S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff and Appellant,

v.

LOEWS HOLLYWOOD HOTEL, LLC,

Defendant and Respondent.

SECOND APPELLATE DISTRICT, DIVISION THREE, NO. B283218
LOS ANGELES COUNTY SUPERIOR COURT NO. BC586176

RESPONDENT'S SUPPLEMENTAL BRIEF

BALLARD ROSENBERG GOLPER & SAVITT, LLP
RICHARD S. ROSENBERG, State Bar No. 77948
JOHN J. MANIER, State Bar No. 145701
DAVID FISHMAN, State Bar No. 217608
15760 VENTURA BOULEVARD, EIGHTEENTH FLOOR
ENCINO, CALIFORNIA 91436
TELEPHONE: 818-508-3700 | FACSIMILE: 818-506-4827

Attorneys for Defendant and Respondent
LOEWS HOLLYWOOD HOTEL, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Defendant and Respondent Loews Hollywood Hotel, LLC (Loews) submits this supplemental brief (Cal. Rules of Court, rule 8.520(d)) to address this Court's decision in *Vazquez v. Jan-Pro Franchising International, Inc.* (Jan. 14, 2021, S258191) __ Cal.5th __ [2021 Cal.Lexis 1]) (*Vazquez*), which holds that *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*) applies retroactively to all cases not yet final as of the date *Dynamex* became final. As discussed below, notwithstanding *Vazquez*, this Court should deny retroactive effect to any holding adopting the position of Plaintiff and Appellant Jessica Ferra that break premiums must be calculated at the overtime regular rate of pay.

ARGUMENT

I. *VAZQUEZ* DOES NOT CHANGE THE LAW ON RETROACTIVITY, BUT APPLIES CASES AND PRINCIPLES DISCUSSED IN LOEWS'S PRIOR BRIEFS.

Dynamex established the "ABC test" for determining whether workers are properly classified as employees or independent contractors under California's wage orders. (See *Vazquez*, *supra*, 2021 Cal.Lexis 1, at pp. *7-*9.) This Court concluded "the well-established general principle affirming the retroactive application of judicial decisions interpreting legislative measures supports the retroactive application of *Dynamex*," as that case presented a question of first impression and did not overrule or disapprove any prior published California decision. (*Vazquez*, at p. *11.)

This Court found no exception to retroactivity applied to *Dynamex*. The defendant argued retroactive application would be unfair because California businesses had reasonably relied on the standard established in *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). This Court disagreed. It explained that for more than a century, California's wage orders had included "the suffer or permit to work standard," which was the broadest of definitions for distinguishing between employees and independent contractors under social welfare statutes. (*Vazquez*, at p. *13.) Moreover, "*Borello* was not a wage order case," but instead involved the workers' compensation statutes. (*Vazquez*, at p. *14.)

In two earlier cases, this Court had cautioned it was not deciding whether *Borello* "has any relevance to wage claims." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 73; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531 [declining to decide the issue, and explicitly leaving it open, after soliciting supplemental briefing].) This Court thus found that "employers were clearly on notice" well before *Dynamex* that the applicable law was unsettled and that the broadly-construed "suffer or permit to work prong of an applicable wage order" might well determine whether a worker was an employee or independent contractor. (*Vazquez*, at p. *16-*17.) Having highlighted the openness of this issue, the Court was unconvinced by "defendant's reasonable reliance argument." (*Id.* at p. *17.) This Court also found the reliance argument was overstated, since *Dynamex* had explained that *Borello* established a balancing

standard that effectively prevented advance determinations of how workers should be classified. (*Id.* at pp. *17-*18, citing *Dynamex*, *supra*, 4 Cal.4th at pp. 954-955.)

The *Vazquez* defendant also argued it could not have reasonably anticipated this Court "would adopt the ABC test" in *Dynamex*. (*Vazquez*, at p. *18.) But this Court rejected the proposition that "litigants must have foresight of the exact rule" ultimately adopted, and found the *Dynamex* test "was within the scope of what employers reasonably could have foreseen" based on this Court's earlier decisions, which gave notice of "the potential breadth" of the applicable test. (*Vazquez*, at pp. *18-*19.) This Court also stated that *Dynamex* was not a sharp departure from *Borello*'s "basic approach," but rather "drew on the factors articulated in *Borello* and was not beyond the bounds of what employers could reasonably have expected." (*Vazquez*, at pp. *19-*21.)

This Court further concluded that fairness and public policy considerations—which may compel exceptions to retroactivity in particular cases—instead "*favor* retroactive application" of *Dynamex*. (*Vazquez*, at p. *21, original italics.) As *Dynamex* explained, extending wage order protections gives workers financial, dignity, and self-respect benefits, and also protects law-abiding businesses from unfair competition from competitors "that utilize substandard employment practices." (*Dynamex*, *supra*, 4 Cal.5th at p. 952.) The wage order standards also benefit the public at large, which otherwise would have to bear responsibility to workers and their families injured by

"substandard wages or unhealthy and unsafe working conditions." (*Id*. at p. 953.) In *Vazquez*, this Court explained that a prospective-only application of *Dynamex* would potentially deprive workers of intended wage order protections and unfairly benefit businesses that misclassify employees. (*Vazquez*, at p. *22.) And because *Dynamex* was applied to the parties in that case, "it would be unfair to withhold the benefit of that decision to other similarly situated litigants." (*Vazquez*, at p. *22.) Although statute of limitations constraints will practically limit the impact of retroactive application of *Dynamex*, this Court found "no compelling justification" to deny retroactivity. (*Vazquez*, at pp. *23-*24.)

II. *VAZQUEZ* DOES NOT CONTRAVENE LOEWS'S POSITION ON RETROACTIVITY.

As discussed in Loews's prior briefs, fairness and public policy support denying retroactive effect to any decision requiring break premiums to be calculated at the overtime regular rate of pay. *Vazquez* does not warrant a contrary conclusion.

Loews has a stronger basis for reasonable reliance than the *Vazquez* defendant. Although no prior appellate decision had construed the meaning of "regular rate of compensation," Loews and other California employers—as well as the Division of Labor Standards Enforcement—have reasonably relied on the principle that the Legislature and Industrial Welfare Commission (IWC) meant that term to have *a different meaning* than the overtime "regular rate of pay" based on the different phraseology of these respective provisions. (See, e.g., *Murphy v. Kenneth Cole*

Productions, Inc. (2007) 40 Cal.4th 1094, 1108 (*Murphy*); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.) A clear majority of federal district court decisions likewise relied on this principle in adopting Loews's position. (See, e.g., *Chavez v. Smurfit Kappa North America LLC* (C.D.Cal., Oct. 3, 2019, No. 2:18-cv-05106-SVW-SK) 2019 U.S.Dist. Lexis 208570, pp. *19-*20.)

Moreover, Ferra and her amici cite to nothing comparable to the broadly-construed "suffer or permit to work standard" in decades-old wage orders that militated against reasonable reliance on *Borello*'s inapposite standard for workers' compensation cases. (See *Vazquez*, *supra*, 2021 Cal.Lexis 1, at pp. *13-*14.) Instead, Ferra relies on passages taken out of context from *footnotes* having nothing to do with the calculation of break premiums. (See *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal.5th 542, 551, fn. 3 [quoting federal overtime regulation which uses unmodified term "regular rate," in case involving calculation of overtime pay rate when employee earns flat-sum bonus in single pay period]; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 730, fn. 1 [using "regular rate of compensation" to describe overtime pay rate; trial court violated attorney-client privilege by ordering disclosure of counsel's opinion letter on whether certain corporate managers were exempt from overtime]; *Murphy*, *supra*, 40 Cal.4th at p. 1104, fn. 6 [noting the Legislature has used both "pay" and "compensation" as synonymous with "wages"; holding that break premiums are wages and not penalties for limitations period purposes]. But see

Kirby v. Immoos Fire Protection, Inc. (2012) 53 Cal.4th 1244, 1255 ["[A] section 226.7 action is brought for the *nonprovision of meal and rest periods*, not for the 'nonpayment of wages.'"] [original italics].) None of Ferra's citations cuts against the statutory interpretation principles on which Loews and other California employers reasonably relied.

The fairness and public policy considerations which favored retroactive application of *Dynamex* militate strongly *against* retroactivity in this case. As discussed in Loews's prior briefs, employers were not given fair notice that the IWC and Legislature made meaningless choices when they used the phrase "regular rate of compensation" for break premiums, and that this simply means the same thing as the overtime "regular rate of pay." Accordingly, such an interpretation would render Labor Code section 226.7 and the corresponding wage order subdivisions unconstitutionally vague and uncertain. (*Britt v. City of Pomona* (1990) 223 Cal.App.3d 265, 278; see dis. opn., p. 2 [finding "regular rate of compensation" to be ambiguous].)

Denying retroactive application to any such holding would not deprive California employees of the protections of meal or rest break requirements—let alone any other Labor Code or wage order standards, as would have been the case in *Vazquez* and *Dynamex*. Nor would a prospective-only holding unfairly benefit the tens of thousands of California employers who have reasonably paid hourly employees' break premiums at their base hourly rate. There also would be no shift of responsibility to the public at large comparable to that discussed in *Dynamex* and

Vazquez. And while this Court found it unfair to withhold the benefit of *Dynamex* to other similarly situated litigants (*Vazquez*, *supra*, 2021 Cal.Lexis 1, at p. *22), Loews respectfully submits that any holding which reverses the Court of Appeal should apply only prospectively to all litigants.

Unlike *Dynamex* and *Vazquez*, statute of limitations considerations would *not* substantially limit the substantive impact of retroactive application of a decision requiring break premiums to be paid at the overtime "regular rate of pay." To the contrary, it would add millions of dollars to employers' exposure in pending class actions under Labor Code section 226.7 and corresponding wage order subdivisions—especially if this Court were to hold that such actions further entitle employees to pursue derivative penalties and attorneys' fees under Labor Code sections 203 and 226. (See *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 474-475, review granted & depublication den., Jan. 2, 2020, No. S258966.)

In addition, Labor Code section 210 was amended effective January 1, 2020 (while Ferra's petition for review was pending), to authorize employees to sue for statutory penalties for failure to pay wages when required by statute. A retroactive application of any holding adopting Ferra's position could expose employers who paid break premiums at the base hourly rate, rather than the overtime regular rate of pay, to additional derivative penalties under a provision that did not even exist before Ferra's petition for review was filed.

Vazquez did not address two other issues raised by Loews—that denying retroactive effect would not negatively impact the administration of justice, or frustrate the purpose of the rule urged by Ferra and her amici. (See *Claxton v. Waters* (2004) 34 Cal.4th 367, 378-379.) These considerations further militate against retroactive application of any decision adopting Ferra's position in this case.

CONCLUSION

As discussed in Loews's prior briefs, the general rule of retroactive application of civil appellate decisions is subject to exceptions based on fairness and public policy for decisions that articulate a new standard or rule of law. *Vazquez* does not change the law on retroactivity. Loews reiterates its respectful submission that if this Court were to agree with Ferra that the "regular rate of compensation" for break premiums means the same as the overtime "regular rate of pay" (which it should not), such a decision should apply only prospectively.

DATED: February 4, 2021 *Respectfully submitted*,

BALLARD ROSENBERG
GOLPER & SAVITT, LLP

By: 

John J. Manier
Attorneys for Defendant and Respondent LOEWS HOLLYWOOD HOTEL, LLC

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to rule 8.520(c)(1) of the California Rules of Court, that Respondent's Supplemental Brief is produced using 13-point Century Schoolbook type, including footnotes, and contains 1,803 words, which is fewer than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: February 4, 2021 *Respectfully submitted*,

BALLARD ROSENBERG
GOLPER & SAVITT, LLP

By: 

John J. Manier
Attorneys for Defendant and Respondent LOEWS HOLLYWOOD HOTEL, LLC

1464968.1

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MOSS BOLLINGER LLP
Dennis F. Moss
Ari E. Moss
15300 Ventura Blvd., Ste 207
Sherman Oaks, CA 91403
dennis@mossbollinger.com
ari@mossbollinger.com

ALTSHULER BERZON LLP
Michael Rubin
Eileen Goldsmith
177 Post Street, #300
San Francisco, CA 94108
mrubin@altber.com
egoldsmith@altber.com

LAW OFFICES OF SAHAG MAJARIAN II
Sahag Majarian, II
18250 Ventura Boulevard
Tarzana, California 91356
sahag@majarianlaw.com

LATHROP GPM LLP
Laura Reathaford
2049 Century Park East, Suite 3500S
Los Angeles, CA 90067-1714
Laura.Reathaford@lathropgpm.com

CAPSTONE LAW APC
Melissa Grant
Ryan H. Wu
John E. Stobart
1875 Century Park East, Suite 1000
Los Angeles, CA 90067
Ryan.Wu@capstonelawyers.com
Melissa.Grant@capstonelawyers.com
John.Stobart@capstonelawyers.com

SEYFARTH SHAW LLP
Jeffrey A. Berman
Brian T. Ashe
Kiran A. Sheldon
2029 Century Park East,
Suite 3500 Los Angeles
CA 90067
jberman@seyfarth.com
bashe@seyfarth.com
ksheldon@seyfarth.com

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Hon. Kenneth R. Freeman
Los Angeles County Superior Court
Spring Street Courthouse
Department 014
312 North Spring Street
Los Angeles, CA 90012

California Court of Appeal
Second Appellate District
Division Three
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

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Narine Munn Ballard Rosenberg Golper & Savitt LLP	nmunn@brgslaw.com	e-Serve	2/4/2021 3:39:59 PM
Michael Rubin Altshuler Berzon LLP 80618	mrubin@altshulerberzon.com	e-Serve	2/4/2021 3:39:59 PM
David Balter DIR/Div Labor Stds Enf 136273	DBalter@dir.ca.gov	e-Serve	2/4/2021 3:39:59 PM
Sahag Majarian Law offices of Sahag Majarian II	sahag@majarianlaw.com	e-Serve	2/4/2021 3:39:59 PM
Kiran Seldon Seyfarth Shaw LLC 212803	kseldon@seyfarth.com	e-Serve	2/4/2021 3:39:59 PM
Dennis Moss Moss Bollinger LLP 77512	dennis@mossbollinger.com	e-Serve	2/4/2021 3:39:59 PM
Laura Reathaford	laura.reathaford@lathropgpm.com	e-	2/4/2021 3:39:59

Lathrop GPM LLP 254751		Serve	PM
Melissa Grant Capstone Law APC 205633	melissa.grant@capstonelawyers.com	e-Serve	2/4/2021 3:39:59 PM
Ari Moss Moss Bollinger LLP 238579	lea@dennismosslaw.com	e-Serve	2/4/2021 3:39:59 PM
Laura Reathaford Lathrop GPM LLP 254751	Shar.Campbell@LathropGPM.com	e-Serve	2/4/2021 3:39:59 PM
Kiran Seldon Seyfarth Shaw LLP	kiranseldon@yahoo.com	e-Serve	2/4/2021 3:39:59 PM
David Fishman	dfishman@brgslaw.com	e-Serve	2/4/2021 3:39:59 PM
Lisa Aguilar	laguilar@brgslaw.com	e-Serve	2/4/2021 3:39:59 PM
Ari Moss 238579	ari@mossbollinger.com	e-Serve	2/4/2021 3:39:59 PM
Ryan H. Wu 222323	Ryan.Wu@capstonelawyers.com	e-Serve	2/4/2021 3:39:59 PM
John E. Stobart 248741	John.Stobart@capstonelawyers.com	e-Serve	2/4/2021 3:39:59 PM
Jeffrey A. Berman 50114	jberman@seyfarth.com	e-Serve	2/4/2021 3:39:59 PM
Brian T. Ashe	bashe@seyfarth.com	e-Serve	2/4/2021 3:39:59 PM
Kiran A. Sheldon	ksheldon@seyfarth.com	e-Serve	2/4/2021 3:39:59 PM

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Manier, John (145701)

Last Name, First Name (PNum)

Ballard Rosenberg Golper & Savitt

Law Firm