ELLISON, WHALEN & BLACKBURN
Attorneys at Law
PATRICK J. WHALEN
State Bar No. 173489
1201 K Street, Ste. 1960
Sacramento, CA 95814
Telephone: (916) 448-2187
Facsimile: (916) 448-5346
E-mail: attorneys@ellisonlawoffices.com

Attorneys for Plaintiff
Western States Trucking Association

UNITED STATED DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WESTERN STATES TRUCKING ASSOCIATION

Plaintiff,

vs.

ANDRE SCHOORL, Acting Director of the California Department of Industrial Relations; XAVIER BECERRA, Attorney General for the State of California, and DOES 1-50

Defendants.

Case No. 2:18-cv-01989-MCE-KJN

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE; MEMORANDUM OF POINTS AND AUTHORITIES

Date: No hearing scheduled
Time: : N/A
Judge: : Hon. Morrison C. England

I. INTRODUCTION

By motion filed on August 23, 2018 (ECF No. 8), proposed intervener International Brotherhood of Teamsters ("IBT") has moved for intervention as of right under Federal Rule of Civil Procedure 24(a), and alternatively for permissive intervention under Federal Rule of Civil Procedure 24(b). Plaintiff hereby opposes the motion because IBT has failed to demonstrate the

requirements under Rule 24(a) and would unduly delay proceedings within the meaning of Rule 24(b)(3).

This case presents the question whether a state law – specifically, Industrial Wage Commission Wage Order 9 – as interpreted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) ("*Dynamex*") is unconstitutional. The complaint alleges three causes of action, two sounding in preemption and a third based on the dormant commerce clause. The questions raised by this complaint are fairly straightforward, as the state law is either constitutional or it is not. There is no middle ground, and because plaintiff desires a judicial determination of the legal question presented there is no possibility of a settlement. Moreover, the relevant facts are not likely to be in dispute. The litigation will likely be resolved via summary judgment after briefing, and because the legal questions are discrete, there is little that IBT can add to this case as an intervener that cannot be accomplished by the simple expedient of filing a brief as an amicus curiae. Accordingly, permission to intervene should be denied.

II. INTERVENTION OF RIGHT

Intervention of right is governed by Rule 24(a) which provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

This case concerns Rule 24(a)(2) because IBT has not claimed or identified any federal statute which purports to given them an unconditional right to intervene. The Ninth Circuit has held that a party seeking to intervene as of right must demonstrate all of the following:

> (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the

> application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002). Each prong of this test will be examined in turn.

1. IBT Does not have a Significant Protectable Interest

The first prong of the test inquires whether the applicant has a significant protectable interest. It is settled that a proposed intervenor "has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

IBT cites the foregoing test, see ECF No. 8 at pp. 12-13, and argues that "IBT represents the very workers who are protected by the minimum wage, overtime, and other employment protections in Wage Order 9." *Id*. Though not expressly clear, it appears that the "some law" being relied upon by IBT is Wage Order 9. It further appears that IBT is arguing that its members will suffer a practical impairment of their interests if the *Dynamex* standard is invalidated. *Id*. However, IBT's claimed interest is speculative. IBT argues that 1) under *Dynamex*, many independent contractors will be reclassified as employees, and 2) those newly-minted employees will want to become IBT members, and 3) those newly-minted IBT members will suffer from impairment of their rights. But it is by no means clear that the reclassification of relationships that will likely occur under *Dynamex* will in fact result in more IBT members, let alone IBT members whose rights are violated. To be sure, IBT likely expects and desires to increase its membership in light of *Dynamex*, but that hope and expectation is insufficient to create a present, legally protectable interest. The Ninth Circuit has determined that in the context of intervention, an interest must be non-speculative, and cannot be "several degrees removed" from the main issues in the case. *United States v. Alisal Water Corp*., 370 F.3d 915, 919–20 (9th Cir. 2004). Here, the possibility that IBT may benefit because there may be a larger pool of employees, some of whom may wish to join IBT, and that those new IBT members may have

cognizable rights under *Dynamex* is simply too far removed from the core questions raised in the complaint.

2. The Disposition of this Matter Will Not Impair IBT's Ability to Protect Its Interests

The second prong requires IBT to demonstrate that its interests may be impaired by the disposition of the litigation. *Donnelly v. Glickman, supra* at 409. IBT argues that this case could invalidate the ABC test announced in *Dynamex* and that such a determination would "establish[] significant barriers to IBT's efforts to fight misclassification. . . ." (ECF No. 8 at p. 14.) But IBT's own moving papers show that it has been quite successful in this regard even prior to the decision in *Dynamex*. According to the Declaration of Bradley Raymond filed in support of the motion to intervene, IBT has been in existence 1903, and has 1.3 million members, including 260,000 members in California. (ECF No. 8-1, ¶ 3.) Notably, Mr. Raymond avers:

> The IBT has long fought against the misclassification of workers as independent contractors, and among its members are many workers who were previously misclassified. The IBT has specifically helped many drayage drivers at California seaports challenge their classification as independent contractors. As a result of the IBT's efforts, many of those drivers were reclassified as employees and then became members of the IBT.

(ECF No. 8-1, ¶ 5.) In other words, IBT was successful in reclassification litigation in California long before *Dynamex*, and there is no reason to suggest that IBT's success will not continue even if the decision in *Dynamex* is invalidated. Admittedly, the new ABC test in *Dynamex* may make it easier to prevail on misclassification claims, but the mere possibility that this case may eliminate a test favorable to IBT and revert to prior law does not mean that IBT's interests are "impaired." While the Ninth Circuit has held that Rule 24 "intervention of right does not require an absolute certainty that a party's interests will be impaired," see *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011), surely the requirement of impairment must mean something more than the possibility of reverting to the status quo ante when that status quo is one of great success.

As the Ninth Circuit has observed, "[e]ven if this lawsuit would *affect* the proposed intervenors' interests, their interests might not be *impaired* if they have 'other means' to protect them." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006.) Here,

even if plaintiff is successful on one or more of its claims, IBT will still have at its disposal all of the tools it has used so successfully for more than a century to benefit its members.

3. Timeliness

Plaintiff concedes the application for leave to intervene is timely given the relatively early stage of the proceedings.

4. The Existing Parties Will Adequately represent IBT's Interests

The fourth prong requires the applicant to demonstrate that the applicant's interest is not adequately represented by the existing parties. See *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). Plaintiff named the California Attorney General and the Acting Director of the Department of Industrial Relations as defendants precisely because they are the state officials charged with defending claims attacking the constitutionality of state laws. Even prior to IBT's motion for leave to intervene, the state defendants filed a motion to dismiss (ECF No. 6.) Thus, there is no doubt that the existing parties will zealously and vigorously defend the action.

IBT argues, however, that its interests are more "narrow" and "parochial" than those of the named defendants. (ECF No. 8, p. 15.) The problem, however, is the discrete nature of this litigation. The holding of *Dynamex* is either constitutional or it is not. This case presents what is essentially a binary question, and IBT has not demonstrated that its arguments regarding the constitutionality of the decision will be any different than those that will likely be argued by the existing defendants. Because this case presents what is largely a question of law, IBT's interests will be adequately represented.

In general, the rule is that

> representation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervener and if the representative does not fail in the fulfillment of his duty.

Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir 1969*); Peterson v. U.S.*, 41 F.R.D. 131 (D.C.Minn.1966); *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962). Here, IBT has failed to show any collusion, has failed to show that the named defendants have an adverse

interest, and has failed to show that the state defendants will not fulfill their duty to defend its state law. Indeed, IBT acknowledges that its arguments that Dynamex is lawful will be the same as those proffered by the named defendants. (See ECF No. 8 at p. 17.)

IBT's reliance upon *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189-90 (9th Cir. 1998) is unhelpful because in that decision, the court devoted a mere paragraph to all four elements of the intervention as of right test. By merely declaring that IBT's interests in that case "were potentially more narrow and parochial than the interests of the public at large" the decision does little to illuminate whether, in this case, the existing defendants will not be able to adequately defend the constitutionality of the holding in *Dynamex*. Moreover, if it is enough to simply claim an interest that is "narrower" or "more parochial" then there is no limiting principle that would ever prohibit intervention. For all these reasons, intervention as of right should be denied.

II. PERMISSIVE INTERVENTION SHOULD ALSO BE DENIED

IBT alternatively seeks permissive intervention. Permissive intervention is governed under Rule 24(b). While courts have wide discretion is deciding questions of permissive intervention, it is recognized that "[a]dditional parties always take additional time that may result in delay and that thus may support the denial of intervention." Charles A. Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 1913 (3rd ed. 2018). For example, the Ninth Circuit previously found that the denial of a public-interest organization's motion for permissive intervention was warranted, in an action alleging that a ballot proposition to amend the California constitution to ban gay marriage was unconstitutional, finding that the organization's interests were adequately represented by the proponents of the ballot proposition, and permitting intervention could unnecessarily delay the proceedings. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955-956 (9th Cir. 2009).

In this case, adding additional parties to argue questions of law will likely unduly delay the proceedings. It would be more efficient to simply permit IBT to file an amicus brief on the merits of the case, and indeed, courts have upheld the exercise of discretion to deny permissive

intervention when the would-be intervenor is allowed to act as amicus in the case. *Mumford Cove Ass'n v. Town of Groton, Connecticut*, 786 F.2d 530, 535 (2nd Cir. 1986.) Moreover,

> additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

Bush v. Viterna, 740 F.2d 350, 359 (5th Cir. 1984). Accordingly, IBT should be permitted to file amicus briefing on the legal questions in this case, but their request for intervention should be denied.

ELLISON, WHALEN & BLACKBURN

Dated: September 6, 2018

/s/ Patrick J. Whalen

PATRICK J. WHALEN

Attorneys for Plaintiff
WESTERN STATES TRUCKING ASSOCIATION