SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Quintero v. Apria Healthcare LLC
20STCV42367

Dept. 12 SSC
Hon. Carolyn B. Kuhl
Date of Hearing: January 31, 2024

Motion for Summary Adjudication or In the Alternative, Motion for Judgment on the Pleadings

Court Ruling: The Motion is granted.

Plaintiff filed this class action on November 3, 2020. Plaintiff filed the First Amended Complaint (FAC) on February 10, 2021, alleging the following causes of action: (1) Unpaid Overtime (Lab. Code, §§ 510, 1198); (2) Unpaid Minimum Wages (Lab. Code, §§ 1194,1197, 1197.1); (3) Wages Not Timely Paid Upon Termination (Lab. Code, §§ 201, 202, 203); (4) Unpaid Rest Break Premiums (Lab. Code, § 226.7); (5) Unpaid Meal Break Premiums (Lab. Code, § 226.7; (6) Non-Compliant Wage Statements (Lab. Code, § 226(a)); (7) Unpaid Business Expenses (Lab. Code, §§ 2800, 2802); (8) Violation of the UCL; and (9) Civil Penalties under PAGA.

Defendant Apria Healthcare LLC (Defendant or Apria) provides its customers with home delivery of medical equipment and supplies, such as beds, oxygenators, and wheelchairs. Plaintiff alleges that Defendant misclassified its delivery drivers as independent contractors. Plaintiff has contended that all of the alleged Labor Code violations alleged in this litigation stem from Defendant's misclassification of the putative class. In the FAC, Plaintiff defines the putative class as follows:

> All individuals who worked for Defendants in California as drivers and are/were classified as independent contractors at any time during the period of four years prior to the filing of the Complaint through the date of certification.

(FAC, ¶ 26, bolded in original.)

Defendant stated as follows in its Opposition to the Motion for Class Certification:

> While Apria's Techs [i.e., official employees] are generally able to address all patient home equipment needs, Apria occasionally needs assistance during high volume times or when a branch has an unexpected loss of an Apria Techs. (Frailey ¶5) To address this work overflow, Apria contracted with Spoke Logistics, LLC ("Spoke"); Fed Med Delivery, LLC ("Fed Med"); and Johnson Pickup & Delivery LLC ("Johnson," collectively, "Courier Companies") to provide couriers.

(Defendant Apria Healthcare LLC's Opposition to Plaintiff Alvara Quintero's Motion for Class Certification, filed July 28, 2021, at p. 6 [the court adopts Defendant's abbreviations herein].) Defendant has asserted in this litigation that it entered into Courier Services Agreements (CSA) with the three Courier Companies named above. (See, e.g., Def's Add. Fact No. 10.) Defendant has asserted that, under the CSAs, no contractual relationship exists between Defendant and the couriers.

On September 14, 2021, the court certified the following class:

> All persons who were provided as drivers to Defendant by Spoke Logistics, LLC, Fed Med Delivery, LLC, and Johnson Pickup & Delivery LLC, between November 1, 2016 and the date of class certification, and who were not paid as W-2 employees by Apria.

(Court's Ruling on Motion for Class Certification, filed Sept. 14, 2021, at p. 1.)

Plaintiff moves for an order summarily adjudicating Defendant's second affirmative defense. Plaintiff argues that there are no triable issues of fact with respect to the question of whether Defendant was Plaintiff's and the class's employer during the relevant period.

Defendant's second affirmative defense states:

> Any recovery on Plaintiff's Complaint, or any purported cause of action alleged therein, is barred on the grounds that Defendant was not Plaintiff's or the putative class'

> employer, [was] never a party to any employment relationship with the Plaintiff or the putative class and never controlled their wages hours or working conditions. Defendant lacked knowledge and information related to the allegations of the Complaint as the same were not communicated to it.

(Answer, ¶ 2.)

The instant Motion was originally heard on November 9, 2021. However, an appeal of this court's order denying Defendant's motion to compel arbitration was filed just a few hours before the hearing and the court decided to allow simultaneous briefing on the question of whether to stay the action pending appeal. (See Minute Order, Nov. 9, 2021.) On November 29, 2021, this court stayed this action "pending Defendant's appeal of the court's order denying Defendant's motion to compel arbitration." (Minute Order, Nov. 29, 2021.)

Defendant did not prevail on its appeal of this court's order denying Defendant's motion to compel arbitration. This court set Plaintiff's instant Motion for hearing and allowed the parties to file supplemental briefing to address any recent relevant precedent. After the hearing, the court issued a tentative ruling stating that, if the test set forth in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), for determining whether a worker is an employee or an independent contractor (the "ABC test") were to be applied, Plaintiff's Motion would be granted, but asking for further, limited briefing on the issue of whether a "joint employer" analysis should instead apply in this case. (Order for further limited briefing, Dec. 18, 2023.) Thereafter, the parties filed supplemental briefs on January 22, 2024. The court heard further oral argument on January 31, 2024. The court now issues its decision.

If the ABC Test is Applicable to this Case, Summary Adjudication Should be Granted because There Is No Triable Issue of Material Fact as to Prong B of the ABC Test, and Defendant's Evidence Has Not Created a Material Issue of Fact as to the Applicability of the Exception Codified in Labor Code Section 2776

a) *The ABC Test and Labor Code Section 2775*

Plaintiff's Motion for Summary Adjudication is premised on the applicability of the test for determining whether a worker hired by an employer is an employee or an independent contractor. Under California law, the distinction between whether a worker is an employee or an

independent contractor is governed by *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), the holding of which has been codified in Labor Code section 2775. In this litigation, Defendant has not previously contested the applicability of *Dynamex* to the determination of whether Defendant is liable for violations of California's wage and hour laws. (See, e.g., Defendant Apria Healthcare LLC's Opposition to Plaintiff Alvara Quintero's Motion for Class Certification, filed July 28, 2021, at pp. 15-16.) In ruling on the motion for class certification, this court held that "the principal issue for determining liability is the question of whether the couriers are Defendant's employees under the ABC test of [*Dynamex*]." (Court's Ruling on Motion for Class Certification, filed Sept. 14, 2021, at p. 5.)

Under *Dynamex* and section 2775, Defendant has the burden of proving that Plaintiff and the class members, who provided delivery services of medical equipment for Defendant, were merely independent contractors, rather than Defendant's employees. Under the Labor Code, "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

> (A) The person 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.
> (B) The person performs work that is outside the usual course of the hiring entity's business.
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed."

(Lab. Code, § 2775, subd. (b)(1); see also *Dynamex*, *supra*, Cal.5th at pp. 956-957 [in order to meet its burden, the hiring entity must establish each of the three factors of this ABC test]; see also Lab. Code, § 3357 ["[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee"].)

Plaintiff has demonstrated that there is no triable issue of material fact as to whether Defendant can establish prong B of the ABC test of section 2775. This conclusion flows from the undisputed fact that Plaintiff and the class members do not perform work that is "outside the usual course" of Defendant's business.

Defendant's own PMQ witness, James Frailey, has testified on Defendant's behalf as to the nature of Defendant's business. When asked about Defendant's business, Mr. Frailey responded:

> So what -- yeah. What Apria does is, we -- we provide healthcare equipment to patients through typically a payer relationship -- so Kaiser, Medicare, et cetera. So these different payers have patients, and we provide equipment when we either have a direct contract with one of those payers, or there's various referral services where the insurance that the patient uses is through one of those payers. And then we are contracted to then provide what's called HME or DME, home medical equipment or durable medical equipment, to that patient. And then about 80 percent of the time, it's rental equipment. So we would provide that to the patient, service it as needed during the patient's use of that equipment, and then we would pick it back up.

(Palay Decl., Ex. 7, at 13:9-25.) Mr. Frailey, testifying on behalf of Defendant, then stated that, "with respect to these customers or patients," Defendant's business "is to provide home delivery of these—this medical equipment and supplies." (Palay Decl., Ex. 7, at 14:2-6.) Defendant does not dispute in the Opposition that Mr. Frailey's testimony as the PMQ witness is binding on Defendant. Moreover, Defendant has confirmed these statements in its responses to form interrogatories, in which it made the admission that "[d]elivering and picking up medical equipment is part of the services Defendant provides ... ." (Palay Decl., Ex. 8, at p. 4, bolded and underlined in original.)

Though Defendant claims that this testimony is somehow disputed, Defendant fails to demonstrate any material factual dispute. Defendant contends that the testimony given by Mr. Frailey refers only to Defendant's "Home Medical Equipment and Durable Medical Equipment service, which is only one aspect of Apria's overall business." (Def's Opp. Pl's Sep. St., Pl's Fact No. 11, at p. 10.) In other words, Defendant contends that its business is not *limited* to deliveries of medical equipment. In support of this contention, Defendant cites to the recently filed declaration of Mr. Frailey, where Mr. Frailey states that "Apria is a home healthcare provider that rents, sells, maintains, repairs, and educates patients on how to use a variety of home healthcare goods and medical services ... ." (Frailey Decl., ¶ 3.) But Mr. Frailey does not contradict any of his earlier sworn testimony that the delivery of such healthcare equipment to customers is part of Defendant's business. Indeed, Mr. Frailey admits in his declaration that "Apria includes

the delivery and pick-up of medical equipment when a patient rents or purchases home healthcare goods and medical services." (Frailey Decl., ¶ 6.)

Defendant's evidence at most would show that the delivery of medical equipment is not the *sole* type of business in which Defendant is engaged. But such evidence is immaterial to the applicability of prong B of the ABC test, given that it is undisputed that the delivery of medical equipment is *part* of Defendant's usual business operation. (See, e.g., *Dynamex*, *supra*, 4 Cal.5th at p. 960.)

Defendant's inability to prove prong B of the ABC test is further demonstrated by the undisputed fact that its own employees were also engaged in the delivery of medical equipment. Indeed, Defendant has represented to this court that it required the delivery services of class members in order to supplement the use of its own employee delivery drivers during "high volume times." (Defendant Apria Healthcare LLC's Opposition to Plaintiff Alvara Quintero's Motion for Class Certification, filed July 28, 2021, at p. 6.) It is undisputed that Mr. Frailey testified that Defendant "hires employees directly who deliver medical products and supplies." (Palay Decl., Ex. 7, at 75:19—76:13.) Moreover, it is undisputed that "approximately 80% of the deliveries are made by employees of Apria and about 20% are made by class members." (Pl's Fact No. 32.) If the overwhelming majority of delivery services were completed by individuals treated as employees, then it is clear that the delivery of medical equipment is part of Defendant's usual business operation. In order to try to "dispute" this fact, Defendant merely presents evidence to demonstrate that the tasks completed by its employees differ from those completed by Plaintiff and the class members. (See Def's Opp. Pl's Sep. St., Pl's Fact No. 8, at pp. 4-5.) But such evidence fails to negate the undisputed fact that Defendant's recognized employees are engaged in the delivery of medical equipment.

It is therefore undisputed that the delivery of medical equipment to customers is a part of Defendant's usual course of business. Moreover, Defendant fails to dispute that Plaintiff and the class worked as delivery drivers of medical equipment on behalf of Defendant, and that Plaintiff and the class thus performed work inside the usual course of Defendant's business. It is undisputed that Mr. Frailey testified that class members filled out route sheets and delivered home medical supplies to Defendant's customers during the relevant period. (Palay Decl., Ex. 7, at 55:3-19.) Mr. Frailey testified that Defendant was aware that class members "were driving and delivering home medical products to [Defendant's] customers." (Palay Decl., Ex. 7, at 29:17-21.) It is undisputed that "both employees and class members are given a route sheet when they arrive for work." (Pl's Fact No.

24.) Mr. Frailey further testified that the delivery of medical supplies and the use of route sheets by class members was "comparable" to certain tasks completed by those drivers who Defendant recognized as its employees. (Palay Decl., Ex. 7, at 56:1-6.)

b) Application of Labor Code Section 2776

Defendant attempts to argue that it is exempt from section 2775 and the ABC test by virtue of Labor Code section 2776. That Code section states in relevant part:

> Section 2775 and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:
> (a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business or to a public agency or quasi-public corporation ("contracting business"), the determination of employee or independent contractor status of the business services provider shall be governed by [*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341], **if the contracting business demonstrates that all of the following criteria are satisfied**:
> (1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
> (2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.
> (3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.
> (4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service

provider has the required business license or business tax registration.

(5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.

(6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.

(8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.

(10) The business service provider can negotiate its own rates.

(11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(Lab. Code, § 2776, subd. (a), emphasis added.) In order to raise a triable issue of material fact under section 2776, Defendant must therefore offer material evidence as to each of the twelve criteria listed in the Code section.

Defendant has failed to create a triable issue of material fact under section 2776. One fatal defect in Defendant's argument is the inherent ambiguity as to the question of what entity or individual is the "business services provider" according to Defendant's position. Defendant begins by arguing that it is "engaged in a bona fide business-to-business contracting relationship with Spoke, Fed Med, and Johnson." (Def's Opp., at p. 13; Def's Supp'l Br. filed Sept. 6, 2023 at p. 4.) However, Defendant offers no evidence or argument for Spoke, Fed Med, or Johnson as to the Fifth, Sixth,

Eighth, or Ninth criteria of section 2276. For example, Defendant's Opposition (at p. 14) cites to Additional Disputed Fact No. 26 to demonstrate that the "business service provider advertises and holds itself out to the public as available to provide the same or similar services." But Defendant's Fact No. 26 refers to *Plaintiff* having posted on a website that he was looking for a job to provide transportation services and states that Spoke responded to the posting. This fact says nothing about how Spoke holds itself out to the public with respect to a contractual relationship with Defendant Apria. This failure to present necessary evidence is fatal to Defendant's argument.

At times, Defendant also seems to argue that Plaintiff's LLC, "CK Transportation Plus," might be the "business services provider" for the purposes of section 2776. However, Defendant fails to offer any evidence or argument to suggest that Plaintiff or his LLC ever entered into a contract with Defendant. In fact, as it has done throughout this litigation, Defendant specifically states that it "has no contractual relationship with couriers." (Def's Opp. Pl's Sep. St., Pl's Fact No. 25, at p. 17.) In an attempt to present evidence as to the third criterion of section 2776, Defendant thus refers to the CSAs, which are contractual agreements between Defendant and the Courrier Companies. (See Def's Fact No. 10.) Consequently, Defendant fails to present sufficient evidence to raise an issue of material fact as to whether section 2776 can be applied to an agreement between Defendant and CK Transportation Plus.

The Joint Employer Test Is Not Applicable in this Case

Defendant now argues, contrary to the court's decision on class certification, that the ABC test found in Labor Code section 2775 does not apply here. Defendant contends that, because Plaintiff worked at Apria pursuant to an agreement between Defendant and Spoke as a provider of courier services, the issue at trial should be whether Apria was a joint employer with Spoke (and with the other Courier Companies with which Apria contracted for the courier services of class members). In order to determine whether Apria was Plaintiff's (and other Class Members') employer, Defendant reasons that the court should apply the joint employer test set forth in *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*).

Defendant's argument raises two questions. First, is the joint employer test from *Martinez* still applicable after the enactment of Labor Code section 2775? And second, if still applicable in certain situations, is the joint employer test applicable in this case? For reasons explained below, the court answers the first question in the affirmative, but the second question in the negative.

a) Even After the Enactment of Labor Code Section 2775, the Joint Employer Test Remains Applicable in the Joint Employer Context

The ABC test as applied in *Dynamex* and formally adopted by the Legislature through the enactment of Labor Code section 2775 was never meant to apply to the question of whether a defendant is the *joint* employer of the plaintiff and thus jointly responsible for paying the plaintiff's wages. Instead, as the statutory text states, the ABC test is meant to be used to decide the question of whether the plaintiff should "be considered an employee *rather than an independent contractor* ... ." (Lab. Code, § 2775, subd. (b)(1), emphasis added.)

Before the enactment of section 2775, the ABC test as applied in *Dynamex* was understood not to apply to the question of whether a defendant is the joint employer of the plaintiff. And there is no binding case law presented by the parties or found by this court suggesting that the joint employer test was rendered a dead letter by the enactment of section 2775. For example, the court in *Henderson v. Equilon Enterprises, LLC* (2019) 40 Cal.App.5th 1111, 1125 (*Henderson*) explained that the ABC test is meant "to resolve whether a worker has been properly classified as an independent contractor or employee." The court concluded that "the ABC test in *Dynamex* does not fit analytically with and was not intended to apply to claims of joint employer liability." (*Id.*)

Henderson explained that the policy concerns informing the application of the ABC test are not present in the joint employment context. According to the court in *Henderson*, "*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." (*Id.* at pp. 1127-1128.) The Court in *Dynamex* had noted that there were clear economic incentives for a company to misclassify an employee as an independent contractor, including "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." (*Dynamex*, *supra*, 4 Cal.5th at p. 913.) The court in *Henderson* explained that the policy concerns raised in *Dynamex* are not present in a case in which the defendant's liability is based on its status as a *joint* employer:

> 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." [Citation.] 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 to their employer.

(*Henderson*, *supra*, at p. 1128, internal citations omitted.)

The *Henderson* court's decision not to apply the ABC test in joint employer claims was further supported by the fact that "parts B and C of the ABC test do not fit analytically with such claims." (*Id.* at p. 1129.) Given that this court here, assuming the ABC test applies, would grant summary adjudication in Plaintiff's favor under part B of the ABC test (as discussed above), the court's discussion of part B is especially relevant:

> 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 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, 109 Cal.Rptr.3d 514, 231 P.3d 259.) 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.*

(*Id.*, emphasis added.) And the court similarly found that application of part C of the ABC test to a joint employment claim would "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." (*Id.* at p. 1130, emphasis in original.)

Nothing in the statutory language of section 2775 is contrary to the principle that the ABC test is understood to apply to the question of whether the plaintiff has been improperly classified as an independent contractor. It is important to note that section 2775 does not mention *Martinez* or the joint employer test, but that section 2775 does mention the holdings in *Dynamex* and *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). In *Borello*, as in *Dynamex*, the Supreme Court "addressed the employee or independent contractor question ... ." (*Dynamex*, *supra*, 4 Cal.5th at p. 929.) *Borello* was not concerned with joint employer claims. Section 2775 notes that, under certain circumstances, the court may choose to apply the standard from *Borello* instead of the ABC test. (Lab. Code, § 2775, subd. (b)(3).) The statute's presentation of *Dynamex* and *Borello* as the two different potential tests that must be applied thus serves to further highlight that the ABC test in section 2775 is meant to address the question of whether the plaintiff "shall be considered an employee rather than an independent contractor ... ." (Lab. Code, § 2775, subd. (b)(1).)

This court follows the reasoning of *Henderson* and determines that the ABC test as stated in *Dynamex* cannot be applied to determine whether a defendant is the plaintiff's joint employer. Because nothing in section 2775, which was written to adopt the test applied in *Dynamex*, suggests that the ABC test must apply to joint employer claims, section 2775 does not prohibit the application of the joint employer test to a joint employer claim.

b) Defendant Has Failed to Raise a Triable Issue of Material Fact so as to Potentially Trigger Application of the Joint Employer Test

In *Henderson*, as in other cases relied upon by Defendant, liability was based on the plaintiff's contention that the defendant was a joint employer. The plaintiff in *Henderson* brought his action against the defendant "under a 'joint employer' theory of liability." (*Henderson*, *supra*, 40 Cal.App.5th at p. 1114.) The plaintiff "alleged that while he had been hired by [a non-party], [the defendant] was liable as his 'joint employer' because [the defendant] 'both directly and indirectly controlled the wages, hours or working

conditions' of [the non-party's] employees." (*Id.*) *Henderson* concluded that the plaintiff was "an admitted employee of a [non-party] primary employer." (*Id.* at p. 1128.) The existence of a primary employer was the justification for the *Henderson* court's determination that the joint employer test should be applied instead of the ABC test from *Dynamex*. As quoted above, the *Henderson* court reasoned from the premise that "[a]s 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." [cite]

The absence of an "admitted" employer also would have changed the reasoning in another case relied upon by Defendant: *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App.5th 289 (*Curry*). In *Curry*, the plaintiff was an employee of a non-party entity that had contracted to provide services to the defendant. The court in *Curry* noted that the plaintiff had completed an employment application and signed the non-party entity's offer of employment to work as a manager. (*Id.*, at 295.) The non-party entity determined that the plaintiff "would be deemed an exempt employee." (*Id.*) The plaintiff thus alleged in her complaint that the defendant was her *joint employer*, along with the non-party entity. (*Id.* at p. 296.) In concluding that the policy reasons for the ABC test "are uniquely relevant to the issue of allegedly misclassified independent contractors," the court in *Curry* reasoned:

> 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. Therefore, the primary employer is presumably paying taxes and the employee is afforded legal protections due to being an employee of the primary employer. *As a result, the policy purpose for presuming [under the ABC test that] the worker [is] an employee and requiring the secondary employer to disprove the worker's status as an employee is unnecessary in that taxes are being paid and the worker has employment protections.*

(*Id.* at p. 314, emphasis added.)

Accordingly, both *Henderson* and *Curry* can be read to stand for the proposition that the ABC test is not applicable where there is an "admitted" primary employer of the plaintiff, and where the plaintiff nonetheless seeks to hold a party other than that primary employer liable under the Labor Code.

In this case, however, there is not an "admitted" primary employer. Plaintiff has not alleged or otherwise argued that Defendant is a joint employer, and Defendant has not filed a cross-claim against the Courier Companies. The most relevant case on the question of whether to apply the ABC test or the joint employer test in the absence of an "admitted" primary employer is *Mejia v. Roussos Construction, Inc.* (2022) 76 Cal.App.5th 811 (*Mejia*). The facts in *Mejia* are similar to those presented here. The plaintiffs in *Mejia* were "unlicensed flooring installers, who installed floors on behalf of defendant, ... a general contractor." (*Id.* at p. 814.) "The dispute at trial largely turned on the status and function of three individuals who stood in between [the] plaintiffs and [the defendant]. [The plaintiffs] called them 'supervisors'; [the defendant] called them 'subcontractors.' " (*Id.*) In *Mejia*, there was a factual dispute as to whether the three intermediaries were the plaintiffs' real employers:

> At trial, [the defendant] maintained that it used independent subcontractors (the three supervisors/subcontractors) who were licensed to perform work not permitted by [the defendant's] contractor's license. Those subcontractors hired and paid the plaintiffs, and according to [the defendant], any mistakes in categorizing the flooring installers or complying with labor laws were solely the subcontractors'.
>
> [The plaintiffs] maintained that [the defendant] had employed a misclassification scheme, whereby it placed a "man in the middle" between the company and the flooring installation employees. By classifying the flooring installers as subcontractors, [the defendant] avoided having to provide them with benefits or complying with labor laws.
>
> All three supervisors/subcontractors testified at trial. One testified that he "[p]rovided labor for installations." He answered, "correct," when asked, "they worked for you. You worked for [the defendant]?" He also testified that [the] plaintiffs were "contractors," not employees.
>
> Another testified that he worked as a contractor for [the defendant] and engaged subcontractors to work on projects for [the defendant]. He testified that about 90 percent of his work was for [the defendant]. But he denied ever managing or supervising installers. He also testified that he did not treat the installers as employees and did not provide them benefits.
>
> The third supervisor/subcontractor testified he was a subcontractor for [the defendant] and "installers" worked

> under his authority. He testified that he treated the installers as "independent installers" and did not provide labor protections, breaks, overtime, or wage statements. He also testified that [the defendant] had nothing to do with his decision on how to classify workers.

(*Id.* at pp. 814-815, internal ellipses omitted.)

Before trial, the parties in *Mejia* agreed that the ABC test should be applied to determine whether the plaintiffs were properly classified as independent contractors. (*Id.* at p. 815.) But the parties disagreed "as to whether the jury should be instructed to first determine whether plaintiffs were hired by [the defendant] or an agent of [the defendant] before applying the ABC test." (*Id.*) The defendant took the position that, in order for the ABC test's presumption against a presumed employer to apply, an employee must establish that the presumed employer is the "hiring entity"; the plaintiffs in *Mejia*, for their part, contended that there is no preliminary "hiring test" that an employee must meet before the burden shifts to the presumed employer to prove under the ABC test that it is not the employer. (*Id.* at p. 816.) On appeal, the defendant also made the related argument that, given the existence of the three presumptive employers (i.e., the three supervisors/contractors), the holdings in *Henderson* and *Curry* should apply to prevent application of the ABC test. (*Id.* at p. 820.)

The appellate court rejected both of the defendant's arguments. First, the court found that the ABC test was not intended to include a "hiring entity test." (*Id.*, at p. 818.) The court concluded:

> Interpreting the *Dynamex* court's ABC test to include a threshold hiring test, with the worker bearing the burden, would also run counter to the intent of the California wage and hour laws, which "are remedial in nature and must be liberally construed in favor of affording workers protection." [Citation.]

(*Id.* at p. 819, internal citations omitted.)

The court in *Mejia* then went on to reject the defendant's "reliance on *Henderson* ... and *Curry* ... for the proposition that a hiring entity cannot be held liable for misclassifying a worker it neither hired nor directed another entity to hire ... ." (*Id.* at p. 820.) The court began by noting that the courts in *Henderson* and *Curry* declined to apply the ABC test to joint employer liability claims, i.e., those that involve a "person or entity that is alleged to share the legal obligations of another employer by exercising significant

control over the other employer's employees." (*Id.*) Despite the factual dispute regarding the three supervisors/subcontractors, the appellate court determined that *Henderson* and *Curry* were inapposite for the simple reason that *Mejia* was "not a joint employment case":

> [The plaintiffs] are not admitted employees of a primary employer: [the] plaintiffs maintain they were solely [the defendant's] employees, and the supervisors/subcontractors maintain plaintiffs were not their employees. And by all accounts, plaintiffs were not provided the protections due employees. Thus, this is not a case where the policy concerns of *Dynamex* are inapplicable. Rather, this case goes to the heart of the *Dynamex* question: were plaintiffs properly classified as independent contractors?

(*Id.* at p. 821.)

The same conclusion reached in *Mejia* must apply here: this is not a joint employment case; the ABC test therefore applies. The FAC does not allege that Defendant is liable as a joint employer; instead, much like in *Mejia*, Plaintiff alleges that Defendant itself intentionally misclassified drivers as independent contractors. (FAC, ¶ 4.) Although Plaintiff did not bring this action against Defendant for joint employer liability, Defendant failed to argue at the outset of this litigation that Plaintiff and the Class Members were employees of another entity. Defendant's silence continued, despite the fact that Plaintiff premised his motion for class certification, in part, on the assumption that the trier of fact would adjudicate the existence of an employment relationship pursuant to the ABC test. (See Pl's Motion for Class Certification, June 7, 2021, at pp. 3-4, 12-15.) In opposing the motion for class certification, Defendant failed to dispute that the ABC test would apply to this action; nor did Defendant claim that this action was brought to impose joint employer liability. Further, Defendant has not joined the Courier Companies as cross-defendants under a theory that they were Plaintiffs' primary employer.

Importantly (given the context of the present motion), Defendant has failed to raise any triable issue as to any material fact regarding whether Plaintiff or the Class Members are the admitted employees of some non-party primary employer. Plaintiff and the Class Members are not employees of the Courier Companies. Timothy Meyer, the founding member and president of Spoke, has stated that Spoke provides courier services to Defendant "under the agreement through independent contractors ... ." (Palay Decl. ISO Reply, Ex. 17, ¶ 4.) Robert Johnson, the owner of Johnson,

noted that Johnson's drivers are "not considered as employees ... ." (Palay Decl., ISO Reply, Ex. 16, ¶ 8.) And Chris Bovey, the managing member of Fed Med, has stated that Fed Med considers its drivers to be "independent contractors," not employees. Defendant has presented no evidence to suggest that any of the Courier Companies treated Plaintiff or the class members as employees of the Courier Companies. The holdings in *Henderson* and *Curry* thus do not apply here, where Plaintiff has shown that Class Members were not employees of the Courier Companies as a primary employer.

Defendant points to the third declaration of Timothy Meyer (which was filed as a separate document with Defendant's opposition papers) to argue that some unidentified Class Members *might* be employees of certain unidentified business entities. The evidence for this is limited to the following statement: "The drivers providing courier services to Spoke may be independent contractors or they may be employees of the businesses that were hired as independent contractors." (Third Meyer Decl., ¶ 4.) The evidence is too vague to support Defendant's argument. To begin, none of these supposed "employees" is identified; and the court thus has no idea how many members, if any, of the Class might have been classified as "employees" by an unknown third-party entity. Second, Mr. Meyer does not state that any of these "employees" ever completed work for Defendant; accordingly, there is no evidence that any of these unidentified "employees" would be members of the Class. Third, Mr. Meyer fails to establish any ability to testify as to the facts surrounding the employment arrangement between an unidentified driver and the unidentified third-party entity that supplied that driver to Spoke. Fourth, Mr. Meyer's statement is inadmissible because it is conclusory. He merely states a legal conclusion that certain unidentified drivers were the "employees" of certain unidentified third-party entities. (*Taylor v. Financial Casualty & Surety, Inc.* (2021) 67 Cal.App.5th 966, 994 ["[a]ffidavits must cite evidentiary facts, not legal conclusions or ultimate facts"].)

Defendant claims as relevant the fact that Defendant "did not enter into contracts with the putative class members to make them independent contractors." (Def's Supp. Br., at p. 10, citing Pl's Fact No. 23.) But, under *Mejia*, Defendant cannot seek to impose a "hiring entity" test on Plaintiff merely because Defendant did not sign an employment contract. The non-existence of a contract between Defendant and Class Members does not prevent application of the ABC test. (See, e.g., *Vazquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2021) 986 F.3d 1106, 1124 [the defendant "could be Plaintiffs' employer under the ABC test even though it is not a party to any contract with Plaintiffs"].) "As long as the putative employee was providing a service to the hiring entity even *indirectly*, the

hiring entity can fail the ABC test and be treated as an employer." (*Id.*, emphasis in original; see also *Ludlow v. Flowers Foods, Inc.* (S.D. Cal., July 5, 2022, No. 18CV1190-JO-JLB) 2022 WL 2441295, at *4.)

Under the facts presented by the parties, it is undisputed that (1) Plaintiff and the Class Members performed work for Defendant and (2) Plaintiff and the Class Members did not perform such work as the admitted employees of a third-party employer. Under these facts, the court cannot apply the joint employer test to determine whether Defendant is Plaintiff's employer but is instead compelled to apply Labor Code section 2775's ABC test. Any other result would allow a defendant to evade the burden placed on it by section 2775 whenever that defendant suggests that some non-party was the true employer of the plaintiff-employee.

Date: 2/1/2024

Carolyn B Kuhl

The Honorable Carolyn Kuhl
Judge of the Superior Court