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January 17, 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 Letter Brief on ABC test

Dear Chief Justice and Associate Justices:

Petitioner Dynamex Operations West, Inc. (Dynamex) submits this letter brief in response to the question the Court posed in its December 28, 2017, order: Is the pertinent wage order's suffer-or-permit-to-work definition of "employ" 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, 462-465, held should be used under the New Jersey Wage and Hour Law, which also defines "employ" to include "to suffer or to permit to work" (N.J. Stat. § 43:11-56a1)?

Dynamex notes that the Court's question as framed is ambiguous in that it asks whether the wage order's definition of "employ" embodies "a test *similar to* the 'ABC' test" without explaining what "similar to" means. However, to the extent that the Court is asking whether California should adopt the statutory ABC test under N.J.S.A. 43:21-19(i)(6) for purposes of determining a worker's status under California's Wage Order 9, the answer is no.

1. The *Hargrove* Case Harmonized Existing New Jersey Law

In *Hargrove v. Sleepy's LLC*, discussed in detail in Dynamex's opening brief at pp. 30-32, the New Jersey Supreme Court was asked whether to extend New Jersey's statutory ABC test, which had long been in place under the Wage and Hour Law (WHL), to the separate Wage Payment Law (WPL), which did not specifically identify the test to be used. In answering this question the *Hargrove* Court focused solely on the definition of an "employee." *Hargrove* notes, but does not focus on, the definition of "employ" under the WHL, which means "to suffer or permit to work".

In holding that "the WPL and WHL should utilize a single test," the New Jersey Supreme Court relied upon both the express regulatory promulgation of the ABC test for use under the WHL (see N.J.A.C. §§ 12:56-16.1), and the New Jersey Department of Labor's administrative practice

of applying the ABC test to the WPL for 20 years without objection. The Court concluded that the same ABC test should also apply to the WPL.

California stands in stark contrast to New Jersey. Unlike in New Jersey, where application of the ABC test sought to harmonize two statutes, applying the ABC test to define "employ" in the Wage Orders would create two separate tests under the same statute: the ABC test for wages, hours and working conditions governed by the Wage Orders, and the *Borello* test for issues that fall outside of the Wage Orders but within the Labor Code's provisions. This point was made by the appellate court when granting Dynamex's writ in part and sending the case back to the trial court:

> [I]t is by no means clear at this point in the litigation whether all of Lee and Chevez's claims under section 2802 (and the related claims for unfair or unlawful business practices), if proved, would be violations of Wage Order No. 9. To be sure, the wage order contains several provisions that arguably relate to the section 2802 claim: . . . To the extent the reimbursement sought by Lee and Chevez in their section 2802 claim are confined to these items, the IWC definition of employee must be applied pursuant to *Martinez,* as discussed in the preceding section of our opinion.
>
> Claims for reimbursement for the rental or purchase of personal vehicles used in performing delivery services, even if viable under section 2802, appear to be outside the ambit of Wage Order No. 9. (See *Estrada v. FedEx Ground Package System, Inc., supra,* 154 Cal.App.4th at pp. 21–25.) If so, the determination whether a class is properly certified to pursue those claims must be made under the common law definition of employee as discussed in *Ayala* and *Borello*. That evaluation is most appropriately made by the superior court in the first instance.

(*Dynamex Operations West, Inc*., (2014) 230 Cal.App.4th 718, 734.)

As the appellate court acknowledged, even the exact same statutory provision, Labor Code section 2802, would be subject to two tests depending upon the specific kind of expense the "employee" incurred. An "employee" who incurred expenses for uniforms would be subject to the ABC test, but governed by the *Borello* factors for a vehicle reimbursement. This could lead to a situation where an individual is an "employee" under Labor Code section 2802 for some expenses but not others. This would undoubtedly create an administrative morass.

Indeed, there are many Labor Code provisions that fall outside the scope of the Wage Orders. For example, if the New Jersey example is followed, the ABC test would be used to determine if a worker was entitled to unpaid overtime wages. If those wages were not timely paid, however, the *Borello* factors would determine if waiting time penalties under Labor Code section 203 applied. Thus, an individual could be an employee under the ABC test entitled to overtime, but, at the same time, an independent contractor not entitled to waiting time penalties for late paid overtime. This result makes no sense. Similar conflicts exist with the many other Labor Code Sections not encompassed by the Wage Order. See, e.g., Cal. Lab. Code, §§ 201, 202, 203,

203.1, 203.5, 204a, 206, 206.5, 208, 209, 212, 218.6, 221, 226(a), 226.8, 227, 227.3, 227.5, 230.5, 230.7, 230.8, 231, 232, 233, 240, 243, 351, 353, 2082, 2800, and 2810.5 (all Labor Code provision that are not covered by the Wage Orders). The purpose of the *Hargrove* decision was to create harmony. Adoption of the ABC test in California is guaranteed to create disharmony.

2. No State Has Adopted The ABC Test Without A Statutory Or Regulatory Underpinning

Every state that uses the ABC test in the wage and hour context has a specific statute authorizing its use. As already discussed, New Jersey expressly adopted the ABC test by statute for unemployment compensation purposes in N.J.S.A. 43:21-19(i)(6), and subsequently by regulation for the WHL in N.J.A.C. 12:56-16:1. Similarly, the six other states that utilize an ABC test also have statutory and/or regulatory authority from which the test emerged. (See, e.g., Colorado: Colo. Rev. Stat. § 8-4-101(5); Connecticut: Conn. Gen. Stat. § 31-222(a)(1)(B),; *Tianti v. Raveis Real Estate*, (Conn. 1995) 651 A.2d 1286 [applying ABC test under Connecticut's unemployment compensation act in the wage and hour context]; Illinois: 820 ILCS 115/2, *Adams v. Catrambone*, (7th Cir. 2004) 359 F.3d 858 [applying ABC test under Illinois' unemployment compensation act in the wage and hour context]; Massachusetts: Mass. Gen. Laws c. 149, § 148B; Montana: Mont. Admin. R 24.35.302(1)(a)-(o); 24.35.303(1)(a)-(n); Vermont: Vt. Stat. tit. 21, § 341.) Thus, in the states that apply the ABC test in the wage and hour context, it was not imposed solely by a common law interpretation of the term "employ," but either expressly by statute or adopted from a statute used to define an "employee" in the unemployment context. Dynamex has not found any state court that has adopted an ABC test without it being grounded in a state statute or regulation.

3. California Has No History Of Utilizing An ABC test

Unlike in New Jersey, where the *Hargrove* Court anchored its decision to harmonize two statutes based on existing, statutory law used for over 20 years by administrative practice, here the Court would be imposing a new definition of "employee" not found anywhere in California statutory or regulatory law. For example, unlike New Jersey's unemployment compensation act that expressly adopted the ABC test (N.J.S.A. § 43:21-19(i)(6)), California's unemployment compensation act defines an employee as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." (Cal. Unemp. Ins. Code, § 621(b).) The Employment Development Department's regulations simply follow this definition. (See Cal. Code Regs., tit. 22, § 4304-1.)

Another important difference is that no California administrative agency has ever used the ABC test for any purpose. Rather, the *Borello* test applies to determine whether an individual is an employee or independent contractor for wage and hour, unemployment, and worker's compensation purposes. For example, the DLSE webpage "Independent Contractor versus Employee" states:

> Not all workers are employees as they may be volunteers or independent contractors. … There is no set definition of the term "independent contractor"

> and as such, one must look to the interpretations of the courts and enforcement agencies to decide if in a particular situation a worker is an employee or independent contractor. … For most matters before the Division of Labor Standards Enforcement (DLSE), depending on the remedial nature of the legislation at issue, this means applying the "multi-factor" or the "economic realities" test adopted by the California Supreme Court in the case of *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341.

DLSE Website, available at https://www.dir.ca.gov/dlse/faq_independentcontractor.htm

The California Unemployment Insurance Appeals Board (CUIAB), in precedent decision *In re NCM Direct Delivery* (2008) P-T-495, held that the *Borello* factors applied to the Unemployment Insurance Code, which was upheld by the court of appeal. (*Messenger Courier Assoc. v. California Unempl. Ins. Appeals Bd*. (2009) 175 Cal.App.4th 1074, 1092.) Similarly, the Worker's Compensation Appeals Board (WCAB) applies the *Borello* factors, given that *Borello* itself was a case involving the Worker's Compensation Act (WCA).

If this Court were to adopt an ABC test, it would: a) create new law that has no statutory underpinning; and, b) reverse consistent and long-standing practice in all California courts and agencies. These results would be the opposite of what the New Jersey Supreme Court achieved by its *Hargrove* opinion.

4. The Existing *Borello* Standard Already Includes The ABC Prongs

This Court need not create a situation where workers, employers and the Labor Commissioner must attempt to juggle both the *Borello* factors and the ABC test in order to interpret or comply with the Labor Code. That is because the multi-factor *Borello* test already gives ample weight to all three prongs of the ABC test.

Under *Borello* the most important factor is the absence of control, which is similar to the "A" factor. (E.g., *Bowerman v. Field Asset Servs*. (N.D. Cal. 2017) 242 F.Supp.3d 910.) However, *Borello* does not stop there; it also looks at where services are performed and how integral they are to the business, which is the essence of the "B" factor. (E.g., *Lowenthal v. Quicklegal, Inc.* (N.D. Cal. Sep. 28, 2016, No. 16-cv-03237-LB) 2016 WL 5462499, at *43-44.)

Finally, the *Borello* factors include examination of indicia of an independent business such as separate business address, advertising, and other customers, all of which go into determining the "C" factor. (E.g., *Alexander v. FedEx Ground Package System* (9th Cir. 2014) 765 F.3d 981, 996.)

In short, there is no aspect of the ABC test that is not already part of the standard *Borello* analysis. If this Court finds the ABC test to be a helpful framework, it could provide further guidance to the business community by refinement of *Borello*. But there is no need to abandon *Borello* when it already directs that all three prongs of the ABC test must be considered, while

also taking into examining numerous other factors that inform whether a worker operates as an independent contractor.

Borello has proven to be a sturdy and adaptable test over the 30 years it has been used by courts and agencies. Indeed, the advantage of *Borello* over the ABC test is its flexibility and adaptability to changing times and circumstances. In *Messenger Courier Assoc. v. California Unempl. Ins. Appeals Bd.*, *supra*, the court rejected the argument that the test used to determine a worker's status as an employee or independent contractor was not capable of evolution. Citing to the Restatement of Jurisprudence and Restatement of Agency, the court explained that the *Borello* factor's "most significant feature is its inherent capacity for growth and change." (*Messenger Courier Assoc.*, 174 Cal.App.4th at 1090.)

Applying New Jersey's statutory ABC test to the term "employ" under the Wage Orders would cause one of two results to occur. One outcome: California law would lose its flexibility and adaptability and be constrained by a rigid, static test — precisely what the *Messenger Courier Assoc.* Court rejected. Alternatively, because the ABC test applied by this Court would not be grounded in any California statute or regulation, it would also be a common law test subject to interpretation and change by lower courts and administrative agencies. California already has an existing common law test that is both broader and more adaptable than the ABC test. There is no reason to abandon it.

5. The Wage Order Cannot Be Reconciled With The ABC Test

The word "employee" is central to the Wage Orders, and cannot be ignored. The Wage Orders require (1) an employee (2) performing services (i.e., in "employ") (3) for an employer before obligations relating to wages, hours and working conditions may be imposed. Without all three elements, the Wage Order does not apply.

While the three elements are interrelated, each term has its own meaning and test. In *Borello* this Court was addressing the meaning of the statutory term "employee" under the WCA, which is defined as an individual "in the service of an employer under any ... contract of hire," but excluding "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." (Cal. Lab. Code § 3353.) Since *Borello* was issued, including after *Martinez v. Combs* (2010) 49 Cal.4th 35, the courts and administrative agencies have repeatedly and faithfully applied the various *Borello* factors to determine who is an "employee" under the Labor Code and Wage Orders. (See Dynamex Opening Brf., pp. 13-16 for listing of decisions pre- and post-*Martinez*.)

In contrast, in *Martinez* this Court addressed the second and third elements of the Wage Orders – "employ" and "employer" – but not the first element "employee." On the specific facts of the case, which was really about joint employment, the *Martinez* Court found that the defendants were not "employers" who had plaintiffs in their "employ." Nothing in *Martinez* ever addressed the definition of an "employee."

Wherever the ABC test has been used in other states, it has defined an "employee." Here, the Court's question contemplates use of the test in a different way, specifically to define "employ." *Martinez* correctly traced the "suffer or permit" language in the Wage Orders to historic efforts to protect child laborers. (See *Martinez*, *supra*, 49 Cal.4th at pp. 53-55.) There was never any question that the child laborers were employees; the primary purpose of the Wage Orders was to ensure that the child laborers would be compensated by an employer. Thus, as Dynamex has demonstrated in prior briefings, the "suffer or permit" standard only applies to define who "employs" an individual. It was never intended to define who is an "employee." Nor could it be used for that purpose, as it would automatically convert all vendors and service providers to employees.

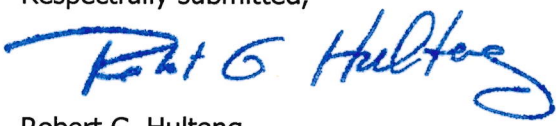
For that reason, the "suffer or permit" language in the IWC orders can never be the basis for defining an "employee" in California. Grafting the ABC test on to the "suffer or permit" language gets no closer to defining an "employee." The Wage Orders never attempted to define "employees" by use of the "suffer or permit" phrase, and there is simply no basis for this Court to do so.

6. Adoption of the ABC Test Would Create Uncertainty and Confusion

The abrupt introduction of an ABC test to California would raise a myriad of questions. What happens to settled determinations of independent contractor status, or employee status, under *Borello* over the past 30 years? Must all those cases be re-litigated under a new standard? If the Court determines to apply a new standard on a prospective basis only, then how can that be fair to individuals whose status was already determined under *Borello*? As previously noted, there is no reason to reach these questions. The *Borello* test encompasses the three ABC prongs. Continuation of the *Borello* standard will ensure consistency and predictability. It will also afford the flexibility to adapt to rapid changes in the economy (including the emergence of the app-based "gig economy").

In conclusion, adopting the ABC test – which is not based on any existing California statute or regulation, and is contrary to all California administrative agency's practices – would not harmonize the law. Instead, it would create two separate tests for interpretation of the Labor Code. *Borello* is a time-tested standard that allows for ready determination of who is an employee and who is an independent contractor by examining the entirety of the circumstances connecting the individual and the putative employer. And *Borello* comfortably includes within its multi-factor test all three prongs of the ABC test. There is no reason to abandon *Borello* now.

Respectfully submitted,



Robert G. Hulteng

RGH/whw

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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 17, 2018, I served the within document(s):

DYNAMEX OPERATIONS WEST, INC.'S LETTER BRIEF

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 17, 2018, at San Francisco, California.

Kara Valls

KARA VALLS