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January 24, 2018

Chief Justice Tani G. Cantil-Sakauye
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Dynamex Operations West, Inc. v. Superior Court (Lee), Case No. S222732
Petitioner's Reply Letter Brief

Dear Chief Justice and Associate Justices:

Petitioner Dynamex Operations West, Inc. (Dynamex) submits this reply letter brief to further address why this Court should not adopt New Jersey's statutory "ABC" test to define "employ" contained in California wage orders. Wage Order No. 9 defines "employ" as "to engage, suffer, or permit to work." (Wage Order No. 9, § 2(E).) The question before the Court is whether this definition of "employ" can or should have any application to a class certification dispute.

I. Engage, suffer or permit arose to address who is an employer in indirect work relationships and simply means to allow work to occur with knowledge

The "engage, suffer or permit" phraseology can be traced back centuries in numerous contexts unrelated to labor and employment. For example, in the early 1700s Pennsylvania law stated: "No Swine shall be *suffered* to run at large ...," meaning a pig's owner cannot knowingly let his swine run around town without supervision. (The Laws of the Province of Pennsylvania Collected in One Volume, 1705, ch. 44, at 92 (1714) (emphasis added).) California has similarly defined "suffer." For example, *Osborne v. Winter* (1933) 133 Cal.App. 664, addressed whether the defendant was liable for a brush fire that burned down his neighbor's dwelling. In rejecting the defendant's assertion that he was neither negligent nor "'*suffered* any fire to extend beyond his own land,'" the court explained that defendant was indeed responsible because "the term 'suffer to occur' is to allow, to admit or to permit," and defendant had permitted the burning of leaves on his property to get out of hand and burn down his neighbor's dwelling. (*Id.*, at 666-667 [italics in the original, internal quotation marks omitted].) In this sense, "engage, suffer or permit" simply means to allow, with knowledge, conduct to occur.

In the context of labor and employment, the use of the "engage, suffer or permit" phraseology was picked up by state legislatures in the mid-to-late 1800s and early 1900s, before there were comprehensive statutory schemes for worker's compensation, unemployment benefits or

minimum wages, as a way to address labor arrangements, particularly for women and children, that were still largely unregulated. One of the first statutes directed at child labor using "suffer" was enacted by Connecticut in 1855: "No proprietor of any manufacturing or mechanical establishment, or persons carrying on business in any such establishment as lessee or in any other manner, or person having charge of any such establishment shall employ or *suffer* to be employed in or about such establishment any child under nine years of age," or to "employ or *suffer* to be employed" any individual under age 18 for more than 11 hours per day. (Act of June 29, 1855, ch. 45, sec. 2, 1855 Conn. Pub. Acts 49, 49 (emphasis added.) Here, as in so many other statutes, "suffer" was intended to get at the kinds of indirect relationships that were so common at the time. The "suffer" standard focused entirely on knowledge and conduct to determine who was an *employer*. The question of who was an *employee* was never considered.

This is evident from cases such as *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.* (N.Y. 1918) 121 N.E. 474. Justice Cardozo, writing for New York's highest court, addressed a New York statute stating that no child under age 14 "shall be employed or permitted to work" in a mercantile establishment. In holding that a violation occurred even when the employer delegated his responsibilities to another, Cardozo wrote:

> At the outset, therefore, we turn to the Labor Law itself. Section 162 is directed primarily against the employer, and only secondarily against others as they may aid and abet him (citation omitted). He must neither create nor *suffer* in his business the prohibited conditions. ... What is true of employment, must be true of the *sufferance* of employment. ... The employer, therefore, is chargeable with the *sufferance* of illegal conditions by the delegates of his power. ... *Sufferance* as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence.

(*Id.*, at 476 [internal citations omitted] [quotation marks in the original] [emphasis added].)

Fast forward to 2010 and the result in *Martinez v. Combs* (2010) 45 Cal.4th 35, is strikingly similar to that in *Sheffield Farms* nearly 100 years earlier: "sufferance" is focused on what conduct the employer knows to occur. The "suffer" standard identifies the employer. It has no role in determining who is an employee. It is for this reason, as explained in Dynamex's reply brief at pp. 5-7, that the *Martinez* Court, relying upon *Sheffield Farms*, found that the plaintiffs, while Munoz's employees, were not in the "employ" of the produce brokers who they were suing because the produce brokers did not allow with knowledge the plaintiffs to take actions that violated the Labor Code. (*Martinez*, 45 Cal.4th at 70 ("Instead, as we have explained, the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring. ... Here, neither Apio nor Combs suffered or permitted plaintiffs to work because neither had the power to prevent plaintiffs from working.") (emphasis in the original).) Stated differently, "suffer or permit" does not shed light on the status of a worker, but is instead directed at ensuring an indirect employer does not escape liability for illegal conduct. It is for this reason that the phrase "engage, suffer or permit" defines "employ" and not "employee." *Martinez* simply reaffirmed this long standing meaning.

II. Suffer or permit does not eliminate independent contractors when used to define an "employee" rather than "employ"

As *Sheffield Farms* notes and *Martinez* held, "engage, suffer or permit" does not make every principal that receives some benefit from a worker's services into the worker's employer. Even in New Jersey, with "employ" defined as "to suffer or to permit to work" (N.J.S.A. § 34:11-56a1(f)), and the ABC test used "to determine whether an individual is an employee or independent contractor for purposes of the Wage and Hour Law" (N.J.A.C. §§ 12:56-16.1, citing to N.J.S.A. § 43:21-19(i)(6)), the courts have found independent contractor status viable. (See, e.g., *Garden State Fireworks, Inc., Petitioner,* 2015 WL 4140704 (EFPS Apr. 30, 2015); *Pilates by Meghan Ltd. Liab. Co., Petitioner,* 2016 WL 3360983, at *8 (EFPS June 3, 2016); *Big Daddy Drayage, Inc., Petitioner*, DOL, 2016 WL 4432542 (EFPS Aug. 10, 2016); *Carpet Remnant Warehouse, Inc. v. New Jersey Dep't of Labor* (N.J. 1991) 593 A.2d 1177.) This is only possible if "engage, suffer or permit" defines "employ" and not "employee." (See also *Standard. Oil of Conn., Inc. v. Administrator, Unemployment Comp. Act* (Conn. 2016) 134 A.3d 581; *Daw's Critical Care Registry, Inc. v. Department of Labor, Employment Sec. Div.* (Conn. 1993) 622 A.2d 518; *Sebago v. Boston Cab Dispatch, Inc.* (Mass. Apr. 21, 2015), 165 Lab. Cas. (CCH) ¶1585, 471 Mass. 321, 28 N.E.3d 1139, 2015 Mass. LEXIS 171; *American Zurich Ins. Co. v. Department of Indus. Accidents* (Mass. Super. Ct. June 1, 2006), 21 Mass. L. Rep. 224, 2006 Mass. Super. LEXIS 333; *Sagar v. Fiorenza* (Mass. Super. Ct. July 4, 2014), 32 Mass. L. Rep. 191, 2014 Mass. Super. LEXIS 84.)

None of these decisions finding independent contractor status would have occurred had these states defined "employ," rather than "employee," using the ABC test. Rather, as argued throughout Dynamex's briefing, to now define "employ" as (A) absence of control; (B) business is unusual or away from the employer's regular place of business; and (C) the worker is customarily engaged in an independent trade, occupation, profession or business, would eliminate independent contractors from existence when addressing wages, hours and working conditions. This is an unprecedented shift in the nature of the phrase "engage, suffer or permit" as it has been understood and used for centuries.

III. Applying the ABC test at the class certification stage requires overruling *Ayala*

This case is only at the class certification stage. To define "employ" using a test designed to define an "employee" would not only decide whether a class should be certified, but the merits as well. (See Dynamex Reply Brf., pp. 2-5.) To do so also requires overruling *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, which applied *Borello* and not *Martinez* to determine who constitutes an "employee" for class certification purposes.

Martinez did not overrule *Borello*, and *Ayala* did not overrule *Martinez*. Rather, *Borello* and *Martinez* have independent life, as they address entirely different legal issues. This case involves class certification. The proper analytic framework *first* requires that a class be certified, *second*, that the class members be determined on the merits to be employees; and *third*, that Dynamex be found an employer which had that class in its employ. *Ayala* governs step one, *Borello* step two and *Martinez* step three.

Here, if the trial court determines that no class is certifiable, whether for lack of an adequate class representative or lack of commonality, then it is unnecessary to determine whether the putative class members are employees. Further, if a class is certified but found not to be employees, then it does not matter if Dynamex had them in its employ. In this way *Ayala*, *Borello* and *Martinez* serve entirely different purposes: *Ayala* addressing class certification, *Borello* addressing the workers' status as employees or independent contractors, and *Martinez* addressing whether an employer is liable when it "suffers or permits" violations of the law. (See Dynamex Reply Brf., at pp. 5-7.)

The appellate court's decision eliminates the second and third analytic steps and merges them into the first step. This conflation of analysis contradicts how "engage, suffer or permit" has been used for centuries. There is simply no way to avoid the conclusion – and plaintiffs have offered none – that under the appellate court's holding all individuals in California who "suffer" or are "permitted" to perform services are "employees." It is neither hyperbole nor overblown rhetoric to say that the consequences to the California economy are enormous if an "employee" is anyone who works. *Martinez* did not go so far, and this Court should decline to do so now.

IV. Plaintiffs agree that *Borello* is sufficient to define who is an "employee"

Plaintiff's letter brief agrees with Dynamex that *Borello* already subsumes the ABC test within it. However, plaintiffs then reject the "B" prong as not being particularly meaningful. Plaintiff cannot have it both ways. If *Borello* contains the three prongs of the ABC test, as Plaintiff concedes, then *Borello* should not be disturbed.

Moreover, plaintiffs fail to advance any argument for how adoption of the ABC test would solve the basic problem here: that it is a test used to define "employee" and has never been used to define "employ." They offer no compelling reason to abandon *Borello* and decades of case law to ascribe an entirely new meaning to "employ" that has no precedent in any statutory or regulatory law in California.

V. Imposition of a conjunctive three part test would be inconsistent with the Labor Code and violate rules of administrative construction

While not actually addressed by Plaintiff's briefing, to the extent this Court seeks to graft a conjunctive three part test onto the definition of "employ," it could not be reconciled with Labor Code section 3353, which defines an "independent contractor" as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished," and section 3357, which states "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." The Labor Code's definitions must trump any contrary wage order definition. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321.)

There is no indication in any statute, regulation or administrative pronouncement, or even in *Martinez*, that either the Legislature or the Executive Branch intended the term "employ" to depart from the common understanding of "engage, suffer or permit" as meaning to allow with knowledge conduct to occur. Indeed, for thirty years California's courts and administrative agencies have applied *Borello* with the Legislature's acquiescence to define an "employee," without a hint that the ABC test should be adopted to define "employ" or even "employee." (*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 207 ("Because the Legislature is presumed to be aware of a long-standing administrative practice, the [Legislature's] failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent").) As such, this Court cannot alter the meaning of the term "employ"; that should be the sole province of the legislature. (Cal. Const. art. IV; see also Cal. Code Civ. Proc. § 1858; *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254.)

This Court raised the question of whether the ABC test should apply to the term "employ." Significantly, no other California court or agency has ever suggested that the ABC test should be introduced to the State. But, if the ABC test has any place, it can only be used as a tool to define who is an "employee." It cannot be grafted into the Wage Order definition of "employ." Separately, California's existing *Borello* standard already allows the ABC prongs to be fully considered in defining an "employee."

VI. Conclusion

Dynamex urges this Court to recognize that the term "employ" as explained in *Martinez* does not address who is an employee, and certainly not at the class certification stage. Every state that uses an ABC test applies it to the term "employee" and not "employ." Nothing in *Martinez* is inconsistent with *Borello*; they define separate terms that address separate issues. The appellate court's decision must be overruled and *Borello* reaffirmed as the proper standard for determining who is an employee and who is an independent contractor, including at the class certification stage.

Respectfully submitted,

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RGH/whw

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 333 Bush Street, 34th Floor, San Francisco, California 94104. On January 24, 2018, I served the within document(s):

DYNAMEX OPERATIONS WEST, INC.'S REPLY LETTER BRIEF

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that the above is true and correct. Executed on January 24, 2018, at San Francisco, California.

KARA VALLS