part of the test calls for an enterprise that exists and can continue to exist independently of and apart from the particular service relationship. The enterprise must be one that is stable and lasting – one that will survive the termination of the relationship." *Hargrove* at 459 (*quoting Gilchrist v. Div. of Emp't Sec.*, (App. Div. 1957) 48 N.J. Super. 147, 158.

C. The Definition Of Employee Under The Wage Orders Establishes That It Is The Hirer's Status as Employer That Gives Rise To Potential Liability

In arguing that the common law test is the only permissible test in the context of alleged misclassification, Dynamex contends that the "suffer or permit" prong of *Martinez* cannot apply because it does not define who is an "employee," and that the Labor Code and Wage Orders only protect "employees." (Dynamex letter brief, 1/17/18, p. 5). Dynamex completely misses the point. The first and second prongs of *Martinez* are specifically designed to hold business owners liable as "employers" for violations of the Wage Order and Labor Code protections committed against workers who are *not* their traditional "employees." All of the child labor and other early 20th century cases cited in *Martinez* and in the briefs of Plaintiffs and their amici emphasize this point.

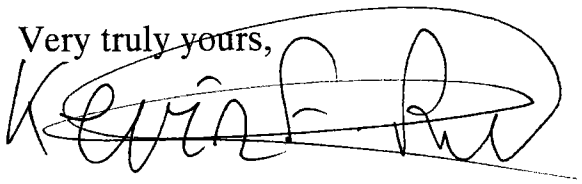
Dynamex thus gets it backwards when it argues that the courts' first and only inquiry in a case like this is whether a worker is a common law "employee." To be sure, there is no need for a court to go further once it determines that a worker *is* an employee. But where the putative employer controls that worker's wages, hours, or working conditions under the first prong, or suffers or permits the unlawful conditions under which that worker is employed (*see, Martinez*, 49

Cal.4th at 69), it is liable as the "employer" (and the worker is deemed an "employee"[3]) even in the absence of a common law relationship. That is the whole point of having three alternative, disjunctive prongs.

D. Conclusion

The enthusiasm for the multifactor *Borello* test by Dynamex and its amici is fueled by a desire to avoid the protections afforded to employees under California law who seek to pursue their rights on a class action basis. A test similar to the ABC test would be useful tool to cut through the fog that can be – and will continue to be – created by employers who seek to transform their entire workforce into independent contractors by having them sign one-sided contracts and making them responsible to pay the costs of running the employer's business.

Very truly yours,



Kevin F. Ruf

[3] Under the applicable Wage Order 9, Section 2(E) an "employee" is defined as "any person employed by an employer."

PROOF OF SERVICE VIA FEDEX

I, the undersigned, say:

I am a citizen of the United States and am over the age of 18 and not a party to the within action. My business address is 1925 Century Park East, Suite 2100, Los Angeles, California 90067.

On January 23, 2018, I served the following document:

LETTER BRIEF TO THE SUPREME COURT IN REPLY

on counsel for the parties in this action, addressed as stated below:

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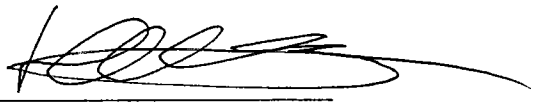
By Fedex: By placing true and correct copies thereof in an individual FedEx envelope which I deposited at a FedEx delivery center.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 23, 2018, at Los Angeles, California.



Harry H. Kharadjian