**NO. S258191**

**IN THE SUPREME COURT OF CALIFORNIA**

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GERARDO VAZQUEZ, GLORIA ROMAN, and JUAN AGUILAR, on behalf of themselves and all others similarly situated,
*Petitioners,*

*vs.*

JAN-PRO FRANCHISING INTERNATIONAL, INC.
*Respondent.*

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Review of Certified Question from the Ninth Circuit
(Ninth Circuit Case No. 17-16096)
*On Appeal from N.D. Cal. Case No. 3:16-cv-05961*
*Before the Honorable William Alsup*

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# REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWERING BRIEF OF RESPONDENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JASON H. WILSON; PROPOSED ORDER

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**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that, pursuant to California Evidence Code Sections 452 and 459, California Rule of Court 8.252, and supporting case law, Respondent Jan-Pro Franchising International, Inc. ("JPI") hereby respectfully requests that the Court take judicial notice of the following materials cited in the Answering Brief of Respondent ("Answering Brief").

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, and the Declaration of Jason H. Wilson ("Wilson Decl.").

Respectfully submitted,

Dated: May 27, 2020

WILLENKEN LLP

*/s/ Jason H. Wilson*
Jason H. Wilson
Attorneys for Respondent
JAN-PRO FRANCHISING
INTERNATIONAL, INC

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

JPI respectfully requests that this Court take judicial notice of the following materials cited in its Answering Brief. True and correct copies of these materials are attached as exhibits to the declaration of Jason H. Wilson:

1. Plaintiff's Motion to Sever and Transfer Out-of-State Claims, *Depianti v. Jan-Pro Franchising Int'l, Inc*. (D.C. Mass. Sept. 22, 2014, No. 08-10663) ECF No. 197 ("Exhibit A");
2. Petn. For Review, *Henderson v. Equilon Enterprises, Inc.* (Nov. 18, 2019, No. S259202) ("Exhibit B");
3. *Connor-Nolan Inc. v. Employment Development Department* (Calif. Unemployment Ins. App. Bd., Nov. 17, 2014) Case No. 4764599 (T), *as reinstated by* Case Nos. AO-418191 and AO-418192 (July 23, 2018) ("Exhibit C");
4. Plaintiff-Appellants' Motion to Remand, *Vazquez v. Jan-Pro Franchising Int'l* (9th Cir. May 9, 2018, No. 17-16096) ECF No. 37 ("Exhibit D");
5. Opening Br. of Plaintiff-Appellants, *Haitayan v. 7-Eleven, Inc.* (9th Cir. Oct. 10, 2018, No. 18-55462) ECF No. 10 ("Exhibit E").

## II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF FILINGS IN STATE AND FEDERAL COURT PROCEEDINGS.

Exhibits A, B, D, and E are noticeable as records of courts of this state. (Evid. Code, § 452 subd. (d)(1) ["Judicial notice may be taken of . . . [r]ecords of . . . any court of this state or . . . any court of record of the United States . . . ."].) Each of these exhibits are court filings either by Petitioners in this case or by counsel for Petitioners in other matters. Exhibit A is a motion by Petitioners to transfer their claims from the District Court of the District of Massachusetts to California, based in part on the fact that California law differed from Massachusetts law. Exhibit B is a petition for review filed in this Court (and which this Court denied) in *Henderson v. Equilon Enterprises, Inc.*, in which the plaintiff in that case was represented by the same counsel representing Petitioners here. Exhibit D is a motion by Petitioners filed in the Ninth Circuit to remand this case following this Court's decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. Exhibit E is an opening brief filed before the Ninth Circuit in a case called *Haitayan v. 7-Eleven, Inc.* (9th Cir. Oct. 10, 2018, No. 18-55462), in which the appellants were represented by the same counsel representing Petitioners here. As court filings, it is proper for this Court to take judicial notice of these records.

In addition, these filings are relevant to material issues in this

matter—specifically, as statements or concessions by Petitioners or their counsel on matters relevant to this briefing. (*Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569 ["Although a court may judicially notice a variety of matters [citation], only relevant material may be noticed. [Citation]."].) In Exhibit A, Petitioners requested to sever their claims because they understood California law to differ from Massachusetts law. In Exhibit B, Petitioners' counsel concedes that the Ninth Circuit's opinion in this case (*Vazquez v. Jan-Pro Franchising Int'l, Inc*. (9th Cir. 2018) 923 F.3d 575, 594-596, *vacated and reinstated in part*, (9th Cir. 2019) 939 F.3d 1045, 1050) involves a "'tiered' or joint employer context." In Exhibit D, Petitioners conceded that the ABC Test introduced by *Dynamex* "entirely upended" the previous legal regime. Exhibit E, likewise, is a statement by Petitioners' counsel conceding that *Dynamex* created a "sea change" in the law that "drastically altered" the legal landscape. These statements are relevant because Petitioners now claim the ABC Test is not a sufficient change to current law to warrant only prospective application.

## III. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ADMINISTRATIVE DECISION OF THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD.

Exhibit C is an administrative decision of the California Unemployment Insurance Appeals Board ("CUIAB"). Evidence Code section 452(c) permits judicial notice of "official acts of the legislative,

executive, and judicial departments of" this state. (Evid. Code § 452 subd. (c).) "Official acts include records, reports and orders of administrative agencies." (*Ordlock v. Franchise Tax Bd.* (2006) 38 Cal.4th 897, 911 fn. 8; *see also Pratt v. Local 683, Film Technicians* (1968) 260 Cal.App.3d 545, 562 [court properly took judicial notice of CUIAB proceeding].)

This decision is relevant because, after a hearing in which the California Employment Development Department alleged that, for the period 2010-2011, Jan-Pro unit franchisees were misclassified employees of their regional master franchisor Connor-Nolan Inc., all were found properly classified as independent contractors under the multifactor test preceding *Dynamex's* ABC Test. This decision demonstrates the reasonableness of JPI's reliance on the prior law in determining whether the decision in *Dynamex* should be retroactive.

## IV. CONCLUSION

For the reasons stated above, Jan-Pro respectfully requests that the Court take judicial notice of Exhibits A through E.

Respectfully submitted,

Dated: May 27, 2020

WILLENKEN LLP

*/s/ Jason H. Wilson*
Jason H. Wilson
Attorneys for Respondent
JAN-PRO FRANCHISING
INTERNATIONAL, INC

## DECLARATION OF JASON H. WILSON

I, Jason H. Wilson, declare as follows:

1. I am an attorney at the law firm of Willenken LLP, counsel of record for Jan-Pro Franchising International, Inc. ("JPI"). I am a member of good standing of the State Bar of California. I have personal knowledge of the facts set forth in this Declaration and could and would testify competently to such facts under oath.

2. Attached here at Exhibit A is a true and correct copy of Plaintiff's Motion to Sever and Transfer Out-of-State Claims, *Depianti v. Jan-Pro Franchising Int'l, Inc.* (D.C. Mass. Sept. 22, 2014, No. 08-10663) ECF No. 197).

3. Attached hereto as Exhibit B is a true and correct copy of Petn. For Review, *Henderson v. Equilon Enterprises, Inc.* (Nov. 18, 2019, No. S259202).

4. Attached hereto as Exhibit C is a true and correct copy of *Connor-Nolan Inc. v. Employment Development Department* (Calif. Unemployment Ins. App. Bd., Nov. 17, 2014) Case No. 4764599 (T), *as reinstated* by Case Nos. AO-418191 and AO-418192 (July 23, 2018).

5. Attached hereto as Exhibit D is a true and correct copy of Plaintiff-Appellants' Motion to Remand, *Vazquez v. Jan-Pro Franchising Int'l* (9th Cir. May 9, 2018, No. 17-16096) ECF No. 37.

6. Attached hereto as Exhibit E is a true and correct copy of Opening Br. of Plaintiff-Appellants, *Haitayan v. 7-Eleven, Inc.* (9th Cir. Oct. 10, 2018, No. 18-55462) ECF No. 10.

Executed on May 27, 2020, at Los Angeles, California.

I declare under the penalty of perjury under the laws of the State of California that the forgoing is true and correct.

*/s/ Jason H. Wilson*
Jason H. Wilson

**NO. S258191**

**IN THE SUPREME COURT OF CALIFORNIA**

---

GERARDO VAZQUEZ, GLORIA ROMAN, and JUAN AGUILAR, on behalf of themselves and all others similarly situated,
*Petitioners,*

*vs.*

JAN-PRO FRANCHISING INTERNATIONAL, INC.
*Respondent.*

---

Review of Certified Question from the Ninth Circuit
(Ninth Circuit Case No. 17-16096)
*On Appeal from N.D. Cal. Case No. 3:16-cv-05961*
*Before the Honorable William Alsup*

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**[PROPOSED] ORDER GRANTING JUDICIAL NOTICE**

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Good cause appearing,

IT IS HEREBY ORDERED that Respondent's Request for Judicial Notice is granted. The Court will take judicial notice of Exhibits A through E contained in Respondent's request.

Dated:_____ _____
Presiding Justice

# EXHIBIT A

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| GIOVANI DEPIANTI et al, and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>JAN-PRO FRANCHISING INTERNATIONAL, INC.,<br><br>Defendant. | Civil Action No. 08-10663-MLW |

**PLAINTIFFS' MOTION TO SEVER AND TRANSFER OUT-OF-STATE CLAIMS**

After six years of litigation, this case has reached a cross-roads. As set forth below, Plaintiffs have a proposal to bring this matter to a close, allow lead plaintiff Giovani Depianti to pursue an appeal of the Court's recent ruling granting summary judgment to Defendant on Depianti's claim that he (like other workers in Massachusetts) was misclassified in violation of Mass. Gen. L. c. 149 § 148B, and allow the California plaintiffs who have brought claims under the law of California to pursue their claims back in their home state.

The parties are in the process of resolving the claim for the plaintiffs from other states, including Texas and New Mexico (including Chiara Harris, Nicole Rhodes, and Mateo Garduno). Plaintiff Depianti intends to dismiss his claims brought under chapter 93A and unjust enrichment, which (if this matter were closed) would clear the way for him to appeal the Court's ruling on his claim brought under § 148B. Thus, the only claims that would remain in this litigation are the claims of three workers from California, who have brought claims on

behalf of a California class. For the reasons set forth below, Plaintiffs request that the Court sever and transfer these claims to California. Doing so would assist in moving this case closer to finality, allow Depianti to pursue his appeal without delay, and allow the plaintiffs who have brought claims under California law to move forward with their claims now, also without further delay.

Thus, Plaintiffs hereby move to sever and transfer to California the remaining claims of Plaintiffs Gerardo Vazquez, Gloria Roman, and Juan Aguilar, which are based on the laws of California. Now that this case no longer entails a proposed nationwide class action against Jan-Pro Franchising International, Inc. (as originally filed), and given that the remaining claims solely address California law, this Court should exercise its broad discretion to sever and transfer these claims to federal court in California, as such a transfer would allow for more expeditious review of the claims on their merits in a forum that is more convenient for them, more familiar with California substantive law, and which has a greater interest in the issues to be decided. For these reasons, as discussed further below, Plaintiffs respectfully request that the Court grant this motion.

## BACKGROUND

Plaintiffs initially filed this action against Jan-Pro Franchising International, Inc. ("Jan-Pro"), on April 18, 2008, as a proposed nationwide class action. The case was originally filed with named plaintiffs Giovani Depianti, from Massachusetts, and Hyun Ki Kim and Kyu Jin Roh, from New Jersey and Pennsylvania. Plaintiffs contended that they were illegally misclassified as independent contractors, and also had been the victims of widespread and systemic misrepresentations and breaches of contract in their relations with Jan-

Pro. See Dkt. 1. Plaintiffs later amended their complaint on December 12, 2008, to add additional lead plaintiffs who worked in California, New Mexico, Florida, and Texas. See Dkt. 29 at 2-3. In April 2010, the Court proposed, and the parties agreed, that it would first address the claims brought under Massachusetts law. See Dkt. 97. Ultimately, the Massachusetts claims were certified to the Supreme Judicial Court, which issued its ruling in 2013. See Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607 (2013). While the Massachusetts claims were being litigated, the plaintiffs from New Jersey, Pennsylvania, and Florida resolved their disputes and/or stipulated to the dismissal of their claims.[1]

On August 22, 2014, this Court ruled on the Massachusetts claims, denying Plaintiffs' motion for partial summary judgment under Mass. Gen. L. c. 149 § 148B, granting Jan-Pro's motion for summary judgment on that claim, but denying Jan-Pro's motion for summary judgment on the Massachusetts unjust enrichment and Chapter 93A claims. See Dkt. 191. The Massachusetts plaintiff, Giovani Depianti, intends to dismiss his surviving claims and pursue an appeal of the Court's ruling on the claim brought under § 148B.

Plaintiffs are in the process now of resolving the claims of Nicole Rhodes and Mateo Garduno (the New Mexico plaintiffs) and Chiara Harris (the Texas plaintiff), and expect those claims to be dismissed shortly as well.

[1] Mr. Kim's claims were dismissed on November 18, 2013. See Dkt. 179. Mr. Sinapov's claims were dismissed on November 27, 2013. See Dkt. 180. Mr. Roh's claims were dismissed on January 16, 2014. See Dkt. 188.

Thus, the only claims that would now remain in the case are those of the California plaintiffs. These plaintiffs originally joined in this action filed in Massachusetts, based on the case having been pled as a nationwide class action against Jan-Pro Franchising International, Inc. Now that the claims of the named plaintiffs from all other states have been, or are in the process of being, adjudicated or dismissed, it makes little sense for the claims of just the California plaintiffs to remain in this forum. Plaintiffs thus respectfully request that the Court sever these claims and transfer them to a federal court in the Northern District of California so that they may be adjudicated expeditiously. This course would also allow Plaintiff Depianti to pursue an appeal to the First Circuit without needing to await the adjudication of the California plaintiffs' claims.

**ARGUMENT**

Fed. R. Civ. P. 21 permits a court to sever claims "on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Acevedo-Garcia v. Monroig, 351 F.3d 547, 558 (1st Cir. 2003). "Whether to separate parties or claims is a case management decision peculiarly within the discretion of the trial court." Lampron v. Grp. Life Ins. & Disability Plan of United Technologies Corp., 2013 WL 2237854, *2 (D. Me. May 21, 2013) (quoting Acevedo-Garcia, 351 F.3d at 558). Furthermore, "a trial court has the discretion to transfer any case where an alternative forum is available which is both fair and convenient to the parties and the court." Pixel Enhancement Labs., Inc. v. McGee, 1998 WL 518187, *3 (D. Mass. Aug. 5, 1998) (citing Mercier v. Sheraton Intern., Inc., 981 F.2d 1345, 1349 (1st Cir.1992)); see also First City Nat. Bank and Trust Co. v. Simmons, 878 F.2d 76, 80 (2d Cir.1989) ("Balancing factors of

convenience is essentially an equitable task. For that reason, an ample degree of discretion is afforded to the district courts in determining a suitable forum"). Here, this Court should sever and transfer the remaining California claims to a California court.

## I. Severance Of The California Claims Is Appropriate.

In deciding whether to sever claims, courts consider a number of factors, including, "(1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims." Spinal Imaging Inc. v. State Farm Mut. Auto. Ins. Co., 2013 WL 1755200, *4 (D. Mass. Apr. 24, 2013). Here, these factors support severance and transfer of the California-based claims because transfer will prevent further delay while Depianti's remaining claims are appealed in the First Circuit, will avoid any prejudicial confusion caused by the application of different state laws, and may facilitate settlement. Further, the facts related to the claims of the California plaintiffs are based on occurrences that took place in California, distinct from the specific facts underlying Depianti's claims in Massachusetts.

A number of courts facing similar cases involving out-of-state plaintiffs have reached this same conclusion, leading them to sever and transfer such claims to the out-of-state Plaintiffs' home states. For example, in Costello v. Home Depot U.S.A., Inc., 888 F. Supp. 2d 258, 261 (D. Conn. 2012), the court

granted a motion to sever and transfer the claims of "thirty-five non-Connecticut plaintiffs and transfer their claims to the six other states in which they reside." The court concluded that "Plaintiffs' claims arise out of their employment in different Home Depot stores, in different states, under different circumstances" such that they did not truly arise from the same transaction or occurrence, even if the claims did relate to common questions of law or fact regarding their classification under the FLSA. Id. at 264. Other cases in which courts have granted requests to sever and transfer claims of plaintiffs from different states include: Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000); Adams v. U.S. Bank, NA, 2013 WL 5437060, at *4 (E.D. N.Y. Sept. 27, 2013); Wilkes v. Genzyme Corp., 2011 WL 1790685, at *2 (D. Md. May 10, 2011); Henderson v. AT & T Corp., 918 F. Supp. 1059, 1061 (S.D. Tex. 1996).

As in these cases, the California plaintiffs here have brought claims under the laws of a different state and may be prejudiced by the confusion of applying their state's laws (with which this Court may have less familiarity than a federal court sitting in California). Moreover, given that they are no longer part of a putative nationwide class action, for efficiency purposes, it no longer makes sense for their claims to be adjudicated across the country. It would be far more convenient for them to have their claims adjudicated where they reside, and where the occurrences at issue took place, in California.

## II. Transfer of the California Claims is Appropriate.

"District courts enjoy considerable discretion in deciding whether to transfer a case pursuant to section 1404(a)." Morin v. Engelberth Const., Inc.,

1994 WL 287727, *1 (D.N.H. June 29, 1994). Section 1404(a) is intended "to prevent waste of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Van Dusen v. Barrack, 376 U.S. 612, 616 (1964). In deciding whether to transfer a case under 28 U.S.C. § 1404(a), courts typically engage in a two-part inquiry, asking: "(1) whether the action might have been brought in the proposed transferee forum, and, if so, (2) whether the transfer promotes convenience and justice." Nelson v. Myrtle Beach Collegiate Summer Baseball League, LLC, 2013 WL 6273890, *9 (D. Conn. Dec. 4, 2013). Here, the case clearly could have been brought by the California plaintiffs in a federal district court in California because the events giving rise to their claims all occurred in California, where these plaintiffs reside. Because the answer to this threshold question is yes, the Court should consider whether a transfer to California promotes convenience and justice.

Courts evaluate a number of factors in deciding whether claims should be transferred to another district. In general a court will consider "(1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative means of the parties; (4) the locus of the operative facts and the relative ease of access to the sources of proof; (5) the attendance of witnesses; (6) the weight accorded the plaintiff's choice of forum; (7) calendar congestion; (8) the desirability of having case tried by forum familiar with substantive law to be applied; (9) any practical difficulties; (10) and how best to serve the interests of justice." Pixel Enhancement Labs., Inc., 1998 WL 518187, *3 (D. Mass. Aug. 5, 1998) (citing Laumann Mfg. Corp. v. Castings USA, Inc., 913 F. Supp. 712, 720

(E.D.N.Y. 1996)). Here, these factors clearly cut in favor of transferring the California claims. The transfer would promote convenience and justice because many fact witnesses related to the California claims will be located in California along with the plaintiffs themselves, and because a transfer would allow the California plaintiffs to have their claims adjudicated expeditiously on the merits by a court familiar with California substantive law and would cause minimal prejudice to Jan-Pro, which is based in Georgia and has no more ties to Massachusetts than it does to California.

Plaintiffs expect that Jan-Pro will object to the timing of this motion. However, the "mere passage of time or delay is not alone sufficient to deny a motion to transfer." Blumenthal v. Mgmt. Assistance, Inc., 480 F. Supp. 470, 471 (N.D. Ill. 1979) (noting that although "defendant has waited three years to bring this transfer motion . . . the delay in filing of the motion is not by itself enough to necessitate its denial"); see also Am. Standard, Inc. v. Bendix Corp., 487 F. Supp. 254, 261 (W.D. Mo. 1980) (holding that "[a]lthough in this complex civil action the plaintiff has delayed four years in making its motion for transfer, no showing has been made that the delay was a dilatory tactic, or that the defendant would be prejudiced solely because of the delay" and therefore the motion was timely). Indeed, the California plaintiffs have chosen to move for severance and transfer at this juncture because it is only now that it has become clear that their claims are no longer a part of a multi-state class action, and thus it no longer makes sense for their claims to be adjudicated across the country.

**1. The convenience of the parties and witnesses.**

Factors one, two, and five clearly favor a transfer because the convenience of the parties and the attendance of witnesses would be easier in a federal court in California. Plaintiffs Gerardo Vazquez, Gloria Roman, and Juan Aguilar all performed work in California and interacted with Jan-Pro's "master franchisees" within the state of California. Thus, California is clearly more convenient for the plaintiffs and most fact witnesses. Furthermore, California is hardly less convenient than Massachusetts for Jan-Pro, which is a Georgia-based company. See Dkt. 67 (Defs' Statement of Facts in Support of Summary Judgment) at ¶1.

**2. The relative means of the parties.**

Factor three – the relative means of the parties – also cuts strongly in favor of transferring the case to California. Numerous courts have recognized that "[w]here a disparity exists between the means of the parties, such as in the case of an individual suing a large corporation, the court may consider the relative means of the parties in determining where a case should proceed." 800–Flowers, Inc. v. Intercontinental Florist, Inc., 860 F.Supp. 128, 135 (S.D.N.Y.1994). Here, the three named plaintiffs from California are cleaning workers of modest means, whereas Jan-Pro Franchising International, Inc. is a large corporation that already does business throughout the state. See Dkt. 76-5 (listing ten different locations in the state of California).[2] Thus, severing and

[2] See Dkt. 76-5, listing the following California "Jan-Pro locations": Jan-Pro Cleaning Systems of Southern CA, Jan-Pro West, Jan-Pro of Riverside, Jan-Pro of the Greater Bay Area, Jan-Pro of Silicon Valley, Jan-Pro of San Diego, Jan-Pro of Central Coast, Jan-Pro Cleaning

transferring the claims to a federal court in California would alleviate the costs to the low-income cleaning workers who reside there and would not present any appreciable hurdle to Jan-Pro. The fact that these plaintiffs initially brought the suit in Massachusetts rather than California makes no difference. See Chiste v. Hotels.com L.P., 756 F. Supp. 2d 382, 400-01 (S.D.N.Y. 2010) (noting that where the Plaintiff "is a Texas resident, [] presumably litigating in Texas is the less costly option for him" as opposed to continuing the case in New York where he filed it).

**3. The locus of the operative facts and sources of proof.**

There can be no doubt that with respect to the California plaintiffs, the "locus of operative facts" is California, where the plaintiffs entered into contracts with Jan-Pro's California-based "master franchisees" and performed all of their work at issue in this case. See Blechman v. Ideal Health, Inc., 668 F. Supp. 2d 399, 405 (E.D.N.Y. 2009) (noting that "Massachusetts appears to be the locus of operative facts" where the plaintiff's "previous employer, has its primary place of business in Massachusetts, [and the plaintiff] negotiated his employment in Massachusetts, [and] . . . clearly availed himself to Massachusetts law"). Thus, witnesses and other sources of proof will be located in California, not Massachusetts, and this factor cuts in favor of transferring the case as well.

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Systems of Sacramento, Jan-Pro Cleaning Systems of Ontario, CA and Jan-Pro of San Francisco.

**4. The desirability of having the case tried by a forum familiar with substantive law to be applied.**

Many courts have recognized that the "interests of justice are best served by having a case decided by the federal court in the state whose laws govern the interests at stake." Kafack v. Primerica Life Ins. Co., 934 F.Supp. 3, 8 (D.D.C.1996); see also Lentz v. Eli Lilly & Co., 464 F. Supp. 2d 35, 37-38 (D.D.C. 2006) (approving transfer of claims to district court in Maine where "Maine has a greater interest than the District of Columbia in adjudicating the personal injury claims of Maine citizens under its own tort law"); Blechman v. Ideal Health, Inc., 668 F. Supp. 2d 399, 405 (E.D.N.Y. 2009) (granting a motion to transfer to a district court in Massachusetts where "Massachusetts appears to be the locus of operative facts, [] Massachusetts state law governs many, if not all of the agreements between the parties; . . . [and] Massachusetts would be more familiar with the substantive law to be applied"); Brown v. New York, 947 F. Supp. 2d 317, 325 (E.D.N.Y. 2013) (granting motion to transfer where the "the transferee forum's familiarity with the substantive law to be applied, trial efficiency, and the interests of justice weigh heavily in favor of transfer"). As these cases recognize, a California district court will have more familiarity with the application of California law to these plaintiffs' claims, and California "has a greater interest than [Massachusetts] in adjudicating the … claims of [California] citizens under its own [] law." Blechman v, 668 F. Supp. 2d at 405. For these reasons, this factor cuts strongly in favor of transferring the California-based claims.

**5. The interests of justice.**

Finally, the interests of justice would clearly be served by severing and transferring the California claims because it would allow the claims to be heard on the merits by a court that has the greatest interest in the outcome and which is more familiar with California substantive law. To date, the California plaintiffs have already waited almost six years for the merits of their claims to be heard, and this Court is, in practicality, no further along in adjudicating their claims than a federal court would be in California starting anew.[3]

## CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court sever and transfer the claims of the California plaintiffs to the Northern district of California. Such an order would promote judicial efficiency, as it would allow Plaintiff Depianti to proceed with his appeal without delay, would allow the California plaintiffs to pursue their claims back in their home state where they and pertinent witnesses to their claims reside, and would bring a close to this long-pending matter in this Court.

[3] Given the length of time that has passed since the parties briefed summary judgment, updated briefing would certainly be needed on the California claims, and as the Court noted at the summary judgment hearing held in 2010, the parties did not give particular focus to the laws of other states in their initial briefing on summary judgment. Thus, for all practical purposes, these claims need to be re-briefed wherever they will now be heard.

Respectfully submitted,

GIOVANI DEPIANTI et al,
and all others similarly situated,

By their attorneys,

/s/ Shannon Liss-Riordan
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Dated: September 22, 2014

**CERTIFICATE OF CONFERENCE**

I hereby certify that I conferred with counsel for Defendant regarding the subject matter of this motion, and the parties were not able to reach agreement.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2014, a copy of this document was served by electronic filing on all counsel of record.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

# EXHIBIT B

**NO. _____**

# IN THE SUPREME COURT OF CALIFORNIA

BILLY R. HENDERSON
Petitioner,

*vs.*

EQUILON ENTERPRISES, LLC
*Respondent.*

After a Decision by the Court of Appeal
FIRST Appellate District, Division One A151626
(Contra Costa County Superior Court No. MSC10-02259)

## PETITION FOR REVIEW

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## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**



**Rules**

## I. ISSUES PRESENTED FOR REVIEW

1. Does the ABC test definition of the "suffer or permit to work" test set forth in *Dynamex Operations West, Inc. v. Superior Court*, (2018) 4 Cal. 5th 903, govern whether a defendant is a joint employer under California law?
2. Did the Court below improperly hold that the defendant could not as a matter of law be liable as an employer where its control over the business and the plaintiff's work conditions was indirect rather than direct?
3. If it were even necessary (after *Dynamex*) for the Court of Appeal to apply the "common law" test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, did the Court err in finding that no reasonable factfinder could find an employment relationship under that test?

## II. WHY REVIEW SHOULD BE GRANTED

Petitioner seeks review in order to gain clarification of the application of this Court's groundbreaking decision in *Dynamex Operations West, Inc. v. Superior Court,* (2018) 4 Cal. 5th 903.[1] In the wake of *Dynamex*, state and federal courts have disagreed on the application of the "suffer or permit" test from *Martinez v. Combs*, (2010) 49 Cal. 4th 35, to California wage claims brought against putative joint employers.

[1] In addition to this action, there are three other related actions pending in various courts, involving the employment status of this defendant, and there are countless other actions pending in California state and federal courts raising issues of joint employment and the proper application of the Court's decision in *Dynamex*.

The State of California has emphasized the need for strong enforcement of its wage and employment laws, notably last year in *Dynamex*, and again recently with the passage of Assembly Bill No. 5 (A.B. 5). In *Dynamex*, the Court adopted a strict ABC test for determining employment status in the context of claims brought under California's wage orders, because it would "provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis." *Dynamex*, 4 Cal. 5th at 964. The policy that animated this Court's decision in *Dynamex* (subsequently endorsed by the state legislature with the passage of A.B. 5), was in no way limited to concerns springing from independent contractor misclassification; the ABC test was adopted to distill and ease administration of the "suffer or permit" test, in order to prevent any "opportunity for manipulation," including tiered and joint employment structures (also known as the "fissured workplace" model, as explicitly referenced in *Dynamex*).

However, with the ink on *Dynamex* barely even dry, the Fourth District Court of Appeal issued a decision, *Curry v. Equilon Enters., LLC.*, (2018) 23 Cal. App. 5th 289,[2] that completely undermined *Dynamex* and ignored this Court's directives in both *Dynamex* and *Martinez v. Combs*, (2010) 49 Cal. 4th 35.[3] Now, in this case, the First District Court of Appeal

[2] A copy of the *Henderson* Court of Appeal opinion is attached hereto as Exhibit A, pursuant to Rule 8.504(e)(1) *California Rules of Court.* The *Henderson Opinion* has been certified for publication. Page references are to the internal page numbers on the attachments.

[3] The court in *Curry* issued its initial opinion finding in favor of Defendant on April 26, 2018, four days before *Dynamex* was published. The *Curry* petitioner filed a petition rehearing in light of *Dynamex* and noting other problems with the opinion. However, rather than remanding the matter back to the trial court, or even inviting the parties to brief

has followed the unfounded reasoning set forth in *Curry*. This Court should grant review of the Court of Appeal's decision in order to make a firm affirmation that the Court meant what it said in *Dynamex* – that the "suffer or permit test" adopted in the joint employer context in *Martinez* is applied through the ABC test.

The question of whether the ABC test should apply to determine whether an entity in a joint employment context is already before this Court for consideration in *Vazquez v. Jan-Pro Franchising International, Inc.*, S258191[4], demonstrating the lack of uniformity, the need for clarity, and the importance of the answer to the State of California. For the reasons outlined below, Petitioner submits that the Court of Appeal erred in its decision in this case, and must be reviewed by this Court to settle important issues of state law: **First**, the Court of Appeals erred in holding that *Dynamex* did not apply in the joint employer context, following the flawed analysis in *Curry*, *see Henderon* at 15, 18–2, *infra* Part IV.A; **second**, if *Dynamex* applied, Shell would not (as the Court of Appeal recognized) be

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*Dynamex*'s impact, the Court simply modified its decision to include a cursory--and erroneous--explanation of why *Dynamex* did not mandate a different result. The Court below in this case relied heavily on *Curry*, which had not allowed for argument on the impact of *Dynamex* and gave the landmark decision only cursory consideration.

[4] *Jan-Pro* has been certified to this Court by the Ninth Circuit to address the question of whether *Dynamex* applies retroactively. *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2019) 939 F.3d 1045. In *Jan-Pro*, the parties have jointly requested that this Court take the case up to consider whether *Dynamex* applies in the franchise context *Vazquez v. Jan-Pro Franchising International, Inc.*, (Cal.) S258191 (joint letter filed 10/25/2019) (attached here as Exhibit B), and the plaintiffs have requested that the Court take up the case to consider whether *Dynamex* applies to the joint employer context. *Vazquez v. Jan-Pro Franchising International, Inc.*, S258191 (letter filed by Plaintiffs-Appellants 10/25/2019) (attached here as Exhibit C).

able to satisfy Prong B of the ABC test and Petitioner would prevail, *see Henderson Opinion*, 20 n. 8 ("Shell is in the business of furnishing and selling fuel to retail customers – the same or similar work performed by appellant), nor could Shell satisfy Prong A or C, *infra* Part IV.B; **finally**, even if the Court of Appeal needed to reach the control over wages and conditions test (under *Martinez*) or the *Borello* test (which it should not, in light of Shell's inability to satisfy the ABC test under *Dynamex*), the Court erred in concluding that no reasonable factfinder could find an employment relationship under *Borello*. *See* Part IV.C–D.

**The first error** in the Court of Appeal's decision was that it held that the ABC test *only* applies when there are an independent contractor misclassification claims and not in the joint employer context. *See Henderon* at 15, 18–21. In *Dynamex*, however, this Court announced that the ABC test was the proper test to apply in analyzing the "suffer or permit" test that had been announced in *Martinez* – a ***joint employer case***. Thus, it was a given that this test would apply in the joint employer context, and so this Court had to clarify that the test would apply also in the independent contractor context. *Dynamex*, 4 Cal. 5th at 943-48. It therefore makes little sense to conclude that, in *Dynamex*, this Court did not intend the ABC test to apply to joint employment questions. Also, as explained below, the same policy concerns that justified this Court's adoption of the ABC test in the independent contractor misclassification context apply with equal force in the joint employer context. Indeed, in *Dynamex*, this Court expressly adopted the Massachusetts ABC test, 4 Cal. 5th at 956 n.23, and the Massachusetts Supreme Judicial Court has already addressed this very issue, holding that the ABC test is to be applied to each "tier" of putative employer, in cases involving multiple alleged employers. *See Depianti v. Jan-Pro Franchising Intern., Inc.,* (2013) 465 Mass. 608, 617-625.

However, conflicting decisions issued by two different panels at the Ninth Circuit (and as this case and *Curry*) demonstrate, there is the lack of uniformity on the question under California law.

In *Vazquez v. Jan-Pro Franchising, International, Inc.*, (9th Cir. 2010) 923 F. 3d 575, the Ninth Circuit agreed that the ABC test from *Dynamex* applies in the "tiered" or joint employer context (and rejected the reasoning in *Curry*, 923 F.3d at 599). In *Jan-Pro*, Plaintiffs who Jan-Pro classified as independent contractors were required to contract with intermediate franchise entities, and not directly with Jan-Pro, the defendant in the case (a much larger national corporation). [5] The plaintiffs alleged they had been misclassified and were employees of the larger entity with whom they did not contract directly. The Ninth Circuit ruled in Plaintiffs' favor, rejecting the argument that any special or relaxed test should apply in the franchise context (when the putative employer is a franchisor). *Jan-Pro*, 923 F.3d at 594. [6] The Court applied *Dynamex* in the *Jan-Pro* case, notwithstanding the fact that the Plaintiffs did not contract directly with the defendant but instead with smaller intermediate franchise entities.

As noted *supra*, the Ninth Circuit later certified to this Court the question of whether *Dynamex* applies retroactively, reflecting the public importance of correct application (and clarification) of *Dynamex*. *See Vazquez v. Jan-Pro Franchising International, Inc.*, (9th Cir. 2019) 939 F.3d 1045. The Ninth Circuit also invited this Court to rephrase the issues for review; the Plaintiffs requested that this Court expand the question to address whether *Dynamex* applies to the question of whether an entity is a joint employer.

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[5] The same is true in this case where Defendant claims that as to it, Petitioner was an independent contractor and not "employee."

[6] The Ninth Circuit also specifically rejected the notion that *Patterson v. Domino's Pizza, LLC.*, (2014) 60 Cal. 4th 474, should apply.

Meanwhile, a different panel of the Ninth Circuit issued a conflicting opinion in *Salazar v. McDonald's Corp.*, (9th Cir. 2019) 939 F.3d 1051, 1058, holding that *Dynamex* did not apply in the joint employer context. In *Salazar*, the Plaintiffs, low-income fast food crew members, sought to enforce their statutory rights and prosecute alleged California labor laws violations on behalf of the State of California, pursuant to the Private Attorneys General Act ("PAGA"), against McDonald's Corporation, who Plaintiffs contend jointly employed them along with a McDonald's "franchisee." These workers allege they have suffered from numerous forms of wage theft, including unpaid overtime premiums, lack of meal periods and rest breaks, and lack of reimbursement for out-of-pocket expenses, all in violation of California law. However, McDonald's claims that it is not responsible for their plight, seeking to outsource all liability to the franchisees who directly contract with the workers.

The District Court in *Salazar* refused to apply *Dynamex* and granted summary judgment to McDonald's. *See Salazar v. McDonald's Corp.*, (N.D. Cal., Aug. 16, 2016) 2016 WL 4394165. The Ninth Circuit affirmed, likewise refusing to apply *Dynamex*, or the proper suffer or permit standard, and not even acknowledging the decision in *Jan-Pro*, which had been decided in the *interim*, or drawing on the analysis in *Depianti. Salazar v. McDonald's Corp.*, (9th Cir. 2019) 939 F.3d 1051, 1058. In 2-1 panel decision, the panel held that McDonald's was not an "employer" under California law that could potentially be liable for wage-and-hour violations committed against the fast food crew members.

Plaintiffs in *Salazar* filed a Petition for Rehearing by Panel or En Banc, and the *Jan-Pro* Certification Order remains pending. This Court may still now choose to take up the additional questions suggested above in *Jan-Pro*. Should this Court decide to address the issue of *Dynamex*'s application to the question of whether an entity is a joint employer, then

Petitioner respectfully requests that the Court stay this petition pending its consideration of *Jan-Pro*.

As described further below, **if the ABC test is applied**, Defendant cannot prevail under the test. *See* Part IV.B. **Finally**, even if the Court of Appeals needed to reach the control over wages and conditions test (under *Martinez*) or the *Borello* test (which it should not), the Court erred in concluding that no reasonable factfinder could find an employment relationship under *Borello*. *See* Parts IV.C–D.

## III. STATEMENT OF THE CASE

### A. Introduction

This is a wage and hour action which Petitioner has brought against Defendant Equilon Enterprises, LLC dba Shell Oil Products US ("Shell"). Petitioner seeks recovery under *Labor Code* § 1194 and Wage Order 7-2001 of unpaid wages for overtime and for missed meal and rest breaks. Petitioner alleges that Shell is his joint employer.

Shell owns the service stations at which Petitioner worked. Shell's primary business at this station was the sale of its branded motor fuel to the public. Shell owned this fuel until it was sold to the public, set the retail price for its sale, owned all of the property on which the motor fuel business operated, and owned all of the equipment necessary to operate that motor fuel facility. It also created three primary manuals that dictated in detail how employees should operate the stations where the fuel is sold. Danville did not share in any proceeds generated from the sale of fuel (which accounted for 90% of the revenue generated at the stations) and had no other interest in the fuel business. Instead, Danville was paid a flat fee for operation expenses of $2,000 a month and reimbursement of certain labor expenses.

Shell provided Danville with three detailed manuals outlining in minute detail the fuel related tasks to be performed and mandated by

contract that ARS "ensure" that its station employees followed these manuals. Shell periodically inspected the station to verify compliance which Shell also verified by daily written reports prepared by station employees and forwarded to Shell through Danville.

**B. Procedural Facts**

Henderson commenced this action on July 27, 2010. [AA 1373].[7]

On November 12, 2010, the Court below stayed this action for the pendency of earlier filed related actions. [AA 1375-1377]

On June 12, 2015, Henderson moved to file his Second Amended Complaint for Labor Code and Unfair Competition Law Violations so that he might delete class allegations in order to proceed on his individual claims. [AA 35-97, 1401] On September 15, 2015, the Superior Court below issued an order granting Henderson's motion subject to certain conditions. [AA 98-103, 1403-1409] While Henderson was in the process of satisfying these conditions, Henderson dismissed without prejudice the claims against former defendant C6 Resources, LLC, a subsidiary of Shell. [AA 104-108, 113-115, 1412]

On April 11, 2016, Henderson filed his Second Amended Complaint. [AA 116-140, 1413] Henderson alleged that he was employed as the station manager of several Shell owned and Danville operated California service stations, worked overtime, did not receive overtime pay, missed off-duty meal and rest breaks and did not receive compensation for those missed breaks. He also alleged that while he was hired by Danville, Shell was liable as his "joint employer."

The stay of the action was lifted on April 15, 2016. [AA 1413]

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[7] References to "AA" are to the Appellant's Appendix and page numbers applicable.

On May 25, 2016 Danville filed its answer. [AA 141-148, 1414] Danville was subsequently dismissed from the action pursuant to settlement, on October 7, 2016. [AA 966-967, 1416-1417].

On July 28, 2016, Shell filed its motion for summary judgment solely on the issue of joint employment. [AA 149-151, 1413] Oral argument on the motion was conducted on January 12, 2017. A copy of the transcript of that argument is contained at AA 1205-1269].

Prior to oral argument, the Court below issued a tentative ruling granting the motion. [AA 1172-1179] On February 3, 2017, the Court below issued its Opinion and Order which incorporated as an exhibit the Court's tentative ruling. [1161-1179]

On March 30, 2017, the Court below filed and entered the Judgment by Court from which appeal was taken. [AA 1180-1181] On April 3, 2017, Shell served a Notice of Entry of Judgment by Court. [AA 1182- 1187] On May 30, 2017, Petitioner appealed, and the Court of Appeal ultimately issued the *Henderson Opinion*, attached hereto, on October 8, 2019. [AA 1270- 1295]

### C. Undisputed Facts

Prior to 2003, Shell both owned and operated a number of California stations which were staffed by Shell's own employees and through which Shell derived substantial knowledge of service station operations (the Contractor Operated Retail Outlet ("CORO") structure). [AA 308, ¶¶ 3-4] During this time Danville operated Shell station. [AA 1163][8] Petitioner for a time was employed directly by Shell to manage two of its stations. [AA 980-981, ¶¶ 4-5]

[8] There is no evidence that Danville had any other business, owned any service stations or operated any service stations other than for Shell. [AA 1163]

In 2003, Shell created its MSO program, and subsequently transferred ownership of its stations into this program. [AA 980-981, ¶ 5.]

Under the MSO program, Shell divided its business into two distinct sides governed by two different contracts: the fuel side and the consumer products and services (convenience store) side. The primary business was the fuel side, which amounted to over 90% of the revenue generated at the station; this was governed by the MSO contract between Shell and Danville. [AA 350-377, 379-404, 408-433 & 435-462] Under this contract the fuel side – all of the equipment and real property necessary for the sale of motor fuel to the public, and the fuel itself until sold to the public – is owned exclusively by Shell. [AA 351–52]. Under this contract Shell is entitled to 100% of the revenue derived from fuel sales and Shell unilaterally set the price at which its fuel was sold. [AA351–52, 358] Shell also includes an indemnification provision included in paragraph 11(j) of each MSO Contract. [AA 357, 386, 415 & 442]

The consumer product and service side, which was the C-store and car wash, was governed by lease of only those small interior portions at the service station. [AA 464-478, 480-494, 498-517 & 519-538] Under the lease, the operator would pay Shell rent but would purchase its own products for sale to the public and retain 100% of the revenue from sales.

Danville became an MSO operator in August 2003. [AA 350] Danville was ultimately assigned 14 stations. [AA 377] Danville had no interest in the motor fuel business. As will be seen below, Shell dictated all of the policies and procedures used to operated the motor fuel business. Danville merely provided the labor that worked at the Motor Fuel Facility, receiving a $2,000/month fee and reimbursement of the expenses used to operate the Motor Fuel Facility. [AA 354-355 & 365]

Petitioner Billy R. Henderson worked as a station manager at one or more Shell stations, operated through Danville, from approximately 2001

continuing into 2008. [AA 244–45] During that time, the stations at which Petitioner worked transitioned to operating under the MSO model but his duties remained essentially the same. [AA 245] Petitioner consistently worked Monday through Saturday, for approximately 68 hours a week, but was never paid overtime, only his monthly salary. [AA 246]

## IV. ARGUMENT

### A. The Court of Appeal Erred by Holding that the ABC Test Does Not Apply in the Joint Employer Context

*Martinez*, 49 Cal. 4th at 64, a ***joint employer case***, and *Dynamex*, 4 Cal. 5th at 943-48, a case that extended the application of the "suffer or permit" test to misclassification claims, from the joint employer context – both make clear that the "suffer or permit" test is used to determine whether an entity is a joint employer. Regardless, the Court of Appeal here curtailed its analysis and merely tracked the (flawed) analysis set forth in *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal. App. 5th 289. *Henderson Opinion* at 7. The Court held that *Dynamex* did not apply in this case, ultimately following the same (incorrect) reasoning as that set forth in *Curry*. *Henderson Opinion* at 19 n. 7.

The Court of Appeal recognized that when this Court adopted the ABC test in *Dynamex*, the Court was discussing the test from *Martinez,* a joint employer case. *See Henderson Opinion* at 15. However, rather than following that point to its logical conclusion – that the ABC test remains applicable in the joint employment context – the Court retreated to *Curry*, which read the language in *Dynamex* as somehow *limiting* the "suffer or permit" test to independent contractor misclassification claims. The *Henderson* Court stated as follows:

> At bottom, *Dynamex* was concerned with the problem of businesses misclassifying workers as independent contractors so that the business may obtain economic advantages that result from the avoidance of legal and economic obligations imposed on an

> employer by the wage order and other state and federal requirements. . . .
>
> Those policy concerns are not present in the instant appeal, or more broadly, in wage and hour claims arising under a joint employer theory of liability. *Henderson Opinion* at 18.

Therefore, the Court concluded, "Given the substantial differences animating these policy concerns, we see no reason to depart from the well-established framework for analyzing the joint employment relationship under *Martinez*," and cited back to *Curry*. The conclusion proves illogical; application of *Martinez*, which *Dynamex* clarified, now requires application of the ABC test.

The Court of Appeal erred in its conclusion for two reasons. First, the text of *Dynamex* and *Martinez*, as well as the Massachusetts case law on the ABC test which this Court has adopted, makes clear that the ABC test is applicable in the joint employer context. Second, the public policy goals that the *Dynamex* court, highlighted in adopting the ABC test, are explicitly applicable to the joint employer context.

#### i. The Court erred in reading of *Dynamex* and *Martinez* and thus contributed to the lack of uniformity amongst courts and requires review

*Dynamex* did not create new law; it merely enunciated the "suffer or permit" test, one of three employment status tests set forth in *Martinez*. The Court embraced the ABC test because it would "provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis." *Id.* at 964. *Dynamex* meant to sharpen, not limit, the enforcement of the California labor standards.

The language of this Court in *Dynamex* did not limit its clarification of *Martinez*'s "suffer or permit" definition of employment to the

independent contractor context. Rather, it appears a given from *Dynamex* that the "suffer or permit" test (and therefore now the ABC test) applies in the joint employer context:

> Thus *Martinez* demonstrates that the suffer or permit to work standard does not apply only to the joint employer context, but also can apply to the question whether, for the purposes of the obligations imposed by a wage order, a worker who is not an 'admitted employee' of a distinct primary employer should nonetheless be considered an employee of an entity that has 'suffered or permitted' the worker to work in its business. *Dynamex*, 4 Cal. 5th at 944-45.

Furthermore, in Footnote 17 the Court discussed the application of the ABC test in a joint employer context, conveying that this Court has already recognized that the test applies to the joint employer question:

> It is important to understand, however, that even when a larger business is found to be a joint employer of the subcontractor's employees under the suffer or permit to work standard, this result does not mean that the larger business is prohibited from entering into a relationship with the subcontractor or from obtaining benefits that may result from utilizing the services of a separate business entity. Even when the subcontractor's employees can hold the larger business responsible for violations of the wage order under the suffer or permit to work standard, the larger business, so long as authorized by contract, can seek reimbursement for any such liability from the subcontractor. *Dynamex*, 4 Cal. 5th at 945 n. 17.

This language is not mere surplusage. This language recognized that the Court's clarification of the Suffer or Permit Test is applicable to the multi-employer situation.

Additionally, the conclusion that the ABC test applies in the joint employer context under *Dynamex* is bolstered by Massachusetts case law. *Dynamex* specifically stated that it was adopting "the Massachusetts version of the ABC test." *Id.* at 955-956 n.23. The Massachusetts Supreme Judicial Court has already found in *Depianti*, 465 Mass. at 617-625, that the ABC test must be applied to each tier of alleged employer in a case

involving multiple putative employers. In that case, the Court examined a tiered employment structure remarkably similar to that in the case at bar in which there was no contract for service between the plaintiff and defendant but held that the defendant could nevertheless be liable for employment misclassification under the ABC test. See *Id.* at 617.

The defendant, Jan-Pro, portrayed itself as a franchisor that "sold regional rights to use the Jan-Pro brand to so-called 'regional master franchisees.'" *Depianti*, 465 Mass. at 608-09. The plaintiff, a cleaner, contracted with one of those regional master franchisees. *Id.* at 609. Plaintiff brought several claims against Jan-Pro for violations of the Massachusetts wage and hour laws, arguing that the ABC test applied to determine whether Jan-Pro was liable as his employer. *Id.* at 609-10. The *Depianti* Court concluded that Jan-Pro could not use its multi-tier structure to shield itself from liability and that the ABC test applied to determine whether it was the plaintiff's employer. *Id.* at 625 (citing *DiFiore v. American Airlines, Inc.*, (2009) 454 Mass. 486, 494 (holding that a company could not escape the requirement of the Massachusetts tips statute "by entering into a contract with a service entity . . . under which the service entity would employ the [workers] and agree to pay to or share with the airline or restaurant the service charge billed to customers")).

Despite this clear roadmap from the Massachusetts courts in applying the ABC test to joint employer claims (which this Court in *Dynamex* indicated should be consulted), the California Court of Appeal refused to apply the ABC test in *Curry*, 23 Cal. App. 5th 289, when addressing analogous claims brought by Plaintiff against Shell.

The *Curry* court thus lay the foundation for further disagreement between courts on the question, as demonstrated by subsequent opinions in *Vazquez* and *Salazar*.

In *Jan-Pro*, 939 F.3d 1045, a case borne out of *Depianti*, *id.* at 579 (explaining that the Plaintiffs claims had been severed and sent to Northern California), the Ninth Circuit found that application of the ABC test under *Dynamex* followed that as instructed in *Depianti*. In *Vazquez*, as discussed *supra* Part I, the Ninth Circuit applied the ABC test to claims brought against the same Jan-Pro, even though plaintiffs contracted with intermediate franchise entities and not directly with Jan-Pro, the defendant in the case (a much larger national corporation). Moreover, in *Jan-Pro*, the defendant argued almost exclusively that *Curry* holds that *Dynamex* does not apply in a multi-employer situation. Not only did the Court reject this argument and reach a contrary conclusion, the Court noted that the *Curry* analysis "is somewhat slim on its own terms." 923 F.3d at 599.

In contrast, the *Salazar* panel held that *Dynamex* did not apply in the joint employer context; however, the panel in *Salazar* opinion failed to cite to, much less reconcile, the decisions in *Jan-Pro* or *Depianti*. The panel summarily stated: "[*Dynamex*] has no bearing here, because no party argues that Plaintiffs are independent contractors. Plaintiffs are [intermediary's] employees; the relevant question is whether they are also McDonald's' employees." *Salazar*, 939 F. 3d at 1058.

The Court of Appeal here did not attempt to dig further and simply circled back to *Curry*, thus cementing the conflicted reading of *Dynamex* as limiting (rather than clarifying) the "suffer or permit" test.

**ii. The Court erred in analyzing the policy of *Dynamex* and *Martinez* and lack of clarity requires review**

The Court of Appeals also erred there in its conclusion that the policy concerns undergirding the adoption of the ABC test are absent in the joint employment context.

The California Supreme Court adopted the "ABC" test to ensure that workers can "provide at least minimally for themselves and their families

and to accord them a modicum of dignity and self-respect." *Dynamex*, 4 Cal.5th at 951. This public policy is also found in *Martinez*, in which this Court made clear that to employ includes to "suffer or permit to work," a decidedly broad definition in order to encompass employers that are not considered responsible under common law, such as in irregular employment relationship like that set forth here. *Martinez*, 49 Cal. 4th at 64. The California state legislature has now confirmed that strong public policy of enforcing wage and employment laws effectively in irregular employment contexts (such as contingent work and the "gig economy"), in order to prevent exploitation particularly of low-wage and vulnerable workers, like that of Plaintiffs here. *See* Assembly Bill No. 5 (statutorily adopting the ABC test). Correct application of the ABC test – as this Court and now the legislature has made clear – is of vital importance if California wage and employment laws are to be effectively enforced. Large corporate entities should not be allowed to outsource labor responsibilities to intermediate entities that directly hire workers (like Danville), yet exercise authority (as Shell does here) over how a business is run while attempting to shield themselves from accountability. The result is that when low-wage workers find themselves unpaid, underpaid, or otherwise cheated out of their hard-earned wages, liability is abdicated to a smaller entity even where, as here, the franchisor has operational control over the working conditions that may have led to those labor violations in the first place. This runs directly counter to the policy undergirding *Dynamex* and A.B. 5.

The *Dynamex* Court explicitly acknowledged that the policy concerns inherent in tiered employment schemes, such as the one in this case, justified the adoption of the ABC test. Immediately after announcing the ABC test, this Court approvingly cited David Weil's "The Fissured Workplace," which discusses tiered employment structures like the one at issue here. *Dynamex*, 4 Cal. 5th at 957-58. It is a common problem that

employers seek to avoid liability for wage violations through schemes in which a top-tier company may be better able to ensure wage law compliance, but will attempt to outsource responsibility to an intermediate entity without the financial means to ensure that proper wages are paid or to satisfy a judgment.[9]

The Court of Appeal here simply assumed (again, taking *Curry* as its starting point) that in a joint employment scenario, the employee is already considered an employee of the primary (direct) employer (which is the case here but certainly is not always the case), and that the employee presumably has been afforded all legal protections due to his or her status as an employee of the primary direct employer. However, if that were true, Petitioner would not have had to bring this case.

Massachusetts courts have also recognized that the same policies driving its ABC test in the misclassification context are equally present in the joint employer context. A significant factor in the *Depianti* court's reasoning was the legitimate concern created by the defendant's attempt to use its "multi-tier" structure to shield itself from liability. *Depianti,* 465 Mass. at 623-24 (citing *DiFiore*, 454 Mass. at 494).

Permitting Shell to avoid its obligations under the California Labor Code and the Wage Order simply by contracting with intermediary companies to purportedly staff the gas stations it owns and effectively operates, would create the same kind of end-run around California law, which would fly in the face of the very purpose of the "exceptionally broad suffer or permit to work standard in [the] California wage orders," the

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[9] *See* David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (Harvard Univ. Press, Feb. 3, 2014); David Weil, "Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience," 22 Econ. & Lab. Rel. Rev. 2, at 33-54 (July 2011).

adoption of which found its justification in the "fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied." *Dynamex*, 4 Cal. 5th at 952.

### B. Defendant Cannot Prevail on the ABC Test if it is Applied

Because the Court held that the ABC test does not apply in the joint employer context, the Court of Appeal declined to analyze Petitioner's claims under the ABC test. Under this test, as the Court of Appeal forecast in a footnote, the Defendant cannot prevail. *Henderson Opinion* 20 n. 8.

#### i. As the Court of Appeals Stated, Defendant Cannot Satisfy Prong B

The Court of Appeal agreed with Petitioner that "Shell is in the business of furnishing and selling fuel to retail customers – the same or similar work performed by appellant." *Id.* The Court is correct in its analysis, which sees through Shell's argument (as adopted by the *Curry* court) that it is merely in the real estate and fuel business. *Curry*, 23 Cal. App. 5th at 308. The Court erred in not finding this dispositive; Petitioner further outlines below the correct analysis to show that Defendants cannot establish Prong B and Petitioner will thus prevail.

How the parties attempt to characterize their business is of little import. *See Carey v. GateHouse Media Massachusetts I, Inc.,* (2018) 92 Mass. App. Ct. 801, 805-11 (holding that companies cannot avoid liability for misclassification under Prong B by creative labeling of what their usual course of business is). The *Carey* court also noted that "a service need not be the sole, principal, or core product that a business offers its customers, or inherently essential to the economic survival of that type of business, in order to be furnished in the usual course of that business." *Id.* at 808. *Vazquez,* is instructive on this issue. In *Jan-Pro,* the defendant claimed to be in the business of selling franchises. *Vazquez*, 923 F.3d at 598-99. The

Court examined the evidence and instead concluded that Jan-Pro was in the cleaning business. *Id.* As *Carey* and *Jan-Pro* show, what is important is the economic reality.

Here, the facts in the record demonstrate that Shell was in the business of selling fuel at its gas stations to the public: "Shell supplied the station with fuel products and set fuel prices. Danville *facilitated* the collection of customer payments for fuel purchases and the *transmission* of these payments to Shell." *Henderson Opinion* at 1-2. Danville had no interest in the fuel side of the business – which generated 90% of the station's revenue. Petitioner performed services required by Shell (and for the benefit if Shell. Shell required its intermediaries' employees to "'ensure' that its employees perform specific tasks and Danville directed Henderson to perform many of those tasks"; the intermediary thus simply relayed Shell's commands. *Id.* 9.

Due to Shell's requirements that the station be open every day, all day, Petitioner was "required to be at work every morning Monday through Saturday to perform the gas survey, complete mandatory fuel sales reports and make bank deposits for the benefit of Shell's motor fuel business," and Shell also determined how Petitioner was compensated for these tasks, as Shell unilaterally set the reimbursement rate to Danville for fuel related labor. *Id.* at 9; *see also id.* at 14 n. 5 discussing manuals.

Furthermore, Shell held itself out as a gas station,[10] branding each and every gas station it owned and providing suggestions to the

[10] Notably, in *Dynamex*, this Court approvingly *Awuah v. Coverall North America, Inc. (*D. Mass. 2010) 707 F. Supp. 2d 80, 82, a Massachusetts case applying the "ABC" test, which concluded that, under Prong B, the defendant was in the commercial cleaning business, despite its efforts to characterize itself merely as a "franchisor" that sold franchises without being itself engaged in commercial cleaning. The *Awuah* court concluded that the plaintiffs, who performed the cleaning, were employees

intermediary companies on how to maintain Shell's brand standards.[11] Shell, as the Court recognized, is in business of *selling* its fuel, which it did through the operation of its gas stations and Petitioner's performance of services for Shell.

**ii. Neither can Defendant Satisfy Prong C**

Because the Court decided not to analyze Petitioner's claims under the ABC test, the Court did not address whether Respondent could prove prong C, which examines whether the worker is "customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed," *Dynamex*, 4 Cal. 5th at 955-56.

In applying prong three, the Court must "determine 'whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise." *Coverall North America, Inc. v. Comm'r of Div. of Unemp. Assistance,* (2006) 447 Mass. 852, 858, (quoting *Boston Bicycle Couriers, Inc. v. Deputy Director of the Div. of Employment & Training*, (2002) 56 Mass. App. Ct. 473, 480). In its explanation of Prong C, this Court stated that the suffer or permit test "is intended to preclude a business from evading the prohibitions or responsibilities embodied in the relevant wage orders directly or indirectly – through indifference, negligence, intentional subterfuge, or misclassification." *Dynamex*, 4 Cal. 5th at 961-62. As such, the question is whether Petitioner has made the decision to go into business himself. *Id.*

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of the defendant under Prong B because the defendant could not prove that their work was outside its usual course of business, rejecting the defendant's argument that "franchising" was itself the defendant's business.

[11] Courts in Massachusetts have regularly recognized that public perception and advertising matter in determining what comprises a defendant's ordinary course of business under Prong B of §148B. *See Carey*, 92 Mass. App. Ct. at 805-10.

This was obviously not the case here, as Petitioner provided services, not for his own independent business; he wears the "hat" of Shell.[12]

**iii. Defendant cannot Satisfy Prong A**

Again, because the Court of Appeal did not analyze Petitioner's claims under the ABC test, Prong A was not analyzed. However, as with Prongs B and C, Respondent will be unable to satisfy Prong A. Under Prong A, the court is required to examine whether the worker is "free from the control and direction of the [alleged employer] in the performance of the work, both under the contract for the performance of the work and in fact." *Dynamex*, 4 Cal. 5th at 958.

Shell retained a contractual right to control Petitioner (for example, Shell retained the right to compel Danville to "remove" an employee with whom Shell was dissatisfied, *Henderson Opinion* at 11). Shell required that Danville and Petitioner's work comply with the specifications set out in three separate manuals; this is sufficient to disprove Prong A, as "a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees . . ." to be considered an employer under Prong A. *Dynamex*, 4 Cal. 5th at 958. In other words, the record demonstrates that Shell exercised considerable control, both directly and indirectly through ARS, which the Court ignored completely.

For example, Shell required its intermediaries' employees to perform numerous specific tasks. *Henderson Opinion* at 9. Shell also indirectly controlled how much Petitioner worked given the fact that its contract with Danville required the gas station to remain open 24 hours per day, 7 days

[12] Indeed, Petitioner was required to wear a shirt emblazoned by the Shell name and logo.

per week. *Id.* This scenario is exactly the type of fissured employment scheme that *Dynamex* was intended to address.

### C. The Court of Appeal Erred in Applying the Wage Order Test Effectively Eliminating Indirect Control as a Means of Satisfying this Test

The wage order definition of "Employer" is one of the three alternative tests for determining whether an entity is a joint employer. *Martinez*, 49 Cal. 4th at 64 and *Dynamex*, 4 Cal. 5th at 938. Under this test, "Employer" is defined as "any person . . . ***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." Wage Order 7-2001*, Cal. Code Regs., Title 8, § 11070* at ¶ 2.(F.) (emphasis added). *See also Dynamex*, 4 Cal. 5th at 926. While indirect control is explicitly part of the definition, the Court of Appeal effectively read "indirect" control out of the wage order.

The undisputed evidence before the Court of Appeal was that Shell controlled, through contracts and manuals, virtually all of the tasks performed by workers at its stations related to Shell's business even though Shell controlled staff tasks through its staffing contract with Danville.[13]

However, the *Henderson Opinion* lifted the *Curry* analysis the (erroneous) conclusion that Petitioner did not meet his burden because it was Danville who directly controlled working conditions and wages:

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[13] Moreover, one federal court examining the same Shell MSO contracts and manuals found in connection with a different issue that "Shell retained extensive control over the marketing of fuel and every aspect of the filling station operation, as well as substantial control over the marketing of convenience store products and services." *RWJ Cos. v. Equilon Enters., LLC* (S.D. Ind. 2005) 2005 U.S. Dist. LEXIS 38329 at 6-7, 9, 11 and 14.

> The record is undisputed that Danville alone set Henderson's wages, determined which employees would be deemed exempt from overtime regulations, and was solely responsible for Danville's payroll function and compliance with labor laws. Danville alone set its meal and rest break policies, enforced its own employee handbook, and determined Henderson's work schedule and the number of employees who worked at a particular station. That Danville may have understaffed its service stations, requiring Henderson to cover shifts for other employees and work longer hours, are working conditions that Danville created and Shell had no contractual authority to control or alter. Danville alone dictated the day-to-day tasks Henderson was required to perform and the conditions under which he performed them. *Henderson Opinion* at 9–10.

In reaching this conclusion, like the *Curry* court, the opinion failed to examine "why" Danville directed Petitioner to perform these tasks (because Shell mandated it do so),[14] nor does it examine what discretion Danville had with regard to these tasks (none). Additionally, the *Henderson Opinion* does not examine who benefits from the tasks Petitioner was required to perform related to the fuel business. Shell, as the sole owner of fuel business, is the only entity benefiting.

This Court in *Martinez*, 49 Cal. 4th at 59-60, and again in *Dynamex*, 4 Cal. 5th at 937, confirmed that the wage order definition reaches situations involving indirect control, "in which multiple entities control different aspects of the employment relationship." Shell is in the business of selling its branded motor fuels to the public. To do so, it needs workers working at the station. While Shell formerly employed these persons

[14] The opinion mentioned that Danville could explain "how" to perform the task but bypassed the why: "In short, while Danville was required by Shell to perform certain tasks under the MSO Agreement, Danville alone dictated how those tasks would be performed by its employees and controlled the day-to-day operations of the service stations." *Henderson Opinion* at 10.

directly, Shell has outsourced to the tenant of the convenience store, Danville, under its MSO model.

If allowed to stand, the *Henderson* opinion compounds the error by the *Curry* court and eliminates "indirect" control as a means of satisfying this test. At no point in either *Martinez* or *Dynamex* did this Court hold that the exercise of control indirectly through a third party could absolve the business owner from joint liability for wage order violations. To let the *Henderson Opinion* stand would sanction the roadmap set forth in *Curry* showing an alleged joint employer how to escape application of the wage order test. All that a business owner must do is outsource the staffing and HR functions to a third party and then avoid directly interfacing with the employee, clearly an end-run that flouts the Labor Code and wage orders.

### D. The Court of Appeal Erred in Applying the Common Law Test by Ignoring the Primary "Control of Details" Examination and Instead Reciting *Curry*'s Mechanical Application of the Secondary *Borello* Factors

As this Court stated in *Dynamex*, 4 Cal. 5th at 929, the seminal decision on the common law test for employment (one of three alternate tests under *Martinez*) remains *Borello.* Although it was no longer necessary for the Court of Appeal to apply *Borello*, in light of *Dynamex*, the Court followed *Curry* and applied *Borello*, thereby fundamentally erring in its analysis. *Henderson Opinion* at 12 & n. 4. To the extent this Court believes that an analysis of *Borello* is still needed in this case, Petitioner submits that the Court of Appeal's analysis is fundamentally flawed and requires review.

The primary test in *Borello* is whether the "hirer controlled the details of the worker's activities." *Dynamex*, 4 Cal. 5th at 927. Control need not be to all details but only the necessary details. *See id.* at 929, 933 and 958. Yet, the *Henderson Opinion* makes no analysis of the "control

over the details" of Petitioner's services retained by Shell in its MSO Contract and manuals, nor of Shell's control over the manner and means by which the results were accomplished, namely the sale of motor fuel to the public. Instead, the *Henderson Opinion* recites the flawed analysis in *Curry* and summarily follows suit. *Henderson Opinion* at 13.

With regard to the secondary factors enumerated in *Borello,* the Court applied those factors mechanically, losing sight of the ultimate goal of determining whether an entity should be held responsible for ensuring wage law compliance for the employees performing the services.[15] "The individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." *Dynamex*, 4 Cal. 5th at 922, 930 (citing *Borello*, 48 Cal. 3d at 351).

The *Curry* court determined that Petitioner was engaged in a distinct occupation. This is an inaccurate application of this secondary factor. Petitioner was paid a salary and had no opportunity for profit or loss; as discussed *supra* regarding Prong C, this is a flawed conclusion.

The *Curry* Court, and by extension the *Henderson* court in its reliance, also concluded that Petitioner's job required skills. However, the *Curry* Court did not explain how some *unique* skill set was required of Petitioner which did not apply to any manager of a service station regardless of ownership. See *Dynamex*, 4 Cal. 5th at 933.

With regard to the Instrumentalities, Tools and Place of Work factor, the *Curry* Court ignored that the fact that Shell provided all of the tools and equipment for the fuel business, wholly owned and occupied the Motor Fuel Facility, and mandated that Petitioner wear a uniform with the Shell

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[15] Indeed, it was this type of mechanical analysis of the multiple *Borello* factors that led this Court to adopt the simpler, and stricter, ABC test in *Dynamex. See Dynamex*, 4 Cal. 5th at 964.

name and logo. While the Length of Time factor was meant to distinguish between an ongoing relationship like Petitioner's and one of limited duration to accomplish a particular purpose, the Court used this factor to note that, while Shell could remove Petitioner (either here or in *Curry*) from working at the station, Shell could not directly terminate workers. This is simply not what this factor was meant to examine. Finally, the Regular Business factor was also misapplied by the *Curry* Court and by *Henderson* (in its reliance therein). This factor overlaps with the B Prong of the ABC test and the application of the wage order test. This Court went to great lengths in *Borello, Martinez, Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, and now *Dynamex*, to explain the proper analysis of the common law test. The Court of Appeal simply failed to follow this direction and threatens the proper application of the common law test in future cases if that opinion is allowed to remain standing.

## V. CONCLUSION

As described above, the Court of Appeal fundamentally misapplied this Court's recent *Dynamex* ruling and threatens to unwind the important principals established by this landmark ruling. This Court should grant this Petition for Review in order to ensure that the lower courts do not follow this misguided analysis of the Court's holding in *Dynamex.*

Dated: November 18, 2019

Respectfully submitted,

*/s/ Shannon Liss-Riordan*_____

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## CERTIFICATE OF WORD COUNT COMPLIANCE

In accordance with California Rules of Court, rule 8.504(d), I hereby certify that this brief contains 8,063 words as established by the word count of the computer program (Microsoft Word) used for preparation of this brief.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 13-point size Times New Roman font.

Dated: November 18, 2019

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.

*Attorney for Petitioner*

# EXHIBIT A

Filed 10/8/19

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| BILLY R. HENDERSON,<br>Plaintiff and Appellant,<br>v.<br>EQUILON ENTERPRISES, LLC,<br>Defendant and Respondent. | A151626<br><br>(Contra Costa County<br>Super. Ct. No. MSC10-02259) |



Plaintiff and appellant Billy R. Henderson brought a civil action for wage and hour violations against defendant and respondent Equilon Enterprises, LLC, doing business as Shell Oil Products US (Shell), under a "joint employer" theory of liability. Henderson's causes of action consisted of failure to pay overtime compensation, failure to pay for missed break periods, and unfair business practices (Bus. & Prof. Code, § 17200). The trial court found Shell was not Henderson's joint employer and granted Shell's motion for summary judgment. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Procedural History*

Henderson commenced this lawsuit as a class action in July 2010. The trial court stayed the action under the common law doctrine of exclusive concurrent jurisdiction due to the earlier filing of a related class action lawsuit. In April 2016, Henderson filed a second amended complaint removing the class action allegations and stating individual claims for unpaid wages, statutory wage and record-keeping penalties and interest, as well as restitution, injunctive, and declaratory relief under Business and Professions Code section 17200 et seq. Henderson alleged he had been employed as the station manager of

several Shell-owned gasoline stations operated by Danville Petroleum, Inc. (Danville). He claimed he worked overtime and missed off-duty meal and rest breaks without receiving compensation. He further alleged that while he had been hired by Danville, Shell was liable as his "joint employer" because Shell "both directly and indirectly controlled the wages, hours or working conditions" of Danville's employees.

Shell moved for summary judgment, asserting it could not be held liable because Danville was Henderson's sole employer. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 49 (*Martinez*) ["only an employer can be liable"].) Henderson settled his claims against Danville and opposed Shell's motion for summary judgment. After a hearing conducted on January 12, 2017, the trial court issued its opinion and order granting Shell's motion. Judgment in favor of Shell was entered on March 30, 2017. This appeal followed.

***B. Relevant Facts***

As the parties acknowledge in their appellate briefs, the relevant facts are largely undisputed. Danville is a California corporation formed in 1997. Danville is a third-party service station operator. Henderson worked as a station manager for Danville from approximately 1998 to 2008, when he was fired following an accusation of sexual harassment. Henderson managed as many as seven of Danville's Shell-branded gas stations between 2001 through 2008. During this time, he was never directly employed by Shell.

Prior to August 2003, Danville operated Shell-branded service stations as a franchisee under a Contractor Operated Retail Outlet (CORO) Agreement.[1] Under these franchise agreements, third-party operators like Danville ran convenience stores and/or car washes at Shell-branded gas stations, retaining the proceeds from those activities while selling fuel for Shell. Shell charged the operators a royalty on convenience store sales and paid the operator a set fee for each gallon of gasoline sold.

In 2003, Shell discontinued the CORO program and adopted a Multi-Site Operator (MSO Agreement) structure. Under the MSO Agreement, Shell supplied the stations

[1] Henderson worked as the manager at two of these CORO stations.

with fuel products and set fuel prices. Danville facilitated the collection of customer payments for fuel purchases and the transmission of these payments to Shell. Shell compensated Danville for this service and reimbursed Danville for certain expenses. In connection with the fuel sale business, Danville also agreed to survey and report the fuel prices charged by competitors, change fuel prices as directed by Shell, keep the station open for specified hours, use specified equipment for recording and reporting all sale transactions to Shell, and abide by certain standards to protect the Shell brand. From August 2003 to 2008, Danville operated as many as 39 gas stations for Shell under an MSO Agreement, employing hundreds of people at those stations.

Danville and Shell also entered into a Multi-Site Non-Petroleum Facility Lease (MSO Lease) in connection with the operation of convenience stores, car washes, and quick service restaurants on Shell gas station sites. Under the MSO Lease, Danville operated these endeavors for its own benefit and was responsible for most of the associated expenses. Danville paid Shell a monthly rent for the leased facilities. The MSO Agreement and MSO Lease expressly disclaim any franchise relationship between Danville and Shell.

The MSO Agreement required Danville to comply with all applicable employment laws. Danville alone made decisions with respect to recruiting, interviewing, hiring, disciplining, promoting and terminating its employees. Danville had sole control over employee payroll functions, including whether employees would be deemed exempt from overtime regulations. Danville had its own employee handbook and set its own meal and break policies. Shell retained the right to ask Danville to "remove" an employee from a Shell-owned station "for good cause shown," but the MSO Agreement provided that Danville had sole authority to terminate its employees.[2]

The MSO Agreement also required Danville to operate gas stations in conformity with Shell's operational standards. Shell provided Danville with station operation manuals, including the MSO Site Operations Manual (MSO Manual), the Enhanced

[2] Shell never asked for any Danville employee to be removed.

Customer Value Proposition Reference Guide (CVP Reference Guide), and the Health, Safety and Environmental Reference Manual (Blue Book). Danville directed its employees as to how to comply with the provisions of these manuals, and the record indicates that Danville never required Henderson to read the MSO Manual. While the standards in these manuals appear extensive, the CVP Reference Guide specifies, among other things, that Danville "may use different methods [or] frequencies [than] those recommended here."

Both Danville and Shell conducted station inspections. Shell's inspections were referred to as "CVP inspections." Shell's representatives would give their inspection reports to Danville, and Danville would discuss any concerns with Henderson. Shell's representatives did not directly tell Henderson or other station employees how to perform their work. Danville performed its own audits of the convenience stores managed by Henderson. Henderson was instructed by Danville to contact Danville representatives for any questions about operating his stations. Shell was not involved in the decision to terminate Henderson's employment.

## DISCUSSION

### *I. Standard of Review*

The standard for reviewing a grant of summary judgment is well established. Summary judgment is appropriate if "there is no triable issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) To meet its initial burden in moving for summary judgment, a defendant must present evidence that either "conclusively negate[s] an element of the plaintiff's cause of action" or "show[s] that the plaintiff does not possess, and cannot reasonably obtain," evidence necessary to establish at least one element of the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853–854.) Once the defendant satisfies its initial burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) When considering an appeal from a grant of summary judgment, we independently review the record, "liberally construing

the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

***II. Joint Employment Relationships in Wage and Hour Claims***

Henderson's wage and hour claims are based on the Industrial Welfare Commission's (IWC) wage order No. 7-2001 (Cal. Code Regs., tit. 8, § 11070 (Wage Order No. 7).) Wage Order No. 7 defines "Employer" as a person or business "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." (Cal. Code Regs., tit. 8, § 11070, subd. 2(F).) An "Employee" is defined as "any person employed by an employer." (*Id.*, subd. 2(E).) "Employ" is defined as "engag[ing], suffer[ing], or permit[ting] to work." (*Id.*, subd. 2(D).)

In *Martinez*, the Supreme Court evaluated wage and hour claims brought by seasonal agricultural workers against a farmer who was their direct employer and two of the produce merchants through whom the farmer sold his strawberries. (*Martinez*, *supra*, 49 Cal.4th at p. 48.) The plaintiffs' suit was predicated on a theory that both the farmer and the produce merchants were their joint employers. The plaintiffs argued that in an action for unpaid and overtime wages under Labor Code section 1194, the court should look to the alternative definitions of "employ" and "employer" as set forth in IWC Wage Order No. 14 to determine who is a potentially liable employer. (*Martinez*, at p. 51). The Supreme Court examined "the question of how employment should be defined" and concluded "the IWC's wage orders do generally define the employment relationship, and thus who may be liable." (*Martinez*, at pp. 50, 52.) The court held: "To employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours, or working conditions [taken from the IWC definition of 'employer'], *or* (b) to suffer or permit to work [taken from the IWC definition of 'employ'], *or* (c) to engage," which the court construed as the common law definition of an employment relationship. (*Id.* at p. 64.) The Court concluded the produce merchants

could not properly be found to be an employer under any of the alternative definitions of employment found in the wage order. (*Id.* at pp. 68–77.)

In examining the first definition of an employment relationship—exercising control over wages, hours, or working conditions—the *Martinez* court recognized that the produce merchants could leverage their business relationship to influence the farmer. (*Martinez*, *supra*, 49 Cal.4th at pp. 72, 74–75.) However, while the merchant's representatives would explain to the agricultural workers "how the merchant wanted strawberries packed," would "check the packed containers as workers brought them from the field," and "would also sometimes speak directly to the workers, pointing out mistakes in packing such as green and rotten berries," these interactions were insufficient to establish that the merchants exercised control over the plaintiffs' working conditions. No evidence suggested that the farm workers viewed the merchants' representatives as their supervisors, and the farmer's contracts with the produce merchants gave the merchants no right to direct the farmers' employees. (*Id.* at pp. 76–77.) And while the produce merchants paid the farmer an advance, that fact alone was not sufficient to establish that the produce merchants controlled the workers' wages and were the workers' employers. (*Id*. at pp. 72, 74–75.)

Under the second definition—"to suffer or permit to work"—"the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring." (*Martinez, supra*, 49 Cal.4th at p. 70.)[3] No employment relationship was found under this test because while the produce merchants were undoubtedly aware that the farmer used laborers to satisfy his contracts, the produce merchants had no authority to prevent such work from occurring. "Neither [produce merchant] suffered or permitted plaintiffs

[3] As the *Martinez* court explained, the IWC language concerning an employer suffering or permitting a person to work was derived from child labor laws and was intended to impose civil or criminal liability for injuries sustained by children in a work setting even when no common law employment relationship existed between the minor and the defendant. (*Martinez*, *supra*, 49 Cal. 4th at p. 58 ["Not requiring a common law master and servant relationship, the widely used 'employ, suffer or permit' standard reached irregular working arrangements the proprietor of a business might otherwise disavow with impunity."]

to work because neither had the power to prevent plaintiffs from working. [The farmer] and his foremen had the exclusive power to hire and fire his workers, to set their wages and hours, and to tell them when and where to report to work." (*Id.* at p. 70.) That the produce merchants derived a benefit from the plaintiffs' labor was insufficient to make them employers, for under such a broad standard the grocer who purchases the strawberries from the defendants or the consumer who buys strawberries at the grocery store could conceivably become employers under this theory of liability. (*Ibid.*)

Finally, under the third IWC definition—"to engage"—the *Martinez* court concluded no common law employment relationship existed between the plaintiffs and the produce merchants. " '[T]he principal test of [a common law] 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.' " ( *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 (*Borello*); see *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 533 (*Ayala*) ["Whether a right of control exists may be measured by asking ' " 'whether or not, if instructions were given, they would have to be obeyed' " ' on pain of at-will ' " 'discharge[] for disobedience.' " ' " The plaintiffs in *Martinez* asserted that the produce merchants were joint employers by virtue of the control they exercised over the quality of the produce picked and packaged by the agricultural workers. In rejecting plaintiffs' quality-control theory, the *Martinez* court noted that the farmer alone decided which fields to harvest on any given day, he alone had the power to hire and fire his workers, and no evidence suggested that the produce merchants ever supervised or exercised control over his employees. (*Martinez*, *supra*, 49 Cal.4th at pp. 70, 72, 76–77.)

### *III. No Triable Issues of Material Fact Demonstrate an Employment Relationship Between Plaintiff and Shell*

Our analysis in the present case is greatly informed by *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289 (*Curry*), an opinion recently issued by our colleagues in Division Two of the Fourth District Court of Appeal. In *Curry,* the plaintiff brought a class action suit against Shell asserting the same claims as the ones presented

here: failure to pay overtime compensation, failure to pay for missed break periods, and unfair business practices. (*Id.* at pp. 292–293.) *Curry* involved the same MSO Agreement at issue here, and the named plaintiff in that case, like Henderson, was a station manager hired by a third-party operator (identified as "ARS") to manage a Shell-branded gas station. (*Id.* at pp. 293–295.) Like Henderson, the plaintiff in *Curry* alleged that Shell was her joint employer. (*Id*. at p. 296.)

Shell moved for summary judgment, contending it did not have an employment relationship with the plaintiff. As here, Shell argued that while ARS and Shell were in a contractual relationship, ARS alone managed and controlled " 'every aspect of its employment relationship with its gas station employees . . . .' " (*Curry*, *supra*, 23 Cal.App.5th at p. 297.) In opposing summary judgment, the plaintiff asserted a reasonable jury could find that Shell was her joint employer because it "mandates how [the fuel business] will be operated primarily by service station employees . . . ." (*Id*. at p. 298.) The trial court granted Shell's motion, finding that Shell was not Curry's employer, either solely or jointly. (*Id.* at p. 299.)

The Court of Appeal affirmed, concluding no triable issues of fact were presented demonstrating a joint employer relationship between Shell and the plaintiff under any of the definitions set forth in *Martinez*. Addressing the first prong of the *Martinez* test, the *Curry* court first considered whether any triable issues had been raised as to whether Shell exercised control over the plaintiff's wages, hours, or working conditions. (*Curry*, *supra*, 23 Cal.App.5th at p. 301.) Answering in the negative, the court concluded that ARS had sole control over the plaintiff's wages and hours because it " 'was responsible for hiring, firing, disciplining, training, and compensating' " her, and "was responsible for determining her work schedule." (*Id.* at pp. 302–303.) The undisputed facts also showed that ARS was solely responsible for the plaintiff's working conditions because only ARS could "direct [the plaintiff] to perform a particular task" and only ARS "maintained control over the daily work of its own employees." (*Id*. at p. 303.)

The *Curry* court rejected plaintiff's assertion that the MSO Agreement and Shell's various operating manuals detailing her daily tasks created a triable issue of fact. While

Shell exercised control over ARS, and ARS exercised control over the plaintiff, the plaintiff did not explain how Shell exercised control over her own working conditions. (*Curry*, *supra*, 23 Cal.App.5th at p. 303.) The court observed that while Shell required certain tasks to be performed by ARS under the contract, it "did not mandate who or how many employees execute the tasks." While Shell required, for example, that the gas station managed by plaintiff be open 24 hours a day, seven days a week, Shell did not control how many employees ARS used to staff the station. (*Id*. at pp. 303–304.) In addition, Shell had no control over the plaintiff's wages because there was no evidence that her wages were affected by reimbursements Shell made to ARS for its reasonable expenses related to maintenance of the fueling station. (*Id.* at p. 304.)

Henderson, whose counsel is the same attorney that represented the plaintiff in *Curry*, raises essentially the same arguments in the instant appeal. He contends Shell exercised control over his working conditions because the MSO Agreement required Danville to " 'ensure' " that its employees perform specific tasks and Danville directed Henderson to perform many of those tasks because he "was the on-site manager with generally only one cashier on duty with him." Shell allegedly controlled Henderson's hours because the MSO Agreement required "all of Danville's assigned stations to be open 24/7/365. This requirement alone required Henderson to cover shifts when a cashier was missing." Henderson also contends he was required to be at work every morning Monday through Saturday to perform the gas survey, complete mandatory fuel sales reports and make bank deposits for the benefit of Shell's motor fuel business. As to Shell's control over his wages, he states, "While Shell did not set each employee's compensation, Shell unilaterally determined how much it would reimburse Danville for all motor fuel related labor."

We reject these contentions for the same reasons explained in *Curry*. The record is undisputed that Danville alone set Henderson's wages, determined which employees would be deemed exempt from overtime regulations, and was solely responsible for Danville's payroll function and compliance with labor laws. Danville alone set its meal and rest break policies, enforced its own employee handbook, and determined

Henderson's work schedule and the number of employees who worked at a particular station. That Danville may have understaffed its service stations, requiring Henderson to cover shifts for other employees and work longer hours, are working conditions that Danville created and Shell had no contractual authority to control or alter. Danville alone dictated the day-to-day tasks Henderson was required to perform and the conditions under which he performed them. Henderson's contention that Shell's reimbursement of reasonable expenses amounted to indirect control of his wages is equally unavailing. No evidence was presented that Henderson's wages were affected by or connected to the reimbursement amounts set by Shell. The evidence does not reflect, for example, that Henderson was paid less for a shift if the reimbursement amount came in lower than expected. (See *Curry*, *supra*, 23 Cal.App.5th at p. 304.) In short, while Danville was required by Shell to perform certain tasks under the MSO Agreement, Danville alone dictated how those tasks would be performed by its employees and controlled the day-to-day operations of the service stations. We conclude Henderson has failed to raise a triable issue of fact concerning Shell's ability to control his wages, hours, or conditions of employment, and Shell is therefore entitled to judgment as a matter of law as to all claims based upon the IWC's definition of an "employer."

Under the second *Martinez* test for joint employment, whether Shell suffered or permitted Henderson to work, the *Curry* court explained this test "was derived from a desire to prevent evasion from liability by a claim that a person was not employed in a traditional master/servant relationship." (*Curry*, *supra*, 23 Cal.App.5th at pp. 310–311.) The definition has been interpreted to mean " 'the employer "shall not . . . permit by acquiescence, nor suffer by a failure to hinder." ' " (*Id*. at p. 311.) The *Curry* court concluded "the undisputed evidence reflects [the plaintiff's] hiring, firing, and daily tasks were ARS's responsibility. Thus, Shell did not acquiesce to [the plaintiff's] employment because Shell was not in a position to terminate [her] or hire a different person to perform the tasks [she] performed." (*Id.* at p. 311.)

We find *Curry's* analysis of this test dispositive of the question before us. The MSO Agreement provides that Danville had the exclusive right to recruit, interview,

train, hire, discipline, promote, and terminate its employees, and Danville maintained control over their daily work activities. While Shell retained the right to ask Danville to "remove" an employee from a Shell-owned station "for good cause shown," Henderson does not dispute that Shell had no right to fire him. As the trial court below found, "[r]emoval cannot be synonymous with discharge when the subsequent sentence [in the MSO Agreement] provides that Shell "shall *not* select, hire, *discharge,* supervise, or instruct any of [Danville]'s employees." (Italics added.) Shell cannot have acquiesced to Henderson's employment because Shell had no power to fire plaintiff, hire his replacement, or prevent him from working for Danville. (See *Curry*, *supra*, 23 Cal.App.5th at p. 311; *Martinez*, *supra*, 49 Cal.4th at p. 70.)

Nor has Henderson raised a triable issue of material fact with respect to whether Shell suffered Henderson's employment by failure to hinder. As the *Curry* court observed, Shell never exercised the option to remove an ARS employee from a service station and has not evoked the "good cause" that must precede any such removal. (*Curry*, *supra*, 23 Cal.5th at p. 311.) The same applies with respect to any Danville employee. Because Shell has not established the good cause required to remove Henderson from a service station, it had no power to hinder his work, and, by extension, could not have failed to hinder his work.

Henderson contends the IWC's "suffer or permit" definition is applicable because Shell failed to keep the claimed violations—unpaid overtime and missed meal and rest break compensation—from occurring. He misapprehends this test. The "suffer or permit" test does not concern whether the alleged joint employer failed to hinder or acquiesced to a violation. As discussed *ante*, the test concerns an alleged employer's failure to hinder the alleged employee's *work* by failing to prevent the work from occurring. (*Martinez, supra*, 49 Cal. 4th at pp. 69–70.) Because Shell had no role in either allowing or preventing Henderson from working for Danville, we conclude Henderson's causes of action fail under the "suffer or permit" definition of employment.

Under the third *Martinez* test, which concerns whether Shell was the plaintiff's employer under the common law definition of employment, the *Curry* court explained

that the "essence of the common law employment test " 'is the "control of details"—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work,' " along with eight other secondary factors.[4] (*Curry*, *supra*, 23 Cal.App.5th at pp. 304–305.) After a detailed analysis of all the factors, the court concluded that while Shell, along with ARS, had provided the plaintiff with a place to work and the equipment with which she performed her job, "one could not reasonably conclude that Shell controlled the manner and means by which Curry accomplished her work" (*id.* at p. 308) because none of the other factors applied. (*Id.* at pp. 304–308.) Undisputed facts showing the absence of a common law employment relationship included the following: (1) while Shell required various tasks to be performed by ARS, "there is nothing indicating that Shell required [the plaintiff] to be the person to perform those tasks" (*id*. at p. 305), (2) "Shell did not have input on the hiring process or [the plaintiff's] job duties" (*ibid.*), (3) while Shell could request that an employee be removed from a station, Shell could not terminate the plaintiff's employment (*id.* at pp. 306–307), (4) the plaintiff was not paid by Shell (*id*. at p. 307), and (5) unlike ARS, Shell was not in the business of operating fueling stations; instead it was in the business of owning gas stations (*id*. at pp. 307–308).

Henderson does not point to any record evidence that distinguishes this case from *Curry* or persuades us to depart from the Court of Appeal's reasoned analysis. Shell

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[4] These factors are: " '(1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship. [Citations.] The parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship.' " (*Curry*, *supra*, 23 Cal.App.5th at pp. 304–305.) This multifactor test was first articulated in *Borello, supra*, 48 Cal.3d at pages 350–351. The significance of these factors will vary, and certain factors, such as the " 'ownership of the instrumentalities and tools' of the job" (*Ayala*, *supra*, 59 Cal.4th at p. 539), may take on less importance in an overall evaluation of the right to control. (See *id.* at p. 540.)

required Danville to perform certain tasks under the MSO Agreement and MSO Lease but left the execution of those tasks to Danville, and neither contract gave Shell authority to hire, fire or direct the work of Danville's employees. (See *Ayala*, *supra*, 59 Cal.4th at p. 531 ["the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities' "], quoting *Malloy v. Fong* (1951) 37 Cal.2d 356, 370.) Although Shell supplied detailed station operation manuals, including the MSO Manual, the CVP Reference Guide, and the Blue Book, Danville was responsible for directing its employees' compliance with these manuals. Indeed, Danville never required Henderson to read the MSO Manual. And while both Shell and Danville conducted station inspections and audits, Shell's inspection reports were delivered directly to Danville—Shell had no formal communications with Henderson or other Danville employees. (Compare *Martinez*, *supra*, 49 Cal.4th pp. 75–76 [direct input from merchant representatives to plaintiffs concerning the quality and packaging of produce did not establish a supervisory or control relationship with farm worker plaintiffs].)

The *Curry* court distinguished two cases relied on here by Henderson, *RWJ Cos. v. Equilon Enters., LLC* (S.D.Ind., Dec. 28, 2005, Civ. A. No. 1:05-cv-1394-DFH-TAB) 2005 U.S.Dist. Lexis 38329, an unpublished federal court case from Indiana, and *Castaneda v. The Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015 (*Castaneda*). As the *Curry* court noted, the *RWJ* case involved whether the MSO Agreement amounts to a franchise agreement. (*Curry*, *supra*, 23 Cal.App.5th at p. 309.) In its analysis, the federal district court stated: " 'The evidence in this case shows that Shell retained extensive control over the marketing of fuel and every aspect of the filling station operation, as well as substantial control over the marketing of convenience store products and services. When reading cases addressing this issue, it is important to recognize that RWJ operates only Shell-branded filling stations and that RWJ's convenience stores are associated very closely with both the filling station operations and the Shell brand.' " (*Curry*, at p. 309.) The *Curry* court properly found the case inapposite, as the issue in

*RWJ* was whether the RWJ contract with Shell was a franchise agreement by virtue of the control Shell exercised over RWJ—not the *employees* of RWJ. (*Curry*, at p. 309.)[5]

In *Castaneda*, an employee filed a class action suit alleging the defendant corporation was the alter ego of a rehabilitation center owned by the defendant and asserting its corporate veil should be pierced. (*Castaneda*, *supra*, 229 Cal.App.4th at p. 1020.) Among other factors distinguishing *Castaneda* from *Curry*, the corporation owned the plaintiff's employer, set the rate of pay for its employees, and administered the employee benefits. (*Curry*, *supra*, 23 Cal.App.5th at p. 310.) Because those facts are not present here, we agree that *Castaneda* does not support the argument Henderson now advances.

Henderson also argues that the trial court failed to address the CORO station structure that was in place prior to August 2003. Under this business arrangement, Shell and Danville shared the revenue generated by the station, with Shell providing the motor fuel and Danville providing the products sold in the convenience stores. Henderson contends a triable issue exists whether the CORO structure amounted to a partnership between Danville and Shell. Henderson failed to present this issue before the trial court below. As Shell points out, Henderson never pleaded a partnership theory, adduced no evidence of a partnership between Shell and Danville, and failed to develop any such

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[5] While the MSO Agreement replaced the CORO franchise agreement, the MSO Agreement retained many of the attributes of the franchise agreement, including Shell providing Danville with detailed manuals concerning the dispensing and sale of gasoline, signage, and condition and maintenance of the property. Henderson places considerable emphasis on these manuals in arguing Shell exercised control over his employment. We note, however, that in *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, our Supreme Court held that a franchisor that supplied these same kinds of operations manuals did not thereby become the joint employer of the franchisee's employees and therefore was not liable for the franchisee's alleged violations under the Fair Employment and Housing Act (FEHA), specifically for alleged sexual harassment by a supervising employee of the franchisee. (*Patterson v. Domino's Pizza, LLC*, at p. 501.) Like the wage and hour laws, FEHA provides important employee protections in the workplace. Thus, the high court's conclusion that the attributes of a franchise agreement, and particularly the kinds of controls aimed at protecting a brand, do not create a joint employer relationship, appears apt in the present context, as well.

argument in opposing Shell's motion for summary judgment. Rather, Henderson hangs his hat on an evidentiary objection to a supplemental declaration filed by one of the defendants. We decline to take up a partnership theory of liability for the first time on appeal when the gravamen of plaintiff's claims has been joint employer liability. The argument is forfeited. (*North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 28–29 [" 'A party is not permitted to change [its] position and adopt a new and different theory on appeal. To permit [it] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.' ").

### *IV. Applicability of* Dynamex *to Claims of Joint Employer Liability*

While briefing was underway in this appeal, the California Supreme Court issued its opinion in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*). *Dynamex* examined what legal standard should apply to resolve whether a worker has been properly classified as an independent contractor or employee. Drawing from the "suffer or permit to work" test articulated in *Martinez* (see *ante* at p. 7), the *Dynamex* court adopted the "ABC" test to address claims of worker misclassification. (*Dynamex*, at pp. 958–963.) Henderson urges us to apply the ABC test and contends that under such test, Shell cannot establish that Henderson was not its employee. For the reasons explained below, we conclude that the ABC test in *Dynamex* does not fit analytically with and was not intended to apply to claims of joint employer liability.

In *Dynamex*, a putative class of delivery drivers brought suit against Dynamex Operations West, Inc. (Dynamex), a nationwide package and document delivery company. (*Dynamex*, *supra*, 4 Cal.5th at p. 914.) The plaintiffs alleged that Dynamex had misclassified them as independent contractors and such misclassification allowed Dynamex to circumvent the requirements of IWC wage order No. 9 and other provisions of the Labor Code pertaining to employers. (*Dynamex*, at p. 914.) The drivers argued that in analyzing whether an employment relationship had been established with Dynamex, the trial court should apply the three alternative definitions of employment set forth in the applicable wage order, consistent with *Martinez*. (*Dynamex*, at p. 914.) Dynamex countered that the wage order definitions in *Martinez* are relevant only to joint

employer claims, and the applicable standard for distinguishing employees from independent contractors is the multifactor common law employment test described in *Borello*. (*Dynamex*, at p. 915; see *ante*, at p. 12 & fn. 4.) Siding with the plaintiffs, the trial court found that common issues about the employment relationship predominated and certified the class. (*Dynamex*, at p. 915.)

Following an unsuccessful motion to decertify the class, Dynamex petitioned for writ of mandate at the Court of Appeal. The Court of Appeal rejected Dynamex's contention that two of the three definitions of employment under the wage order are relevant only to joint employment issues. The court concluded instead that all three definitions discussed in *Martinez* may be applied to determine whether a worker is an employee covered under the wage order or is an independent contractor. (*Dynamex*, *supra*, 4 Cal.5th at p. 915.) The Supreme Court granted review to consider whether the definitions of "employer" and "employ"—the first and second *Martinez* tests—are applicable to determine whether a worker is properly classified as an employee or independent contractor for purposes of compliance with the IWC wage order. (*Id.* at p. 916.)

The Supreme Court concluded that the "suffer or permit to work" definition of "employ" under the applicable wage order may be relied upon to evaluate claims that workers have been misclassified as independent contractors. As *Martinez* explained, the suffer or permit to work standard was established by wage order over a century ago and has its roots in addressing irregular working arrangements and child labor cases, not simply joint employer claims. (*Dynamex, supra,* 4 Cal.5th at pp. 944–945, citing *Martinez*, *supra*, 49 Cal.4th at pp. 57–58.) A broad application of the suffer or permit to work standard is justified as well by the history and remedial purpose of the wage orders and other social legislation intended to protect the health and welfare of workers, provide industrywide fair labor practices for law-abiding businesses, and ensure that the costs of substandard wages and unsafe working conditions are not borne unnecessarily by the public. (*Dynamex*, at pp. 952–953.) The high court recognized that a literal application of the suffer or permit to work standard would characterize *all* individual workers who

directly provide services to a business as employees, encompassing even those individuals who traditionally serve as independent businesses, such as plumbers and electricians. (*Id.* at p. 949.) The court thus adopted the "ABC" test to distinguish covered employees from traditional independent contractors who would not reasonably have been viewed as working in the hiring entity's business.

The court explained: "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfied *each* of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex*, *supra*, 4 Cal. 5th at pp. 955–956.) The hiring entity's failure to prove any one of these three elements will be sufficient to establish that the worker is an employee, and not an independent contractor, covered under the relevant wage order. (*Id.* at p. 964.)

Part A of the ABC test is concerned with whether a worker is subject to the type and degree of control a business typically exercises over an employee, the equivalent of a common law employment relationship predicated on the principal's right to control how the end results are achieved. (*Dynamex*, *supra*, 4 Cal.5th at pp. 958, citing *Borello*, *supra*, 48 Cal.3d at pp. 353–354, 356–357.)[6] Part B asks whether the worker is engaged in services that would ordinarily be viewed as part of the hiring entity's usual business operations. (*Id.* at p. 959.) When a worker provides services which are comparable to work performed by the hiring entity's employees or which align with and further the

[6] As discussed *ante*, no evidence was presented demonstrating that Shell had a right to control Danville's employees in any way, and certainly no evidence that Shell could terminate or discipline Danville's employees if its instructions were not followed. The existence of Shell-provided operations manuals, without more, does not suffice to create a joint employer relationship with appellant. (See *ante*, p. 14, fn. 5.)

hiring entity's operations, "the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees." (*Id.* at p. 960.) Part C asks the related question whether the independent contractor is an "individual who *independently* has made the decision to go into business for himself or herself." (*Id*. at p. 962.) This test starts from the premise that a business may not evade the prohibitions or responsibilities of being an employer by unilaterally determining a worker's status as "independent contractor" or by "requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor." (*Ibid*.) Part C therefore requires inquiry into whether the worker has taken steps to establish and promote his or her independent business, such as through licensing, incorporation, advertisements, the existence of multiple customers, and other related indicia of self-employment. (*Ibid*.)

At bottom, *Dynamex* was concerned with the problem of businesses misclassifying workers as independent contractors so that the business may obtain economic advantages that result from the avoidance of legal and economic obligations imposed on an employer by the wage order and other state and federal requirements. "[T]he risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled." (*Dynamex*, *supra*, 4 Cal.5th at p. 913.)

Those policy concerns are not present in the instant appeal, or more broadly, in wage and hour claims arising under a joint employer theory of liability. In a joint

employer claim, the worker is an admitted employee of a primary employer, and is subject to the protection of applicable labor laws and wage orders. The distinct question posed in such claims is whether "another business or entity that has some relationship with the primary employer should properly be considered a joint employer of the worker and therefore also responsible, along with the primary employer, for the obligations imposed by the wage order." (*Dynamex*, *supra*, 4 Cal.5th at p. 915.) Joint employer claims raise different concerns, such as when the primary employer is unwilling or no longer able to satisfy claims of unpaid wages and workers must look to another business entity that may be separately liable as their employer. (See *Martinez*, *supra*, 49 Cal.4th at pp. 47–48 [claims asserted against putative joint employers after primary employer defaulted on payment of back wages and statutory penalties]; *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 928 [federal and state wage and hour claims asserted against county for unpaid in-home supportive services under theory that county's exercise of control over administration of program rendered it a joint employer].) Given the substantial differences animating these policy concerns, we see no reason to depart from the well-established framework for analyzing the joint employment relationship under *Martinez*.[7]

Further underscoring our conclusion that the *Dynamex* ABC test was not intended to apply to joint employer claims is that parts B and C of the ABC test do not fit analytically with such claims. Part B probes whether a worker is rendering services that would ordinarily be seen as part of the hiring entity's usual business operations because

[7] The *Curry* court similarly concluded that the ABC test in *Dynamex* was not intended to apply in joint employment cases. "[T]he Supreme Court's policy reasons for selecting the 'ABC' test are uniquely relevant to the issue of allegedly misclassified independent contractors." (*Curry*, *supra*, 23 Cal.App.5th at p. 314.) In the "joint employment context, the alleged employee is already considered an employee of the primary employer; the issue is whether the employee is also an employee of the alleged secondary employer." (*Ibid*.) The *Curry* court reasoned that "the 'ABC' test set forth in *Dynamex* is directed toward the issue of whether employees were misclassified as independent contractors. Placing the burden on the alleged employer to prove that the worker is not an employee is meant to serve policy goals that are not relevant in the joint employment context." (*Ibid.*)

such activity would indicate that the worker is in actuality a misclassified employee. But a worker whose primary employer has a contractual relationship with another business entity is in a different situation. As an existing employee, he or she already performs work that furthers the interests of the primary employer and is protected under wage and hour laws. Thus, asking whether that employee's work is "outside the usual course of business" of a secondary employer makes little sense if one wants to determine whether the secondary employer has suffered or permitted the employee to work for them. The relevant inquiry is instead whether the secondary entity has the power to control the details of the employee's working conditions, or indeed, the power to prevent the work from occurring in the first place. (See *Martinez*, *supra*, 49 Cal.4th at p. 70.) As a practical matter, applying Part B to claims of joint employer liability might result in the end of many service contracts or other joint venture agreements between two business entities that happen to be in the same line of work (unless one business is willing to oversee the human resources and payroll departments of the other company). We do not believe that was the intended effect of *Dynamex*.[8]

Trying to apply Part C of the ABC test to joint employer claims recalls the proverbial square peg in a round hole. The basic premise of a joint employer claim is that the plaintiff is already employed by a primary employer and is seeking to establish that another business entity is separately responsible for obligations imposed under the wage order and other requirements. The primary thrust of Part C, on the other hand, is to determine whether the plaintiff is an independent contractor who has chosen the burdens

[8] In an abundance of caution, the *Curry* court applied the ABC test and concluded that no triable issues of fact demonstrated an employment relationship between Shell and the plaintiff under those factors. With respect to Part B, the court found that Shell was not in the business of operating fuel stations but was instead in the business of owning real estate and fuel. (*Curry*, *supra*, 23 Cal.App.5th at p. 315.) We believe appellant has the better of the argument and that Shell is in the business of furnishing and selling fuel to retail customers—the same or similar work performed by appellant. But as discussed *ante*, this similarity should not, by itself, transform Shell into appellant's joint employer in the absence of any evidence that Shell has the right to exercise control over appellant's wages, hours, or conditions of employment.

and benefits of *self-employment*. (*Dynamex*, *supra*, 4 Cal.5th at p. 962.) The factors relevant to Part C, whether the worker has taken steps to establish his or her independent business, have no application in the instant appeal because appellant elected to work for his primary employer, Danville, and had no reason to establish an independent occupation or trade. The same circumstance would seem to apply to many, if not most, joint employer wage and hour claims. A literal application of Part C in the context of joint employment questions would result in the absurdity that a secondary business entity is deemed a joint employer merely *because* the plaintiff is already employed by the primary employer. We conclude the *Dynamex* ABC test does not apply in the joint employment context, and the governing standard is found in *Martinez*.

**CONCLUSION**

Appellant Henderson has not presented any triable issues of fact demonstrating the existence of a joint employment relationship between Shell and appellant under the three alternative definitions of employment set forth in Wage Order No. 7. *Dynamex* does not alter our conclusion because the ABC test was adopted to address claims that workers have been misclassified as independent contractors rather than covered employees, and was not intended to apply to claims of joint employer liability. The governing standard for determining the existence of a joint employment relationship remains *Martinez*. Because no evidence demonstrates that Shell was appellant's employer, either solely or jointly, summary judgment was properly granted.

**DISPOSITION**

The judgment is affirmed. Equilon is to recover costs on appeal.

_____
Sanchez, J.

WE CONCUR:

_____
Margulies, Acting P.J.

_____
Banke, J.

Trial Court: Contra Costa County Superior Court

Trial Judge: Hon. Barry P. Goode

Counsel:

Bleau Fox, PLC, Samuel T. Rees, Lichten & Liss-Riordan, P.C., Shannon E. Liss-Riordan, for Plaintiff and Appellant

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# EXHIBIT B

Office of the Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

October 25, 2019

**Re: *Vazquez v. Jan-Pro Franchising International*, S258191**

To the Honorable Justices of Supreme Court of California:

The parties in the above referenced case submit this joint letter to the Supreme Court of California, pursuant to California Rule of Court 8.548(e)(2), and in light of the amicus letters filed regarding the United States Court of Appeals for the Ninth Circuit's September 24, 2019, Order Certifying Question to the California Supreme Court. *See Vazquez v. Jan-Pro Franchising Int'l* (9th Cir. Sept. 24, 2019) ___F.3d ___, 2019 WL 4648399, No. 17-16096 [hereinafter "Certification Order"].

Jan-Pro Franchising International, Inc. maintains its position previously presented to this Court on October 16, 2019, and this letter is not intended to modify that position. That said, while Plaintiffs have a different view on whether the question certified by the panel needs to be addressed by this Court, the parties are in agreement that the following question should be addressed by this Court:

> What standard applies to determine whether a franchisee has been misclassified as an independent contractor and thereby suffered alleged wage-and-hour violations?

Under the standard set forth in Rule of Court 8.548(f)(1),[1] this question merits consideration by the Court,[2] and the Court should grant the Ninth Circuit's Certification Order.

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[1] "In exercising its discretion to grant or deny the request, the Supreme Court may consider whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law, and any other factor the court deems appropriate." Rule of Court 8.548(f)(1). While the Court is considering whether to grant a certification request, parties may submit letters and replies in support of certification, and may "ask[] the court to restate the question," in which case the letter must also "propose new wording." Rule of Court 8.548(e)(3). The Ninth Circuit panel stated in its Certification Order: "Our phrasing of the question should not restrict the Court's consideration of the issues involved. The Court may rephrase the questions as it sees fit in order to address the contentions of the parties. If the Court agrees to decide this question, we agree to accept its decision." 2019 WL 4648399, at *1. This Court therefore has the ability, and is within its authority, to take up the parties' proposed question.

[2] Plaintiffs have two additional questions that they believe this Court should exercise its discretion in granting review of, as certified by the Ninth Circuit panel as part of the "issues involved" in *Vazquez*. Plaintiffs will submit that request by separate letter.

The parties agree that the proposed question is an important one. Answering what standard governs misclassification claims brought by independent contractors in the franchise context, and thereby claims of wage-and-hour violations, like those of the Plaintiffs in *Vazquez*, is necessary to both "secure uniformity," and "settle an important question of law." *Vazquez* and other cases demonstrate a lack of uniformity when courts seek to select the correct standard for misclassification and employment-based claims in the franchise context. *See, e.g.*, *Salazar v. McDonald's Corp.* (9th Cir. Oct 1, 2019) ___ F.3d ___, 2019 WL 4782760, at *6 ("*Salazar*"); *Henderson v. Equilon Enterprises, LLC*, (Cal. Ct. App. 1st Div. Oct. 8, 2019) 2019 WL 4942458. As both the lower court and Ninth Circuit panel recognized in considering *Vazquez*, there is no controlling precedent on the correct standard. *Vazquez*, 923 F. 3d. at 592 ("The district court recognized that '**no binding decision ha[d] addressed the standard applicable to determining whether a franchisor is an employer of a franchisee**,'") (quoting *Roman v. Jan-Pro Franchising Int'l, Inc.* (N.D. Cal. May 24, 2017) No. 16-cv-05961, 2017 WL 2265447, at *3) (emphasis supplied).

Clarification of the correct test is of paramount importance. Multiple cases raising misclassification and wage-and-hour claims brought by individuals classified as franchisees, who allege misclassification as independent contractors, are pending before courts in the Ninth Circuit. *See, e.g.*, *Juarez v. Jani-King of California*, (N.D. Cal.) C.A. No. 4:09-cv-03495-YGR (individuals classified as franchisees, bringing misclassification and Cal. Lab. Code violation claims, remanded for further proceedings in light of *Dynamex*); *Gonzalez v. Coverall North America, Inc.* (9th Cir.) Case No. 19-55511 (individuals classified as franchisees, bringing misclassification and Cal. Lab. Code provision violation claims pending appeal in the Ninth Circuit); *Rivas v. Coverall* (C.D. Cal.) Case No. SACV-18-1007 JGB (KKx) (individuals classified as franchisees, bringing misclassification and PAGA claims).

For this case, and others, it is imperative that franchisors, franchisees, and franchisees' workers understand how their relationship will be treated by the law, so that employers may ensure compliance with and workers may enforce their protections under the Cal. Lab. Code provisions and Wage Orders.

## CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court consider the question of what standard applies to determine whether a franchisee has been misclassified as an independent contractor and thereby suffered alleged wage-and-hour violations.



---

Plaintiffs disagree that the question of retroactivity merits grant of certification, as this Court already denied a request for rehearing on the question of retroactivity in *Dynamex*, and there is no split of authority on the question. *See, e.g.*, *generally Valadez c. CSX Intermodal Terminals, Inc.* (N.D. Cal. Mar. 15, 2019) 2019 WL 1975460, at *5 (*citing Johnson v. VCG-IS, LLC*, 30-2015-00802813-CU-CR-CXC); *Gonzales v. San Gabriel Transit, Inc.* (Oct. 8, 2019) ___ Cal. 5th ___, 2019 WL 2942213, at *11.

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# EXHIBIT C

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October 25, 2019

Office of the Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

**Re: *Vazquez v. Jan-Pro Franchising International*, S258191**

To the Honorable Justices of Supreme Court of California:

Pursuant to California Rule of Court 8.548(e)(2), Plaintiffs Gerardo Vazquez, Gloria Roman, and Juan Aguilar submit this letter in reply to the amicus letters filed in support of United States Court of Appeals for the Ninth Circuit's September 24, 2019, Order Certifying Question to the California Supreme Court. *See Vazquez v. Jan-Pro Franchising Int'l* (9th Cir. Sept. 24, 2019) ___ F.3d ___, 2019 WL 4648399, No. 17-16096 [hereinafter "Certification Order"].

Plaintiffs disagree that the question presented by the Ninth Circuit's order need be taken up by this Court, namely the question of whether *Dynamex Operations West Inc. v. Superior Court* (Cal. 2018) 416 P.3d 1 (*Dynamex*) applies retroactively. This Court denied a petition to modify that decision to limit its application prospectively, *Dynamex*, 416 P.3d 1, *petition to modify denied*, June 20, 2018, and the courts have been consistent in determining that the decision has retroactive application. *See Vazquez v. Jan-Pro-Franchising Int'l, Inc.* (9th Cir. 2019) 923 F.3d 575, 586–90.; *Gonzales v. San Gabriel Transit, Inc.* (Oct. 8, 2019) ___ Cal. 5th ___, 2019 WL 2942213, at *11; *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal. App. 5th 558, 572 n. 12; *Valadez c. CSX Intermodal Terminals, Inc.* (N.D. Cal. Mar. 15, 2019) 2019 WL 1975460, at *5; *Johnson v. VCG-IS, LLC* (Super Ct. Cal. July 18, 2018) Case No. 30-2015-00802813-CU-CR-CXC, Ruling on Motion in Limine, at *1–2 (a true and accurate copy is attached hereto as **Exhibit A**).

However, Plaintiffs respectfully submit that this case raises several other extremely important unsettled issues of California law in the wake of *Dynamex*, upon which the courts have not been in agreement and which warrant consideration by this Court.[1]

The parties have jointly requested that the Court accept certification of the question of what standard applies to determine whether a worker classified as a franchisee has been misclassified as an independent contractor and thereby suffered alleged wage-and-hour violations.

In addition to this question, Plaintiffs submit that this case also raises the following two extremely important unsettled issues that remain after *Dynamex*, which the Court should address:

(1) Does *Dynamex* apply to the question of whether an entity is a joint employer?

(2) Does *Dynamex* apply to claims brought under Cal. Labor Code § 2802?

**Does *Dynamex* apply to the question of whether an entity is a joint employer?**

The question of whether the "ABC test" that this Court clarified in *Dynamex* as an explication of the "suffer or permit" prong from *Martinez v. Combs* (Cal. 2010) 231 P.3d 259 – ***a joint employer case*** – applies to joint employer cases is an important and unsettled question of California law. *See Martinez* 231 P.3d at 266–67 ("plaintiffs contended defendants [] jointly employed plaintiffs and were thus liable . . ."). The courts have already reached divergent conclusions on this issue.

This case raises the joint employment issue, since the defendant, Jan-Pro Franchising International, Inc. ("Jan-Pro"), does not contract directly with the plaintiffs. Instead, the plaintiffs perform their work for Jan-Pro through intermediate entities which Jan-Pro calls "master franchisees". One of Jan-Pro's defenses in this case has been that it does not directly contract with the plaintiffs and thus could not be the liable entity. However, Plaintiffs have contended that Jan-Pro is legally responsible for the wage violations they allege, since it is the cause of these violations and, under the "ABC" test adopted in *Dynamex*, Jan-Pro is their employer.

[1] "In exercising its discretion to grant or deny the request, the Supreme Court may consider whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law, and any other factor the court deems appropriate." Rule of Court 8.548(f)(1). While the Court is considering whether to grant a certification request, parties may submit letters and replies in support of certification, and may "ask[] the court to restate the question," in which case the letter must also "propose new wording." Rule of Court 8.548(e)(3). The Ninth Circuit panel stated in its Certification Order: "Our phrasing of the question should not restrict the Court's consideration of the issues involved. The Court may rephrase the questions as it sees fit in order to address the contentions of the parties. If the Court agrees to decide this question, we agree to accept its decision." 2019 WL 4648399, at *1. This Court therefore has the ability, and is within its authority, to take up these proposed questions.

The Ninth Circuit in this case agreed with Plaintiffs' contention that *Dynamex* would apply to their claims that Jan-Pro employed them, notwithstanding the fact that another entity was involved that contracted directly with the plaintiffs to perform the work. Thus, the panel, at least implicitly, agreed that *Dynamex* applies to joint employment questions, as well as questions of whether an individual is misclassified as an independent contractor. Indeed, given that *Dynamex* clarified the standard of *Martinez*, itself a joint employer case, it would appear obvious that *Dynamex* was intended to apply to the related issues of independent contractor misclassification and joint employment.

However, other courts have recently rejected the notion that the *Dynamex* test applies to joint employment cases. In *Salazar v. McDonald's Corp.* (9th Cir. Oct 1, 2019) ___ F.3d ___, 2019 WL 4782760, at *6, the Ninth Circuit recently determined that *Dynamex* would not apply to the joint employer question. Similarly, the California Courts of Appeal have decided in *Henderson v. Equilon Enterprises, LLC* (Cal. Ct. App. 1st Div. Oct. 8, 2019) 2019 WL 4942458, at *5, and *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289, that *Dynamex* has no application to this question.[2]

As federal and state courts across California grapple with the question of whether *Dynamex* applies to joint employment questions (a frequent subject of litigation), and reach conflicting results, an enormous amount of uncertainty prevails. It would be extremely beneficial to employers and employees throughout the State for this Court to address this question here.

**Does *Dynamex* apply to claims brought under Cal. Labor Code § 2802?**

In addition, this case presents another outstanding question that is the subject of great uncertainty -- and conflict already – among the federal and state courts across California. That is the question left expressly open in *Dynamex* (due to the parties' not having addressed it there) of whether the employment standard enunciated there would apply to claims brought under Cal. Labor Code § 2802.[3]

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[2] Notably, *Curry* was decided before this Court decided *Dynamex*. After *Dynamex* was issued, the *Curry* Court amended the decision to include a brief explanation as to why *Dynamex* would not change the result. *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289 ("*Curry*") (modifications applied May 29, 2018). The *Curry* plaintiffs petitioned for review to this Court, which was denied. *Curry*, 23 Cal.App.5th 289, *petition for rev. denied*, July 11, 2018. In *Henderson*, the Court adopted the reasoning of the *Curry* Court, which had not fully considered *Dynamex*, as the case was briefed and argued prior to the issuance of the original decision. The *Henderson* plaintiffs (also represented by the undersigned counsel) intend to petition this Court for review.

[3] In *Dynamex*, the plaintiffs only challenged the Court of Appeal's conclusion regarding the wage order definitions of "employ" and "employer" discussed *Martinez* as applied to plaintiffs' wage order claims, and the Court therefore limited review to the wage order claims. *Dynamex*, 416 P.3d 1, 7 & n. 5. The Court declined to address whether the "ABC test" adopted

Here, the plaintiffs have challenged their classification as independent contractors, and the heart of their claim for damages is that they should not have been required to pay expenses in the thousands of dollars in the form of franchise fees (and other fees) in order to perform cleaning work.[4] Although this is a claim brought under Labor Code § 2802, the Ninth Circuit determined that the "ABC test" articulated by this Court in *Dynamex* would apply to this case.

At least one other California court has already determined that *Dynamex* applies to claims brought under Labor Code § 2802. *See Johnson*, Case No. 30-2015-00802813-CU-CR-CXC, at *5 (attached Ex. A).

However, other courts have read *Dynamex* to be of *limited* application and have declined to apply the decision (or at least stated in *dicta* that *Dynamex* would not apply) to claims brought under Labor Code § 2802. *See, e.g., Garcia*, 28 Cal.app.5th at 561; *Karl v. Zimmer Biomet Holdings, Inc.*, 2018 WL 5809428 (N.D. Cal. Nov. 6, 2018).

As this is likewise an extremely important issue that will recur in numerous cases throughout California, and is already the subject of conflicting statements by the Courts, it would be extremely beneficial for this Court to address it here.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court take up the questions in this case of whether *Dynamex* applies to the question of whether an entity is a joint employer and whether *Dynamex* applies to claims brought under Cal. Labor Code § 2802.

Respectfully submitted,

*/s/ Shannon Liss-Riordan*
Shannon Liss-Riordan, Esq.
Counsel for Plaintiffs

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in *Dynamex* would apply to plaintiff's reimbursement claims pursuant to § 2802 because the plaintiffs had not sought review on that question and the parties had not briefed the issue. *Id.*

[4] This issue is essentially the same issue as plaintiffs face who have challenged their classification as independent contractors in the so-called "gig economy" (against companies such as Uber, Lyft, and numerous food delivery companies), who have been required to pay expenses in order to work, such as for the maintenance and fuel for their vehicles. *See, e.g., Lawson v. GrubHub* (9th Cir.) Case No. 18-15386; *O'Connor v. Uber Technologies, Inc.* (N.D. Cal.) Case No. CV-13-3826; *Cotter v. Lyft, Inc.* (N.D. Cal.) Case No. 13-cv-4065-YGR; *Colopy v. Uber Technologies, Inc.,* (N.D. Cal.) Case No. 3:19-cv-06462-EMC. In a similar case to this one, the Massachusetts Supreme Judicial Court determined that requiring cleaning franchisees to pay in order to obtain cleaning work (in other words, paying for a job) violated Massachusetts wage law. *See Awuah v. Coverall North America, Inc.* (2011) 460 Mass. 484.

# EXHIBIT A

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE**
Civil Complex Center
751 W. Santa Ana Blvd
Santa Ana, CA 92701

**SHORT TITLE:** Johnson vs. VCG-IS, LLC, et al.

| **CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE** | CASE NUMBER: **30-2015-00802813-CU-CR-CXC** |
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I certify that I am not a party to this cause. I certify that the following document(s), dated , have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on July 18, 2018, at 10:18:33 AM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

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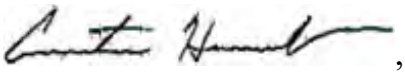
Clerk of the Court, by:  , Deputy

**SUPERIOR COURT OF CALIFORNIA,**
**COUNTY OF ORANGE**
**CIVIL COMPLEX CENTER**

**MINUTE ORDER**

DATE: 07/18/2018 TIME: 10:00:00 AM DEPT: CX102

JUDICIAL OFFICER PRESIDING: William Claster
CLERK: Gus Hernandez
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Barbara Allen

CASE NO: **30-2015-00802813-CU-CR-CXC** CASE INIT.DATE: 08/05/2015
CASE TITLE: **Johnson vs. VCG-IS, LLC, et al.**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Civil Rights

EVENT ID/DOCUMENT ID: 72809838
**EVENT TYPE**: Motion - Other

**APPEARANCES**

There are no appearances by any party.

Tentative Ruling e-served upon the parties.

All parties telephonically submit on the Court's tentative ruling.

The Court confirms the tentative ruling as follows: The Court's ruling is attached hereto and incorporated herein by reference.

Court orders clerk to give notice.

**JOHNSON v. VCG-IS, LLC 15-802813: RULING ON MOTION IN LIMINE**

The instant PAGA case involves, among other things, the issue of whether exotic dancers working at Imperial Showgirls in Anaheim, California qualify as independent contractors. The entity which directly engages the dancers is Defendant VCG-IS, LLC dba Imperial Showgirls. Defendants VCG Holding Corp. and International Entertainment Consultants, Inc. are affiliated companies which, according to Plaintiffs, are jointly liable for the alleged Labor Code violations.

On May 10, 2018, during a status conference preceding an upcoming motion for summary judgment and the trial, the parties jointly requested that the Court provide clarification on whether the California Supreme Court's recent decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903 will be applied and relied upon in deciding the case. The case is significant in that it altered the previous test *(see S.G. Borello v. & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341) utilized to determine whether individuals qualify as independent contractors or employees in any given situation. Although the question before the Court is essentially a question of law, the guidance being provided herein is in the context of a motion in limine. For the parties' benefit and planning, the Court's intention is to apply the following ruling to subsequent motions and the trial.

1. **Is Dynamex Retroactive?**

In *Dynamex*, a putative class of delivery drivers contended that their employer misclassified them as independent contractors. The lawsuit in that case sought to certify a class of drivers who purportedly had been misclassified since 2005. By the time that *Dynamex* was decided—April 30, 2018—the case had been going on for 13 years. Ultimately the California Supreme Court ruled that previous multi-factor tests to determine misclassification, including the "economic realities" test of the FLSA and the *Borello* test, leave "both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly," and were subject to abuse because they permit "a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying

the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard." (*Dynamex, supra* at 954-55.) The Court therefore sought to create a brighter line, citing favorably to Massachusetts cases holding workers to be employees when they performed their work within the usual course of a hiring entity's business. *(Id.* at 963.)

To satisfy these aims, the *Dynamex* Court held that it is appropriate to (1) place the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the IWC wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in simpler test known as the ABC test. *(Id.* at 957.) The Court embraced the ABC test because it would "provide greater clarity and consistency, and less opportunity for manipulation than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis." (*Id.* at 964.)

Even though *Dynamex* established a new standard for evaluating independent contractor/employee issues (at least as to claims brought under the IWC wage orders), it did not state that its decision applied only prospectively. Given the age of the claims in the *Dynamex* case, and given the Court's longstanding acknowledgment of its authority to make such a statement (*see Newman v. Emerson Radio Corp.* (1989) 48 Cal. 3d 973, 978), the lack of such a pronouncement suggests that the decision should apply retroactively. Although not necessarily determinative, the Court's later decision (on June 20, 2018) to deny requests to modify its decision to state that *Dynamex* will only be applied prospectively supports this conclusion. In light of "the general rule that judicial decisions are given retroactive effect" (*Newman, supra* at 978), and because it is up to the Supreme Court to declare an exception to this rule (*see Barr v. ADandS, Inc.* (1997) 57 Cal. App. 4th 1038, 1053), this Court will apply *Dynamex* retroactively.

2. **Does Dynamex Only Apply to Claims Seeking to Enforce California's Wage Orders?**

Defendants argue that the ABC standard enunciated in *Dynamex*, even if applied retroactively, is limited to claims brought under the IWC wage orders. Indeed, the Supreme Court stated at the beginning of its opinion as follows: "Dynamex's petition for review challenged only the Court of Appeal's conclusion that the trial court properly determined that the wage order's definitions of "employ" and "employer" may be relied upon in determining whether a worker is an employee or an independent contractor for purposes of the obligations imposed by the wage order. We granted the petition for review to consider that question." (*Dynamex, supra* at 925.)

In light of this and other statements by the Supreme Court emphasizing that its analysis focused on specific language found in the wage orders, Defendants argue that *Dynamex* does not apply to PAGA claims since such claims are premised on Labor Code violations, not wage order violations. Instead, according to Defendants, PAGA claims must be considered using the *Borello* test. Not surprisingly, Plaintiffs disagree with this position.

The PAGA claims in this case are all based on alleged violations of Labor Code provisions. These violations include:

(a) Failure to pay all wages owed, including minimum wage (Violation of Labor Code §§ 201-204, 210, 558, 1194, 1194.2, 1197 and 1198);
(b) Failure to provide meal breaks (Violation of Labor Code §§ 226.7 and 512);
(c) Failure to provide rest breaks (Violation of Labor Code § 226.7);
(d) Failure to provide accurate itemized wage statements (Violation of Labor Code § 226);
(e) Failure to keep accurate records of hours worked (Violation of Labor Code §§ 1174, 1174.5 and 1175);
(f) Failure to reimburse all expenses incurred for Defendants' benefit (Violation of Labor Code § 2802);
(g) Improper deductions from wages (Violation of Labor Code § 221); and
(h) Failure to permit Plaintiffs and aggrieved employees to retain all gratuities (Violation of Labor Code § 351).

As it turns out, the applicable wage order (IWC Order No. 10) also covers each of these violations except for the gratuity claim pursuant to Labor Code § 351. Thus, a failure to pay minimum wages is covered by Section 4 of the wage order, meal periods are governed by Section 11, rest periods are covered by Section 12, accurate wage statements and records of hours work are required by Section 7, and reimbursement of expenses and improper deductions are covered by Sections 8 and 9. Further, these wage order requirements are tied into the Labor Code by, among others, Labor Code § 1194 (failure to pay minimum wages which, per Labor Code § 1197, are set in the wage orders), § 1198 which makes unlawful "employment of any employee . . . under conditions of labor prohibited by the [wage] order," and Labor Code §§ 512 and 516 pertaining to meal periods and rest breaks.

Notwithstanding these close, if not inseparable ties between the applicable Labor Code sections and the wage order provisions, Defendants insist that different tests should be used to determine employee v. independent contractor status depending on the statutory basis for the particular claims. Stated differently, Defendants contend that a violation of the requirement to pay minimum wages under Labor Code § 1194 should be analyzed under *Borello*, while a violation of Section 4 of the wage order should be decided under *Dynamex*.

In this Court's view, this position misses the mark. For one thing, there is a huge practical problem. Considering wage and hour claims based on state laws, how is a trial court supposed to apply one standard to a claim grounded in the Labor Code and a different test for essentially the same claim premised on a wage order? More significantly, how are employers and employees/independent contractors supposed to determine their rights if they are unable to figure out what test applies? Indeed, the suggestion that multiple tests should apply to state law wage and hour claims runs counter to the purpose of *Dynamex*—providing greater clarity and consistency in analyzing this issue. (*Dynamex, supra* at 964.)

More to the point, there is no private right of action under the wage orders. As stated by the court in *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal. App. 4th 1112, 1132: "The IWC has not created, and has no power to create, a private right of action for violation of a wage order, and we are aware of no statute that creates a private right of action for a violation of an IWC wage order when the violation at issue is not also a violation of the Labor Code."

The foregoing statement makes clear that in lawsuits such as the one at hand, where an individual is suing for violation of the minimum wage laws, etc., he or she is actually enforcing the Labor Code which, by its own terms, incorporates the wage orders. "[An employee] who sues to recover unpaid minimum wages under Section 1194 [of the Labor Code} actually sues to enforce the applicable wage order. Only by deferring to wage orders' definitional provisions do we truly apply Section 1194 according to its terms by enforcing the 'legal minimum wage.'" *Martinez v. Combs* (2010) 49 Cal. 35, 62.

Indeed, that is exactly what happened in *Dynamex*. There, the plaintiffs filed a complaint that set forth alleged Labor Code violations based on, among other things, Dynamex's alleged failure to pay overtime compensation. Given this pleading and the fact that overtime pay requirements are set by the wage orders, the Court's holding that the ABC test should be applied to determine employee status under the wage orders can only mean that that test also had to be applied to Labor Code claims seeking to enforce the wage order requirements.

Because all of the claims (except for the gratuities claim) in the instant case are rooted in the wage orders, the Court concludes that *Dynamex's* ABC test should be utilized to determine the employee/independent contractor issues in this case. The fact that the case is brought under PAGA does not compel a different result. PAGA claims are based on violations of the Labor Code which, in turn, requires compliance with the wage orders. As such, "PAGA actions can serve to *indirectly* enforce certain wage order provisions by enforcing *statutes* that require compliance with wage orders (e.g., § 1198, which prohibits longer work hours than those fixed by wage order or employment under conditions prohibited by a wage order*). " Thurman, supra* at 1132 (emphasis in original).

Defendants' contention that the Supreme Court specifically approved different tests for determining employee status in the context of wage and hour litigation also misses the mark. While Defendants correctly point out that the *Dynamex* court acknowledged the possibility of a "two-test approach" to "disparate claims under different labor statutes brought by the same individual" (*Dynamex, supra* at 948), there is no indication that the court approved such an approach when it comes to state wage and hour law. In referencing different wage and hour standards under the federal FLSA, the Court appropriately lumped together the protections afforded by both state wage and hour laws and the wage orders: "The federal context demonstrates that California is not alone is adopting a distinct standard that provides broader coverage of workers with regard to *the very fundamental protections afforded by wage and hour laws and wage orders*." (*Id.*; emphasis added)

While the *Dynamex* court did not cite specific examples of non-wage and hour labor statutes for which the *Borello* test would continue to apply, it is likely that the workers compensation and unemployment compensation laws would fit into this category. It is those types of laws, which are not directly based on the wage orders and which do not fall into the generic category of "wage and hour laws" that, in this Court's view, would not yet be analyzed under the ABC test.

### 3. Labor Code Section 351--Gratuities

Labor Code §§ 350-356 is the state law pertaining to gratuities or tips. Because of the nature of this form of compensation, the statute includes a unique definition of "Employee" in § 350(b):

> "Employee" means every person, including aliens and minors, rendering actual service in any business for an employer, whether gratuitously or for wages or pay, whether the wages or pay are measured by the standard of time, piece, task, commission, or other method of calculation, and whether the service is rendered on a commission, concessionaire, or other basis.

The plain language of this provision establishes that, for purposes of gratuities, the determination of who qualifies as an employee is different (and arguably broader) than the definition found in the wage orders. "Rendering actual service," including doing so "gratuitously," supports the conclusion that the Legislature recognized that tips often are provided to individuals who do not fit into traditional definitions (or even the *Dynamex* version) of employee. Because of this specialized definition, there is no basis to apply the *Dynamex* analysis in determining issues relating to the gratuities issue in this case.

This conclusion is reinforced by the fact that there is no reference to gratuities in the wage orders. Indeed, an argument can be made that Labor Code §§ 350 et seq. are not "wage and hour laws" given that gratuities or tips are usually not determined by the employer, but rather by the customer.

## 4. Joint Employer Issues

The final issue for resolution in connection with this motion in limine is whether *Dynamex's* ABC test also applies to the determination of joint employer status as to VCG Holding (the owner of VCG-IS, LLC--the club where the dancers worked) and IEC (the consulting company). For now, the answer is relatively simple. In *Curry v. Equilon Enterprises* (2018) 23 Cal. App. 5th 289, the court of appeal concluded that it was not the intention of the Supreme Court to apply this new test to joint employment issues: "In conclusion, the "ABC" test set forth in *Dynamex* is directed toward the issue of whether employees were misclassified as independent contractors. Placing the burden on the alleged employer to prove that the worker is not an employee is meant to serve policy goals that are not relevant in the joint employment context. Therefore, it does not appear that the Supreme Court intended for the "ABC" test to be applied in joint employment cases." *Id.* at 314.

Plaintiff argues that this Court should not follow *Curry* inasmuch as that decision conflicts with *Dynamex* and because a petition for review has been filed in that case. As to the first point, this Court is not inclined to second guess the court of

appeal which considered and rejected Plaintiff's argument. As to the second point, until such time as the Supreme Court overrules or depublishes the case, this Court is bound to follow it.

**PROOF OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. My business address is Lichten & Liss-Riordan, P.C., 729 Boylston St. Suite 2000, Boston, MA 02116. On October 25, 2019, I served the following document:

> Letter submitted by Plaintiffs to the Supreme Court of California re: *Vazquez v. Jan-Pro Franchising International*, S258191

I served the document on the persons below by sending true and correct copies thereof via U.S. Mail and email to the addresses listed below:

Office of the Clerk
James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103-1526

*United States Court of Appeals for the Ninth Circuit*

Theodore J. Boutrous, Jr.
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Boston, MA 02199
jrosin@ohaganmeyer.com

*Attorneys for Defendant Jan-Pro Franchising International, Inc.*

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 25th day of October, 2019 in Boston, Massachusetts.

Anastasia Doherty

# EXHIBIT C

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

C·U·I·A·B

CONNOR-NOLAN INC
c/o CONSTANGY BROOKS & SMITH LLP
Account No.: 305-1361-8
Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Appellant

Case No.: **AO-418191 (T)**

OA Decision No.: 5611370

# DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

**MARTY BLOCK**

**ELLEN CORBETT**

This is the final decision by the Appeals Board. The Appeals Board has no authority to reconsider this decision. If you disagree with the decision, please refer to the information attachment which outlines your rights.

CONSTANGY BROOKS & SMITH LLP
JEFFREY M. ROSIN
535 BOYLSTON STREET STE 902
BOSTON, MA 02116

Date Mailed: 7/23/2018

CUIAB01

The Employment Development Department (EDD) appealed from the decisions of the administrative law judge that granted the Petitioner's petitions for reassessment.

Pursuant to California Code of Regulations, title 22, section 5100(b), these appeals are consolidated for consideration and decision.

PROCEDURAL HISTORY

*AO-418191/FO Case No. 5611370 formerly FO Case No. 4764599:*
On July 31, 2013, EDD issued a notice of assessment (Assessment No. 4) against the Petitioner in this matter. In the notice, EDD alleged that the Petitioner owed $578,172.12 for the period beginning April 1, 2010, and ending June 30, 2012, pursuant to Unemployment Insurance Code Section 1127. No penalties were imposed.

*AO-418192/FO Case No. 5611371 formerly FO Case No. 4964472:*
On July 31, 2013, EDD issued a notice of assessment (Assessment No. 2) against the Petitioner in this matter. EDD alleged that the Petitioner owed $49,375.76 for the period beginning July 1, 2009, and ending December 31, 2009.

The Petitioner filed timely appeals to those notices. After various pre-trial motions, and multiple hearing dates, the collection of evidence concluded on or about May 7, 2014.

Decisions were issued in FO Case Nos. 4764599 and 4964472 on November 17, 2014. In those decisions, the administrative law judge granted the Petitioner's request for reassessment finding that the involved persons were not employees of the Petitioner. The Petitioner was held not liable for any of the appealed assessments.

On December 12, 2014, EDD appealed those decisions to the Appeals Board.

On July 10, 2015, this Board issued decisions in Case Nos. AO-365836 (FO Case No. 4764599) and AO-365837 (FO Case No. 4964472) setting aside the appealed decisions and remanding the matters back to another administrative law judge for further hearing and new decisions on the merits.

The Board specifically requested an analysis of the facts in this matter in light of Precedent Tax Decision 502 (P-T-502).

The Office of Tax Petitions took no action on the matter other than to forward the matters to the San Jose Office of Appeals and issue new case numbers. FO Case No. 4764599 was registered as FO Case No. 5611370; and FO Case No. 4964472 was registered as FO Case No. 5611371 for the purposes of the new hearing and decisions that were to be issued in connection with the remand.

We take judicial notice of the following:

On August 8, 2017, P-T-502 was overruled by the decision in *SuperShuttle International, Inc., et al. v. Patrick W. Henning, Jr., as Director of Employment Development Department, et al.;* [Sacramento County Superior Court Case No. 34-2014-80001841-CU-MC-GDS]. P-T-502 is no longer viable law, therefore a remand for the purpose of an analysis under that precedent has become unnecessary.

On April 19, 2018, this Board issued a Notice of Possible takeover in these matters. The parties were notified that at the duly noticed May 16, 2018, Board meeting, the Board would vote on taking jurisdiction pursuant to code section 412 of the Unemployment Insurance Code. The parties were given an opportunity to comment on the proposed action.

On May 9, 2018, EDD responded in a letter indicating that EDD "does not agree that the takeover complies with either section 412 or 413, nonetheless agrees that the Board has jurisdiction over this matter". EDD appeared at the Board meeting and commented on the proposed action.

At that duly noticed Board meeting on May 16, 2018, the Board voted to take jurisdiction of the cases pursuant to section 412 of the Unemployment Insurance Code.

The Board now having jurisdiction over FO Case No. 5611370 and FO Case No. 5611371, shall reinstate the decisions previously set aside in the remand (FO Case Nos. 4764599 and 4964472, respectively) and address EDD's initial appeal to those decisions.

ISSUE STATEMENT

We correct the administrative law judge's issue statements in each of the appealed cases as follows:

In Case No. AO-418191 (FO Case No. 5611370 formerly FO Case No. 4764599), the issue statement should read as follows:

Petitioner filed a petition to review an Employment Development Department (hereafter "Department") Assessment No. 2 issued on January 31, 2013, under Unemployment Insurance Code section 1127 covering the period beginning July 1, 2009, and ending December 31, 2009. The issues in this case are:

1. Whether individuals performed services as employees; and,
2. Whether Petitioner is liable for additional unemployment insurance and employment training tax contributions, disability insurance and personal income tax withholdings, penalty and interest in the amount of $49,375.76.

In Case No. AO-365837 (FO Case No. 5611371 formerly FO Case No. 4964472), the issue statement should read as follows:

Petitioner filed a petition to review an Employment Development Department (hereafter "Department") Assessment No. 4 issued on July 31, 2013, under Unemployment Insurance, Code section 1127 covering the period beginning April 1, 2010, and ending June 30, 2012. The issues in this case are:

1. Whether individuals performed services as employees; and
2. Whether Petitioner is liable for additional unemployment insurance and employment training tax contributions, disability insurance and personal income tax withholdings, penalty and interest in the amount of $578,172.12.

## FINDINGS OF FACT

We adopt the administrative law judge's findings of fact in each of the appealed decisions.

## REASONS FOR DECISION

We adopt the administrative law judge's reasons for decision in each of the appealed cases in affirming the appealed decisions.

We cannot say, after carefully studying the record in each of these cases that the findings of the administrative law judge are against the weight of the evidence. Therefore, those findings will not be disturbed on appeal. (Precedent Decisions P-B-10 and P-T-13.)

## DECISION

The decisions of the administrative law judge in each of the appealed cases are affirmed. The petitions for reassessment are granted.

## TO SEEK JUDICIAL REVIEW OF ANY PORTION OF THIS TAX DECISION

**Denying or Dismissing Any Portion of a Claim for Refund:**

The petitioner may seek judicial review of any portion of this decision denying or dismissing any portion of its claim for refund by filing an action in the Superior Court in the County of Sacramento against the Employment Development Department (EDD) Director. (Unemployment Insurance (UI) Code, section 1241.)

**Regarding Reserve Account Charge or Rate Protest or Reserve Account Transfer:**

The employer may seek judicial review of a decision on an appeal from a denial of a protest to a reserve account charge or contribution rate, or a decision on an appeal from a denial or granting of an application for transfer of a reserve account, by filing an action in court against the EDD Director. (UI Code, section 1243.)

**Adverse to the Employment Development Department:**

EDD may seek judicial review of any portion of this decision adverse to it.

**All Other Issues:**

Judicial review of a decision other than as set forth above may be obtained only upon conclusion of the administrative process, including the payment of sums owed and the filing of a claim for refund with EDD. (UI Code, sections 1178, 1241.)

"No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." (California Const., Art. XIII, section 32.)

No action that would tend to impede the collection of employment taxes, including a suit for injunctive relief or an action for declaratory relief or mandamus, may proceed in court. (UI Code, section 1851; *Modern Barber Colleges, Inc. v. Calif. Emp. Stabil. Comm.* (1948) 31 Cal.2d 720; *First Aid Services v. Cal. Emp. Dev. Dep.* (2005) 133 Cal.App.4th 1470; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 838, quoting *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 280-281; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 214.)

## PARA BUSCAR UNA REVISIÓN JUDICIAL DE CUALQUIER PARTE DE ESTA DECISIÓN DE IMPUESTOS

**Negando o Descartando Cualquier Parte de una Solicitud de Reembolso:**

El peticionario puede pedir la revisión judicial de cualquier porción de esta decisión que le esté negando o descartando cualquier parte de su solicitud de reembolso pidiendo una acción en el Tribunal Superior del Condado de Sacramento contra el Director del Departamento del Desarrollo del Empleo (EDD). (Código del Seguro de Desempleo (UI), artículo 1241.)

**Respecto al cargo de Cuenta de Reserva o Protesta de Tarifa o Transferencia de la Cuenta de Reserva:**

El empleador puede solicitar la revisión judicial de cualquier decisión sobre una apelación de una denegación de una protesta a una cuenta de reserva o tasa de contribución, o una decisión sobre una apelación de una denegación o la concesión de una solicitud de transferencia de una cuenta de reserva, pidiendo una acción en el tribunal contra el Director de EDD. (Código UI, artículo 1243.)

**Adverso al Departamento del Desarrollo del Empleo:**

EDD puede solicitar la revisión judicial de cualquier porción de esta decisión desfavorable (adversa).

**Todos los demás Asuntos:**

La revisión judicial de una decisión que no sea establecida anteriormente sólo se podrá obtener una vez concluido el proceso administrativo, incluyendo el pago de las sumas adeudadas y la petición de reembolso con EDD. (Código UI, artículos 1178, 1241.)

"Ningún proceso legal o equitativo deberá emitir en ningún procedimiento ante un tribunal contra este Estado o cualquier funcionario del mismo para impedir o imponer la recaudación de cualquier impuesto. Después del pago de un impuesto declarado ilegal, se podrá mantener una acción para recuperar el impuesto pagado con intereses, en la manera que se provea según la Legislatura." (Constitución de California, estatuto XIII, artículo 32.)

Ninguna acción que pueda intentar impedir la recaudación de impuestos sobre el empleo, incluyendo una demanda de medidas cautelares, una acción de declaración de liberación, o una orden de algún tribunal, puede proceder en el tribunal. (UI Code §1851, *Modern Barber Colleges, Inc. v. CA. Emp. Stabil. Comm.* (1948) 31 cal.2d 720; *First Aid Svcs. v. CA EDD* (2005) 133 CA App.4th 1470, *Calfarm Ins. v. Deukmejian* (1989) 48 CA.3d 805, 838 citando *PG&E Co. v. State Bd. of Equ.* (1980) 27.CA3d 277, 280-281; *Western Oil & Gas Assn. v. State Bd. of Equ.* (1987) 44 Cal. 3d 208,214.)

Case No. **AO-418191 (T)**

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## DECISIONS SENT TO

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CALIFORN' 'NEMPLOYMENT INSURANCE A' 'ALS BOARD

C·U·I·A·B

**OFFICE OF TAX PETITIONS**
**2400 Venture Oaks Way, Ste 200**
**SACRAMENTO CA 95833**

**(916) 263-6733**

CONNOR-NOLAN INC
c/o CONSTANGY BROOKS & SMITH LLP
Account No: 305-1361-8
Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

Case No. **4764599 (T)**

Issue(s): REASSESS, Note T

Date Petition Filed: 02/11/2013

**Date and Place of Hearings(s):**
(1) 01/14/2014 SACRAMENTO
(2) 03/24/2014 SAN JOSE
(3) 05/07/2014 SAN JOSE

**Parties Appearing:**
None
None
Petitioner, Department

# DECISION

The decision in the above-captioned case appears on the following page(s).

This decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal.

**Madlyn M. Hilton**, Administrative Law Judge

**FILE COPY**

Date Mailed: **NOV 17 2014**

*The Administrative Law Judge (ALJ Iman Shad) who originally presided over the hearings in this matter was subject to a mandatory layoff at the California Unemployment Insurance Appels Board (CUIAB). As a result, his employment ended on August 31, 2014, before he issued a decision in this matter. Consequently, the Presiding Administrative Law Judge of the Office of Tax Petitions (ALJ Shad's immediate supervisor) performed a complete review of the entire record, including all testimony, exhibits and correspondence and issued the following decision.

## ISSUE STATEMENT

Petitioner filed a petition to review an Employment Development Department (hereafter "Department") assessment issued under Unemployment Insurance Code section 1127 covering the period beginning July 1, 2009, and ending December 31, 2009. The issues in this case are:

1. Whether individuals performed services as employees; and

2. Whether Petitioner is liable for additional unemployment insurance and employment training tax contributions, disability insurance and personal income tax withholdings, penalty and interest.

## FINDINGS OF FACT

On January 31, 2013, the Department issued Assessment No. 2 pursuant to Unemployment Insurance Code section 1127. This assessment covered the period of time beginning July 1, 2009, and ending December 31, 2009, and did not include a penalty under section 1127.

The total amount due and owing as of February 7, 2013 under Assessment No. 2 was approximately $49,376 plus applicable interest.

The instant case was heard concurrently with companion Case No. 4964472, wherein the petitioner filed a petition for reassessment of Assessment No. 4.

On July 31, 2013, the Department issued Assessment No. 4 pursuant to Unemployment Insurance Code section 1127. This assessment covered the period of time beginning April 1, 2010, and ending June 30, 2012, and did not include a penalty under section 1127.

The total amount due and owing as of August 17, 2013 was approximately $578,172 plus applicable interest.

Beginning no later than January 1, 2010, and continuing through June 30, 2012, Fulton Connor operated Connor-Nolan, Inc., DBA "Jan Pro Cleaning Systems" (hereafter referred to as "Petitioner" and the "franchisor," forms) – as a subchapter S-Corporation with a California State identification number.

During the period of time, beginning July 1, 2009, and ending July 31, 2013 (hereafter "the Assessment Period"), Fulton Connor served as the president of Petitioner, and he was responsible for the ongoing operation of the business. Petitioner reported Fulton Connor, other corporate officers, along with various administrative, bookkeeping, customer service, training, collection, sales and marketing staff to the Department as employees.

At the hearing, Petitioner stipulated that the amount of the above-described assessments based upon the estimated calculations of the Department auditor were not in dispute.

Petitioner is a regional franchisor of commercial cleaning franchises. Petitioner is in the business of selling separate "unit franchises" (hereafter "UFs," or singularly as "UF") to persons who operate those cleaning businesses pursuant to a written form Unit Franchise Agreement, along with written training, procedures, operations and disclosure documents (hereafter collectively referred to as the "UFA"). During the Assessment Period, Petitioner retained no less than 100 "UFs, who are the subjects of the Department's above-described assessments.

The parties stipulated that for the purposes of the hearing only, the Department did not challenge Petitioner's position that: (i) it had taken all steps required under California/federal franchise law to continued status as a franchisor; (ii) it had sold franchises to unit franchisees in compliance with California/federal franchise law; and (iii) Petitioner was lawfully registered and qualified as a duly licensed franchisor in California.

Petitioners entered into unit franchise agreements with UFs to provide "janitorial and other related services" for initial accounts in a specified geographical territory under the Jan Pro system of specifications and operating procedures (the "System") and the service mark Jan Pro and other trademarks, trade names, service marks, and logos that the Jan Pro International master franchisor may

periodically authorize (the "Marks"). As part of its brand guarantees, Petitioner, among other things, provided: (1) quality assurance through a routine 50 point inspection of the work performed by UFs; (2) initial and routine training provided to UFs; and (3) a two-hour response *guarantee*, assuring cleaning service customers of prompt service.

The UF was required to pay an initial franchise fee. Once the accounts were serviced, the UFs would pay a royalty fee, a support fee and if applicable, an administrative fee for any specialized services billed to the customer by the UF.

Petitioner offered the rights to service such customers for an initial 10 year period of time to a worker who entered into the UFA. Initial accounts were obtained by the Petitioner, who entered into the initial contracts with customers. Petitioner determined which accounts would be bundled together to provide an approximate defined annual stream of income to the UF. The UF was free to accept or reject the accounts which comprised the bundle offered by Petitioner. Petitioner retained the right not to replace the rejected account(s) or refuse to sell the right to service further accounts to a UF. Ownership of the account was transferred to the UF upon acceptance of the account.

The Petitioner provided the UF with an Initial Equipment Package at no charge if they acquired an Initial Plan of at least $20,000 in gross annual billings or if they paid the Initial Franchise fee in full. If these conditions were not met the UF was required to purchase an Initial Equipment Package for $950. The equipment could also be purchased from a third party.

In order to use the Marks, the UF had to hold itself as an independent franchisee and owner and operator of the franchised business.

The UFA provided that the franchisee is an independent contractor. In furtherance of this requirement, the UFA required the franchisee to take affirmative action to disclose to the public that the franchisee was an independent contractor. Prior to signing the UFA, the UF was provided a Franchise Disclosure Document. The document provided: "As the owner operator of an independent business, you make all decisions concerning the objectives of that business and he manner in which those objectives are reached. You alone choose the details concerning day-to-day operations for the Franchised Business – subject to our System standards, which are necessary to preserve and promote the Jan-Pro brand".

If it chose, the UF could establish a separate cleaning business that did not provide services under the Jan Pro System or Marks. The UF could also grow its franchised business by obtaining more work within the Jan Pro system. The Petitioner could offer the UF an "Additional Account". The additional account was an account not offered in the initial plan. The UF would review the account and decide whether to accept or reject it. If the account was accepted, the UF

would pay the Petitioner a sales and marketing fee for the value of the services Petitioner provided in the acquisition and negotiation of the account. "Supplemental Accounts" were customer accounts that had not been offered or even procured with the assistance of the Petitioner, but were serviced under the "Marks" by the UF. In addition, the UF could request that the Petitioner assist with the bidding and negotiation of a cleaning service contract ("Negotiated Contract"). The UF was required to pay the Petitioner a "negotiation fee" under the UFA.

After accepting the accounts and depending on how they chose to run their business, UFs could do the cleaning themselves or hire others to do it. If a UF hired workers, it was not subject to Petitioner's approval. UFs determined how much and when to compensate their workers. Workers were paid directly by the UF. Most of the UFs hired helpers. Neither the assessments issued by the Employment Development Department nor the audits conducted on the Petitioner's business, covered any of the helpers that performed cleaning services for the UFs.

The UFs cleaning services were based entirely on the customer's preferences for days of week, time of day and what needed to be done. UFs interacted directly with customers for special requests, additional services and initial customer satisfaction or concerns. The UFs determined which order to service their accounts. The UFs determined how each account would be cleaned. UFs could purchase supplies through Petitioner's vendors or they could purchase from a vendor of their own choice.

Petitioner provided billing and collection services to the UFs. UFs were required to maintain complete and accurate books and records for the franchised business. The UF would provide the Petitioner with a statement of the services performed in a month. The Petitioner would bill the customers and remit the payments to the UFs after deducting the franchise and any other fees owed to the Petitioner.

Ownership of an account would revert to the Petitioner for franchisee misconduct or any action which caused damage to the Marks. It would revert to Petitioner if a UF did not resolve a complaint to a customer's satisfaction within 48 hours or if a customer complained three or more times within 90 days. If a customer requested termination or the use a different UF, the account would revert to Petitioner.

The franchise agreement could be terminated at any time by the UF. Upon termination, the UF was required to cease operations and the use of the Marks. The UF had to return customer keys, loaned materials and any confidential

information. The Petitioner could arrange for substitute contractors to perform any work required to service the accounts or transfer the accounts to another UF.

Under the UFA, the franchise agreement could be terminated by the Petitioner if the UF failed to complete the certification program, or if the UF made a material misrepresentation to obtain the franchise. The agreement could be terminated if the UF abandoned the business, or if there was a serious and imminent threat or danger to public safety. Petitioner could also terminate the agreement if the UF denied the Petitioner the right to inspect the franchised business or inspect or audit sales and accounting records.

A $50 "complaint fee" could be assessed against the UF by the Petitioner to compensate the Petitioner for the administrative cost of responding to the complaint to prevent loss of goodwill of the Marks. A "complaint" was a customer complaint to which the UF did not respond within 48 hours. The Petitioner assessed the fee in about 8% of the complaints received.

## REASONS FOR DECISION

If the department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. If any part of the deficiency is due to negligence or intentional disregard of the law, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment. (Unemployment Insurance Code, section 1127.)

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

(a) The extent of control which may be exercised over the details of the work;

(b) Whether or not the one performing services is engaged in a distinct occupation or business;

(c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;

(d) The skill required in the particular occupation;

(e) Who supplies the instrumentalities, tools and place of work for the one performing services;

(f) The length of time for which the services are to be performed;

(g) The method of payment, whether by time or by the job;

(h) Whether or not the work is part of the regular business of the principal;

(i) Whether or not the parties believe they are creating a relationship of master and servant; and

(j) Whether the principal is or is not in business.

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments* (1977) 71 Cal.App.3d 647.)

The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. (*Hillen v. Industrial Accident Commission* (1926) 199 Cal. 577.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

Early California case law applied a simple agency analysis for determining when a franchisor could be held vicariously liable for the acts of its franchisees: if the franchisor had a right of substantial control over the franchisee, an agency relationship would be found to exist. (See, e.g., *Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610, 613; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 547.) Later decisions, however, focused on whether a franchisor exercised or had the right to exercise complete or substantial control over the means and manner in which the franchisee conducted day-to-day

operations. (See, e.g., *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1295; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 746; *Juarez v. Jani-King, Inc.* (N.D. Cal. Jan. 23, 2012) No. 09-3495, 2012 U.S. Dist. LEXIS 7406,; *Singh v. 7-Eleven, Inc.* (N.D. Cal. 2007) 2007 WL 715488.

California courts have recognized that "[a] franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and goodwill, without the risk of creating an agency relationship with its franchisees." ( *Id.* at p. 1295.) "The franchisor's interest in the reputation of its entire [marketing] system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchise into an agent." ( *Kaplan v. Coldwell Banker Residential Affiliates, Inc., supra,* 59 Cal.App.4th at p. 745.)

In *Cislaw v. Southland Corp., supra,* the Court of Appeal affirmed a grant of summary judgment in favor of franchisor 7-Eleven in a wrongful death action brought by parents of a customer of a local 7-Eleven franchise who had purchased clove cigarettes which allegedly caused his death. The franchise agreement required franchisees to complete an operations training program, carry an inventory consistent with the 7-Eleven image, and operate the store from 7 a.m. to 11 p.m. 364 days a year, and submit to store inspections, but declared franchisees to be independent contractors. ( *Id.* at p.1294.) A manager at Southland provided a declaration attesting that the franchisor had no power to require or prevent the franchisees from carrying clove cigarettes, and the franchisee herself declared she maintained "full and complete control" over her choice of inventory as well as "hiring, firing, disciplining, and compensation." ( *Id.* at pp. 1292-1293.) This evidence, the Court of Appeal determined, established that "Southland did not control the means and manner" of the franchisee's operation and that franchisees retained "control over the manner and means of the store's operation." The court rejected the suggestion that the franchisee's operational rights were illusory because the franchise agreement permitted Southland to control the "Financial, Executive, and Operational aspects of the franchised store." (*Id.)* The court reasoned that "'[e]ven one who is interested primarily in the result to be accomplished by certain work is ordinarily permitted to retain some interest in the manner in which the work is done without rendering himself [or herself] subject to the peculiar liabilities which are imposed by law on an employer.'" (*Id.,* citation omitted.)

Most recently, the California Supreme Court in *Patterson v. Domino's Pizza* (2014) 60 Cal. 4th 474. held that a franchisor may be held vicariously liable for workplace injuries inflicted by one franchisee employee on another only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of

the workplace behavior of the franchisee's employees. The facts in *Patterson* , involved a restaurant employee who sued her employer, Sui Juris, LLC, (doing business as a Domino's Pizza franchise) for sexual harassment. She also named as defendants Domino's Pizza, LLC, Domino's Pizza, Inc., and Domino's Pizza Franchising, LLC. Patterson alleged that the assistant restaurant manager sexually harassed and assaulted her at her job. Patterson claimed that Sui Juris and the Domino's defendants were the assistant manager's employers and were vicariously liable for his actions. The Domino's defendants contended they were not Patterson's employer and were not involved in the training, supervision or hiring of any Sui Juris employees. In reversing the Court of Appeals, the Court stated, "The 'means and manner' test generally used by the Courts of Appeal cannot stand for the proposition that a comprehensive operating system alone constitutes the control needed to support vicarious liability claims against a franchisor. A franchise contract consists of standards, procedures, and requirements that regulate each store for the benefit of both parties. This approach minimizes chain-wide variations that can affect product quality, customer service, trade name, business methods, public reputation, and commercial image." ( *Id.* at p.497.) The court further stated, "There are sound and legitimate reasons for business format contracts to allocate local personnel issues almost exclusively to the franchisee. Franchisees are owner-operators who hold a personal and financial stake in the business. A major incentive is the franchisee's right to hire the people who work for him, and to oversee their performance each day. A franchisor enters this arena, and becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees. (*Id.* at pp. 497-498.).

In this case, many of the requirements of the UFs were controlled by the Jan Pro System and Marks. As part of its brand guarantees, Petitioner provided quality assurance through a routine 50 point inspection of the work performed by UFs. It provided initial and routine training to the UF and guaranteed a forty- eight hour response to complaints, assuring cleaning service customers of prompt service. These requirements were essential to the cleaning brand assurances and guarantees advertised and offered to the customer accounts. Applying the Court's holdings in both *Cislaw* and *Patterson,* compliance with the franchisor's operational system does not establish the control necessary for an employment relationship to exist. Further, as described in more detail below, other additional controls involving the day to day operations of the UF did not exist.

The franchise agreement describes the UF's as independent contractors. In addition, the UFA required that the UFs were to hold themselves out as owner operators of the franchised business. The UFs were responsible for soliciting and providing any additional services needed by the customer in order to

promote their own business and financial gain. These facts weigh in favor of the UFs being independent contractors.

The franchise agreement could be terminated at any time by the UF. If it was terminated by the UF, the Petitioner could arrange for substitute contractors to perform any work required to service the accounts or transfer the accounts to another UF. The franchise agreement could also be terminated by Petitioner if the franchisee defaulted under any of the terms set forth in the UFA. While this factor may show some indication the UFs were employees, it is not a strong indicator because the Petitioner has an affirmative requirement to show a default or breach as set forth in the UFA.

Cleaning services are not the kind of activity that is normally subject to direct supervision by an employer. The UFs determined how they would do the cleaning. Schedules and services were handled between the UFs and the customers. As a result, this factor would indicate independence.

Normally, providing basic cleaning services would not be considered a skilled occupation. In this case, however, the UFs were responsible for selling special services, managing their own workers and handling customer accounts in addition to the cleaning. Those entrepreneurial skills would tend to indicate independence.

The Petitioner provided the "Initial" and, in some cases, "Additional" customer accounts to the UF. The UFs could also obtain "Supplemental" accounts. While the Initial Equipment Package was provided at no cost in certain circumstances, one way or another the UF ultimately paid for it by purchasing a larger "Initial Account", paying the entire franchise fee upfront, or coming up with approximately $950 to obtain the equipment. The UF purchased the products and supplies used to perform the cleaning services. Since both the UF and the Petitioner contributed necessary components, this factor is neutral.

The Petitioner and the UF expected the 10 year franchise to last for 10 years. As a result both believed that the service would be ongoing for a period of time which would indicate a continuing relationship and an employment relationship.

The method of payment was determined by the service(s) provided to the customers. The UF would provide monthly statements to the Petitioner. The Petitioner billed the customers and remitted final payment to the UF. Essentially, payment was by the job not by the hour which would tend to indicate independence.

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not

furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.)

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It is difficult, if not impossible to identify any franchised business that is not an integral part of a franchisor's business. That is the very nature of a franchise. The right to use the franchisor's mark in the operation of the business, either by selling goods or performing services identified with the mark or by using the mark, in whole or in part, is an integral part of franchising. To require the services provided by the UF to be substantially different from the Petitioner's business for the UF to be considered an independent contractor is simply disregarding the nature of a franchised business. In fact, this Petitioner, and any other franchisor is foremost in the business of selling franchisees.

In the SuperShuttle case, the drivers were required to accept all assignments. The drivers were assigned specific territories and AM or PM schedules. The drivers had daily contact with SuperShuttle regarding their availability and assignments. Without that daily contact and access to a necessary dispatch system, they would have no ability to perform their services. If the drivers hired any workers, those workers had to be approved by SuperShuttle. The drivers performed the same services as franchisees that they did as acknowledged employees. (Precedent Decision P-T-502)

The UFs had substantial freedom in the way they conducted their business on a day-to-day basis. UFs could decide what time and days they wanted to service their accounts (keeping in mind that their customer's preference was an important part of customer satisfaction). They could accept or reject any accounts offered by the Petitioner, and ownership of the account was transferred to the UF upon acceptance of the account. The franchisees could perform their services without daily contact from the Petitioner. The UFs hired, trained and paid their workers without any approval or oversight from the Petitioner. The UFs had entrepreneurial ability and could improve their business by selling special services to their customer or obtaining additional accounts on their own or through the Petitioner. The services performed by the UFs were never performed for the petitioner as acknowledged employees.

There is no issue under Unemployment Insurance Code section 606 in regards to any workers hired by the UFs. Those individuals were not part of the audit or assessments issued by the Employment Development Department on this matter.

It is found that the UFs were not common law employees under section 621 of the Unemployment Insurance Code.

DECISION

The petition is granted. The unit franchisees are not employees of the petitioner. The petitioner is not liable for tax, penalties and interest as described in the assessments.

Case No. **4764599**

OFFICE OF TAX PETITIONS
2400 Venture Oaks Way, Ste 200
SACRAMENTO CA 95833
Telephone: (916) 263-6733
Fax: (916) 263-6763

**DECISIONS SENT TO**

CONNOR-NOLAN INC
15551 WINCHESTER BLVD.
MONTE SERENO, CA 95030-3301

CONSTANGY BROOKS & SMITH LLP
JEFFREY M. ROSIN
535 BOYLSTON STREET STE 902
BOSTON, MA 02116

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

C·U·I·A·B

**OFFICE OF TAX PETITIONS**
**2400 Venture Oaks Way, Ste 200**
**SACRAMENTO CA 95833**

**(916) 263-6733**

CONNOR-NOLAN INC
c/o CONSTANGY BROOKS & SMITH LLP
Account No: 305-1361-8
Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

Case No. **4964472 (T)**

Issue(s): REASSESS, Note T

Date Petition Filed: 08/15/2013

**Date and Place of Hearings(s):**
(1) 01/14/2014 SACRAMENTO
(2) 03/24/2014 SAN JOSE
(3) 05/07/2014 SAN JOSE

**Parties Appearing:**
None
None
Petitioner, Department

# DECISION

The decision in the above-captioned case appears on the following page(s).

This decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal.

**Madlyn M. Hilton**, Administrative Law Judge

**FILE COPY**

Date Mailed: NOV 17 2014

*The Administrative Law Judge (ALJ Iman Shad) who originally presided over the hearings in this matter was subject to a mandatory layoff at the California Unemployment Insurance Appels Board (CUIAB). As a result, his employment ended on August 31, 2014, before he issued a decision in this matter. Consequently, the Presiding Administrative Law Judge of the Office of Tax Petitions (ALJ Shad's immediate supervisor) performed a complete review of the entire record, including all testimony, exhibits and correspondence and issued the following decision.

## ISSUE STATEMENT

Petitioner filed a petition to review an Employment Development Department (hereafter "Department") assessment issued under Unemployment Insurance Code section 1127 covering the period beginning July 1, 2009, and ending December 31, 2009. The issues in this case are:

1. Whether individuals performed services as employees; and

2. Whether Petitioner is liable for additional unemployment insurance and employment training tax contributions, disability insurance and personal income tax withholdings, penalty and interest.

## FINDINGS OF FACT

On July 31, 2013, the Department issued Assessment No. 4 pursuant to Unemployment Insurance Code section 1127. This assessment covered the period of time beginning April 1, 2010, and ending June 30, 2012, and did not include a penalty under section 1127.

The total amount due and owing as of August 17, 2013 was approximately $578,172 plus applicable interest.

The instant case was heard concurrently with companion Case No. 4964599, wherein the petitioner filed a petition for reassessment of Assessment No. 2.

On January 31, 2013, the Department issued Assessment No. 2 pursuant to Unemployment Insurance Code section 1127. This assessment covered the period of time beginning July 1, 2009, and ending December 31, 2009, and did not include a penalty under section 1127.

The total amount due and owing as of February 7, 2013 under Assessment No. 2 was approximately $49,376 plus applicable interest.

Beginning no later than January 1, 2010, and continuing through June 30, 2012, Fulton Connor operated Connor-Nolan, Inc., DBA "Jan Pro Cleaning Systems" (hereafter referred to as "Petitioner" and the "franchisor," forms) – as a subchapter S-Corporation with a California State identification number.

During the period of time, beginning July 1, 2009, and ending July 31, 2013 (hereafter "the Assessment Period"), Fulton Connor served as the president of Petitioner, and he was responsible for the ongoing operation of the business. Petitioner reported Fulton Connor, other corporate officers, along with various administrative, bookkeeping, customer service, training, collection, sales and marketing staff to the Department as employees.

At the hearing, Petitioner stipulated that the amount of the above-described assessments based upon the estimated calculations of the Department auditor were not in dispute.

Petitioner is a regional franchisor of commercial cleaning franchises. Petitioner is in the business of selling separate "unit franchises" (hereafter "UFs," or singularly as "UF") to persons who operate those cleaning businesses pursuant to a written form Unit Franchise Agreement, along with written training, procedures, operations and disclosure documents (hereafter collectively referred to as the "UFA"). During the Assessment Period, Petitioner retained no less than 100 "UFs, who are the subjects of the Department's above-described assessments.

The parties stipulated that for the purposes of the hearing only, the Department did not challenge Petitioner's position that: (i) it had taken all steps required under California/federal franchise law to continued status as a franchisor; (ii) it had sold franchises to unit franchisees in compliance with California/federal franchise law; and (iii) Petitioner was lawfully registered and qualified as a duly licensed franchisor in California.

Petitioners entered into unit franchise agreements with UFs to provide "janitorial and other related services" for initial accounts in a specified geographical territory under the Jan Pro system of specifications and operating procedures (the "System") and the service mark Jan Pro and other trademarks, trade names, service marks, and logos that the Jan Pro International master franchisor may

periodically authorize (the "Marks"). As part of its brand guarantees, Petitioner, among other things, provided: (1) quality assurance through a routine 50 point inspection of the work performed by UFs; (2) initial and routine training provided to UFs; and (3) a two-hour response *guarantee*, assuring cleaning service customers of prompt service.

The UF was required to pay an initial franchise fee. Once the accounts were serviced, the UFs would pay a royalty fee, a support fee and if applicable, an administrative fee for any specialized services billed to the customer by the UF.

Petitioner offered the rights to service such customers for an initial 10 year period of time to a worker who entered into the UFA. Initial accounts were obtained by the Petitioner, who entered into the initial contracts with customers. Petitioner determined which accounts would be bundled together to provide an approximate defined annual stream of income to the UF. The UF was free to accept or reject the accounts which comprised the bundle offered by Petitioner. Petitioner retained the right not to replace the rejected account(s) or refuse to sell the right to service further accounts to a UF. Ownership of the account was transferred to the UF upon acceptance of the account.

The Petitioner provided the UF with an Initial Equipment Package at no charge if they acquired an Initial Plan of at least $20,000 in gross annual billings or if they paid the Initial Franchise fee in full. If these conditions were not met the UF was required to purchase an Initial Equipment Package for $950. The equipment could also be purchased from a third party.

In order to use the Marks, the UF had to hold itself as an independent franchisee and owner and operator of the franchised business.

The UFA provided that the franchisee is an independent contractor. In furtherance of this requirement, the UFA required the franchisee to take affirmative action to disclose to the public that the franchisee was an independent contractor. Prior to signing the UFA, the UF was provided a Franchise Disclosure Document. The document provided: "As the owner operator of an independent business, you make all decisions concerning the objectives of that business and he manner in which those objectives are reached. You alone choose the details concerning day-to-day operations for the Franchised Business – subject to our System standards, which are necessary to preserve and promote the Jan-Pro brand".

If it chose, the UF could establish a separate cleaning business that did not provide services under the Jan Pro System or Marks. The UF could also grow its franchised business by obtaining more work within the Jan Pro system. The Petitioner could offer the UF an "Additional Account". The additional account was an account not offered in the initial plan. The UF would review the account and decide whether to accept or reject it. If the account was accepted, the UF

would pay the Petitioner a sales and marketing fee for the value of the services Petitioner provided in the acquisition and negotiation of the account. "Supplemental Accounts" were customer accounts that had not been offered or even procured with the assistance of the Petitioner, but were serviced under the "Marks" by the UF. In addition, the UF could request that the Petitioner assist with the bidding and negotiation of a cleaning service contract ("Negotiated Contract"). The UF was required to pay the Petitioner a "negotiation fee" under the UFA.

After accepting the accounts and depending on how they chose to run their business, UFs could do the cleaning themselves or hire others to do it. If a UF hired workers, it was not subject to Petitioner's approval. UFs determined how much and when to compensate their workers. Workers were paid directly by the UF. Most of the UFs hired helpers. Neither the assessments issued by the Employment Development Department nor the audits conducted on the Petitioner's business, covered any of the helpers that performed cleaning services for the UFs.

The UFs cleaning services were based entirely on the customer's preferences for days of week, time of day and what needed to be done. UFs interacted directly with customers for special requests, additional services and initial customer satisfaction or concerns. The UFs determined which order to service their accounts. The UFs determined how each account would be cleaned. UFs could purchase supplies through Petitioner's vendors or they could purchase from a vendor of their own choice.

Petitioner provided billing and collection services to the UFs. UFs were required to maintain complete and accurate books and records for the franchised business. The UF would provide the Petitioner with a statement of the services performed in a month. The Petitioner would bill the customers and remit the payments to the UFs after deducting the franchise and any other fees owed to the Petitioner.

Ownership of an account would revert to the Petitioner for franchisee misconduct or any action which caused damage to the Marks. It would revert to Petitioner if a UF did not resolve a complaint to a customer's satisfaction within 48 hours or if a customer complained three or more times within 90 days. If a customer requested termination or the use a different UF, the account would revert to Petitioner.

The franchise agreement could be terminated at any time by the UF. Upon termination, the UF was required to cease operations and the use of the Marks. The UF had to return customer keys, loaned materials and any confidential

information. The Petitioner could arrange for substitute contractors to perform any work required to service the accounts or transfer the accounts to another UF.

Under the UFA, the franchise agreement could be terminated by the Petitioner if the UF failed to complete the certification program, or if the UF made a material misrepresentation to obtain the franchise. The agreement could be terminated if the UF abandoned the business, or if there was a serious and imminent threat or danger to public safety. Petitioner could also terminate the agreement if the UF denied the Petitioner the right to inspect the franchised business or inspect or audit sales and accounting records.

A $50 "complaint fee" could be assessed against the UF by the Petitioner to compensate the Petitioner for the administrative cost of responding to the complaint to prevent loss of goodwill of the Marks. A "complaint" was a customer complaint to which the UF did not respond within 48 hours. The Petitioner assessed the fee in about 8% of the complaints received.

## REASONS FOR DECISION

If the department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. If any part of the deficiency is due to negligence or intentional disregard of the law, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment. (Unemployment Insurance Code, section 1127.)

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

(a) The extent of control which may be exercised over the details of the work;

(b) Whether or not the one performing services is engaged in a distinct occupation or business;

(c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;

(d) The skill required in the particular occupation;

(e) Who supplies the instrumentalities, tools and place of work for the one performing services;

(f) The length of time for which the services are to be performed;

(g) The method of payment, whether by time or by the job;

(h) Whether or not the work is part of the regular business of the principal;

(i) Whether or not the parties believe they are creating a relationship of master and servant; and

(j) Whether the principal is or is not in business.

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments* (1977) 71 Cal.App.3d 647.)

The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. (*Hillen v. Industrial Accident Commission* (1926) 199 Cal. 577.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

Early California case law applied a simple agency analysis for determining when a franchisor could be held vicariously liable for the acts of its franchisees: if the franchisor had a right of substantial control over the franchisee, an agency relationship would be found to exist. (See, e.g., *Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610, 613; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 547.) Later decisions, however, focused on whether a franchisor exercised or had the right to exercise complete or substantial control over the means and manner in which the franchisee conducted day-to-day

operations. (See, e.g., *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1295; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 746; *Juarez v. Jani-King, Inc.* (N.D. Cal. Jan. 23, 2012) No. 09-3495, 2012 U.S. Dist. LEXIS 7406,; *Singh v. 7-Eleven, Inc.* (N.D. Cal. 2007) 2007 WL 715488.

California courts have recognized that "[a] franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and goodwill, without the risk of creating an agency relationship with its franchisees." ( *Id.* at p. 1295.) "The franchisor's interest in the reputation of its entire [marketing] system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchise into an agent." ( *Kaplan v. Coldwell Banker Residential Affiliates, Inc., supra,* 59 Cal.App.4th at p. 745.)

In *Cislaw v. Southland Corp., supra,* the Court of Appeal affirmed a grant of summary judgment in favor of franchisor 7-Eleven in a wrongful death action brought by parents of a customer of a local 7-Eleven franchise who had purchased clove cigarettes which allegedly caused his death. The franchise agreement required franchisees to complete an operations training program, carry an inventory consistent with the 7-Eleven image, and operate the store from 7 a.m. to 11 p.m. 364 days a year, and submit to store inspections, but declared franchisees to be independent contractors. ( *Id.* at p.1294.) A manager at Southland provided a declaration attesting that the franchisor had no power to require or prevent the franchisees from carrying clove cigarettes, and the franchisee herself declared she maintained "full and complete control" over her choice of inventory as well as "hiring, firing, disciplining, and compensation." ( *Id.* at pp. 1292-1293.) This evidence, the Court of Appeal determined, established that "Southland did not control the means and manner" of the franchisee's operation and that franchisees retained "control over the manner and means of the store's operation." The court rejected the suggestion that the franchisee's operational rights were illusory because the franchise agreement permitted Southland to control the "Financial, Executive, and Operational aspects of the franchised store." (*Id.)* The court reasoned that "'[e]ven one who is interested primarily in the result to be accomplished by certain work is ordinarily permitted to retain some interest in the manner in which the work is done without rendering himself [or herself] subject to the peculiar liabilities which are imposed by law on an employer.'" (*Id.,* citation omitted.)

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It is difficult, if not impossible to identify any franchised business that is not an integral part of a franchisor's business. That is the very nature of a franchise. The right to use the franchisor's mark in the operation of the business, either by selling goods or performing services identified with the mark or by using the mark, in whole or in part, is an integral part of franchising. To require the services provided by the UF to be substantially different from the Petitioner's business for the UF to be considered an independent contractor is simply disregarding the nature of a franchised business. In fact, this Petitioner, and any other franchisor is foremost in the business of selling franchisees.

In the SuperShuttle case, the drivers were required to accept all assignments. The drivers were assigned specific territories and AM or PM schedules. The drivers had daily contact with SuperShuttle regarding their availability and assignments. Without that daily contact and access to a necessary dispatch system, they would have no ability to perform their services. If the drivers hired any workers, those workers had to be approved by SuperShuttle. The drivers performed the same services as franchisees that they did as acknowledged employees. (Precedent Decision P-T-502)

The UFs had substantial freedom in the way they conducted their business on a day-to-day basis. UFs could decide what time and days they wanted to service their accounts (keeping in mind that their customer's preference was an important part of customer satisfaction). They could accept or reject any accounts offered by the Petitioner, and ownership of the account was transferred to the UF upon acceptance of the account. The franchisees could perform their services without daily contact from the Petitioner. The UFs hired, trained and paid their workers without any approval or oversight from the Petitioner. The UFs had entrepreneurial ability and could improve their business by selling special services to their customer or obtaining additional accounts on their own or through the Petitioner. The services performed by the UFs were never performed for the petitioner as acknowledged employees.

There is no issue under Unemployment Insurance Code section 606 in regards to any workers hired by the UFs. Those individuals were not part of the audit or assessments issued by the Employment Development Department on this matter.

It is found that the UFs were not common law employees under section 621 of the Unemployment Insurance Code.

DECISION

The petition is granted. The unit franchisees are not employees of the petitioner. The petitioner is not liable for tax, penalties and interest as described in the assessments.

Case No. **4964472**

OFFICE OF TAX PETITIONS
2400 Venture Oaks Way, Ste 200
SACRAMENTO CA 95833
Telephone: (916) 263-6733
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**DECISIONS SENT TO**

CONNOR-NOLAN INC
15551 WINCHESTER BLVD.
MONTE SERENO, CA 95030-3301

CONSTANGY BROOKS & SMITH LLP
JEFFREY M. ROSIN
535 BOYLSTON STREET STE 902
BOSTON, MA 02116

# EXHIBIT D

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**APPEAL NO. 17-16096**

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GLORIA ROMAN, GERARDO VAZQUEZ, and JUAN AGUILAR,
on behalf of themselves and all others similarly situated,

Plaintiff-Appellants

v.

JAN-PRO FRANCHISING INTERNATIONAL, INC.,

Defendant-Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:16-cv-05961-WHA
The Honorable William H. Alsup

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# PLAINTIFF-APPELLANTS' MOTION TO REMAND

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Shannon Liss-Riordan (SBN 310719)
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Pursuant to Circuit Rule 3-6(a), Plaintiff-Appellants Gloria Roman, Gerardo Vazquez, and Juan Aguilar ("Plaintiffs") respectfully request that this Court issue an order remanding this case to the District Court for reconsideration in light of the California Supreme Court's recent decision in Dynamex Operations West, Inc. v. Superior Court, --- P.3d ----, 2018 WL 1999120 (Cal. Apr. 30, 2018).[1] In Dynamex, the California Supreme Court announced a revised test for determining when workers may be classified as independent contractors and when they must be classified as employees for the purposes of the California Labor Code.

The issue in this case is whether Plaintiffs, low-income janitorial workers who performed cleaning services under the name of Defendant-Appellee Jan-Pro Franchising International, Inc. ("Jan-Pro") were Jan-Pro's employees. Plaintiffs allege that, because they were misclassified as independent contractors, Jan-Pro committed a variety of California Labor Code violations by taking improper deductions from their pay, failing to pay overtime and ensure that they received minimum wage, and most egregiously, requiring them to pay thousands of dollars

[1] Ninth Circuit Rule 3-6(a) provides that the Court may remand or vacate a judgment or remand the case for additional proceedings where "the Court determines: (a) that clear error *or an intervening court decision* or recent legislation requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings[.]" (emphasis added). See also Walczak v. EPL Prolong, Inc., 198 F.3d 725, 728 n.2 (9th Cir. 1999) (noting that under Circuit Rule 3-6(a), a party may move for summary reversal based on, *inter alia*, an intervening court decision).

in fees in order to obtain cleaning work.[2] Jan-Pro maintains that Plaintiffs were properly classified as independent contractors and that it therefore owes them no damages.

In determining that Plaintiffs were not Jan-Pro's employees as a matter of law, the District Court below focused on the degree of Jan-Pro's control over Plaintiffs (purportedly applying Martinez v. Combs, 49 Cal. 4th 35 (2010)). See Roman v. Jan-Pro Franchising Int'l, Inc., 2017 WL 2265447, at *3 (N.D. Cal. May 24, 2017). The District Court also focused on the fact that Jan-Pro classifies itself as a "franchisor" (and the workers as "franchisees") in analyzing whether Jan-Pro was "vicariously liable" for the wage violations that Plaintiffs alleged, assuming that because of the "franchise" label, it needed to apply Patterson v. Domino's Pizza, LLC, 60 Cal. 4th 474 (2014) (a case analyzing whether a franchisor would be vicariously liable for sexual harassment of a franchisee's employee). See Roman, 2017 WL 2265447, at *2–*3.[3]

However, in Dynamex, the California Supreme Court has now announced that, in determining whether a worker is an employee or independent contractor,

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[2] See Awuah v. Coverall North America, Inc., 952 N.E.2d 890, 900–01 (Mass. 2011) (holding that requiring cleaning franchisees who were misclassified as independent contractors to pay substantial fees in order to obtain work, as well as insurance payments and other charges, violated Massachusetts wage law).

[3] The District Court stated that it would apply Martinez "with the gloss of Patterson." Roman, 2017 WL 2265447, at *3.

under Martinez, courts should apply a strict "ABC" test that does not require an analysis of how much control the alleged employer has over the worker. Dynamex, 2018 WL 1999120, at *4, *29, *34. Instead, under this "ABC" test, the burden is on the alleged employer to prove all three prongs of the test, the second of which is simply that the work is performed outside the usual course of the employer's business. Id. at *29.[4] If the employer is not able to establish *all three* prongs of the test (including this second prong), then the worker is an employee. See id. at *34.

In Dynamex, the California Supreme Court expressly adopted the Massachusetts version of the "ABC" test for distinguishing between employees and independent contractors. Id. at *29 n.23. Significantly, in explaining the second prong of the test (Prong B), the Dynamex Court specifically cited a Massachusetts case that had held that a cleaning "franchisee" was an employee of a cleaning "franchisor" under Prong B. See id. at *34 (citing Awuah v. Coverall

[4] These prongs require the alleged employer to prove that: "(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trader, occupation, or business of the same nature as the work performed." Id.

North America, Inc., 707 F. Supp. 2d 80, 82–84 (D. Mass. 2010)).[5] Thus, there can be no question that the California Supreme Court intended this "ABC" test (including prong B) to apply to "franchisors." While Plaintiffs have contended in this appeal that the District Court erred in its application of Patterson to this case, there can now be no dispute that Patterson does not apply here, but instead the newly announced Dynamex "ABC" test applies.

The District Court considered the question of employment status under what it believed to be the California Supreme Court's test articulated in Martinez, 49 Cal. 4th 35. However, its analysis, which focuses on the degree of control that Defendant had over Plaintiffs, has been entirely upended by Dynamex. Noting the remedial purpose of the California wage laws, the Supreme Court in Dynamex stated that the "suffer or permit" standard from Martinez is "exceptionally broad," "must be liberally construed," and applies to the employee-independent contractor inquiry in all cases. Dynamex, 2018 WL 1999120, at *27. The Court thus held that the proper standard for resolving that inquiry is: first, to provide workers with a *presumption* of employee status, placing the burden on the putative employer to establish that the worker is an independent contractor; and second, to require the

[5] In Coverall, the court determined on summary judgment that the services provided by the worker, commercial cleaning, was within Coverall's usual course of business, rejecting the defendant's argument that it was in the business of "franchising," as opposed to commercial cleaning. 707 F. Supp. 2d at 82–84.

putative employer to establish each of three factors of the "ABC" test in order to justify classifying workers as independent contractors. Id. at *29.

The Dynamex decision made clear that California's adoption of the ABC test is a reinterpretation of existing law that applies retroactively, which would include application to Plaintiffs in this case. 2018 WL 1999120, at *35–*36.[6] Indeed, as numerous courts in California have found, judicial decisions altering the common law and statutory interpretation have retroactive applicability. See, e.g., Brennan v. Tremco Inc., 25 Cal. 4th 310, 318 (2001) ("The general rule that judicial decisions are given retroactive effect is basic in our legal tradition."); Abramson v. Juniper Networks, Inc., 115 Cal. App. 4th 638, 660-61 (2004)

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[6] In a similar case brought in California against one of Jan-Pro's competitors, Jani-King International, Inc., which also involves claims that "cleaning franchisees" were misclassified as independent contractors and suffered wage violations as a result, the District Court likewise granted summary judgment in favor of the Defendant. See Juarez v. Jani-King of California, Inc., 2012 WL 177564, at *4–*5 (N.D. Cal. Jan. 23, 2012). In reaching this decision, the District Court in Juarez relied largely on the plaintiffs' status as "franchisees," which the District Court determined justified any control that Jani-King maintained over the plaintiffs (and determined would require the plaintiffs to prove a level of control beyond what was necessary to protect the franchise). See id. The plaintiffs in that case appealed. See 9th Cir. No. 12-17759. On appeal, in 2015, the Ninth Circuit stayed the case pending the California Supreme Court's ruling in Dynamex. See id. ECF No. 57. In staying the case these past three years in anticipation of Dynamex, the Ninth Circuit appeared to recognize both that: (1) the Supreme Court decision in Dynamex clarifying the proper standard to be applied, when issued, would apply to a pending case in this Court; and (2) that the standard to be applied in determining whether the plaintiffs were misclassified would apply even though the defendant justified its arrangement as a "franchise."

("Although the [California] Supreme Court issued its decision . . . after the trial court's grant of summary judgment in this case, [the Supreme Court decision] nevertheless applies to this controversy. As a general rule, judicial decisions are given retroactive effect."); see also Rogers v. Tennessee, 532 U.S. 451, 452 (2001) (observing that prohibiting the retroactive application of judicial decisions would "unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system"); United States v. Tavizon-Ruiz, 196 F. Supp. 3d 1076, 1078 (N.D. Cal. July 25, 2016) ("[D]ecisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law has always meant.") (quoting United States v. Aguilera-Rios, 769 F.3d 626, 631) (9th Cir. 2014)).

The District Court's opinion, granting summary judgment to Jan-Pro on the ground that Plaintiffs were independent contractors as a matter of law, did not perform the analysis that Dynamex requires. The District Court's analysis of the employee-independent contractor inquiry in this case is thus now obsolete and must be reconsidered. Because the District Court did not have the benefit of this important new appellate authority, this Court should remand this case to the District Court for reconsideration in light of Dynamex.

Respectfully submitted,

GLORIA ROMAN, GERARDO VAZQUEZ, and JUAN AGUILAR, on behalf of themselves and all others similarly situated,

By their attorneys,

/s/ Shannon Liss-Riordan
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Dated: May 9, 2018

**CERTIFICATE OF COMPLIANCE**

I hereby certify that pursuant to Fed. R. App. P. 27(d) and Circuit Rule 27-1, this Motion has been prepared in a proportionally spaced typeface in 14 point font, and does not exceed 20 pages in length.

Dated: May 9, 2018

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan (SBN 310719)

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System on May 9, 2018. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 9, 2018

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan (SBN 310719)

# EXHIBIT E

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

No. 18-55462

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SERGE HAITAYAN, JASPREET DHILLON, ROBERT ELKINS, and MANINDER "PAUL" LOBANA,

Plaintiff - Appellants,

v.

7-ELEVEN, INC.,

Defendant-Appellee

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# OPENING BRIEF OF PLAINTIFF-APPELLANTS

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## INTRODUCTION

This case was brought by four 7-Eleven franchisees, Plaintiff-Appellants Serge Haitayan, Jaspreet Dhillon, Robert Elkins, and Maninder "Paul" Lobana, contending that they and other 7-Eleven franchisees in California, while classified as independent contractors, are actually employees entitled to the benefits of California and federal wage laws. In their detailed complaint, Plaintiffs explained how Defendant-Appellee 7-Eleven, Inc. has micromanaged every aspect of their work. Although, under this "franchise" structure, Plaintiffs are nominally running their own convenience store businesses, in reality they work as store managers for 7-Eleven (an international convenience store chain), required to follow 7-Eleven's corporate procedures down to the smallest detail, with little independent judgment or discretion, and under the close supervision of 7-Eleven field consultants.[1]

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[1] As discussed further below, Plaintiffs have alleged that it is 7-Eleven, not the franchisees, that manages the finances of each store, selecting the store's bank account, requiring all store receipts be deposited into that account, and directing payment out of the account -- including the amount franchisees are permitted to draw from the store's account (in other words, determining the franchisees' pay). Excerpts of Record ("ER") 046 ¶ 24; 049 ¶ 34. Similarly, it is 7-Eleven that makes all the decisions regarding the specific products that must be stocked on the shelves, ER 050 ¶ 41, and it monitors the stores closely to ensure that all products are properly stocked. 7-Eleven, not the franchisees, holds the store leases, ER 051 ¶ 49, and it decides and creates the in-store decorations, fixtures, and furnishings, ER 050 ¶ 43. The franchisees cannot even control the temperature in the stores – that is set and controlled by 7-Eleven, from its corporate headquarters in Dallas, Texas. ER 065 ¶ 105. It is 7-Eleven, not Plaintiffs and other franchisees, that sets requirements for hiring and training of new store employees and handles payment of store employees (and franchisees). ER 055 ¶¶ 71-75. And it is 7-Eleven that

Despite the specificity of the complaint, and the broad protections of the California Labor Code (and the federal Fair Labor Standards Act) under which Plaintiffs brought this suit, the District Court below disposed of the case on the pleadings, prior even to the creation of an evidentiary record. In granting 7-Eleven's Motion for Judgment on the Pleadings, the District Court analyzed the merits of the question of whether Plaintiffs have been misclassified, rather than deciding whether, construing all facts in Plaintiffs' favor, they had made out sufficient allegations to even bring before a jury (after discovery) the question of whether they are employees under state or federal law. It was entirely improper for the District Court to make this type of determination as a matter of law on the pleadings alone. It has been well recognized that (at least until this past April) the question of whether workers are employees or independent contractors is detailed and fact-intensive -- and rarely suitable for determination on summary judgment, let alone on a motion for judgment on the pleadings. The judgment below must be reversed on this ground alone.

However, even more significantly, this past April, the California Supreme

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sets the hours stores must be open: 24 hours a day, 7 days a week, at least 364 days per year. ER 048 ¶ 32. Under any standard, a jury could easily have concluded that Plaintiffs and other franchisees are not running their own businesses, but instead act as 7-Eleven store employees, routinely working well more than eight hours per day, six to seven days per week, ER 083 ¶ 136, in order to run what is not their own place of business, but rather 7-Eleven's place of business.

Court created a sea change in the law of independent contractor misclassification. In a landmark ruling, the Court announced in *Dynamex Operations West, Inc. v. Superior Court*, 461 P.3d 1, 4 Cal. 5th 903 (Cal. Apr. 30, 2018), reh'g denied (June 20, 2018), that California will now use a new and extremely employee-protective test in determining whether a worker is an employee or an independent contractor. The Court expressly adopted the "ABC" test utilized in Massachusetts, which has long been recognized as the strictest test in the country for assessing independent contractor misclassification. In doing so, the Court explained, in a forceful 82-page unanimous decision, that the previous multi-factor test that had long been utilized to answer this question in California (the "*Borello*" test), was not protective enough of employee status, had led to too much uncertainty, and was subject to manipulation. *Id.* at 964. Under the ABC test that the Court adopted, the burden falls on the alleged employer to prove three prongs in order to justify independent contractor status: "(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed." *Id.* at 957-58. This test is conjunctive, meaning that if the alleged

employer is not able to satisfy *all three prongs* of the test, then the worker is an employee. *Id.*

Significantly, in explaining this test, the Court emphasized that it had selected the version of the ABC test in use in Massachusetts, in which the second prong of the test ("Prong B") may only be satisfied if the alleged employer can show that the services provided by the plaintiff are "outside the usual course of business" of the defendant. And in describing what this test means, the Court cited to cases in other states that have utilized an ABC test, including a case in Massachusetts where a federal court had held that franchisees were actually employees of their franchisor under Prong B: *Awuah v. Coverall North America, Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010) (cited in *Dynamex*, 461 P.3d at 963). In *Awuah*, the court granted the plaintiffs' motion for summary judgment, holding as a matter of law that the franchisees were employees because the defendant could not establish Prong B (i.e. the plaintiff franchisees performed commercial cleaning services, which was the same business that Coverall was in). The court rejected Coverall's argument that "it is not in the commercial cleaning business, but rather it is in the franchising business," and concluded that "[d]escribing franchising as a business in itself…sounds vaguely like a description for a modified Ponzi scheme." *Id.* at 82, 84. Recognizing the reality of Coverall's dependence on its cleaning workers, the court ruled "that Coverall sells cleaning services, the same

services provided by [the] plaintiffs." *Id*. at 84. Similarly, here, under Prong B of the new "ABC" test, there can be no doubt that Plaintiffs are 7-Eleven employees under California law. 7-Eleven is an international operator of convenience stores, and Plaintiffs are the individuals who run the convenience stores for it in California. Indeed, the District Court below already determined that Plaintiffs are "integral" to 7-Eleven's business. ER 020.

This decision by the California Supreme Court, in which it announced a new standard for evaluating claims of independent contractor misclassification, and in explaining and illustrating that standard specifically cited approvingly to a case which, in applying this standard, held as a matter of law franchisees to be employees of a franchisor, can leave little question that the District Court's decision here must be reversed. Indeed, under *Dynamex*, it is Plaintiffs themselves who will be entitled to judgment as a matter of law on the question of whether they were misclassified; the judgment of the District Court holding just the opposite must be vacated and reversed.[2]

Regardless of *Dynamex*, and the fact that this decision compels reversal, the District Court disregarded its proper role in deciding a motion for judgment as a matter of law. Rather than construing all of Plaintiffs' factual allegations of 7-

[2] *See Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (where district court held that FedEx Ground drivers were properly classified as independent contractors, Ninth Circuit reversed with direction that judgment should enter in favor of plaintiff delivery drivers instead).

Eleven's control over their day-to-day operations (as well as other factors) in their favor, deciding whether Plaintiffs had alleged sufficient facts to state a claim of employee status, as it was required to do, the District Court took it upon itself to find and rely on contradictory evidence in Plaintiffs' franchise agreements. The Court thus concluded that Plaintiffs' factual allegations were "unpersuasive" and that Plaintiffs had not "established" they were employees of 7-Eleven. On a motion for judgment on the pleadings (which was being considered as a Rule 12(b) motion to dismiss), the District Court was not entitled to determine what, if anything, Plaintiffs had "established." Its only role was to do determine what Plaintiffs *could* establish, if their factual allegations were taken as true. This Court must correct the District Court's clear legal error by vacating its decision.

But then, just weeks after the District Court issued its order of judgment in this case and during the pendency of this appeal, the California Supreme Court issued its decision in *Dynamex*, which dramatically altered the legal landscape relevant to Plaintiffs' claims of employee status under California law. In light of this new binding authority, which the District Court did not apply, this Court must vacate and reverse in favor of Plaintiffs under the *Dynamex* "ABC" test.[3]

[3] Indeed, the District Court recognized the pendency of *Dynamex* at the California Supreme Court and even noted that the *Dynamex* ruling would "presumably shed light on this issue," ER 014, but then, rather than waiting for the decision to be issued, it rushed to enter judgment against Plaintiffs while this case was still in its infancy.

In addition to vacating the District Court's order of judgment, this Court should also reverse its order denying Plaintiffs' motion to retax costs. While its own dispositive motion was pending and months prior to the close of the discovery period, 7-Eleven engaged in abusive, scorched-earth discovery on the issue of class certification, taking eight depositions and issuing twenty-five document subpoenas. After prevailing on their motion for judgment on the pleadings, 7-Eleven sought more than $40,000 in costs, close to $0 of which was necessary to its obtaining judgment in its favor. The Clerk reduced 7-Eleven's excessive request to $22,474.41. ER 025.

The District Court abused its discretion in taxing this amount to Plaintiffs. The District Court was wrong to find that 7-Eleven's discovery tactics were reasonably necessary, and it was wrong to ignore the equitable considerations in this case, which counsel against an award of costs. In particular, Plaintiffs pursued this case, which involved difficult legal issues, in good faith; a massive financial disparity exists between 7-Eleven and Plaintiffs; Plaintiffs' case is of significant public importance; and taxing costs to Plaintiffs risks chilling future litigation in which individual workers seek to assert their legal rights against the abuse of powerful corporations. This Court should thus also reverse the decision of the District Court and decline to reward 7-Eleven for its abusive tactics with a costs award (which should also be reversed because the judgment below should be

reversed).

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case because it involved a federal question, namely whether Defendant-Appellee 7-Eleven, Inc. ("7-Eleven") violated the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. *See* 28 U.S.C. §1331. The District Court had supplemental jurisdiction over Plaintiff-Appellants' state law claims for violations of California state wage-and-hour laws. *See* 28 U.S.C. § 1367(a). The District Court also had jurisdiction under the federal Class Action Fairness Act. *See* 28 U.S.C. 1332(d).

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this is an appeal from a final judgment entered by the District Court on March 20, 2018, which fully disposed of all of the claims of all of the parties. ER 010-011. Plaintiffs' appeal is timely under Rule 4(a) of the Federal Rules of Appellate Procedure, because Plaintiffs filed their Notice of Appeal with the District Court on April 9, 2018, ER 008-009, within 30 days of the entry of the final judgment.

Plaintiffs' appeal of the District Court's denial of their motion to retax costs is also timely. The order denying Plaintiffs' motion was entered on September 4, 2018, ER 003-007, and Plaintiffs filed an amended notice of appeal, to include the motion to retax costs, on September 12, 2018. ER 001-002.

## STATEMENT OF THE ISSUES

1. Whether the District Court erred when, in granting 7-Eleven's motion for judgment as a matter of law, it found that Plaintiffs are not employees of 7-Eleven.
2. Whether the District Court abused its discretion in denying Plaintiffs' Motion to Retax Costs.

## STATEMENT OF THE CASE

7-Eleven and its affiliates currently operate at least 25,000 convenience stores worldwide, with 7,800 stores in the United States (approximately 1,500 of which are in California). ER 044 ¶ 16. While most of its stores are managed by franchisees, historically, more than 25% of 7-Eleven's stores have been corporate stores, admittedly owned and operated by 7-Eleven itself. ER 067 ¶ 111. The franchisee-managed stores sell the same goods and services that 7-Eleven sells in its corporate stores. ER 061 ¶ 94.

To become a franchisee, prospective franchisees must complete 300 hours of unpaid training. ER 048 ¶ 31. Qualified prospective franchisees must then pay an initial franchisee fee and a $20,000 "down payment." ER 046 ¶ 22. On an ongoing basis, 7-Eleven takes a portion of the gross profits of the franchise-managed stores (which is 50% under the 2004 version of the franchise agreement and generally has been increased in the 2016 version of the agreement); 7-Eleven

determines what amount of money franchisees are permitted to take out of the profits. ER 046 ¶ 23. Each franchise is governed by a written franchise agreement between 7-Eleven and the franchisee. ER 043 ¶ 12.

On October 12, 2017, Plaintiffs filed the action below, on behalf of themselves and others similarly situated. ER 106. On November 1, 2017, Plaintiffs filed a First Amended Complaint, which alleged six claims against 7-Eleven: 1) failure to pay overtime in violation of the Fair Labor Standards Act; 2) failure to pay overtime in violation of the California Labor Code; 3) failure to reimburse business expenses in violation of the California Labor Code; 4) failure to provide and maintain uniforms and equipment in violation of California law; 5) unfair business practices in violation of the California Business and Professions Code; and 6) unlawful business practices in violation of the California Business and Professions Code. ER 039-094.

Underlying all of these claims is Plaintiffs' allegation that, despite 7-Eleven's classification of them as "independent contractors," they are, in fact, employees. Plaintiffs' allegation of employee status was based largely on the excessive control held and exercised by 7-Eleven over their work (beyond even that which is typical in franchise arrangements). In particular, Plaintiffs described, *inter alia*, 7-Eleven's control over franchisees' finances, including the amount franchisees can draw from the store's bank account; its requirement that stores be

open 24 hours a day and at least 364 days a year; its dictation to franchisees of the products they must stock and the suppliers from whom they must order the products; its control of in-store decorations, fixtures, furnishings, and equipment, as well as in-store temperature and width of store aisles and height of shelves; and its requirements for hiring and training of new store employees and processing of payroll for store employees and franchisees. ER 046 ¶ 24; 048 ¶¶ 32-33; 049 ¶ 34; 050 ¶¶ 41, 43; 055 ¶¶ 71-75; 058 ¶ 86, 065 ¶ 105.

On January 31, 2018, 7-Eleven moved for judgment on the pleadings, arguing that Plaintiffs had failed to state any claims upon which relief could be granted because Plaintiffs are not employees of 7-Eleven. ER 110 #52. In ruling on 7-Eleven's Motion for Judgment on the Pleadings, the District Court found that, as a matter of law, Plaintiffs were not employees under the FLSA or the California Labor Code, and thus held that their complaint failed as a matter of law. ER 012-022. The District Court then issued judgment in 7-Eleven's favor. ER 010-011.

The District Court considered the question of employment status under California law under the test articulated in *Martinez v. Combs*, 49 Cal. 4th 35 (2010). *Martinez* provides that an employer is an entity or person who either: (1) exercises control over the wages, hours and working conditions of the workers; *or* (2) suffers or permits their work; *or* (3) engages the worker to perform work. *Id*. at 64, 66. The District Court noted that this test incorporates the standard articulated

in *S.G. Borello & Sons,Inc. v. Dept. of Industrial Rel.*, 48 Cal. 3d 341 (1989), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), for determining whether a common law employment relationship exists. It also found that *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 489 (2014), a case that addressed whether a franchisor can be held liable for a franchisee's employee's torts, was incorporated into the third *Martinez* prong.

The District Court considered the question of employment status under the FLSA using the "economic reality test," under which courts consider a variety of factors: "1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer's business." *Driscoll Strawberry Assocs. Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

Plaintiffs filed a notice of appeal on April 6, 2018. ER 8-9.

While its motion for judgment on the pleadings was pending, rather than waiting for the parties to brief the motion or for the Court to decide it, 7-Eleven embarked on an aggressive undertaking of discovery, including eight depositions

(of the named plaintiffs and other witnesses), and served twenty-five document subpoenas. ER 028-032. By the time the Court ruled on their motion for judgment on the pleadings, 7-Eleven had incurred upwards of $40,000 in costs, mostly spent on discovery. ER 026. On April 2, 2018, 7-Eleven, a massive multinational corporation, filed a bill of costs requesting $40,377.52 from Plaintiffs, four hard-working individuals who were merely seeking to vindicate their wage rights under federal and state law. ER 026. Plaintiffs filed an objection. ER 120 #137. On July 23, 2018, the Clerk entered a taxation of costs against Plaintiffs in the amount of $22,474.41. ER 025.

On July 30, 2018, Plaintiffs filed a motion to re-tax costs, arguing that the costs sought by 7-Eleven were excessive and unnecessary to its successful motion for judgment on the pleadings.[4] ER 122 #159. The District Court denied the

[4] The following day, the District Court struck Plaintiffs' motion, based on their failure to comply with Local Rule 7-3, which the Court contended required conferral with Defendant at least 7 days before filing of the motion. ER 122 #160. The Court ordered the parties to confer in person prior to filing another motion, which they did (in Los Angeles) on August 6, 2018. See ER 122 #161, 162. Plaintiffs then re-filed their motion to retax costs on August 13, 2018. ER 122 #164.

Plaintiffs respectfully note that this Court has recently admonished the Central District for maintaining and enforcing an overly stringent local rule that did not recognize the realities of class litigation. *See ABS Entertainment, Inc. v. CBS Corp., Inc.*, 900 F.3d 1113, 1140 (9th Cir. 2018). Here too, the District Court's strict enforcement of a local rule that was not, as a practical matter, possible to comply with would appear to fall under the same vein. Indeed, other courts in the Central District of California have recognized that is impossible to

motion on August 31, 2018, finding that 7-Eleven had demonstrated that its depositions and subpoenas were "reasonably necessary," notwithstanding that they were irrelevant to the court's decision on the motion for judgment on the pleadings, because Plaintiffs were preparing or had already filed a Motion for Class Certification.[5] ER 005-006.

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comply with the District's Local Rule requiring conferral in filing a motion to retax costs, given that parties have only 7 days to file such a motion pursuant to Local Rule 54. *See, e.g., Mulligan v. Yang*, 2017 WL 826909, at *1 (C.D. Cal. Mar. 2, 2017) ("While parties are ordinarily required to meet and confer at least seven days prior to filing a motion, see C.D. Cal. L.R. 7-3, that requirement seems inapplicable where, as here, a party only has seven days to file the motion in the first place, *see* C.D. Cal. L.R. 54. Even if it were possible to theoretically comply with both mandates simultaneously without seeking some sort of extension, the court would nonetheless exercise its discretion to consider Plaintiff's Motion to Retax Costs.")

Likewise, the District Court's requirement that counsel confer in person regarding any motion (ER 107 #160) made little sense where Plaintiffs' lead counsel resides in Boston and 7-Eleven's lead counsel resides in Chicago. Enforcement of this rule, even for this motion on which it was clear the parties would not reach agreement, required Plaintiffs to expend unnecessary time and expense in the simple act of opposing a defendant's excessive request for costs (which the court ultimately rejected in any event). In its strict of enforcement of such local rules, Plaintiffs submit that the District Court lost sight of the rational principles of fairness and litigation efficiency that should have been applied.

[5] Under C.D. Cal. Local Rule 23-3 (the very rule stricken by this Court in *ABS Entertainment*, 900 F.3d at 1140, discussed *supra* note 4), Plaintiffs were required to file their motion for class certification when they did, within 90 days after service of their First Amended Complaint on November 9, 2017. Plaintiffs offered at the outset of litigation of postpone the parties' class certification briefing to allow 7-Eleven additional time to file a motion to dismiss, but 7-Eleven refused. Rather, 7-Eleven instead proceeded to file an *ex parte* application for a 27-day extension to its deadline for responding to Plaintiffs' First Amended Complaint

The Court also rejected Plaintiffs' arguments that the Court should use its discretion to deny costs based on the vast disparity between Plaintiffs' and 7-Eleven's financial resources, the likelihood of Plaintiffs' success on appeal (which is particularly strong in light of *Dynamex*, as discussed *infra*), and that an award of costs would discourage litigants from bringing future wage violation suits. ER 006-007.

On September 12, 2018, Plaintiffs amended their notice of appeal to include the Court's denial of their motion to retax costs. ER 001-002.

## SUMMARY OF THE ARGUMENT

**I.** The District Court's decision to grant 7-Eleven's Rule 12(c) motion for judgment on the pleadings constitutes reversible error. The District Court erroneously determined – while this case was in its infancy -- that, as a matter of law, Plaintiffs could not be employees of 7-Eleven. To reach this conclusion, the District Court failed to construe Plaintiffs' factual allegations in their favor and instead engaged in an evaluation of the credibility and persuasiveness of Plaintiffs'

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*without* seeking a corresponding extension to the parties' class certification briefing. *See* ER 036-038. Plaintiffs were therefore compelled to oppose 7-Eleven's requested extension, but with an explanation that "[i]f the Court grants any relief to Defendant, Plaintiffs request that due consideration be given to the discovery and class certification issues implicated by an extension." ER 035. Ultimately, the Court denied 7-Eleven's request for an extension on November 27, 2017, without taking into account the resultant impact on the discovery schedule. ER 109 #32. Thus, the fault does not lie with Plaintiffs that 7-Eleven took such excessive discovery while asking the Court to dispose of Plaintiffs' claims on the pleadings.

claims in the face of contradictory evidence. At the motion for judgment on the pleading stage, the District Court was entitled only to determine whether Plaintiffs had sufficiently stated their claims of federal and state wage violations. As Plaintiffs' First Amended Complaint included sufficient factual allegations to make out a claim that they are 7-Eleven employees, the District Court exceeded its authority in granting 7-Eleven's motion for judgment on the pleadings.

**II.** In any event, there can now be no question that this Court must vacate and remand the District Court's order in light of the California Supreme Court's decision in *Dynamex*, 4 Cal. 5th 903. In this landmark decision, the Court adopted an "ABC" test for evaluating workers' claims of employment status under the California Labor Code. Under this important new appellate authority, the judgment against Plaintiffs must be reversed, and indeed it is Plaintiffs who will be entitled to a ruling that they are employees.

**III.** The District Court abused its discretion in denying Plaintiffs' Motion to Retax Costs because none of the costs awarded to 7-Eleven were reasonably necessary pursuant to 28 U.S.C. § 1920. Not only must the judgment be reversed, along with the taxation of costs, but the costs taxed by the District Court represented the costs for depositions and document subpoenas, which were not even necessary to 7-Eleven obtaining judgment in its favor. Moreover, had 7-Eleven agreed to stay the class certification briefing while its motion for judgment

was pending, it would not have had to incur any of the costs at issue. Even if the costs were justified, the District Court ignored the relevant equitable considerations, which counsel against an award of fees to 7-Eleven, where, as here, there is a massive financial disparity between the parties and taxing costs to Plaintiffs is likely to chill future litigation brought by other workers seeking to vindicate their wage rights.

## ARGUMENT

### I. Standards of Review

#### A. Motion for Judgment on the Pleadings

This Court reviews a District Court's decision to grant a Rule 12(c) motion for judgment on the pleadings *de novo*. *Doe v. U.S.*, 419 F.3d 1058, 1061 (9th Cir. 2005). Rule 12(c) is "functionally identical" to Rule 12(b)(6) and "the same standard of review" applies to motions brought under either rule. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). To evaluate a Rule 12(b)(6) motion to dismiss, the court accepts the material facts alleged in the complaint, together with reasonable inferences to be drawn from those facts, as true. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A plaintiff must allege facts that are enough to raise their right to relief "above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The Court "must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party." *Turner v.*

*Cook,* 362 F.3d 1219, 1225 (9th Cir. 2004). A motion for judgment on the pleadings may be granted "only if, taking all allegations in the pleading as true," the moving party is entitled to judgment as a matter of law. *McSherry v. City of Long Beach*, 423 F. 3d 1015, 1021 (9th Cir. 2005).

**B. Motion to Retax Costs**

The Ninth Circuit reviews a district court's award of costs for abuse of discretion. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 945 n.12 (9th Cir. 2003). Costs are governed by Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920. "Taxable costs are limited to relatively minor, incidental expenses" and are intended to be "modest in scope." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012); *see also Kalitta Air L.L.C. v. Cent. Texas Airborne Sys. Inc.*, 741 F.3d 955, 958 (9th Cir. 2013) (noting that "§ 1920 is narrow, limited, and modest in scope" and reversing award of costs for *pro hac vice* admission fees and for editing and synchronizing deposition videotapes).

Courts may deny or reduce an award of costs for several reasons, including: (1) the substantial public importance of the case; (2) the closeness and difficulty of the issues in the case; (3) the chilling effect on future similar actions; (4) the plaintiff's limited financial resources; and (5) the economic disparity between the parties. This is not "an exhaustive list of 'good reasons' for declining to award

costs," but rather a starting point for analysis. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1247–48 (9th Cir. 2014).

## II. The District Court Erred in Making Factual Findings in Ruling on 7-Eleven's Motion for Judgment on the Pleadings, Which Was Equivalent to a Motion to Dismiss under Rule 12(b)(6)

In granting 7-Eleven's motion for judgment on the pleadings, the District Court ignored its proper role in evaluating such a motion. In ruling on the motion, instead of construing all of Plaintiffs' factual allegations in their favor, as it was required to do, the District Court took it upon itself to answer what it called "the threshold question before the Court [of] whether an employment relationship exists between the parties." ER 014. The District Court's proper role, of course, was not to answer that question, but merely to determine whether Plaintiffs had alleged sufficient facts that could, if taken as true, establish the existence of such a relationship.

### A. 7-Eleven's Control Over Plaintiffs' Operations

The thrust of 7-Eleven's argument was that Plaintiffs had not alleged sufficient facts to show that 7-Eleven exercised the necessary level of control over Plaintiffs to confer employee status on them under either the FLSA or the California Labor Code, and thus their claims of violations of federal and state wage laws could not stand. The employer's exercise of control represents the first prong of the *Martinez* test, and the employer's right-to-control is the primary inquiry

under the third prong of the *Martinez* test and is the first factor in the six-part FLSA "economic realities test."

Plaintiffs included numerous factual allegations on the issue of control in their First Amended Complaint, including that 7-Eleven:

(i) controls all money and accounting functions and systems, including sole authority to decide the amount franchisees can withdraw from the accounts of their own stores, ER 046 ¶ 24; ER 047 ¶¶ 25-26, ER 049 ¶ 34;

(ii) can use unlimited store space for its own use in its sole discretion, ER 051 ¶ 49;

(iii) controls virtually all goods and services sold within the store as well as how they are marketed, advertised and displayed, ER 049 ¶ 39, ER 052 ¶ 50;

(iv) dictates vendor sources to acquire replacement goods and contractors to maintain equipment, ER 050 ¶¶ 41-42, ER 053 ¶ 59-60;

(v) contractually commands compliance with all of Defendant's standards and specifications for all products and services carried, used or offered for sale at the franchise store, including all such directives in a "mandatory," 1,000 page Operations Manual, ER 050 ¶ 40, ER 052 ¶ 51, ER 053 ¶¶ 62-66;

(vi) contractually controls payment of all wages to store workers, commands what store workers can wear, what type of store worker is acceptable to hire, and how they must interact with customers, ER 055 ¶¶ 71-74;

(vii) holds the leases for franchisees' stores, ER 051 ¶ 49;

(viii) controls the temperature of each store from its headquarters, ER 065 ¶ 105; and

(ix) in order to insure compliance with all these directives, Defendant is granted extensive oversight rights, including rights to compel attendance at initial and ongoing training sessions, ER 048 ¶ 31, ER 053 ¶ 61, ER 054 ¶ 63, ER 055 ¶ 73, ER 059 ¶¶ 87-88.

Yet the District Court found these overwhelming factual allegations insufficient to survive a motion to dismiss. Instead, in considering the level of 7-Eleven's control over Plaintiffs' operations, the District Court contrasted Plaintiffs' factual allegations with what the District Court considered to be contradictory evidence in the Franchise Agreements, which provide that Plaintiffs themselves "control the manner and means of the operation" of their stores and "exercise complete control over and all responsibility for all labor relations and the conduct of [Plaintiffs'] agents and employees, including the day-to-day operations" of Plaintiffs' stores and employees." ER 016. Thus, the District Court concluded that Plaintiffs' factual allegations were not "persuasive," ER 015, and that Plaintiffs had not established, under the first prong of *Martinez*, that 7-Eleven exercised sufficient control to render it Plaintiffs' employer.

The District Court acted wholly inappropriately in contrasting Plaintiffs' allegations of 7-Eleven's actual control over their stores with evidence in the Franchise Agreement that contradicted Plaintiffs' allegations of 7-Eleven's actual control over their stores. At the motion to dismiss stage, the Court was *required* to accept Plaintiffs' factual allegations as true, even if they contradicted the language of the relevant contracts. Self-serving provisions in the franchise agreement under which the franchisees are required to recite that they control the manner and means of the operation of the store and exercise control over labor relations does not

make it so. Federal and state caselaw make abundantly clear that courts cannot rely simply on independent contractor labels or assertions in contracts that the "contractors" have discretion to run their own businesses. Instead, courts (and where necessary, juries) must determine the actual nature of the relationship between the parties.[6]

The District Court similarly erred in its consideration of 7-Eleven's "right to control" Plaintiffs under the third *Martinez* prong and the FLSA "economic realities test." Prong three of *Martinez* asks whether the employer has a right "to engage" the worker; in other words, this prong examines whether there is a "common law employment relationship." *Martinez*, 49 Cal. 4th at 64. At common law, "[t]he 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 desired result." *Borello*, 48 Cal. 3d at 350. Similarly, under the first factor in the FLSA test, courts look to "the degree of the alleged employer's

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[6] *See Alexander*, 765 F.3d at 998 ("Labeling the drivers 'independent contractors' in FedEx's Operating Agreement does not conclusively make them so when viewed in the light of (1) the entire agreement, (2) the rest of the relevant 'common policies and procedures' evidence, and (3) California law."); *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 10–11, 64 Cal. Rptr. 3d 327, 335 (2007) (in determining whether a worker is an employee or independent contractor, "[t]he parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship."); *Driscoll Strawberry Assocs., Inc.*, 603 F.2d at 755 ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.").

right to control the manner in which the work is to be performed." *Driscoll Strawberry Assocs.*, 603 F.2d at 754.

Ignoring the pendency of *Dynamex*, which it even acknowledged was forthcoming and likely to be material to its decision, ER 014, the District Court hastily rushed to enter judgment in this case. And rather than correctly applying the *Martinez* test, which it purported to apply, the District Court essentially crafted its own test for employment status in the franchise context, in which it determined that the plaintiff must show that the employer has the right to exercise "control [of the franchisee] beyond what was necessary to protect and maintain its interest in its trademark, trade name and good will." ER 017. In other words, the district court flipped the burden of proof, placing it on the shoulders of the worker rather than the alleged employer, and also required the worker to meet a higher standard to demonstrate he is an employee. In support of this test, the District Court cited *Juarez v. Jani-King of Cal., Inc.*, 2012 WL 177564, at *4 (N.D. Cal. Jan. 23, 2012), a case that had been pending for six years on appeal, awaiting the issuance of *Dynamex*.[7] The District Court compounded its error by determining, as a matter of law, that the level of controls 7-Eleven exercises "do not exceed what is

[7] After *Dynamex* was decided, this Court remanded *Juarez* to the district court for consideration in light of that decision. *Juarez v. Jani-King of California, Inc.*, No. 12-17759 (9th Cir. June 26, 2018) (Dkt. 69).

necessary to protect 7-Eleven's trademark, trade name, and good will," ER 017, and therefore did not render 7-Eleven Plaintiffs' employer.[8]

The District Court's order granting 7-Eleven's motion for judgment is replete with legal error. In evaluating 7-Eleven's control over Plaintiffs' operations – critical to prongs one and three of the *Martinez* test and the primary factor in the FLSA economic realities test – the Court failed to accept Plaintiffs' factual allegations as true – as it was required to do at the motion to dismiss stage – and instead took it upon itself to weigh Plaintiffs' allegations of employee status against contradictory evidence contained in the Franchise Agreement. This, in itself, constitutes reversible error. *See, e.g.*, *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1319 (11th Cir. 2013) (finding district court impermissibly weighed FLSA "economic realities test" factors at summary judgment stage, as reasonable factfinder could have found in plaintiffs' favor on many of the factors). The District Court fashioned its own test, applied it improperly, and utterly ignored its proper role in deciding a motion to dismiss. This Court must correct this judicial error by vacating the District Court's order and, for the reasons explained *infra*, reversing on the question of employee status under California law.

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[8] For this conclusion, the District Court cited *Cislaw v. Southland Corp.*, 4 Cal. App. 4th 1284 (1992), a 25-year-old tort case involving a different franchise agreement than the one at issue here.

**B. Other Considerations**

The District Court also concluded that Plaintiffs had not satisfied the second ("suffer or permit") prong of *Martinez*, under which a defendant is liable based on its "knowledge of and failure to prevent the work from occurring." *Martinez*, 49 Cal. 4th at 70. The District Court found that the Plaintiffs could not establish this prong because they could not establish that "7-Eleven knowingly permitted them to perform work while being paid less than minimum wage." ER 016. The District Court's reference to Plaintiffs' failure to make out a minimum wage claim is reflective of how little attention the District Court appeared to pay to Plaintiffs' complaint; indeed, Plaintiffs' First Amended Complaint *did not even include any claims of minimum wage violations*. *See* ER 039-094.

Regardless, however, given the California Supreme Court's adoption in *Dynamex* of an "ABC" test for the "suffer or permit" standard, discussed *infra*, there is no need for this Court to determine whether the District Court erred under the previously articulated "suffer or permit" standard of *Martinez* when it concluded that Plaintiffs could not establish a claim that they had not alleged. As explained further below, the new definition of "suffer or permit" compels reversal, and indeed will mandate judgment *in Plaintiffs' favor*, on the issue of employee status.

The District Court briefly addressed the remainder of the factors comprising the FLSA "economic realities" test and concluded that, overall, the factors did not weigh in Plaintiffs' favor. ER 020. However, it was not the District Court's role to engage in such a weighing of factors in deciding a motion to dismiss, *particularly before discovery and without an evidentiary record*. And *even at the summary judgment stage*, Courts of Appeal have reversed judgments granting summary judgment on the issue of employment status under the FLSA where the districts courts impermissibly attempted to weigh the factors themselves and draw their own factual conclusions. *See, e.g., Scantland*, 721 F.3d at 1319 (holding it was improper for district court to weigh FLSA factors at summary judgment stage); *Henderson v. Inter-Chem Coal Company*, 41 F. 3d 567, 570 (10th Cir. 1994) (reversing district court's grant of summary judgment under the economic realities test); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495 (11th Cir. 1993) ("we reversed this judgment in light of the genuine dispute of material fact regarding Honeywell's authority over the manner and means by which Daughtrey discharged her duties under the Consultant Agreement"); *Weisel v. Singapore Joint Venture Inc.*, 602 F. 2d 1185, 1190 (5th Cir. 1979) (reversing grant of summary judgment to employer and finding that plaintiff was an employee).

Thus, even before considering *Dynamex*, addressed in the next section, there can be little question that the District Court's order granting 7-Eleven's motion for judgment as a matter of law requires reversal.

## III. In Light of The California Supreme Court's Decision in *Dynamex*, There Can Be No Question That This Court Must Reverse the Judgment Entered Against Plaintiffs

In *Dynamex Operations West, Inc. v. Superior Court*, 461 P.3d 1, 4 Cal. 5th 903, decided just six weeks after the District Court entered judgment below, the California Supreme Court unanimously announced a revised test for determining when workers may be classified as independent contractors and when they must be classified as employees for claims brought to enforce rights under the wage orders promulgated by the California Industrial Welfare Commission ("IWC").

In light of this dramatic change to the legal landscape, there can no question this Court must reverse the District Court's judgment entered against Plaintiffs. Ninth Circuit Rule 3-6(a) provides that the Court may vacate a judgment where "the Court determines: (a) that clear error *or an intervening court decision* or recent legislation requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings" (emphasis added).[9]

[9] *See also Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 728 n.2 (9th Cir. 1999) (noting that under Ninth Circuit Rule 3-6(a), a party may move for summary reversal based, *inter alia*, on an intervening court decision.).

### A. The Landmark Decision in *Dynamex* Drastically Altered the California Law Applicable to Plaintiffs' Claims of Employee Status

In determining that Plaintiffs were properly classified as independent contractors under California law and thus entering judgment on behalf of 7-Eleven, the District Court did not have the benefit of the Supreme Court's ruling in *Dynamex*, which upends the District Court's analysis.

In *Dynamex*, the Court expressly adopted the Massachusetts "ABC" test for determining employment status, holding that an employer alleged to have violated the wage orders must prove that: "(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed." *Id.* at 957-58. If the employer is not able to establish *all three* prongs of the test, the worker is an employee. *Id.*

In its discussion of Prong B, the *Dynamex* Court specifically cited with approval a Massachusetts case which, applying the same ABC test, held that a cleaning "franchisee" was an employee of a cleaning "franchisor" under Prong B. See *Dynamex*, 4 Cal. 5th at 963 (citing *Awuah v. Coverall North America, Inc.*,

707 F. Supp. 2d 80, 82-84 (D. Mass. 2010) (rejecting defendant's argument that it was in the business of "franchising" rather than commercial cleaning)). The *Dynamex* Court's citation to *Awuah* confirms that franchises are not exempt from the newly announced test.[10]

The *Dynamex* decision is significant not only for its holding, but also for its careful review of previous California Supreme Court cases related to employee misclassification, and its broad pronouncements regarding the public policy and the purpose behind the ABC test, all of which are critical to the issues raised in this case. At the outset, the Court noted the significant risk of unlawful misclassification "in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors." *Id.* at 913. The Court also reviewed its earlier decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341. The Court explained that the concept of employment "is not inherently limited by common law principles," and that *Borello* "call[s] for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the

[10] As discussed *supra* Part II.A, the District Court appears to have been unduly influenced by the franchisor-franchisee relationship at issue in this case, going out of its way to (improperly) conclude that 7-Eleven exercised no more control over its franchisees than was necessary to maintain its brand name, and thus that Plaintiffs had failed to state a claim. It is inconceivable that Plaintiffs' detailed factual allegations could have been dismissed at the premature Rule 12(c) stage otherwise.

particular statutory provision or provisions at issue." *Id*. at 931. In the end, the *Borello* case adopted a multi-factor test that "consider[ed] all of the various factors set forth in prior California cases" based on the purposes of the worker's compensation law. *Id.* at 931-32.

The Court emphasized that the "statutory purpose" of social welfare legislation upon which claims are pursued is the "touchstone" for deciding whether particular workers are employees rather than independent contractors. *Id.* at 935. The Court also noted that in the almost 30 years since *Borello*, the California Legislature has responded to the "continuing serious problem of worker misclassification" by imposing "substantial civil penalties on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors." *Id.*

The California Supreme Court next rejected the employer's argument that the *only* way to demonstrate employment status in a misclassification case is the common law test from *Borello*. Instead, in *Martinez*, the Court had recognized three alternative definitions of "to employ": "(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 938 (quoting *Martinez*, 49 Cal. 4th at 64).

According to the *Dynamex* Court, the breadth and purpose of the "suffer or permit" standard stood at odds with the multi-factor *Borello* test, as this test for employee status leaves "both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly," *id.* at 954, and is subject to abuse because they permit "a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard." *Id.* at 955. The Court therefore intentionally created a brighter line, citing favorably to Massachusetts cases holding workers to be employees when they performed their work within the usual course of a hiring entity's business. *See id.* at 963.

To satisfy these aims, the *Dynamex* Court held that it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish each of the three factors embodied in the ABC test (described above). *Id.* at 957. The Court embraced the ABC test because it would "provide greater clarity and consistency,

and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis." *Id.* at 964.

In sum, the resounding message of *Dynamex* is that, in order to fulfill the important public policy goals of the wage laws and to prohibit abuse of the wage laws through misclassification of employees, a simple and broad "employee" definition must be applied that will ensure that any worker performing her work in the hiring entity's business receives the protections of the relevant wage laws. In light of the holding of *Dynamex* and its reasoning, the ABC test applies directly and consequentially to California state law claims at issue in this case.

### B. 7-Eleven Cannot Establish Prong B of the *Dynamex* ABC Test

Notably, the *Dynamex* Court specifically adopted the Massachusetts version of the "ABC" test, which contains a very strict "Prong B". Under that prong, the alleged employer can only establish independent contractor status by showing that the work performed is outside the employer's usual course of business. In other words, "when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company . . . or when a bakery hires cake decorators to work on its custom-designed cakes . . . the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as

having suffered or permitted the workers to provide services as employees." *Id.* at 959-960 (internal citations omitted).

Plaintiffs manage and work at 7-Eleven convenience stores. The District Court has already found that "the services Plaintiffs collectively perform are *integral* to 7-Eleven's business." ER 020 (emphasis added). Thus, under Prong B of the ABC test, it is apparent that 7-Eleven cannot possibly carry its burden of establishing that the services Plaintiffs provide are outside 7-Eleven's usual business operations and thus are not employees. *See Dynamex*, 4 Cal. 5th at 961.

Under Prong B, only workers who perform services that fall "outside the usual course of the hiring entity's business" may be deemed independent contractors. *Id.* Courts in Massachusetts, applying the same "ABC" test that *Dynamex* adopted, have thus routinely granted summary judgment to workers under Prong B, holding them to be employees when they provide services within the defendant's usual course of business.[11] That long line of cases has now been

[11] *See, e.g., Da Costa v. Vanguard Cleaning Sys., Inc.*, 2017 WL 4817349, at *8 (Mass. Super. Sept. 29, 2017) (applying ABC test under Massachusetts law to franchisees and granting plaintiffs' motion for summary judgment under Prong B, holding that they were employees of defendant franchisor); *De Giovanni v. Jani-King International, Inc.*, No. 07-10066 (Dkt. 208) (D. Mass. June 6, 2012) (same); *Awuah*, 707 F. Supp. 2d at 82 (same) (cited in *Dynamex*, 4 Cal. 5th at 963). *See also Meier v. Mastec North America, Inc.*, Hampden C.A. No. 13-00488 (Mass. Super. April 8, 2015) (granting summary judgment to plaintiff cable installers, holding them to be employees under Massachusetts ABC test); *Barbosa v. Kilnapp Enterprises, Inc. d/b/a/ Real Clean et al. ("Real Clean")*, Norfolk C.A. No. 2013-00266-A (Mass. Super. Ct. June 13, 2014), at *11-19 (granting summary judgment

affirmed by the Massachusetts Appeals Court, which has confirmed that trial courts have acted properly in granting summary judgment to plaintiffs claiming they have been misclassified under Prong B. *See Carey v. Gatehouse Media Massachusetts I, Inc.* 92 Mass. App. Ct. 801, 94 N.E. 3d 420, 424 (2018) (affirming grant of summary judgment to plaintiff newspaper delivery drivers where defendant could not satisfy prong B of ABC test because it could not show that drivers' services were performed outside the usual course of business of newspaper publisher).[12]

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to auto detailers under Prong B of Massachusetts ABC test); *Granite State Ins. Co. v. Truck Courier, Inc.*, 2014 WL 316670, *4 (Middlesex Super. Ct. Jan. 17, 2014) (granting summary judgment to truck couriers under Prong B of Massachusetts ABC test); *Schwann v. FedEx Ground*, 2013 WL 3353776 (D. Mass. July 3, 2013), aff'd in part, rev'd in part on other grounds, 813 F.3d 429 (1st Cir. 2016) (granting summary judgment to FedEx drivers claiming misclassification under Prong B of Massachusetts ABC test); *Martins v. 3PD, Inc.*, 2013 WL 1320454 (D. Mass. Mar. 28, 2013) (same); *Monteiro v. PJD Entertainment of Worcester, Inc., d/b/a/ Centerfolds*, 29 Mass. L. Rptr. 202 (Mass. Super. Ct. Nov. 23, 2011) (holding exotic dancers to be employees of a strip club under Prong B of Massachusetts ABC test); *Jenks v. D & B Corp., d/b/a/ The Golden Banana ("Golden Banana")*, 28 Mass.L.Rptr. 579 (Mass. Super. Ct. Aug. 24, 2011) (same); *Oliveira v. Advanced Delivery Sys., Inc.*, 2010 WL 4071360 (Mass. Super. Jul. 16, 2010) (holding delivery drivers to be employees of delivery company under Prong B of Massachusetts ABC test); *Chaves v. King Arthur's Lounge*, 2009 WL 3188948 (Mass. Super. July 30, 2009) (holding exotic dancers to be employees of a strip club under Massachusetts ABC test); *Fucci v. Eastern Connection Operating, Inc.*, C.A. No. 2008-2659, *9 (Mass. Super. Sept. 21, 2009) (holding delivery drivers to be employees as a matter of law under Massachusetts ABC test); *Amero v. Townsend Oil Co.*, 2008 WL 5609064, *5 (Mass. Super. Dec. 3, 2008) (same).

[12] Massachusetts courts have regularly rejected defendants' attempts to define their business as something they are obviously not. *See, e.g., Awuah*, 707 F. Supp.

A service falls within the scope of a putative employer's usual course of business where the putative employer either holds itself out as offering that service or defines its activities as including that service. *See Gatehouse*, 94 N.E.3d at 426 ("GateHouse's self-description as a newspaper publisher and distributor, and the manner in which it held itself out to the public and its drivers, support the conclusion that the drivers performed services in the usual course of GateHouse's business"); *Athol Daily News v. Board of Review of Div. of Employ. & Training* 439 Mass. 171, 178-79 (2003) (holding that workers who delivered newspapers performed service within the scope of defendant's business, where defendant "define[d] its business as 'publishing and distributing' a daily newspaper"); *Rainbow Dev., LLC v. Commonwealth, Dep't of Indus. Accidents*, 2005 WL

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2d 80 (rejecting argument that defendant cleaning company was in the business of "franchising" and not "commercial cleaning"); *Schwann v. FedEx Ground Package Sys., Inc.* 2013 WL 3353776 at *5 (rejecting FedEx's attempt to characterize its business as "logistics" rather than delivery services and noting, "[w]hether intended as shorthand for a more metaphysical purveyor of logistics business entity or not, FedEx advertises that it offers package pick-up and delivery services and its customers have no reason to believe otherwise"); *Chaves v. King Arthur's Lounge*, 2009 WL 3188948 (rejecting strip club's argument that it is not in the business of adult entertainment, noting that "[a] court would need to be blind to human instinct to decide that live nude entertainment was equivalent to the wallpaper of routinely-televised matches, games, tournaments and sports talk in such a place"). Indeed, in the *Gatehouse* case, the Massachusetts Appeals Court specifically endorsed the trial court's refusal to allow the defendant to narrowly define its usual course of business in its attempt to avoid liability under Prong B of the ABC test. 92 Mass. App. Ct. at 806-07. The California Supreme Court's specific decision to adopt the Massachusetts version of the ABC test, and particularly its citation to *Awuah*, *see Dynamex*, 4 Cal. 5th at 963, confirms that it was aware of the strength of the Massachusetts test and that it intended to adopt it.

3543770, *2 (Mass. Super. 2005) ("[B]ottom line: were [defendant] to have employees, they would perform the same services as those whom the agreement terms as independent contractors. The only business of [defendant] is to provide customers with the services that these employees perform").

A service also falls within the scope of a putative employer's usual course of business where the work performed is integral to the employer's business, and not merely incidental to it. *See Gatehouse*, 94 N.E.3d at 426 (holding that "a service need not be the sole, principal, or core product that a business offers its customers, or inherently essential to the economic survival of that type of business, in order to be furnished in the usual course of that business" and finding that instead, the question is whether the services is "*more necessary than incidental* to [Defendant's] business.") (emphasis added).

The California Supreme Court made clear that it was adopting this expansive view of employee status with several examples of what types of services would fall within a company's usual course of business. For instance, the Court explained that when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, "the workers are part of the hiring entity's

usual business operation." *Dynamex*, 4 Cal. 5th at 960. In contrast, "when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business." *Id*.

Here, Plaintiffs – who have worked essentially as store managers for a convenience store company – are plainly more like the seamstresses working for a clothing company or the cake decorators working at the bakery; their services are at the very core of 7-Eleven's usual course of business and "would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business." *Id*.

The California Supreme Court's express citation to franchise cases decided under the Massachusetts "ABC" test leaves no doubt that the *Dynamex* test applies to franchisor-franchisee relationships. *See Dynamex*, 4 Cal. 5th at 48 (citing *Awuah*, 707 F. Supp. 2d at 82 (rejecting employer's claim that it was in the "franchise business"); *Coverall N. Am. v. Div. of Unemployment*, 447 Mass. 852, 857 (2006) (holding a franchisee to be an employee for unemployment purposes, under the third prong of a similar ABC test)). Here, 7-Eleven is clearly in the

business of operating convenience stores, and it even operates its own corporate stores, which managers run, while classified as employees. ER 061 ¶ 94.[13]

Thus, 7-Eleven cannot satisfy Prong B of the ABC test adopted by *Dynamex*, and the judgment below must be reversed.

### C. *Dynamex* Applies Retroactively to Plaintiffs

Given how clear it is that *Dynamex* compels reversal in this case, Plaintiffs expect that 7-Eleven may attempt to argue that *Dynamex* does not apply to Plaintiffs' claims in this case. First, 7-Eleven may contend that the decision is not retroactive. However, as the California Supreme Court has explained, "[t]he general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978 (1989); *see also Sierra Club v. San Joaquin Local Agency Formation Com.*, 21 Cal. 4th 489, 509

[13] When companies have workers performing essentially the same work, where some are classified as employees and others are classified as independent contractors, courts have looked skeptically on defendants' claims that some of the workers performing this same work are independent contractors. *See, e.g., Meier v. MasTec N. Am., Inc.*, (Mass. Super. Apr. 9, 2015), Hampden Civ. A. No. 13-00488, Mem. at 10 (rejecting defendant's argument that it was in the business of coordinating cable installation, not the business of installation itself, when it employed in-house technicians who performed the same work as independent contractor technicians); *Amero v. Townsend Oil Co.*, 2008 WL 5609064, at *2 (finding plaintiff oil delivery drivers were employees where "there appears to have been absolutely no difference between the duties of the drivers [defendant] characterized as 'employees' and those it characterized as 'independent contractors.'").

(1999). The Court has gone so far to say that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207 (1988), citing *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *see also United States v. Tavizon-Ruiz*, 196 F. Supp. 3d 1076, 1078 (N.D. Cal. July 25, 2016) ("[D]ecisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law has always meant.") (quoting *United States v. Aguilera-Rios*, 769 F.3d 626, 631) (9th Cir. 2014)).[14]

There is a *narrow* exception to the retroactivity rule, "when considerations of fairness and public policy are so compelling in a particular case that, on

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[14] The California Supreme Court has routinely held that its decisions regarding wage orders and the Labor Code apply retroactively. *See, e.g.*, *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542, 573 (2018) ("Furthermore, if we were to restrict our holding … to prospective application, we would, in effect, negate the civil penalties, if any, that the Legislature has determined to be appropriate in this context, giving employers a free pass as regards their past conduct . . . . In doing so, we would exceed our appropriate judicial role."); *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal. 4th 833, 848 n.18 (Jan. 8, 2015) ("At oral argument, [defendant's] counsel urged that our decision only apply prospectively. The general rule that judicial decisions are given retroactive effect is basic in our legal tradition. . . . We see no reason to depart from the general rule here.") (internal quotations omitted); *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal. 4th 1004, 1030-50 (2012) (applying its holding retroactively regarding rest time and meal periods and remanding to the trial court for further consideration of the plaintiffs‟ class certification motions, because the ruling "changed the legal landscape"). In addition, the case that the *Dynamex* Court interpreted, *Martinez v. Combs*, also was applied retroactively when it was decided in 2010. *See* 49 Cal.4th at 69–78.

balance, they outweigh the considerations that underlie the basic rule"; the California Supreme Court also looks at whether the new decision would "raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law." *Sierra Club*, 21 Cal. 4th at 508 (citation omitted). However, if the California Supreme Court had believed that the *Dynamex* decision met this narrow exception, one would have expected it to have said that in the course of its 82-page decision or subsequently agreed to grant Dynamex's request to modify the decision to make it prospective only.[15] Not only did the *Dynamex* Court not limit its holding to prospective application only, it expressly denied a request for modification to so limit it. *Dynamex*, 4 Cal 5th 903 (June 20, 2018 Dkt. Entry) (denying petition for rehearing). The decision thus applies to the events underlying the long-pending *Dynamex* case itself, going years into the past, and also must apply to pre-*Dynamex* events in other cases as well.[16]

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[15] A statement that a California Supreme Court decision is *not* to be applied retroactively must come from the California Supreme Court itself. *See Barr v. ADandS, Inc.*, 57 Cal. App. 4th 1038, 1053 (1997) ("We know of no decisions where the traditional retroactive effect of a judicial decision was altered to apply prospectively other than through pronouncements of the Supreme Court.").

[16] Even if the decision were not generally retroactive (which it is), there can be no question that, unless otherwise stated in the decision, the decision has retroactive applicability to all cases then pending on direct review. *See People v.*

At least one California court has now confirmed that *Dynamex* should be applied retroactively. *See Johnson v. VCG-IS, LLC*, Case No. 30-2015-00802813 (Super. Ct. Cal. July 18, 2018). In rejecting the defendant's argument that *Dynamex* applied only prospectively, the *Johnson* court explained:

> Given the age of the claims in the *Dynamex* case, and given the Court's longstanding acknowledgment of its authority to make such a statement (*see Newman v. Emerson Radio Corp.*, (1989) 48 Cal. 3d 973, 978), the lack of such a pronouncement suggests that the decision should apply retroactively. Although not necessarily determinative, the Court's later decision (on June 20, 2018) to deny requests to modify its decision to state that *Dynamex* will only be applied prospectively supports this conclusion. In light of "the general rule that judicial decisions are given retroactive effect" (*Newman*, *supra* at 978), and because it is up to the Supreme Court to declare an exception to this rule (*see Barr v. ADandS, Inc.*, (1997) 57 Cal. App. 4th 1038, 1053), this Court will apply *Dynamex* retroactively.

*Id.* at 2. The *Johnson* court also took note of the fact that the California Supreme Court was expressly petitioned to rule that *Dynamex* would apply only prospectively, and it had denied that request. *Id.*

Given all of these facts, it is amply clear that *Dynamex* applies retroactively, including to the Plaintiffs in this case. The District Court in its decision finding that Plaintiffs could not establish that they are employees did not perform the analysis now required by *Dynamex*. And notably, the District Court's holding that Plaintiffs are integral to 7-Eleven's business will be dispositive under "Prong B" of the ABC test.

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*Guerra*, 37 Cal.3d 385, 399 (1984) ("even a non-retroactive decision…ordinarily governs all cases still pending on direct review when the decision is rendered.").

### D. *Dynamex* Applies to All of Plaintiffs' Claims Under the California Labor Code

7-Eleven may also try to contend that the "ABC" test announced in *Dynamex* does not apply to all claims Plaintiffs brought under the California Labor Code. As described *supra* Section III, the District Court's decision on a motion for judgment on the pleadings must be reversed regardless of what test applies to each claim. But in any event, *Dynamex* does apply to all of the state law claims in this case, which include failure to pay overtime, failure to reimburse for necessary business expenses, and failure to provide and maintain uniforms and equipment.

There can be no question that the ABC test applies to Plaintiffs' claims for overtime and for failure to provide and maintain uniforms and equipment, as the *Dynamex* decision made expressly clear that it applied to all claims made pursuant to the California wage orders. 4 Cal 5th at 913-914 ("Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*…") (emphasis in original).

With respect to Plaintiffs' expense reimbursement claim brought pursuant to Cal. Lab. Code § 2802, the *Dynamex* Court did not address whether the test it announced would apply to this claim, leaving that question to be decided by the court below, but only because the parties there specifically did not address it. *See id.* at 916 n.5. However, it is clear that the ABC test would apply to this claim,

since the wage orders require that an employer provide its employees with any "tools or equipment" that "are necessary to the performance of a job" (with certain exceptions not applicable here). *See* Wage Order No. 5 at ¶ 9, Wage Order No. 10 at ¶ 9, Cal. Code Regs., tit. 8, § 11050. This requirement mirrors that of Labor Code § 2802, which requires that employees be reimbursed for their reasonable and necessary business expenses. The *Dynamex* opinion thus compels application of the ABC test to this claim.

More generally, § 2802 is contained within the Labor Code, which preamble declares: "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." Labor Code § 90.5(a). Like the overtime claims at issue here, the Labor Code provision preventing unreimbursed expenses was also "adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business" and have the same remedial purposes: to protect the wage earner, to protect the law-abiding business by ensuring it is "not hurt by unfair competition from competitor businesses that utilize substandard employment practices," and to benefit the

public at large by preventing the public from shouldering the burden of the "ill effects to workers and their families resulting from the substandard wages or unhealthy and unsafe working conditions." *Dynamex*, 4 Cal. 5th at 953.

At least one court has concluded that the *Dynamex* ABC test applies to claims under the Labor Code, including a claim under Labor Code § 2802 for expense reimbursement. *See Johnson v. VCG-IS, LLC*, Case No. 30-2015-00802813 (Super. Ct. Cal. July 18, 2018). The court in *Johnson* reasoned that "where an individual is suing for violation of the minimum wage laws, etc., he or she is actually enforcing the Labor Code which, by its own terms, incorporates the wage orders." *Id*. at 5. Because claims such as for expense reimbursement under §2802 are "rooted in the wage orders," the *Johnson* court found that the *Dynamex* ABC test applied. *Id*. at 5. The court also noted that the suggestion that multiple tests should apply to state law wage and hour claims runs counter to the purpose of *Dynamex* – to provide greater clarity and consistency in analyzing the issue of whether workers have been properly classified. *Id*. at 4.

Thus, the Court should hold that the *Dynamex* ABC test applies to the state law claims in this case and, for the reasons discussed *supra*, the judgment below must be reversed.

## IV. The District Court Abused Its Discretion in Denying Plaintiffs' Motion to Retax Costs

For all the reasons discussed above, the Court should reverse the entry of judgment against Plaintiffs. Thus, the entry of costs against Plaintiffs should be reversed along with the judgment. As discussed next, the District Court acted improperly in any event in awarding costs against Plaintiffs.

### A. Costs Should Not Be Awarded for Discovery That Was Not Necessary to the Judgment

First, 7-Eleven should not be rewarded for its scorched-earth discovery tactics with an award of costs to be borne by the individual plaintiffs in this case. Deposition costs are typically taxable if they were reasonably necessary. *Evanow v. M/V Neptune*, 163 F.3d 1108, 1113 (9th Cir. 1998). The District Court failed to justify why 7-Eleven needed the deposition testimony of anyone other than the four named plaintiffs or address why the information 7-Eleven requested through its 25 subpoenas was necessary. ER 003-007. Indeed, the class certification issue was rendered moot by 7-Eleven's success on its motion for judgment on the pleadings. The fruits of 7-Eleven's significant labor in discovery were never put to use and were not necessary at all the judgment 7-Eleven eventually obtained.[17] *Cf.*

[17] Moreover, the evidence before the District Court suggests that 7-Eleven was improperly seeking to incur excessive costs. The Rule 30(b)(6) depositions that Plaintiffs took, transcribed by HG Litigation, cost only $843.75 for *both* depositions and $858.86 for one additional copy of each. ER 023. This amounts to $851.30 per deposition (for a transcript and one copy). The rest of the depositions,

*Vancouver Furniture v. General Elec. Retail Sys.*, 967 F.2d 596 (9th Cir. 1992) (finding depositions for which costs were taxed were necessary to the case because they were used in cross-examination of witnesses or read directly to the jury); *E.E.O.C. v. Pape Lift, Inc.,* 115 F.3d 676, 683 (9th Cir. 1997) (affirming district court's denial of costs for depositions of defense witnesses not called at trial.)

The Ninth Circuit has held that costs are not taxable if they arise from depositions that were "merely useful for discovery." *See Independent Iron Works Inc. v. U.S. Steel Corp.*, 322 F.2d 656, 678 (9th Cir. 1963). "Merely useful" costs are considered incidental to normal preparation for trial and the costs should be borne by the party taking the deposition. *Id*. In this case, the costs 7-Eleven sought in this matter must be considered merely useful. As explained *supra* note 5, 7-Eleven did not need to take any discovery to obtain judgment in its favor, and any discovery costs arising out of its need to respond to Plaintiffs' motion for class certification could have been avoided had 7-Eleven agreed to Plaintiffs' suggestion to stay the briefing on class certification while its dispositive motion was pending. 7-Eleven should not be rewarded for its intransigence with a windfall in the form of a cost award.

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conducted by Esquire Deposition Solutions (the provider selected by 7-Eleven), averaged *more than $4,000 each*. *Id*.

**B. Equitable Considerations Counsel Against Taxing Costs to Plaintiffs**

The Ninth Circuit recognizes that, despite the presumption in favor of awarding costs to the prevailing party, Rule 54(d)(1) "also vests in the district court discretion to refuse to award costs." *Association of Mexican-American Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000) (en banc). Appropriate reasons to deny costs include:

> (1) the substantial public importance of the case, (2) the closeness and difficulty of the issues in the case, (3) the chilling effect on future similar actions, (4) the plaintiff's limited financial resources, and (5) the economic disparity between the parties. This is not "an exhaustive list of 'good reasons' for declining to award costs," but rather a starting point for analysis.

*Id*. "This is not "an exhaustive list of 'good reasons' for declining to award costs," but rather a starting point for analysis. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1248 (9th Cir. 2014).

Under the *Mexican-American Educators* criteria, the District Court should not have awarded costs in this case. First, this case involves substantial public importance: the enforcement of remedial wage laws designed to protect not only workers, but also society as a whole. As the *Dynamex* Court recognized, independent contractor misclassification significantly impacts the public at large:

> [T]he risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as

> independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled… [When a worker is] classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and ***the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families***.

*Dynamex*, 4 Cal. 5th at 913 (emphasis added). The relief sought by Plaintiffs in this case would benefit not only Plaintiffs and all others similarly situated, but the general public at large: not only would it likely increase tax revenue from payroll and other taxes that 7-Eleven is currently shirking, but also it would level the playing field for other compliant businesses that are properly classifying their workers, and it would decrease the burden on taxpayers to assume responsibility for franchisees who are injured or being paid too little to support themselves and their families.

Second, the District Court's finding that the case neither "present[ed] particularly difficult and complex issues" nor was it "of particular importance," ER 006, is, to put it simply, wrong. The District Court itself recognized that, at the time it rendered its decision, there was no clear-cut legal test for determining

whether a franchisee is an employee of a franchisor under California law. ER 014. While *Dynamex* has since clarified the issue, it was undecided at the time, and the parties engaged in significant briefing regarding the appropriate test to use in determining whether individuals who are classified as franchisees are, in fact, employees. Moreover, the question of whether 7-Eleven is engaged in widespread misclassification of franchisees, resulting in violations of wage-and-hour laws, and denial to franchisees of the attendant benefits of employee status is of vital importance, not only to Plaintiffs themselves, but also to the public at large, for all the reasons outlined by the *Dynamex* court, *supra*. It is clear that Plaintiffs brought their claims in good faith on a difficult legal issue of significant public importance, and they should not be financially penalized for having done so. Moreover, Plaintiffs were well aware that *Dynamex* was pending and that the decision was likely to clarify the proper test to be applied in misclassification claims. Thus, the fact that this decision was pending (and has since been decided in a manner that is favorable to Plaintiffs' claims in this case) is relevant to Plaintiffs' good faith at the time the Complaint was filed.

Third, the District Court erred in concluding that "there is absolutely no support for Plaintiffs' argument that awarding costs in this action will chill future litigation." ER 006-007. The support for Plaintiffs' argument comes from this Court's decision in *Escriba*, an individual action alleging violations of the Family

and Medical Leave Act, which was cited to the District Court. *Escriba*, 743 F.3d at 1236. While the plaintiff ultimately did not prevail, the Ninth Circuit upheld the district court's denial of costs to the prevailing defendant due to its concern that awarding costs would chill future similar actions, noting, "[a]lthough the costs sought by [Defendant] might be considered modest when compared to amounts sought in other, larger cases, even modest costs can discourage potential plaintiffs…" *Escriba*, 743 F.3d at 1248-1249.

The District Court in this case reasoned that its award of costs would not chill future litigation because Plaintiffs "have ample incentive to continue bringing similar types of lawsuits because they stand to reap a significant financial benefit if a court ultimately adopts their position and finds they are employees." ER 007. This rationale ignores the enormous financial and emotional toll that litigation takes on parties, particularly on individuals who are pressing novel arguments and are seeking to advance the development of the law. Awarding a large sum of costs against a group of individuals with disparately less means than the defendant, seeking to protect their rights under remedial wage laws, is likely to deter future similar litigation and to stagnate the development of worker protections in the law, regardless of the potential for future reward. *See Stanley v. Univ. of S. California*, 178 F.3d 1069, 1080 (9th Cir. 1999) ("Furthermore, the imposition of such high costs on losing civil rights plaintiffs of modest means may chill civil rights

litigation in this area. While we reject Stanley's claims, we also note that they raise important issues and that the answers were far from obvious. Without civil rights litigants who are willing to test the boundaries of our laws, we would not have made much of the progress that has occurred in this nation since *Brown v. Board of Educ.,* 347 U.S. 483 (1954).").

The District Court also ignored the financial disparity between the parties. As Plaintiffs made clear below, 7-Eleven is a vast, multinational company with more than 10,000 stores in North America and billions of dollars in annual revenue, having earned a reported $682.6 million ***in profit*** in 2016. ER 024 at n.4. By contrast, the four named plaintiffs are individual franchisees who ran several convenience stores in California and claim that they worked essentially as managers for 7-Eleven, rather than as independent business owners. ER 040-042 ¶¶ 2-6.

The District Court also suggested that Plaintiffs' case was being funded by an organization, the National Coalition of 7-Eleven Franchises and thus that Plaintiffs may not suffer any financial loss. *Id*. This reasoning blatantly ignores this Court's directive in *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist. Council*, 56 F. App'x 768, 770 (9th Cir. 2003), which expressly disapproved of a district court's consideration of the fact that a nonprofit organization provided some funding to the plaintiffs. The *Simo* court held that "the

district court's decision should be based on the parties' *own financial resources*" and not on whether they are receiving outside financial help from a third-party organization. *Id.*

The District Court abused its discretion in finding that none of the relevant equitable considerations warranted denying an award of costs to 7-Eleven, and its decision to tax Plaintiffs for 7-Eleven's overly aggressive -- and unnecessary -- discovery should be reversed.

## CONCLUSION

In granting 7-Eleven's Motion for Judgment on the Pleadings, the District Court committed clear legal error in finding – prior to the development of any record -- that Plaintiffs could not establish that they were misclassified as independent contractors. Moreover, in entering judgment, the District Court did not have the benefit of the California Supreme Court's recent decision in *Dynamex*, which has upended the District Court's analysis and compels reversal.

Further, the District Court abused its discretion in denying Plaintiffs' motion to retax costs; this Court should decline to compound that error by affirming its taxation of costs to individuals seeking to advance the development of remedial wage laws.

Dated: October 1, 2018

Respectfully submitted,

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By their attorneys,

*/s/ Shannon Liss-Riordan*

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## STATEMENT OF RELATED CASES

Plaintiff-Appellants are aware of the following related cases: (1) *Haitayan v. 7-Eleven, Inc.*, No. 18-cv-05465-DSF (C.D. Cal.); (2) *Haitayan v. 7-Eleven, Inc.*, No. 18-55910 (9th Cir.); (3) *Patel v. 7-Eleven, Inc.*, No. 17-cv-11414-NMG (D. Mass.).

Dated: October 1, 2018 */s/ Shannon Liss-Riordan*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations of Fed. R. App. P. 32(a) and Ninth Circuit Rule 32-1 because:

(1) Pursuant to Ninth Circuit Rule 32-1, this Opening Brief contains 13,586 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32 because the brief has been prepared in 14-point Times New Roman, which is a proportionally spaced font that includes serifs.

Dated: October 1, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2018, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of this filing to all counsel of record.

Dated: October 1, 2018

/s/ *Shannon Liss-Riordan*_____

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## PROOF OF SERVICE

I am over the age of 18 and am not a party to the within action. I am employed by Willenken LLP and my business address is 707 Wilshire Boulevard, Suite 3850, Los Angeles, California 90017.

On May 27, 2020, I served a true copy of the document titled **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWERING BRIEF OF RESPONDENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JASON H. WILSON; PROPOSED ORDER** on the interested parties in this action as follows:

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|---|---|
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Chamber of Commerce of the United States of America: Amicus curiae

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| Aaron D. Kaufman<br>Leonard Carder, LLP<br>1330 Broadway, Suite 1450<br>Oakland, CA 94612 | California Employment Lawyers Association: Amicus curiae<br><br>*VIA TRUEFILING E-SERVICING* |
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San Francisco, CA 94103

Ninth Circuit Court of Appeals

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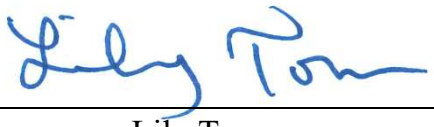
I declare under penalty of perjury that the foregoing is true and correct. Executed on May 27, 2020 at Los Angeles, California.



Lily Tom

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **VAZQUEZ v. JAN-PRO FRANCHISING INTERNATIONAL**
Case Number: **S258191**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **jwilson@willenken.com**

3. I served by email a copy of the following document(s) indicated below:

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| Filing Type | Document Title |
|---|---|
| BRIEF | Respondent Jan-Pro Franchising International, Inc.'s Answering Brief |
| PROOF OF SERVICE | Proof of Service |
| REQUEST FOR JUDICIAL NOTICE | Request for Judicial Notice In Support of Answering Brief of Respondent; Memorandum of Points and Authorities; Declaration of Jason H. Wilson; Proposed Order |

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5/27/2020

Date

/s/Lily Tom

Signature

Wilson , Jason (140269)

Last Name, First Name (PNum)

Willenken LLP

Law Firm