635 F.Supp.3d 979
United States District Court, C.D. California.

Randy SALINAS, Plaintiff,
v.
The CORNWELL QUALITY TOOLS COMPANY, Defendant.

Case No. 5:19-cv-02275-FLA (SPx)
|
Signed October 17, 2022

Synopsis

Background: Resale dealer brought putative class action against distributor of professional-quality tools and equipment for the automotive and aviation industries in state court, which distributor removed, asserting claims for failure to reimburse expenses, unlawful deductions from wages, failure to provide accurate wage statements, failure to provide overtime pay, failure to provide meal periods, failure to provide rest breaks, failure to pay wages, unfair business practices under the Unfair Competition Law, (UCL), and violation of the California Private Attorneys General Act under California law. Dealer moved for partial summary judgment as to two of distributor's affirmative defenses.

Holdings: The District Court, Fernando L. Aenlle-Rocha, J., held that:

[1] *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders was not preempted by Federal Trade Commission's franchise rule;

[2] direct salesperson exemption under California Unemployment Insurance Code did not apply to render ABC test inapplicable to determine whether employment relationship existed;

[3] genuine dispute of material fact existed as to whether distributor reserved requisite degree and control over dealers to establish employment relationship under first prong of ABC test; and

[4] genuine dispute of material fact existed as to whether dealers of distributor's tools and equipment performed work that was necessary to distributor's business so to establish employment relationship under second prong of ABC test.

Motion denied.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (18)

[1] Labor and Employment Independent Contractors and Their Employees

Under California common law test for determining whether workers are independent contractors or employees, the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.

[2] **Labor and Employment** Nature, Creation, and Existence of Employment Relation

Under the California common law test for determining an employment relationship, the right to control work details is the most important or most significant consideration; however, several secondary considerations bear in the analysis and the right to discharge at will, without cause, serves as strong evidence in support of an employment relationship.

[3] **Labor and Employment** Nature, Creation, and Existence of Employment Relation

Under California common law, considerations in determining whether an employment relationship exists include: a) whether the one performing services is engaged in a distinct occupation or business, b) the kind of occupation, with reference to whether the work is usually done under the direction of the principal or by a specialist without supervision, c) the skill required in the particular occupation, d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work, e) the length of time for which the services are to be performed, f) the method of payment, g) whether or not the work is a part of the regular business of the principal, and h) whether the parties believe they are creating an employer-employee relationship.

[4] **Labor and Employment** Payment of wages in general

The *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hirer demonstrates that the worker satisfies each of three conditions: (a) that the worker is free from control and direction of the hirer in connection with the work performed, both under the contract for the performance of the work and in fact, (b) that the worker performs work that is outside the usual course of the hirer'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.

1 Case that cites this headnote

[5] **Labor and Employment** Payment of wages in general

Since a worker is an employee unless the employer proves all three conditions under the *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, each individual factor may be dispositive in a worker's favor on the merits.

[6] **Federal Preemption** Trade Regulation

Labor and Employment Preemption

Dynamex ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders was not preempted by Federal Trade Commission's franchise rule, and thus rule did not render ABC test inapplicable to determine whether employment relationship existed on resale dealers claims, arising under California law and wage orders, against tools and equipment distributor; even though distributor contended that franchise rule required franchisee to exert significant degree of control over franchisee's method of operation, it did not identify any specific provision of rule that contains such requirement, and distributor failed to identify any provision of California law that conflicted with requirement of rule. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Lab. Code §§ 221, 222, 223, 226, 226.3, 226.7, 510, 1194, 1197, 2775(b)(1)(A), 2802; 16 C.F.R. § 436.1 et seq.

More cases on this issue

[7] **Federal Preemption** Conflicting or Conforming Laws or Regulations; Conflict Preemption

The Supremacy Clause of the Constitution makes evident that state laws that conflict with federal law are without effect. U.S. Const. art. 6, cl. 2.

[8] **Federal Preemption** Grounds for preemption in general

There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.

[9] **Federal Preemption** Conflicting or Conforming Laws or Regulations; Conflict Preemption

Conflict preemption is implicit preemption of state law that occurs where there is an actual conflict between state and federal law.

[10] **Federal Preemption** Impossibility of complying with both state and federal law

Federal Preemption State law as obstacle to objectives or purpose of federal law

Conflict preemption arises when [1] compliance with both federal and state regulations is a physical impossibility, or [2] when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[11] **Federal Preemption** Clear or manifest intent

Federal Preemption Traditionally or historically regulated by states

In the interest of avoiding unintended encroachment on the authority of the States, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption; thus, preemption will not lie unless it is the clear and manifest purpose of Congress.

[12] **Federal Preemption** Presumptions and burden of proof

The burden of proof of establishing conflict preemption is on the party asserting a preemption defense.

[13] **Labor and Employment** Payment of wages in general

Direct salesperson exemption set forth in California Unemployment Insurance Code did not apply to render *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, inapplicable to determine whether employment relationship existed on resale dealers claims, arising under California law and wage orders, against tools and equipment distributor; exemption only applied to workers who were engaged in business of primarily in person demonstration and sales of consumer products in home or for resale, and testimony of distributor's director of national sales established that dealers were restricted from selling to wholesale distributors and that typical customers were professional shops. Cal. Unemp. Ins. Code § 650; Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Lab. Code §§ 221, 222, 223, 226, 226.3, 226.7, 510, 1194, 1197, 2775(b)(1)(A), 2802.

More cases on this issue

[14] **Labor and Employment** Payment of wages in general

Under the first prong of the *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, a worker is an employee unless the hiring entity establishes 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.

1 Case that cites this headnote

[15] **Labor and Employment** Payment of wages in general

Under the first prong of the *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, depending on the nature of the work and overall arrangement between the parties, 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, but does not possess over a genuine independent contractor; what matters is not how much control a hirer exercises, but how much control the hirer retains the right to exercise.

1 Case that cites this headnote

[16] **Labor and Employment** Questions of law and fact as to employment status

Summary Judgment Regulation of wages and hours

Genuine dispute of material fact existed as to whether distributor of professional-quality tools and equipment for automotive and aviation industries reserved requisite degree and control over its resale dealers to establish employment relationship under first prong of *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, precluding summary judgment in favor of dealer on distributor's affirmative defenses that dealers were independent contractors under California law. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Lab. Code §§ 221, 222, 223, 226, 226.3, 226.7, 510, 1194, 1197, 2775(b)(1)(A), 2802.

More cases on this issue

[17] **Labor and Employment** Payment of wages in general

Under the second prong of the *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, a worker is an employee unless the hiring entity establishes the person performs work that is outside the usual course of the hiring entity's business.

[18] **Labor and Employment** Questions of law and fact as to employment status

Summary Judgment Regulation of wages and hours

Genuine dispute of material fact existed as to whether resale dealers of distributor's professional-quality tools and equipment for automotive and aviation industries performed work that was necessary to distributor's business so to establish employment relationship under second prong of *Dynamex* ABC test, 416 P.3d 1, for distinguishing between employees and independent contractors in connection with California Industrial Welfare Commission (IWC) wage orders, precluding summary judgment in favor of dealer on distributor's affirmative defenses that dealers were independent contractors under California law. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Lab. Code §§ 221, 222, 223, 226, 226.3, 226.7, 510, 1194, 1197, 2775(b)(1)(A), 2802.

More cases on this issue

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ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [DKT. 98]

FERNANDO L. AENLLE-ROCHA, United States District Judge

RULING

Before the court is Plaintiff Randy Salinas' ("Plaintiff") Motion for Partial Summary Judgment ("Motion"). Dkt. 98 ("Mot."). [1] Defendant The Cornwell Quality Tools Company ("Defendant") opposes the Motion. Dkt. 107 ("Opp'n"). On November 11, 2021, the court took the Motion under submission, finding it appropriate for decision without oral argument. Dkt. 121; *see* Fed. R. Civ. P. 78(b); Local Rule 7-15.

***983** For the reasons set forth below, the court DENIES Plaintiff's Motion for Partial Summary Judgment (Dkt. 98) in its entirety. Plaintiff's requests for judicial notice (Dkts. 98-3 & 112-2) are DENIED as moot.

BACKGROUND

Cornwell is a manufacturer and distributor of professional-quality tools and equipment for the automotive and aviation industries, and its end-user customers are almost entirely professional mechanics and technicians. Dkt. 98-1 ("Mot. Br.") at 6; Opp'n 8, 11. [2] Cornwell primarily sells its products through sales to franchisees, who are known as "Dealers," for resale to end-user customers. Opp'n 8; Mot. Br. 7; Dkt. 98-10 (Markley Decl. Ex. D, Studenic Dep.) at 6 ("in 2011, nearly all of – 99 percent of Cornwell's top-line revenue came from the franchise dealer sales"). Dealers make their sales from display trucks or vans, which are called "mobile dealerships," and operate in non-exclusive "territories" that Cornwell assigns them. Mot. Br. 7-8; Opp'n 11.

In addition to selling products to customers, Dealers are also required to service warranties and repairs, collect on open accounts, and process returns for end-user customers. Mot. Br. 2-3, 8; Opp'n 8-9. Cornwell also maintains a sales department, which employs District Managers, Regional Managers, and a Director of National Sales ("DNS"). Mot. Br. 8; Opp'n 16.-17. Cornwell advertises its tool products directly to its end-user customers through catalogs, bulletins, and flyers. Mot. Br. 7; *see* Opp'n 29.

Dealers contract with Cornwell pursuant to standard Dealer Franchise Agreements ("DFAs"), which define the scope and terms of the franchise relationship. Mot. Br. 10; Opp'n 8; Dkt. 98-6 (Markley Decl. Ex. A, Columbus Dep. Ex. 3) at 11. Dealers are also provided with a detailed Franchise Disclosure Document ("FDD"), which includes extensive information concerning Cornwell's operations, the nature of the franchise relationship, and Dealers' obligations. Mot. Br. 10; Opp'n 9. Pursuant to the

terms of the DFAs, Dealers are required to "personally participate full-time in the direct operation of the Dealership." Dkt. 98-6 (Markley Decl. Ex. A, Columbus Dep. Ex. 3) at 14.

On October 10, 2019, Plaintiff filed the Class Action Complaint ("Complaint") in Riverside County Superior Court. Dkt. 1-3 ("Compl."). Defendant removed the action to federal court on November 27, 2019. Dkt. 1. On May 29, 2020, Plaintiff filed the operative First Amended Class Action Complaint ("FAC"), asserting nine causes of action against Defendant for: (1) failure to reimburse expenses in violation of Cal. Labor Code § 2802 and the California Industrial Welfare Commission ("IWC") Wage Order No. 1, §§ 8-9; (2) unlawful deductions from wages in violation of Cal. Labor Code §§ 221-23 and IWC Wage Order No. 1, §§ 8-9; (3) failure to provide accurate wage statements in violation of Cal. Labor Code §§ 226 and 226.3, and IWC Wage Order No. 1, § 7; (4) failure to provide overtime pay in violation of Cal. Labor Code § 510 and IWC Wage Order No. 1, § 3; (5) failure to provide meal periods in violation of Cal. Labor Code § 226.7 and IWC Wage Order No. 1, § 11; ***984** (6) failure to provide rest breaks in violation of Cal. Labor Code § 226.7 and IWC Wage Order No. 1, § 12; (7) failure to pay wages in violation of Cal. Labor Code §§ 1194 and 1197, and IWC Wage Order No. 1; (8) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200 et seq. (the Unfair Competition Law, "UCL"); and (9) violation of the California Private Attorneys General Act of 2004 ("PAGA"). Dkt. 26 ("FAC"). [3]

Plaintiff contends Defendant improperly classifies its "Dealers" as independent contractors instead of employees, despite retaining and exercising control over Dealers and their central role in Cornwell's tools sales business. *Id.* ¶ 2. Plaintiff asserts the first through eighth causes of action on behalf of a proposed class of himself and similarly situated Dealers in California and the ninth cause of action as a representative action on behalf of the same. *Id.* ¶ 4.

Defendant filed its Answer to the FAC on June 12, 2020, asserting forty-two affirmative defenses. Dkt. 28. The fifth affirmative defense pleads the FAC "is barred to the extent that Plaintiff and/or the alleged putative class members/aggrieved employees were not employees of Defendant." *Id.* at 15-16. The thirty-fifth affirmative defense pleads that "[a]ny recovery on Plaintiff's FAC is barred because Plaintiff and the alleged putative class members/aggrieved employees were at all times independent contractors not subject to the provisions of the California Labor Code, the applicable wage orders of the California Industrial Welfare Commission, and/or any other law alleged in the FAC." *Id.* at 22.

On August 13, 2021, Plaintiff filed the operative version of the Motion, requesting the court grant summary judgment in his favor on Defendant's fifth and thirty-fifth affirmative defenses. Mot. 1. Defendant filed the operative version of its Opposition on September 1, 2021. Opp'n. These versions of the parties' documents replace and supersede the parties' earlier filings in connection with the Motion. *See* Dkt. 92.

Defendant's Evidentiary Objections

As an initial matter, Defendant objects to certain evidence submitted by Plaintiff in connection with the subject Motion. Dkt. 107-4. On a motion for summary judgment, the parties may only object to evidence if it "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). At this stage of the proceedings, the court is concerned only with the admissibility of the relevant *facts*, and not the *form* in which the evidence is presented. *See* Fed. R. Civ. P. 56(c)(2) advisory committee's note to 2010 amendment ("Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting."); *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003) ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents."); *Block v. City of L.A.*, 253 F.3d 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rule of Civil Procedure 56.").

To the extent Defendant objects to the form in which evidence is presented, Defendant's objections are OVERRULED. *See* Fed. R. Civ. P. 56(c)(2). Defendant's evidentiary objections are otherwise OVERRULED as moot.

*985 DISCUSSION

I. Legal Standard

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Facts are "material" only if dispute about them may affect the outcome of the case under applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.*

If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial to defeat the motion. *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505; *see also* Fed. R. Civ. P. 56(c), (e). Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. The court must decide whether the moving party is entitled to judgment as a matter of law in light of the facts presented by the nonmoving party, along with any undisputed facts. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 & n. 3 (9th Cir. 1987). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *Id.* "If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. ... Inferences from the nonmoving party's 'specific facts' as to other material facts, however, may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law." *T.W. Elec.*, 809 F.2d at 631-32. "[S]ummary judgment should not be granted where contradictory inferences may reasonably be drawn from undisputed evidentiary facts...." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir. 1980). The nonmoving party, however, must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); *see also Celotex*, 477 U.S. at 324, 106 S.Ct. 2548.

II. Analysis [4]

A. The *Borello* and *Dynamex* Tests and California Law

[1] [2] [3] California law recognizes two tests for determining whether workers are ***986** independent contractors or employees. Under the 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 result desired." *S. G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal. 3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). Under this test, the right to control work details is the "most important" or "most significant" consideration; however, several "secondary" considerations bear in the analysis. *Id.* In particular, the California Supreme Court noted "the right to discharge at will, without cause," serves as "[strong] evidence in support of an employment relationship...." *Id.* at 350-51, 256 Cal.Rptr. 543, 769 P.2d 399. Additional considerations include:

a) whether the one performing services is engaged in a distinct occupation or business;

b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

c) the skill required in the particular occupation;

d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

e) the length of time for which the services are to be performed;

f) the method of payment, whether by the time or by the job;

g) whether or not the work is a part of the regular business of the principal; and

h) whether or not the parties believe they are creating the relationship of employer-employee.

Id. at 351, 256 Cal.Rptr. 543, 769 P.2d 399. "Generally, ... the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." *Id.* (internal citations omitted).

[4] On April 30, 2018, the California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 956-57, 232 Cal.Rptr.3d 1, 416 P.3d 1 (2018), which established a different test for distinguishing between employees and independent contractors in connection with IWC Wage Orders (the "ABC test").

> 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 satisfies *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.

Id. at 955-56, 232 Cal.Rptr.3d 1, 416 P.3d 1 (emphasis in original).

[5] Since a worker is an employee unless the employer proves all three conditions, each individual factor may be dispositive in a plaintiff's favor on the merits. *Id.* at 966, 232 Cal.Rptr.3d 1, 416 P.3d 1. The California Supreme Court and Ninth Circuit have held that the *Dynamex* ABC test applies retroactively to claims that predate the decision. ***987** *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1117 (9th Cir. 2021) (citing the California Supreme Court's decision on the certified question at *id.*, 10 Cal. 5th 944, 273 Cal.Rptr.3d 741, 478 P.3d 1207 (2021)).

B. Whether *Dynamex* or *Borello* Apply

In 2020, the California Legislature adopted the ABC test for all claims that arise under the California Labor and Unemployment Insurance Codes, unless a statutory or IWC Wage Order exception applies. Cal. Lab. Code § 2775(b)(1), (2); *e.g., Parada v. E. Coast Transp. Inc.*, 62 Cal. App. 5th 692, 699 n. 2, 277 Cal.Rptr.3d 89 (2021). This extension of the ABC test "was prospective, with an effective date of January 1, 2020." *Lawson v. Grubhub, Inc.*, 13 F.4th 908, 912 (9th Cir. 2021) (citing Cal. Lab. Code § 2785(c)). If a court rules the ABC test cannot be applied to a particular context based on grounds other than an express exception to employment status under Section 2775(b)(2), the *Borello* test applies. Cal. Lab. Code § 2775(b)(3).

Plaintiff's first through seventh causes of action arise under the California Labor Code and IWC Wage Order No. 1, and the eighth and ninth causes of action are dependent on the underlying Labor Code and Wage Order claims. Accordingly, the *Dynamex* ABC test governs as to Plaintiff's claims unless an exception applies.

Defendant raises two primary arguments for why the ABC test is inapplicable here.

1. Preemption

[6] First, Defendant contends the ABC test is preempted by the Federal Trade Commission's Franchise Rule, 16 C.F.R. § 436.1 et seq. (the "Franchise Rule"), because "[i]t is plainly impossible for a franchisor to both 'exert a significant degree of control over the franchisee's method of operation,' as required by the Franchise Rule and, at the same time, leave its franchisee 'free from control and direction, as required by Section 2775(b)(1)(A) of the Labor Code." Opp'n 20.

[7] **[8]** "The Supremacy Clause of the Constitution makes evident that state laws that conflict with federal law are without effect." *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (citations omitted). "There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption." *Id.* As Defendant's argument is based upon the existence of a direct conflict between Labor Code § 2775 and the Franchise Rule, the court, therefore, will only discuss conflict preemption.

[9] **[10]** **[11]** **[12]** "Conflict preemption is implicit preemption of state law that occurs where there is an actual conflict between state and federal law." *McClellan*, 776 F.3d at 1039 (citations omitted). "Conflict preemption arises when [1] compliance with both federal and state regulations is a physical impossibility, ... or [2] when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted, brackets in original). "In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 663-64, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). "Thus, preemption will not lie unless it is 'the clear and manifest purpose of Congress.' " *Id.* at 664, 113 S.Ct. 1732. The burden of proof is on the party asserting a preemption defense. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n. 6 (9th Cir. 1995).

Defendant argues the ABC test is based on the Massachusetts Independent Contractor Law, Mass. Gen. Laws ch. 149, § 148B ("ICL"). Opp'n 20. Defendant cites ***988** *Patel v. 7-Eleven, Inc.*, 8 F.4th 26, 28 (1st Cir. 2021), to argue that the First Circuit has recognized that "[i]t appears difficult, if not impossible for a franchisor to satisfy the FTC Franchise Rule's requirement that the franchisor 'exert or ha[ve] authority to exert a significant degree of control over the franchisee's method of operation' and simultaneously rebut the ICL's presumption by demonstrating that each franchisee is 'free from control and direction in connection with the performance of the service.' " Opp'n 20.

Patel, 8 F.4th 26, is an order by the First Circuit certifying a question to the Massachusetts Supreme Judicial Court. The Massachusetts Supreme Judicial Court, in turn, considered the issue and answered that the FTC Rule does not preempt the ICL. *Patel v. 7-Eleven, Inc.*, 489 Mass. 356, 363-64, 183 N.E.3d 398 (2022) (rejecting the argument that the independent contractor statute should not apply where an industry is separately or even highly regulated, and recognizing "categorically excluding franchise relationships from the statute's ambit would permit employers to evade obligations under the wage statutes merely by labeling what is actually an employment relationship as a 'franchise' relationship, allowing employers to foil the legislative intent to protect workers as employees when they are, in fact, employees"). Unlike the First Circuit's order certifying the question, which does not constitute binding or even persuasive law on the issue, the Massachusetts Supreme Judicial Court's response constitutes persuasive authority against a finding of preemption.

Cornwell also fails to identify any provision of California law that directly conflicts with a requirement of the Franchise Rule. While Defendant contends the Franchise Rule requires a franchisee to "exert a significant degree of control over the franchisee's

method of operation," Defendant does not identify the specific provision of the Franchise Rule that contains such a requirement. *See* Opp'n 20.

16 C.F.R. § 436.1 defines the term "franchise" to mean "any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that: ... (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation...." Assuming this is the provision Defendant relies upon in its Opposition, Defendant does not identify how this definition or any other portion of the Franchise Rule establishes a substantive requirement that directly conflicts with California law. *See Patel*, 489 Mass. at 365, 183 N.E.3d 398 (recognizing "the FTC Franchise Rule 'is a pre-sale disclosure rule ... [that] does not regulate the substantive terms of the franchisor-franchisee relationship" and that "[c]ompliance with these disclosure requirements does not mandate that a franchisor exercise any particular degree of control over a franchisee"). Defendant, thus, fails to meet its burden to establish preemption.

2. Direct Salesperson Exemption

[13] Second, Defendant contends *Dynamex* is inapplicable because Plaintiff and the putative class members fall within the scope of the "direct salesperson exemption" set forth in California Unemployment Insurance Code § 650 ("Unemployment Insurance Code § 650"). Opp'n 21-22. This section states in relevant part:

> "Employment" does not include services performed ... as a ... direct sales salesperson, ... by an individual if all of the following conditions are met:
>
> (a) The individual is licensed under the provisions of Chapter 19 (commencing with Section 9600) ***989** of Division 3 of, or Part 1 (commencing with Section 10000) of Division 4 of, the Business and Professions Code, Article 2 (commencing with Section 700) of Chapter 5 of Division 3 of the Harbors and Navigation Code, or is engaged in the trade or business of primarily in person demonstration and sales presentation of consumer products, including services or other intangibles, in the home or sales to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis, for resale by the buyer or any other person in the home or otherwise than from a retail or wholesale establishment.
>
> (b) Substantially all of the remuneration (whether or not paid in cash) for the services performed by that individual is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual.
>
> (c) The services performed by the individual are performed pursuant to a written contract between that individual and the person for whom the services are performed and the contract provides that the individual will not be treated as an employee with respect to those services for state tax purposes.

Cal. Unemp. Ins. Code § 650. [5]

Defendant argues Dealers qualify as direct salespeople under this section because they: "(1) engage in direct, in person sales of consumer products at third-party service shops ..., (2) are solely paid based on the profits they receive from their sales[ ], and (3) operate under a [Dealer Franchise Agreement ('DFA')] which states they are independent contractors." Opp'n 21-22.

Unemployment Insurance Code § 650, however, does not apply to all individuals who engage in "direct, in person sales of end-user products," as Defendant suggests. This exception applies only to individuals who are "engaged in the trade or business of primarily in person demonstration and sales presentation of consumer products, including services or other intangibles, in the home or sales to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis, for resale by the buyer or any other person in the home or otherwise than from a retail or wholesale establishment." Cal. Unemp. Ins. Code § 650(a) (emphasis added).

Defendant does not present any evidence to suggest Dealers primarily engage in direct, in person sales of consumer products in the home or for resale. To the contrary, Cornwell's Director of National Sales, Dave Columbus ("Columbus"), testified at deposition that Dealers are "restricted from selling to wholesale distributors or middlemen" and that their "typical customers" are auto repair dealer shops, body shops, motorcycle shops, and truck shops, who use the tools professionally. Dkt. 98-5 (Markley Decl. Ex. A) at 35-36. Accordingly, the court finds that Unemployment Insurance Code § 650 and the "direct salesperson exception" do not apply here.

3. Conclusion

In sum, the court finds Plaintiff's claims are subject to the ABC test, rather than the common law test discussed in *Borello.* ***990** Accordingly, the court need not address the parties' arguments regarding *Borello.*

C. Whether a Genuine Dispute Exists Under the ABC Test

Plaintiff contends Defendant cannot establish that he and other putative class members do not qualify as employees under Prongs A and B of the ABC test. Mot. Br. 19-25. Defendant disagrees. Opp'n 22-30.

1. Prong A of the ABC Test

[14] **[15]** Under Prong A of the ABC test, a worker is an employee unless the hiring entity establishes "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." *Dynamex*, 4 Cal. 5th at 955, 232 Cal.Rptr.3d 1, 416 P.3d 1. "[D]epending on the nature of the work and overall arrangement between the parties, 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, but does not possess over a genuine independent contractor." *Id.* (citing *Borello*, 48 Cal. 3d at 353-54, 356-57, 256 Cal.Rptr. 543, 769 P.2d 399). [6] What matters here "is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise." *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 533, 173 Cal.Rptr.3d 332, 327 P.3d 165 (2014) (emphasis in original).

[16] Plaintiff contends Cornwell cannot disprove it reserves broad rights to control Dealers under the DFAs and, in fact, exercises vast control over their work. Mot. Br. 17. According to Plaintiff, the DFAs and Cornwell's Operations Manuals vest Cornwell with large degrees of control, including by requiring Dealers to use best, full-time efforts to service a territory, operate a mobile tool store approved by Cornwell, obtain and submit detailed weekly information through Cornwell's software programs, and meet minimum purchase requirements. Mot. Br. 23-24. Plaintiff further argues Cornwell's control is demonstrated by the fact that it retains and exercises the right to evaluate Dealers' performance, and to discipline and terminate Dealers for perceived performance deficiencies and failure to meet minimum purchasing requirements. *Id.* at 24.

Defendant argues it does not retain or exercise the requisite degree of control over Dealers' operations of their franchises. Opp'n 11. According to Defendant, Dealers (1) are not obligated to visit any specific locations or customers, or discouraged from seeking additional customers, and have freedom to set their own schedule and route, (2) have complete discretion in selecting what products to buy after their initial purchase, (3) are allowed to and, in fact, sell products from other manufacturers than Cornwell (including Cornwell's direct competitors), as Cornwell does not restrict the goods Dealers may offer in their dealerships, and (4) have wide discretion in other aspects of their franchises as long as they meet minimum standards, including the clothing they wear and the types of vehicles they operate. *Id.* at 11-15. While Cornwell acknowledges Dealers are required to service warranties ***991** for Cornwell products, Defendant notes that Dealers also service warranties for non-Cornwell products they sell. *Id.* at 14.

Defendant further contends that while Cornwell provides suggested retail prices, Dealers are free to sell products to end-user customers at any price and on any terms they choose. *Id.* at 13. According to Defendants, the terms of Dealers' sales vary widely, including the time-frame in which customers may pay for purchases and whether customers are submitted for Cornwell Tech-Credit financing. *Id.* at 13. Defendant additionally states Dealers are never required to comply with Cornwell-instituted sales or marketing programs (such as coupons, gift cards, gift certificates, or incentives), and that some Dealers have instituted their own promotional programs for their customers or engaged in independent advertising. *Id.* at 14. According to Defendant, while Cornwell organizes quarterly sales meetings and offers Dealers assistance from District Managers and additional training, Dealers have the freedom to decide whether and how to take advantage of these services after the initial mandatory training. *Id.* at 10, 14-17.

Viewing the evidence in the light most favorable to Defendant, the court finds a genuine dispute exists as to whether Cornwell reserves the requisite degree of control and direction over its Dealers, in connection with the performance of the work and in fact, to establish an employment relationship under Prong A of the ABC test. *See Dynamex*, 4 Cal. 5th at 955, 232 Cal.Rptr.3d 1, 416 P.3d 1; Cal. Lab. Code § 2775(b)(1)(A). The court, therefore, DENIES Plaintiff's Motion on this basis.

2. Prong B of the ABC Test

[17] Under Prong B of the ABC test, a worker is an employee unless the hiring entity establishes "[t]he person performs work that is outside the usual course of the hiring entity's business." *Dynamex*, 4 Cal. 5th at 955, 232 Cal.Rptr.3d 1, 416 P.3d 1; Cal. Lab. Code § 2775(b)(1)(B). "Analytically, courts have framed the Prong B inquiry in several ways. They have considered [1] whether the work of the employee is necessary to or merely incidental to that of the hiring entity, [2] whether the work of the employee is continuously performed for the hiring entity, and [3] what business the hiring entity proclaims to be in." *Vazquez*, 986 F.3d at 1125.

[18] First, Plaintiff contends Dealers are necessary to Cornwell's business, because over 99% of Cornwell's revenue arises from Dealers' sales. Mot. Br. 20. Plaintiff further notes (1) Cornwell sets its own sales goals based on the number of Dealers and their past performance within districts, (2) Cornwell's Regional Managers review weekly reports regarding Dealer performance, (3) Cornwell's sales department holds annual awards ceremonies for Dealers where it recognizes top performers in various categories, (4) Cornwell "promotes" Dealers to District Manager positions and advertises these positions as advancement opportunities to prospective Dealers, and (5) District Managers and Regional Managers are expected to hit sales targets and their compensation depends on sales within their district. Mot. Br. 8-9, 15-17, 20.

Second, Plaintiff argues that Dealers work continuously for Cornwell, as Cornwell has relied on Dealers to sell products in California since the early 2000's, and Cornwell's standard DFAs contain no end date. Mot. Br. 21. Third, Plaintiff states Cornwell holds itself out as a manufacturer and distributor of tool products and admits its primary market is the automotive aftermarket, which Plaintiff argues is the same "business" as that of Dealers. *Id.* at 6-7, 21-22.

Defendant responds Dealers are no more necessary to Cornwell's business ***992** than any customers are to a manufacturing or wholesale business. Opp'n 28. According to Defendant, Cornwell manufactures tools and equipment, wholesales product from third-party vendors, franchises, licenses its trademarks, and operates as a finance company, but does not sell directly to end-users; whereas, Dealers sell products they purchase from Cornwell and other manufacturers. *Id.* Defendant argues these are separate types of businesses and that Dealers' work is performed exclusively for their own dealerships and does not constitute "continuous" work performed for Cornwell. Opp'n 28-29.

Plaintiff cites *Vazquez*, 986 F.3d at 1126, to argue that Cornwell's business model is analogous to circumstances the Ninth Circuit has considered to create an employment relationship. Mot. Br. 21. In *Vazquez*, 986 F.3d at 1122-23, the Ninth Circuit reversed a district court's grant of summary judgment in a defendant company's favor, on the grounds that the district court made its

decision before the California Supreme Court clarified the applicable standard in *Dynamex*. The Ninth Circuit remanded the action to the district court for reconsideration in light of *Dynamex*, and did not make any findings regarding whether the facts of that case established an employment relationship. *Id.* at 1122. While the Ninth Circuit offered "observations and guidance" to help guide the district court's analysis on remand, the circuit court's discussion of the ABC test was dicta based on generalized hypotheticals and did not constitute a holding that any specific set of facts did or did not establish an employment relationship. *See id.* at 1125-26. The court will not grant summary judgment in Plaintiff's favor based on the Ninth Circuit's non-binding discussion of hypotheticals in *Vasquez*.

Viewing the evidence in the light most favorable to Defendant, the court finds that a genuine dispute exists as to whether Dealers perform work that is necessary or merely incidental to Cornwell's business. A reasonable jury could find the nature of Cornwell's "business" comprises the manufacturing and wholesale of professional-grade tools, and related activities—and not the direct sales of products to end-user consumers. A reasonable jury could also find that Dealers engage in a separate type of "business" that is focused on retail sales—particularly in light of the fact that Dealers may sell products by other manufacturers, including Cornwell's direct competitors. A reasonable jury could also conclude otherwise. Accordingly, the court DENIES Plaintiff's Motion on this basis.

CONCLUSION

For the foregoing reasons, the court DENIES Plaintiff's Motion for Partial Summary Judgment (Dkt. 98), finding there are genuine disputes as to whether Plaintiff qualified as an employee under the *Dynamex* ABC test. Plaintiff's requests for judicial notice (Dkts. 98-3 & 112-2) are DENIED as moot.

IT IS SO ORDERED.

All Citations

635 F.Supp.3d 979

Footnotes

1 The court cites documents by the page numbers added by the court's CM/ECF system, rather than any page numbers that appear natively within the documents.

2 The court cites the parties' evidence by reference to the parties' briefs, as the parties did not list relevant facts separately in their respective separate statements (Dkts. 98-2, 107-3), as required by the court's Initial Standing Order (Dkt. 52), and instead stated them in their briefs along with citations to supporting evidence. The parties are advised that the court expects them to comply with all statutory requirements, court orders, and court rules, and that failure to comply in the future may result in the denial or striking of filings and documents.

3 All subsequent statutory references will be to the California Labor Code unless otherwise specified. All discussion of "employees" in connection with IWC Wage Orders shall refer to non-exempt employees, unless otherwise specified.

4 Defendant contends the Motion is untimely as to the putative class members because the court has not yet issued a ruling on Plaintiff's Motion for Class Certification (Dkt. 97). Opp'n 18-19. In light of the court's Order granting Plaintiff's Motion for Class Certification (Dkt. 162), Defendant's argument is moot.

5 Section 2775 and *Dynamex* do not apply to a "direct sales salesperson," as described in California Unemployment Insurance Code § 650, "so long as the conditions for exclusion from employment under that section are met." Cal. Lab. Code § 2783(e).

6 *Dynamex*, 4 Cal. 5th at 939 & 958, 232 Cal.Rptr.3d 1, 416 P.3d 1, recognized that because the IWC Wage Orders' definition of "employ" was intended to be broader and more inclusive than the common law test, a worker who would be considered an employee under the common law test would also properly be treated as an employee for purposes of Prong A of the ABC test. Thus, *Borello* and its progeny's discussion of a putative employer's right to control a worker inform and are relevant to the court's analysis of this issue.

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