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July 26, 2013

SUPREME COURT
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Frank A. McGuire Clerk

Deputy

Attention: Clerk
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

Dear Clerk and Counsel:

This letter will serve as Plaintiffs and Respondents' ("Plaintiffs") response to the Court's Order directing the parties to provide letter briefs 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. Summary of Plaintiffs' Position that *Martinez* And Wage Order 1-2001 Are Relevant to the Critical Issue in this Case of Whether Plaintiffs Were Misclassified As Independent Contractors

Martinez and the IWC Wage Order 1-2001 are highly relevant to the issue in this case as to whether Plaintiffs were misclassified as independent contractors by Defendant and Appellant Antelope Valley Newspapers, Inc. ("Defendant"). *Martinez* holds that where a plaintiff makes a claim under a Labor Code Section and a complementary wage order, the wage order's definition of employer is controlling. *See also Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1042 ("To the extent a wage order and a statute overlap, we will seek to harmonize them..."). Here, there are several provisions of Wage Order 1-2001 which Plaintiffs allege Defendant violated, including Subdivisions 7 ("Records"), 8 ("Cash Shortage and Breakage"), and 9 ("Uniforms and Equipment"). Thus, Wage Order 1-2001's definition of employer under Subdivision 2(D)-(F) is controlling. *Martinez* holds that under IWC 1-2001, there are three alternative definitions of who is an employer: "It means: (a)

to exercise control over the wages, hours or working conditions, (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." *Martinez*, 48 Cal.4th at 64. These are the three definitions that control whether Plaintiffs are, in fact, Defendant's employees.

II. *Martinez* Is Controlling Authority Over the Critical Issue as to Whether Plaintiffs Were Misclassified as Independent Contractors When, in Fact, They Were Defendant's Employees

A. *Martinez* Holds that Where There Is an Applicable Wage Order the Court Must Look to that Wage Order's Definition of Employer to Determine Whether an Employment Relationship Exists

In *Martinez* this Court addressed the issues of: (1) who is an employer under Labor Code Section 1194; and (2) more broadly, who is an employer under all of the Labor Code Sections. The Court first examined the language of Section 1194 which provides in relevant part: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation..." The Court noted that Section 1194 was silent as to who could actually be held liable under that section, but concluded that logically it could only apply to an employer. *Id.* at 50. The question then before the Court was what is the definition of an employer under Labor Code Section 1194. To answer that, the Court looked to the history of the IWC's wage orders and their relationship with the Labor Code and found that the Legislature intended that the IWC's definition of employer would control. *Id.* at 52 (holding that it was "unmistakeabl[e] that the Legislature intended the IWC's wage orders to define the employment relationship.").

This Court noted that Labor Code 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. The 1913 Act was enacted as part of a wave of legislation that had swept across the United States in order to provide a minimum wage and address poor working conditions for women and children. *Id.* at 53. The Court found that, "[t]he 1913 Legislature addressed these continuing problems by creating the IWC and delegating to it *broad authority to regulate the hours, wages*

and labor conditions of women and minors (Stats. 1913, ch. 324)..." *Id.* at 54 (Emphasis added).

Under the 1913 Act, the IWC's initial statutory duty was to "ascertain the wages paid, the hours and conditions of labor and employment in the various occupations, trades, and industries in which women and minors are employed in the State of California, and to make investigations into the comfort, health, safety and welfare of such women and minors. (Stats. 1913 ch. 324, Section 3, subd. (a), p. 633.)." *Id.* at 54. Significantly, the IWC was also given the authority to issue wage orders to effect these duties. *Id.* at 55.

This Court explained that: "[t]oday, the laws defining the IWC's powers and duties remain essentially the same as in 1913, with a few important exceptions", including: (1) men are also now under the IWC's jurisdiction; (2) "the IWC now has 'legislative, executive, and judicial powers [Citations omitted]' "; and (3)" *the responsibility of the IWC has become even broader* and is now charged with the 'continuing duty' to ascertain the wages, hours and labor conditions of 'all employees in this state,' to 'investigate [their] health, safety, and welfare...and to convene wage boards and adopt new wage orders if the commission finds 'that wages paid to employees may be inadequate to supply the costs of proper living.' [Citation omitted]." *Id.* at 55 (Emphasis added).

This Court then noted that since 1913, the IWC has "exercise[d] its *broad delegated powers*", and "[t]oday 18 wage orders are in effect, 16 covering specific industries and occupations..." *Id.* at 57 (Emphasis added). The Court recognized that "*the Legislature and the voters have repeatedly demanded the courts' deference to the IWC's authority and orders.*" *Id.* at 60 (Emphasis added). In particular, in 1976 "the voters again amended the Constitution to confirm in even stronger terms that '[t]he Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission *legislative, executive, and judicial powers*.' [Citations omitted]." *Id.* at 61 (Emphasis in original). The Court further explained:

> Concerning the wage orders' validity, "[j]udicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, *the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's*

> *exercise of a considerable degree of policy-making judgment and discretion.*" [Citation omitted].

Id. at 61 (Emphasis added).

The Court further emphasized the IWC's broad authority stating:

> Moreover, past decisions ... teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, *the statutory provisions are to be liberally construed with an eye to promoting such protection.*

Id. at 61 citing *Industrial Welfare Com. v. Sup. Ct.* (1980) 27 Cal.3d 690, 701 (Emphasis added).

Thus, the IWC's powers includes the authority to "adopt reasonable rules and regulations which are deemed necessary to the due efficient exercise of the powers expressly granted...." *Id.* at 61. Under this broad authority, this Court has, "*repeatedly enforced definitional provisions the IWC has deemed necessary, in the exercise of its statutory and constitutional authority [Citations omitted], to make its wage orders effective, to ensure that wages are actually received, and to prevent evasion and subterfuge.*" *Id.* at 62 citing to *Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 302-33 (Emphasis added).

The Court explained that because the Legislature granted the IWC broad authority over wages, hours and working conditions, it makes "***eminently good sense***" for the IWC "to adopt a definition of 'employer' that brings within its regulatory jurisdiction an entity that controls any one of these aspects of the employment relationship..." *Id.* at 59 (Emphasis added); *see also Id.* at 64 ("The Legislature has delegated to the IWC broad authority over wages, hours and working conditions [Citation omitted], the voters have repeatedly ratified that delegation [Citation omitted], and the Court has repeatedly confirmed that the IWC may adopt rules to make its wage orders effective.").

The Court concluded that where an applicable wage order exists, the Court must look to that applicable IWC wage order to define the employment relationship. The Court explained that to hold otherwise, i.e., to hold that only the common law

controlled, "would render the commission's definitions effectively meaningless." *Id.* at 65. Under these general principles, *Martinez* then held that the IWC Wage Order 14-2001, provided the definition of employer for claims made under Labor Code Section 1194.

In sum, *Martinez* made very clear that the IWC has broad authority to regulate who is an employee and to ensure that those employees are protected by the Labor Code and the IWC's wage orders. In this case, where Plaintiffs have alleged that Defendant violated specific IWC wage orders, those wage orders' definition of employer is controlling.

B. *Martinez* Did Not Hold that the Wage Order Definition of Employer Only Applies to Labor Code Section 1194

Plaintiffs anticipate that Defendant will argue that *Martinez'* holding is limited only to claims made under Labor Code Section 1194 and its corresponding IWC Wage Order 14-2001. Defendant will likely make this argument based on the fact that *Martinez* based its holding, in part, upon the fact that Labor Code Section 1194 incorporated the wage order. *Id.* at 62.

As discussed below, this argument is without merit for three principal reasons.

1. The Only Labor Code Section at Issue In *Martinez* Was Section 1194

In *Martinez*, the only Labor Code at issue was Section 1194 - the plaintiffs were only seeking recovery for unpaid minimum wages. Thus, the Court only looked at Section 1194 and found that because it incorporated the IWC Wage Order in Section 1197, an employee who sues under Labor Code Section 1194 would "actually and necessarily" be suing to enforce the wage order. *Id.* at 57. Because the plaintiffs claims were only under Labor Code Section 1194, the Court did not specifically rule upon whether other Labor Code Sections' definition of employer was controlled by complimentary IWC Wage Orders. As explained below, however, *Martinez* did provide substantial guidance on this issue and indicated that the wage orders define who is an employer.

2. *Martinez* Held that the Wage Order's Definition of Employer Should Control Where the Wage Order Compliments A Labor Code Section

Martinez did not hold that an IWC wage order's definition of employer would not also apply to claims made under other Labor Code sections. In fact, as explained above in Section II(A), the Court repeatedly emphasized that the Legislature delegated to the IWC broad powers to regulate the hours, wages, and working conditions of California's citizens, and this authority has only grown over the years. *Id* at 61. In fact, the Court noted that, "[t]he Legislature and the voters have repeatedly demanded the courts' deference to the IWC's authority and orders." *Id.* Thus, "courts have shown the IWC's wage orders *extraordinary deference*", and "'[j]udicial authorities have repeatedly emphasized that in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, *a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion.*' [Citation]." *Id.* at 61 (Emphasis added). Further, courts have "*repeatedly enforced definitional provisions the IWC has deemed necessary*...to make its wage orders effective..." *Id.* at 61-62 (Emphasis added). The Court concluded that for the IWC to be able to define who is an employer "makes eminently good sense." *Id.* at 59. Thus, the *Martinez* Court strongly suggested that if the issue were before it, the Court would hold that where a plaintiff brings a claim under a Labor Code Section and a complimentary wage order, the wage order's definition of employer controls.

3. *Brinker Restaurant v. Sup. Ct.* Holds that the Wage Orders' Definition Controls

After *Martinez*, this Court in *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1026, once again reinforced the IWC's broad authority to regulate wages, hours, and working conditions:

> Nearly a century ago, the Legislature responded to the problem of inadequate wages and poor working conditions by establishing the IWC and delegating to it the authority to investigate various industries and promulgate wage orders fixing for each industry minimum wages, maximum hours of work, and conditions of labor. [Citations omitted].

Id. at 1026.

Brinker explained that, "[p]ursuant to its 'broad authority' [Citation omitted], the IWC in 1916 began issuing...wage orders specifying minimum requirements with respect to wages, hours, and working conditions. [Citation omitted]. In addition, the Legislature has from time to time enacted statutes to regulate wages, hours, and working conditions directly." *Id.* *Brinker* explained that the Labor Code and wage orders are designed to compliment each other and to serve to grant the broad authority the IWC needs:

> Consequently, wage and hour claims are today governed by two ***complementary and occasionally overlapping sources of authority****: the provision of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC.* [Citations omitted].

Id. (Emphasis added).

Brinker explained the great significance of the IWC's wage orders, and that they are not limited by the Labor Code, but instead serve to expand and effectuate the IWC's enforcement of the Labor Code provisions:

> IWC[] wage orders are entitled to "extraordinary deference, both in upholding their validity and in enforcing their specific terms." [Citation omitted]...***[They] are to be accorded the same dignity as statutes*** [and] must be given "independent effect" separate and apart from any statutory enactments [Citation omitted].

Id. (Emphasis added).

Further, *Brinker* noted that, "*[t]he IWC has long been understood to have the power to adopt requirements beyond those codified in statute.* [Citations omitted]." *Id.* at 1042 (Emphasis added). *Brinker* also explained that wage orders "must be interpreted in the manner that best effectuates their protective intent. [Citations omitted]." *Id.* Significantly, *Brinker* held that "***[t]o the extent a wage order and a statute overlap, we will seek to harmonize them***, as we would with any two statutes. [Citation omitted]." *Id.* Also, *Brinker* commented upon the IWC's authority to

"augment the statutory framework" provided by the Labor Code to provide greater protections. *Id.* at 1043.[1]

Under *Brinker,* it is clear that the IWC wage order's definition of "employer" is controlling where there is a Labor Code Section and complimentary wage order. *Brinker* directs that the Labor Code and wage orders must be harmonized. This means that where the IWC specifically provides a definition of employer, and the Labor Code does not, the IWC's wage order must be adopted into the Labor Code section to harmonize the two statutes. This would "best effectuate [the] protective intent of the wage orders as *Brinker* instructs must be done.

C. It Would Lead to Absurdities If the Labor Code and Wage Orders Had Different Definitions of Employer

Under basic statutory interpretation principles, it also makes eminently good sense for the Court to find that the Labor Code and wage orders' definitions of "employer" are the same. "When constructing a statute, a court's goal is 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.' [Citations omitted]." *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567. If the Court finds the statutory language to be ambiguous, the Court should "consider the consequences of each possible construction and will *reasonably infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity.*" *Id.* (Emphasis added). Thus, "[t[he court will apply common sense to the language at hand *and interpret the statute to make it workable and reasonable.*" *Wasatch Property Mgmt. v. Degrate* (2005) 35 Cal.4th 1111, 1112 (Emphasis added). Where, as here, the Labor Code Section and wage order are designed to compliment one another, it makes practical sense that they should apply equally.

Moreover, if the definition of employer for the wage order and corresponding Labor Code section are interpreted differently, there is no doubt that severe

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[1] *S.G. Borello & Sons, Inc. v. Department of Indus. Relations* (1989) 48 Cal.3d 341 recognized that the concept of "employment" is not inherently limited by common law principles. *Id.* at 351. Instead, the "[d]efinition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute." *Id.* quoting *Liang v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777-778.

absurdities and confusion will result. In particular, there would be the absurd result that a plaintiff making the exact same claims could be held to be an employee under the IWC wage order, but not under the Labor Code. For example, in our case, Plaintiffs have sued under Labor Code Section 2802 for Defendant's failure to reimburse their business expenses. As part of that claim, they have alleged that Defendant violated IWC Wage Order 1, 2001, Subdivisions 8 and 9, which require an employer to provide and maintain all tools and equipment necessary to the performance of a job. If the Court finds that IWC Wage Order and Labor Code 2802's definition of employer is different, then there is a possibility that Plaintiffs would recover under the Wage Order's broader definition, but not the actual Labor Code section upon which this Wage Order is based. This would run directly afoul of *Brinker* which holds that the wage orders are designed to augment the Labor Code and that the statutes and wage orders must be harmonized.

There would also be the absurd result that a plaintiff who sues under Labor Code Section 1194 and also other Labor Code Sections, such as Section 2802, could be found to be an employee under Section 1194, but not under Section 2802. This would make no sense, as both Sections 1194 and 2802 were introduced by the same legislation (Stats 1937, c. 90, p. 217, & 1195 and p. 258, Section 2802). Instead, these statutes, enacted at the exact same time with the same purpose of protecting employees, should have the same definition of who is an employer and, in turn, who may be an employee.

In sum, the wage orders and Labor Code are to be interpreted to produce practical and workable results. Given the IWC's broad authority over working conditions it makes sense that the Legislature intended to allow the IWC to define who is an employer and for that definition to control over both the Labor Code provisions at issue along with the complimentary wage orders.

D. The Applicable Wage Order Under Which the Court of Appeal Certified Plaintiffs' Claims Provides the Exact Same Definition of Employer as the Wage Order In *Martinez*

The Court of Appeal held that Plaintiffs' fourth cause of action for failure to reimburse reasonable expenses, fifth cause of action for unlawful deductions from wages, sixth cause of action for failure to provide itemized wage statements, seventh cause of action for failure to keep accurate payroll records, and eighth cause of action under Business & Professions Code Section 17200, should be certified. As explained

below, each of these causes of action was brought pursuant to a Labor Code section and a complimentary IWC wage order and, as such, the wage order's definition of employer controls.

1. Plaintiffs' Fourth Cause of Action for Failure to Reimburse Business Expenses

Plaintiffs' fourth cause of action is for Defendant's failure to reimburse their business expenses. Plaintiffs bring this claim under Labor Code Section 2802 and IWC Wage Order 1-2001, subdivisions 8 and 9.

Labor Code Section 2802 was enacted in 1937 as part of the original Labor Code. *See Gattuso*, 42 Cal.4th at 561. The purpose of Section 2802 is to "prevent employers from passing their operating expenses on to their employees." *Id.* at 562 quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1305 (1999-2000 Reg. Sess. As amended Aug. 18, 2000, p. 3). One of the critical expenses Plaintiffs seek reimbursement for is the automobile expenses they incurred in delivering their routes. The Supreme Court has specifically recognized that this is a recoverable expense. *Id.* at 567 (holding that an employer is obligated to indemnify its employees for the automobile expenses they incur in performing their employment tasks).

IWC Wage Order 1-2001, Subdivision 9, compliments Labor Code Section 2802. In particular, paragraph (B) of Subdivision 9 states in relevant part:

> When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.

Just like Section 2802, IWC Wage Order 1-2001, Subdivision 9 holds that an employer must pay for the expenses an employee incurs in performing his or her job duties. Thus, a claim for failure to reimburse is enforceable under both Section 2802 and the Wage Order. The only limitation that the Wage Order provides is that when an employee is paid at least two times the minimum wage, he or she may be required

to pay for the hand tools and equipment customarily required by the trade or craft. This is a very narrow exception as explained by the IWC's Statement as to the Basis:

> The IWC retained its longstanding policy of requiring employers to provide uniforms, tools and equipment necessary for the performance of a job. Subsection (B) permits an exception to the general rule by allowing an employee who earns more than twice the State minimum wage to be required to provide hand tools and equipment where such tools and equipment are customarily required in a trade or craft. *This exception is quite narrow and is limited to hand (as opposed to power) tools and personal equipment, such as tool belts or tool boxes, that are needed by the employee to secure those hand tools. Moreover, such hand tools and equipment must be customarily required in a recognized trade or craft.* (Emphasis added).[2]

Thus, this exception is not applicable to this case as Plaintiffs do not seek reimbursement for hand tools. Further, newspaper delivery is not a trade or craft.

In sum, because Plaintiffs can assert a claim under IWC Wage Order 1-2001, section 9, *Martinez* and *Brinker* hold that this Wage Order's definition of "employer" controls. IWC Wage Order No. 1-2001, subdivision 2(D)-(F) provides the definition of "employer", and it is exactly the same as the wage order at issue in *Martinez*.[3] As explained in section II(E) above, this consists of three alternative definitions, "[i]t means: (a) to exercise control over the wages, hours or working conditions, (b) to

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[2] "As part of its function, the IWC issues 'Statements As To The Basis'...explaining 'how and why the commission did what it did.'" *Harris v. Sup. Ct.* (2011) 53 Cal.4th 170, 180 quoting *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 213; *see also* Cal. Lab. Code § 1177; *Burnside v. Kiewit Pac. Corp.* (9th Cir. 2007), 491 F.3d 1053, 1063 fn. 10 (applying California law)

[3] Plaintiffs also believe that IWC Wage Order 1-2001, section 8, is also applicable. It states that: "No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee."

suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." *Id.* at 64.

2. Plaintiffs' Causes of Action for Failure to Provide Itemized Statements And to Keep Accurate Payroll Records

The Court of Appeal also certified Plaintiffs' sixth and seventh causes of action under Labor Code Sections 221, 223, and 226. IWC Wage Order, 1-2001, subdivision 7 compliments those Labor Code Sections and requires that employers must keep accurate time records and on semimonthly basis, or at the time of each payment of wages, furnish the employee with an itemized statement. Again, because Plaintiffs can assert a claim under those Labor Code sections and IWC Wage Order 1-2001, Subdivision 7, the Wage Order's definition of "employer" controls.

E. The Applicable Wage Order's Broad Definition of Employer

Martinez and *Brinker* hold that the wage orders under which Plaintiffs bring their claims controls the definition of employer. The wage order in *Martinez* contains the exact same definition of employer as the controlling wage order in this case. As such, *Martinez'* holding regarding the definition of employer is highly relevant.

IWC Wage Order No. 1-2001(F), defines an employer as "*any person* as defined in Section 18 of the Labor Code, who directly or *indirectly*, or through an agent or any other person, employs *or exercises control over the wages, hours, or working conditions of any person.*" Further, Subsection (D) defines "employ" as "to engage, suffer, or permit to work." *Martinez* recognized, therefore, that the IWC's definition of to employ then 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.

Of critical importance to our case are two of the Court's definitions - the "exercises control over ... wages, hours, or working conditions", and "to engage, thereby creating a common law employment relationship." Under these two definitions, the Court recognized that the IWC intended to broadly define who is an employer.

1. "[E]xercises control over ... wages, hours, or working conditions"

This definition is derived from the common law "right to control" test. *Martinez,* 49 Cal.4th at 76 ("Supervision of the work, in the specific sense of exercising how services are performed, is properly viewed as one of the working conditions mentioned in the wage order. To read the wage order in this way makes it consistent with other areas of the law, in which control over how services are performed is an important, perhaps even the principal test for the existence of an employment relationship.") citing to *Metropolitan Water Dist. v. Sup. Ct.* (2004) 42 Cal.4th 491, 512 (common law); *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946 (unemployment insurance) ("The 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."); *McFarland v. Boorheis-Trindle Co.* (1959) 52 Cal.2d 698, 704 (workers' compensation). Thus, under this definition of employer, a plaintiff need only show that a defendant had the right to control their wages, hours, *or* working conditions.[4] This is a broader definition of an employer than the common law's, as it does not require a plaintiff to address the common law's secondary factors. Instead, it focuses only on the common law's "principal test" of right to control as to wages, hours, *or* working conditions.[5] Given that this is a broader and simpler definition of employer, when compared with the common law's multi-factor test, it makes independent contractor versus employee cases amenable to class treatment.

2. "To engage, thereby creating a common law employment relationship"

Another alternative definition of employer under IWC Wage Order 1-2011 is "to engage, thereby creating a common law employment relationship." *Martinez* held

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[4] "[I]t is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." *Hillen v. The Industrial Acc. Com'n,* (1926) 199 Cal. 577, 581.

[5] *Borello,* 48 Cal.3d at 350; *Guifu Li v. A Perfect Day Franchise, Inc.* (N.D. Cal.) 2012 WL 2236752 * 6 (applying California law); *Hurst v. Buczek Enters., LLC* (N.D. Cal. 2012) 870 F.Supp.2d 810, 824; 3 Witkin, Summary of California Law, Tenth Ed. (2005), Agency, § 24, p. 64.

that this definition of employment "incorporates the common law definition..." In particular, the Court found that "to engage" in "its plain, ordinary sense" means "'to employ', that is, to create a common law employment relationship." *Id.* at 64. *Martinez* recognized that "the common law definition of employment plays an important role in the wage orders' definition..." *Id.* at 65. As stated above, under the common law the principal test of whether an employment relationship exists is whether the defendant had the right to control the manner and means of how the plaintiffs performed their work. *S.G. Borello & Sons v. Department of Indus. Relations,* 48 Cal.3d 341 (1989). Under the common law test there are also secondary factors which can serve as indicia of an employment relationship. These include, but are not limited to: whether there is a right to terminate at will without cause; whether the one performing services is engaged in a distinct occupation or business; the skill required in the particular occupation; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; whether or not the work is a part of the regular business of the principal; the contractor's degree of investment and whether he or she holds themselves out as an independent business; and whether the service rendered is an "integral" part of the employer's business. *Id.* at 356. This was the definition under which the Court of Appeal held that class should be certified finding that "[a]ll of the factors may be determined based upon common proof."

F. *Sotelo* and *Bradley*

In its Order, the Court also referred the parties to the decisions of *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 660-662 and *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1146-1147, which cited to and relied upon *Martinez*. Plaintiffs briefly address the significance of these decisions.

In *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639 the Court of Appeal did note that the trial court was wrong to apply only the common law test for employment in determining whether the plaintiffs were misclassified as independent contractors. *Id.* at 661-662. *Sotelo*, however, incorrectly held that the IWC's broad definition of employer is limited only to claims under Labor Code Section 1194 for violation of minimum wage and overtime laws.

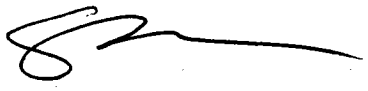
In contrast, in *Bradley v. Networkers International*, LLC, 211 Cal.App.4th 1129 (2012), the plaintiffs asserted a total of seven causes of action, six of which were not based upon Labor Code section 1194. *Id.* at p. 1135. The *Bradley* court correctly held *Martinez*' broad definition of employer applies to any "claims brought under the Industrial Welfare Commission's wage orders..." *Id.* at 1146. The *Bradley* Court concluded that under either *Martinez'* broad definition or *Borello's* common law definition "the evidence relevant to the factual question whether the class members were employees or independent contractors is common among all class members." *Id.*

Just as in *Bradley*, Plaintiffs presented substantial common evidence that satisfy two of the applicable IWC Wage Order's definition of employer. Thus, as in *Bradley*, the Court of Appeal in this case correctly held that the class should be certified.

III. CONCLUSION

In sum, *Martinez* and IWC Wage Order 1-2001 are highly relevant as *Martinez* holds that the IWC wage orders which Plaintiffs allege Defendant violated determine whether Defendant was Plaintiffs' employer. IWC Wage Order 1-2001 provides two alternative definitions relevant to this case. One is based upon the common law multi-factor test under which the Court of Appeal held the class should be certified. The other alternative test is much broader than the common law test and only requires a plaintiff to show that the defendant had the right to control their wages, hours, or working conditions.

Very truly yours,



Scott D. Nelson

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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 **July 26, 2013,** I served the foregoing document(s) entitled:

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

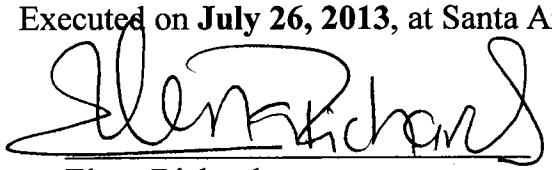
on the interested parties in this action by placing [ ] the original **[X]** a true copy thereof enclosed in a sealed envelope addressed as follows:

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 **July 26, 2013**, at Santa Ana, California.



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Ayala, et al., v. Antelope Valley Newspapers, et al.
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