

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GLORIA ROMAN, GERARDO  
VAZQUEZ, and JUAN AGUILAR,  
Plaintiffs,

No. C 16-05961 WHA

v.

JAN-PRO FRANCHISING  
INTERNATIONAL, INC.,  
Defendant.

**ORDER RE MOTION FOR  
CLASS CERTIFICATION  
AND MOTIONS FOR  
SUMMARY JUDGMENT**

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**INTRODUCTION**

In this wage-and-hour misclassification action, plaintiffs move for class certification as to all claims. Plaintiffs and defendant move for summary judgment as to all claims. Plaintiffs’ motion for class certification is **GRANTED IN PART AND DENIED IN PART**. Plaintiffs’ motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**. Defendant’s motion for summary judgment as to all certified issues is **DENIED**. A separate order on the instant briefing shall resolve the parties’ motions for summary judgment as to the uncertified, individual claims and issues that remain in this action.

**STATEMENT**

**1. PROCEDURAL HISTORY.**

Plaintiffs Gloria Roman, Gerardo Vazquez, and Juan Aguilar performed janitorial services on behalf of defendant Jan-Pro Franchising International, Inc. Plaintiffs claim

1 defendant misclassified them and the putative class members as independent contractors.  
 2 They allege defendant violated California minimum wage, overtime, expense reimbursement,  
 3 and unlawful deduction laws, and they seek compensation on behalf of the putative class.

4 A prior order in this action granted summary judgment in favor of defendant as to the  
 5 misclassification claim. Plaintiffs appealed that order. During the appeal, the California  
 6 Supreme Court adopted the “ABC test” for determining employee classification for claims  
 7 governed by California wage orders. *Dynamex Operations W., Inc. v. Super. Ct.*, 4 Cal. 5th  
 8 903 (2018). Thereafter, our court of appeals directed the parties to brief the effect of *Dynamex*  
 9 on the merits of this case. Our court of appeals did not discuss the factor test outlined in  
 10 *Borello*, which California courts use to determine employee classification for purposes of non-  
 11 wage-order claims. *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Rels.*, 48 Cal. 3d 341 (1989).

12 Our court of appeals certified the issue of whether *Dynamex* applied retroactively to the  
 13 California Supreme Court. The high court answered yes. Based on that answer and the  
 14 parties’ briefing, our court of appeals vacated the previous summary judgment order and  
 15 remanded for this order to consider the merits in light of *Dynamex*. *Vazquez v. Jan-Pro*  
 16 *Franchising Int’l, Inc.*, 986 F.3d 1106, 1110 (9th Cir. 2021). Specifically, our court of appeals  
 17 stated that this order “should consider all three prongs of the ABC test . . . .” *Id.* at 1122. Our  
 18 court of appeals also provided significant guidance on whether summary judgment is  
 19 appropriate as to the misclassification claim. *Id.* at 1122–28.<sup>1</sup>

## 20 2. FACTUAL BACKGROUND.

21 At all material times, defendant has been an international janitorial cleaning business.  
 22 It uses a franchising model with three tiers. The top tier consists of defendant, Jan-Pro  
 23 International, Inc. The middle tier consists of “master franchisees” or “master owners” —  
 24 regional, third-party entities — to whom defendant sells exclusive rights to use the

25  
 26  
 27 <sup>1</sup> This action began in the District of Massachusetts in 2008. That district severed plaintiffs’  
 28 claims and transferred them to this district. Although the District of Massachusetts eventually  
 dismissed the original action (and the Court of Appeals for the First Circuit affirmed), our court of  
 appeals rejected defendant’s contention that res judicata or the doctrine of law of the case bar  
 plaintiffs’ claims in this severed action.

1 trademarked “Jan-Pro” logo. As of 2009, there were at least 91 master franchisees in the  
2 United States. The bottom tier consists of “unit franchisees” who contract with master  
3 franchisees to clean businesses. Unit franchisees do not contract with defendant. A given unit  
4 franchisee can be an individual or a few partners, and those persons can hire additional workers  
5 to help them clean. The First Circuit explained defendant’s franchising model:

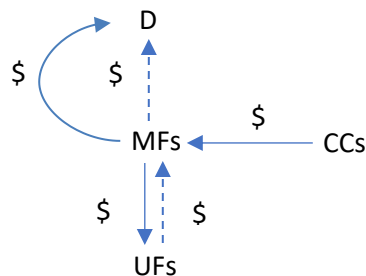
6 Jan-Pro and its master owners are separate corporate  
7 entities, and each has its own staff. Moreover, master owners may  
8 sell or transfer their individual businesses without approval from  
9 Jan-Pro. Jan-Pro also reserves the right to inspect any premises  
10 serviced by either the master owner or any of the master owner’s  
[unit] franchisees to ensure the Jan-Pro standards are being  
maintained. Still, master owners have their own entity names and  
internal business structures, and are responsible for their own  
marketing, accounting, and general operations.

11 As for master owners and their unit franchisees, under the  
12 terms of the model franchise agreement, master owners agree to  
13 provide their franchisees with an initial book of business, as well  
14 as start-up equipment and cleaning supplies. Moreover, the master  
15 owner furnishes a training program for its unit franchisees. Once  
16 initial set-up and training is complete, the master owner agrees to  
17 (1) assist in the unit franchisee’s customer relations (by, for  
18 example, providing substitute employees or contractors to supply  
19 services in the event of an emergency impacting the unit  
20 franchisee); (2) provide the unit franchisee with invoicing and  
21 billing services; (3) advance the unit franchisee amounts that have  
22 been billed but not yet collected from customers; and (4) make  
23 available to the unit franchisee any improvement or changes in  
24 services or business methods that are made available to other  
25 franchisees. Additionally, the agreement notes that a unit  
26 franchisee is at all times an independent contractor solely in  
27 business for itself. As such, the unit franchisee may, for example,  
28 hire its own employees and decide what to pay them, as well as  
decide whether or not to pursue certain business opportunities.

*Depianti v. Jan-Pro Franchising Int’l, Inc.*, 873 F.3d 21, 23–24 (1st Cir. 2017).

22 Our plaintiffs were and are unit franchisees who purchased their unit franchises from two  
23 different master franchisees. (The master franchisees in question are not parties herein.)  
24 Plaintiff Vazquez purchased a unit franchise from New Venture of San Bernardino, LLC, for  
25 \$2800. Plaintiff Roman purchased a unit franchise from Connor-Nolan, Inc., for \$2800.  
26 Plaintiff Aguilar, with a business partner, also purchased a unit franchise from Connor-Nolan,  
27 for which he and his partner paid \$9000.

1 The diagram below shows the general structure of defendant’s three-tier business.  
 2 Solid lines represent revenue from cleaning services. Cleaning customers (CCs) pay master  
 3 franchisees (MFs) for cleaning services based on “pricing agreements” between them.  
 4 For some cleaning customers, master franchisees supplement the pricing agreements with  
 5 “bid worksheets,” which show calculations of cleaning costs. Master franchisees then pay unit  
 6 franchisees (UFs) from that revenue (because unit franchisees do the cleaning), with the  
 7 exception that master franchisees deduct and pay four percent of that revenue to defendant (D).  
 8 Dotted lines represent revenue from franchise fees. Unit franchisees each pay master  
 9 franchisees a franchise fee. Then, master franchisees pay ten percent of the franchise fee to  
 10 defendant. Additionally, master franchisees profit by collecting other fees from unit  
 11 franchisees, such as “management fees” and “sales and marketing fees” (not depicted), which  
 12 defendant does not collect.



19 Plaintiffs seek to certify the following class: all unit franchisees who have signed  
 20 franchise agreements with master franchisees in the state of California and have performed  
 21 cleaning services for defendant since December 12, 2004.

22 This order grants plaintiffs’ motion for class certification and summary judgment as to  
 23 (1) failure to pay minimum wage for mandatory training, (2) failure to reimburse for expenses  
 24 incurred for (a) required uniforms and (b) necessary cleaning supplies and equipment, and  
 25 (3) unlawful deductions of (a) management fees and (b) sales and marketing fees for the  
 26 following group: all unit franchisees who signed a franchise agreement with a master  
 27 franchisee in the state of California and who performed cleaning services for defendant from  
 28 December 12, 2004, to the latest date on which a named plaintiff terminated employment.

1 This order denies class certification as to the remaining labor code claims and issues.  
2 A separate order on the instant briefing shall resolve the parties’ motions for summary  
3 judgment as to the uncertified, individual claims and issues that remain in this action.  
4 This order defers resolving damages until a later phase of the action.

5 This order follows full briefing and oral argument.

6 **ANALYSIS**

7 Here is the relevant legal framework. The Industrial Welfare Commission of California  
8 publishes wage orders that regulate the hours, wages, and working conditions of California  
9 employees. The wage orders encompass some, but not all, of the provisions in the California  
10 labor code.

11 Whether a wage order encompasses a labor code claim dictates the applicable  
12 misclassification test. When a wage order encompasses a labor code claim (or a discrete issue  
13 within a claim), courts determine employee classification under *Dynamex* for purposes of that  
14 claim or issue. When the wage orders do not cover a labor code claim (or a discrete issue  
15 within a claim), such as expense reimbursements for gas and tolls, courts determine employee  
16 classification under *Borello* for purposes of that claim or issue. *See Dynamex*, 4 Cal. 5th  
17 at 915–16 n. 5.

18 Given this legal framework, this order proceeds as follows:

19 *First*, this order applies the FRCP 23(a) criteria (numerosity, commonality, typicality,  
20 and adequacy) to the misclassification claim and simultaneously to the labor code claims.  
21 This order finds the FRCP 23(a) criteria satisfied for all claims.

22 *Second*, this order considers whether plaintiffs have met their burden under  
23 FRCP 23(b)(3) to establish predominance and superiority as to the misclassification question  
24 under (1) *Dynamex* and (2) *Borello*. Those considerations show that plaintiffs satisfy  
25 FRCP 23(b)(3) for the misclassification question under *Dynamex* but not under *Borello*.

26 This order then applies FRCP 23(b)(3) to each of the labor code claims that rely on  
27 misclassification under *Dynamex*. Those applications show that plaintiffs satisfy  
28 FRCP 23(b)(3) for only the following labor code issues: (1) failure to pay minimum wage for

1 mandatory training; (2) failure to reimburse for expenses incurred for (a) required uniforms,  
2 and (b) necessary cleaning supplies and equipment; and (3) unlawful deductions of  
3 (a) management fees, and (b) sales and marketing fees.

4 *Third*, this order considers whether summary judgment is appropriate, on a class-wide  
5 basis, for plaintiffs or for defendant as to the misclassification claim under *Dynamex*.

6 Those considerations show summary judgment in favor of plaintiffs is warranted as to the  
7 misclassification claim under *Dynamex*.

8 *Fourth*, this order considers whether summary judgment is appropriate as to the certified  
9 labor code issues. Those considerations show summary judgment in favor of plaintiffs is  
10 appropriate as to all certified labor code issues.

11 *Fifth*, this order denies as moot both parties' motions for summary judgment regarding  
12 itemized wage statements.

13 **1. FEDERAL RULE OF CIVIL PROCEDURE 23(a).**

14 Plaintiffs must show that the proposed class action satisfies each of the four prerequisites  
15 of FRCP 23(a), which are:

- 16 (1) the class is so numerous that joinder of all members is  
17 impracticable;
- 18 (2) there are questions of law or fact common to the class;
- 19 (3) the claims or defenses of the representative parties are typical  
of the claims or defenses of the class; and
- 20 (4) the representative parties will fairly and adequately protect the  
21 interests of the class.

22 A district court must do a rigorous analysis to determine whether the requirements of  
23 FRCP 23 are satisfied. "Frequently that rigorous analysis will entail some overlap with the  
24 merits of the plaintiff's underlying claim. That cannot be helped. The class determination  
25 generally involves considerations that are enmeshed in the factual and legal issues comprising  
26 the plaintiff's cause of action." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).  
27 (cleaned up).  
28

1                   **A.       NUMEROSITY.**

2           The proposed class includes all unit franchisees who signed franchise agreements with  
3   master franchisees in California since December 2004. Just one master franchisee had over  
4   100 unit franchisees who signed agreements in California during the class period  
5   (Dkt. No. 292-17 at 265). Thus, given there were many master franchisees in California, this  
6   order finds numerosity is satisfied.

7                   **B.       COMMONALITY.**

8           The commonality element requires that there be a common contention among all class  
9   members which is “of such a nature that it is capable of class-wide resolution — which means  
10  that determination of its truth or falsity will resolve an issue that is central to the validity of  
11  each one of the claims in one stroke.” *Wal-Mart Stores*, 564 U.S. at 350.

12           Here, the common misclassification contention is necessarily central to the labor code  
13  claims because no class member can recover if defendant’s classification of unit franchisees as  
14  independent contractors was proper. And, defendant relies on the classification of unit  
15  franchisees as an affirmative defense to all of plaintiffs’ labor code claims (Dkt. No. 245 at 7).  
16  This order finds commonality is satisfied.

17                   **C.       TYPICALITY.**

18           “Under [FRCP 23(a)(3)]’s permissive standards, representative claims are ‘typical’ if  
19  they are reasonably co-extensive with those of absent class members; they need not be  
20  substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

21           Here, plaintiffs’ defining contention is that defendant improperly classified them as  
22  independent contractors. That is also the defining contention of the class. Defendant allegedly  
23  injured plaintiffs and the putative class members by failing to provide them with minimum  
24  wage, overtime pay, and expense reimbursements, and plaintiffs allege unlawful deductions.  
25  Those alleged injuries arose from defendant’s conduct of classifying plaintiffs and the putative  
26  class members as independent contractors. Thus, plaintiffs and the putative class members  
27  allege the same injuries arising from the same conduct. Although there may be some  
28  differences between plaintiffs’ experiences and those of the putative class members, plaintiffs’

1 claims are reasonably co-extensive with those of the putative class members. This order finds  
2 typicality is satisfied.

3 ***D. ADEQUACY.***

4 As to adequacy, the representative plaintiffs and class counsel cannot have conflicts of  
5 interest with the putative class members and must prosecute the action vigorously on behalf of  
6 the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

7 Here, plaintiffs' lead counsel submitted a declaration describing her qualifications and  
8 extensive experience in wage-and-hour litigation, including serving as class counsel in  
9 numerous wage-and-hour misclassification actions. Her law partner also has experience in  
10 wage-and-hour litigation (Liss-Riordan Decl. ¶¶ 2–17).

11 Thus far, plaintiffs' counsel have vigorously litigated this case. Plaintiffs' counsel have  
12 deposed defendant's President and Chief Executive Officer, Vice President, Vice President of  
13 Field Services, and Director of Training (Dkt. No. 247-4). They have also successfully  
14 appealed the prior order on summary judgment in this matter.

15 Plaintiffs each submitted declarations stating that they understand their duty to always  
16 consider the best interests of the class before their own and to actively participate in the  
17 lawsuit. They also declare that they have no conflicts of interest with the putative class  
18 members (Vazquez Decl. ¶ 3; Aguilar Decl. ¶ 3; Roman Decl. ¶ 3). Defendant has provided no  
19 reason to doubt those declarations. This order finds none. This order finds adequacy of  
20 representation is satisfied.

21 ***E. DEFENDANT WAIVED THE RIGHT TO ENFORCE ARBITRATION***  
22 ***AGREEMENTS.***

23 Defendant argues the named plaintiffs cannot satisfy typicality and adequacy because it  
24 has waived the right to arbitrate against the named plaintiffs but not against the absent class  
25 members. This supposed difference is not disqualifying.

26 The short answer is that an otherwise typical plaintiff ought not be rendered atypical at  
27 the whim of a defendant by that defendant simply giving up a defense only against that named  
28 plaintiff. That neat trick will not be blessed. Otherwise, it could defeat class certification



1 every time. And, defendant has not actually moved to compel arbitration. It has only said it  
2 intends to do so in the future.

3 The long answer is that defendant has waived its right to compel arbitration against the  
4 absent class members by seeking in court to litigate the merits of its franchise scheme on a  
5 *system-wide* basis, *i.e.*, on a class- wide basis. Having done so, and having now seen how the  
6 judicial winds are blowing, defendant should not be allowed to reverse field and play the  
7 arbitration card.

8 This order considers now whether the issue of waiver is properly before the district court.  
9 “The court’s role under the [Federal Arbitration] Act is . . . limited to determining (1) whether  
10 a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the  
11 dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.  
12 2000). Our court of appeals has stated:

13 [T]he Supreme Court [has] distinguished between two  
14 categories of gateway issues on motions to compel arbitration,  
15 each of which has a different presumption as to whether a court or  
16 an arbitrator should decide. The first category of gateway issues is  
17 a “question of arbitrability” — that is, “whether the parties have  
18 submitted a particular dispute to arbitration.” . . . . These disputes  
19 are “for judicial determination unless the parties clearly and  
20 unmistakably provide otherwise.” In contrast, the second category  
21 — “procedural” issues — is “presumptively not for the judge, but  
22 for an arbitrator, to decide.”

23 \* \* \*

24 We have made clear that waiver by litigation conduct is  
25 part of the first category of gateway issues.

26 *Martin v. Yasuda*, 829 F.3d 1118, 1122–23 (9th Cir. 2016) (citations omitted). Thus, here, this  
27 order may determine whether defendant has waived the right to enforce the arbitration  
28 agreements unless the parties clearly and unmistakably provided otherwise.

Although defendant’s incorporation of the American Arbitration Association rules could  
constitute clear and unmistakable evidence that the parties agreed to arbitrate arbitrability  
under *Brennan v. Opus Bank*, that decision is off point. *Brennan* expressly limited its holding  
to commercial contracts between sophisticated parties. 796 F.3d 1125, 1131 (9th Cir. 2015).  
Here, therefore, the employment contracts with janitors fall outside of *Brennan*

1 (unit franchisees are primarily immigrant workers, of whom many do not speak English).  
 2 Moreover, although defendant argues the Federal Arbitration Act preempts the sophistication  
 3 requirement, the Third Circuit decision it cites for support is not binding here.

4 In *Cox v. Ocean View Hotel Corp.*, an arbitration agreement incorporated the American  
 5 Arbitration Association rules and included broad language to arbitrate any dispute “arising out  
 6 of or related to” the agreement. 533 F.3d 1114, 1117 (9th Cir. 2008). Nevertheless, *Cox* held  
 7 the waiver issue was “properly heard by the district court.” *Id.* at 1120. Thus, defendant’s  
 8 argument fails. This order may adjudicate the waiver issue.

9 This order now considers the merits of whether defendant has waived its right to enforce  
 10 the arbitration agreements. Our court of appeals has stated:

11 [W]here the waiver of the right to compel arbitration implicates  
 12 questions of arbitrability that “affect the allocation of power”  
 13 between a court and arbitrator, we have applied a federal law  
 standard for determining whether an arbitration agreement has  
 been waived.

14 *Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 940  
 15 (9th Cir. 2019) (citation omitted). Because the waiver issue affects the allocation of power  
 16 between the district court and an arbitrator, the federal law standard applies here.

17 “Waiver . . . ‘is the intentional relinquishment or abandonment of a known right.’  
 18 To decide whether a waiver has occurred, the court focuses on the actions of the person who  
 19 held the right . . . .” The Supreme Court recently held “prejudice is not a condition of finding  
 20 that a party waived its right to . . . compel arbitration under the [Federal Arbitration Act].”  
 21 So the test for waiver now has only two elements. Thus, “a party waives its contractual right to  
 22 arbitration if it [1] knew of the right; [and] [2] ‘acted inconsistently with that right.’”

23 *Morgan v. Sundance, Inc.*, No. 21-328, 596 U.S. \_\_\_\_ (2022) (citations omitted).

24 Ninth Circuit precedent provides us with the following general rules regarding acts  
 25 inconsistent with the right to arbitrate. If, before moving to compel arbitration, a party moves  
 26 to dismiss on a key merits issue, then the party’s action is inconsistent with the right to  
 27 arbitrate. Moreover, a motion for summary judgment is inconsistent with the right to arbitrate.  
 28 Conversely, resisting discovery or seeking a stay is not inconsistent with the right to arbitrate.

1 Failure to raise arbitration as an affirmative defense is not inconsistent with the right to  
2 arbitrate. *Newirth*, 931 F.3d at 942; *Martin*, 829 F.3d at 1125–26; *Britton v. Co-op Banking*  
3 *Grp.*, 916 F.2d 1405, 1413 (9th Cir. 1990); *Freaner v. Valle*, 966 F. Supp. 2d 1068, 1086  
4 (S.D. Cal. 2013) (Judge Janis L. Sammartino); *see Morgan Stanley & Co. LLC v. Couch*,  
5 659 F. App’x 402, 405 (9th Cir. 2016).

6 Here, defendant has had knowledge of an arbitration defense for well over a decade.  
7 One of defendant’s motions to dismiss in the District of Massachusetts in 2008 relied on the  
8 outcome of an arbitration proceeding between some unit franchisees and their master  
9 franchisees (Dkt. No. 17). Defendant cannot claim ignorance of an arbitration defense.

10 Moreover, defendant has acted inconsistently with the right to arbitrate. In two motions  
11 to dismiss for failure to state a claim in the District of Massachusetts, defendant sought a  
12 victory in court on the misclassification claim and the wage and hour claims — key merits  
13 issues (Dkt. Nos. 4, 17). Although its failure to raise arbitration as an affirmative defense was  
14 not, in and of itself, a waiver, defendant has moved for summary judgment three times  
15 (Dkt. Nos. 65, 246, 299), which includes two motions in this district.<sup>2</sup>

16 In fact, defendant’s pending motion for summary judgment seeks a *system-wide* victory  
17 on the classification issue. For two and one-half pages, defendant argues its entire franchise  
18 system complies with state and federal franchise laws and, therefore, that all unit franchisees  
19 — not just the named plaintiffs — were independent contractors rather than employees  
20 (Dkt. No. 328 at 21–24).

21 True, defendant couched that argument as an opposition to plaintiffs’ motion for  
22 summary judgment on misclassification. But defendant quoted a Ninth Circuit decision that  
23 shows it moved for summary judgment on misclassification on a system-wide basis:

24 “The franchise system creates a class of independent businessmen;  
25 it provides the public with an opportunity to get a uniform product  
26 at numerous points of sale from small independent contractors,  
rather than from employees of a vast chain.”

27  
28 <sup>2</sup> To ignore defendant’s conduct in the District of Massachusetts would not account for  
“the totality of [defendant’s] actions” to seek decisions on the merits. *Newirth*, 931 F.3d at 941.

1 (Dkt. No. 328 at 22) (quoting *GTE Sylvania Inc. v. Cont'l T.V., Inc.*, 537 F.2d 980, 999  
2 (9th Cir. 1976)).

3 Defendant also made system-wide arguments on the merits prior to the pending motion  
4 for summary judgment. In 2017, defendant moved for and obtained summary judgment on the  
5 misclassification issue. Although that motion sought relief on an individual basis, defendant  
6 made the following system-wide argument on the merits:

7 Given that [defendant] has a Master Franchise structure, moreover,  
8 which inherently means it has no regional control, [defendant] is  
9 even further attenuated from the franchise relationships . . . that  
this court found not to constitute an employment relationship.

10 (Dkt. No. 246 at 18–19).

11 When plaintiffs appealed that summary judgment decision, moreover, defendant sought  
12 system-wide relief on the merits. In its answering brief in 2017, defendant stated:

13 [T]he California Supreme Court in *Patterson* duly recognized:  
14 “we cannot conclude that franchise operating systems necessarily  
15 establish the kind of employment relationship that concerns us  
16 here. A contrary approach would turn business format franchising  
17 on its head.” Given this guidance, the district court properly  
granted summary judgment to [defendant] on [plaintiffs’]  
employment misclassification claims and attendant Labor Code  
violations.

18 (App. Br. 13–14) (quoting *Patterson v. Domino’s Pizza, LLC*, 60 Cal. 4th 474, 499 (2014)).

19 The foregoing intentional acts doom defendant’s argument here.

20 When all a defendant does is bring a motion aimed at the individual circumstances of a  
21 single, named plaintiff, it would perhaps be unfair to say that that motion amounts to a class-  
22 wide motion or that a class-wide waiver of arbitration has occurred. But when, as here, a  
23 defendant brings a motion aimed at vindicating its system-wide practices, then it is effectively  
24 seeking class-wide relief, even if a class has not yet been certified. Bringing such a system-  
25 wide motion on the merits in a court is inconsistent with arbitration on the merits. Once a  
26 defendant seeks system-wide vindication of its practices in a court and on the merits, therefore,  
27 it has waived any right to compel an arbitration on the merits. And, this is true regardless of  
28 whether a class has yet been certified. To hold otherwise would allow a defendant to litigate

1 the system-wide merits of an individual case, see which way the judicial winds are blowing,  
2 and then, if the winds seem unfavorable, reverse field and demand arbitration against all absent  
3 class members once a class is certified.

4 Defendant, however, argues that until a class is certified, there is no occasion to arbitrate  
5 against absent class members. Defendant cites *Moser v. Benefytt*, 8 F.4th 872 (9th Cir. 2021),  
6 for support. In that action, the defendant corporation asserted a personal jurisdiction defense at  
7 the class certification stage. Specifically, the defendant, which was not a California resident,  
8 argued the California district court would not have specific personal jurisdiction over claims by  
9 non-California-resident class members for unlawful telemarketing. The defendant argued,  
10 therefore, the district court could not certify a nation-wide class. But the district court rejected  
11 the defendant's argument, holding the defendant had waived the defense by failing to raise it at  
12 the motion to dismiss stage pursuant to FRCP 12(g)(2). The district court then certified a  
13 nation-wide class. *Moser v. Health Ins. Innovations, Inc.*, 2019 WL 3719889, at \*4 (S.D. Cal.  
14 Aug. 7, 2019) (Judge William Q. Hayes).

15 Our court of appeals, however, reversed and remanded for the district court to reconsider.  
16 It held the defendant had not waived its personal jurisdiction defense because the defense had  
17 not been available at the motion to dismiss stage. Namely, the absent class members were not  
18 parties to the action prior to class certification, so the defendant could not have imposed a  
19 personal jurisdiction defense on them prior to class certification. *Moser*, 8 F.4th at 877.

20 Similarly, our defendant argues our absent class members are not parties to this action  
21 prior to class certification, so the right to arbitrate against them has not matured.  
22 Thus, defendant argues it could not have waived its arbitration defense as to absent class  
23 members prior to class certification.

24 But *Moser* is inapposite. There, the defendant did not have an opportunity to bring a  
25 personal jurisdiction defense against absent class members until the class certification stage.  
26 As our court of appeals reasoned, personal jurisdiction inherently ““entails a court’s power  
27 over the parties before it,”” and absent class members are not parties to an action prior to class  
28 certification. Moreover, as to the named plaintiff, ““there were no claims the district court

1 could have dismissed on personal jurisdiction grounds when it decided [the defendant]’s  
2 motion to dismiss because . . . there was specific personal jurisdiction over [the named  
3 plaintiff’s] claims against [the defendant].” The defendant, therefore, would not have been  
4 expected to raise personal jurisdiction prior to the class certification stage. 8 F.4th at 877–78  
5 n. 2 (citation omitted).

6 By contrast, here, we are dealing with arbitration. Defendant could have moved to  
7 compel our named plaintiffs to arbitrate. It did not. Defendant then sought system-wide  
8 vindication of its practices in court and on the merits. It has, therefore, sought system-wide  
9 vindication even though a class has not yet been certified. After a trip to our court of appeals,  
10 it now realizes the judicial winds may not be favorable, so defendant seeks to reverse field  
11 and arbitrate.

12 *Moser* did not involve any attempt to have it both ways; to test the waters in court before  
13 playing the arbitration card. That is the critical distinction.

14 Having found that all the requirements of FRCP 23(a) are met as to all claims, this order  
15 next considers whether the requirements of FRCP 23(b)(3) are met.

16 **2. FEDERAL RULE OF CIVIL PROCEDURE 23(b)(3).**

17 Plaintiffs seek certification under FRCP 23(b)(3), which requires they show:

18 [T]he questions of law or fact common to class members  
19 predominate over any questions affecting only individual  
20 members, and that a class action is superior to other available  
methods for fairly and efficiently adjudicating the controversy.

21 “[T]he likely difficulties in managing a class action” are pertinent to this inquiry.  
22 FRCP 23(b)(3)(D). “Commonly referred to as ‘manageability,’ this consideration  
23 encompasses the whole range of practical problems that may render the class action format  
24 inappropriate for a particular suit.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974)  
25 (citation omitted). This order, therefore, “must determine whether the elements necessary to  
26 establish liability are susceptible of common proof or, if not, whether there are ways to manage  
27 effectively proof of any elements that may require individualized evidence.” This inquiry “can  
28

1 turn on the precise nature of the element and require resolution of disputed legal or factual  
2 issues affecting the merits.” *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1024 (2012).

3 This order must first consider whether FRCP 23(b)(3) is satisfied for the misclassification  
4 claim under *Dynamex*. It must then consider the same for the misclassification claim under  
5 *Borello*. Thereafter, it must consider whether FRCP 23(b)(3) is satisfied for the labor claims.

6 **A. MISCLASSIFICATION CLAIM.**

7 “To employ . . . has three alternative definitions. It means: (a) to exercise control over  
8 the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage,  
9 thereby creating a common law employment relationship.” *Martinez v. Combs*, 49 Cal. 4th 35,  
10 64 (2010) (emphasis in original). In *Dynamex*, the California Supreme Court clarified that the  
11 “suffer or permit to work” standard is met when an employer fails to satisfy the requirements  
12 of the ABC test. The high court explained:

13 The ABC test presumptively considers all workers to be  
14 employees, and permits workers to be classified as independent  
15 contractors only if the hiring business demonstrates that the worker  
in question satisfies each of three conditions:

- 16 (a) that the worker is free from the control and direction of the  
17 hirer in connection with the performance of the work, both  
under the contract for the performance of the work and in fact;  
*and*  
18 (b) that the worker performs work that is outside the usual course  
of the hiring entity’s business; *and*  
19 (c) that the worker is customarily engaged in an independently  
20 established trade, occupation, or business of the same nature as  
that involved in the work performed.  
21

22 4 Cal. 5th at 955–56 (emphasis in original). The ABC test applies only when a California  
23 wage order encompasses the relevant labor code claim. *Id.* at 915–16. Yet the “‘suffer or  
24 permit to work standard in California wage orders’ is meant to be ‘exceptionally broad,’” and  
25 the wage orders are to be “‘liberally construed in a manner that serves their remedial  
26 purposes.”” *Vazquez*, 986 F.3d at 1122 (citing *id.* at 952–53).

27 Our court of appeals laid out the considerations for Prong B of the ABC test:  
28



1 Analytically, courts have framed the Prong B inquiry in several  
 2 ways. They have considered whether the work of the employee is  
 3 necessary to or merely incidental to that of the hiring entity,  
 whether the work of the employee is continuously performed for  
 the hiring entity, and what business the hiring entity proclaims to  
 be in.

4 *Id.* at 1125.

5 Plaintiffs need only show, “given the factual setting of the case, if . . . plaintiffs’ general  
 6 allegations are true, common evidence could suffice to make out a prima facie case for the  
 7 class.” *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). “Under the [ABC test], if  
 8 the employer cannot satisfy *just one* prong of the test, the inquiry into employment status  
 9 ends.” Thus, if plaintiffs show “that common evidence will resolve Prong [B], they have made  
 10 a prima facie showing that they *can* win their case based on evidence common to the class.”  
 11 Such a finding is sufficient to satisfy predominance as to the misclassification claim, as the  
 12 Seventh Circuit further explained:

13 [C]ertifying the class for purposes of Prong [B] would  
 14 substantially advance the litigation, regardless of whether the  
 15 common evidence on Prong [B] turns out in [plaintiffs’] or  
 [defendant’s] favor. If answered in [plaintiffs’] favor, all of  
 16 [defendant’s] couriers would have to be classified as employees,  
 . . . eliminating the need for any individualized factfinding.  
 17 If answered in [defendant’s] favor, [defendant] would not have to  
 litigate its satisfaction of Prong [B] against every individual  
 18 plaintiff, promoting efficiency. . . . Regardless of which party  
 wins, the common answer on Prong [B] “represents a significant  
 19 aspect of the case and . . . can be resolved for all members of the  
 class in a single adjudication.”

20 *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1060 (7th Cir. 2016) (emphasis in original)  
 21 (citations omitted).

22 Here, common questions predominate under Prong B. Defendant classified all unit  
 23 franchisees as independent contractors. It provided a standard franchise agreement to master  
 24 franchisees (Dkt. No. 359-1 at 143; Kissane Dep. 56–59), and master franchisees had a  
 25 common practice of using that agreement as a template for their agreements with unit  
 26 franchisees (*see* Dkt. Nos. 292-11, 292-12, 292-13). Although unit franchisees’ agreements  
 27 did not always contain every provision of defendant’s template agreement, “[i]n most ways . . .  
 28



1 plaintiffs' agreements substantially follow[ed] [defendant's] requirements." *Vazquez*,  
2 986 F.3d at 1119.

3 The policies within the template agreement were, therefore, applicable to all unit  
4 franchisees. Those common policies will help to adjudicate the misclassification question.  
5 The term of unit franchisees' agreements, for example, was ten years (Dkt. No. 359-1 at 147;  
6 *see* Dkt. No. 292-11 § 18). This will help to determine, on a class-wide basis, whether unit  
7 franchisees "continuously performed" work for defendant for purposes of Prong B. *Vazquez*,  
8 986 F.3d at 1125.

9 Moreover, "what business [defendant] proclaim[ed] to be in" for purposes of Prong B is  
10 susceptible to common proof, as defendant's statements on its website and advertisements  
11 were equally applicable to all unit franchisees. *Ibid.*

12 And, whether unit franchisees' work was necessary or merely incidental to that of  
13 defendant is susceptible to common proof. All unit franchisees did the same work on behalf of  
14 defendant: they cleaned small businesses. Based on the common nature of unit franchisees'  
15 work, this order can determine the "necessary to or merely incidental" inquiry under Prong B  
16 for all unit franchisees in one fell swoop. *Ibid.*

17 Whether Prong A or Prong C is susceptible to common proof does not affect class  
18 certification here. As the discussion of the merits below will show, there is no genuine dispute  
19 of material fact as to Prong B, and summary judgment in favor of plaintiffs on the  
20 misclassification issue is warranted. Thus, irrespective of any decision on Prong A or Prong C,  
21 the unit franchisees were employees. Common questions under Prong B will, therefore,  
22 predominate. *See Costello*, 810 F.3d at 1060; *James v. Uber Techs., Inc.*, 338 F.R.D. 123, 139  
23 (N.D. Cal. 2021) (Judge Edward M. Chen).<sup>3</sup>

24 Even if summary judgment were granted in favor of defendant on Prong B on a class-  
25 wide basis, such an outcome would significantly advance the litigation. In that scenario,

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26  
27 <sup>3</sup> "[A] district court must formulate some prediction as to how specific issues will play out in  
28 order to determine whether common or individual issues predominate in a given case."  
*Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000) (citing *Gen. Tel. Co.*  
*of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982)).

1 defendant would not have to litigate Prong B as to each individual plaintiff, promoting  
2 efficiency. *See ibid.*

3 For the same reasons, superiority is required only as to Prong B. And, that too is satisfied  
4 for Prong B. It would be inefficient to try the misclassification issue on an individual basis for  
5 the numerous putative class members here when common questions predominate. *See Alan*  
6 *Wright & Arthur R. Miller, 7AA Fed. Prac. & Proc. Civ. § 1778 (3d ed. 2022).* Moreover,  
7 plaintiffs are correct in pointing out: (1) the chilling effect that fear of employer retaliation  
8 will have on unit franchisees deciding whether to file individual lawsuits; and (2) the difficulty  
9 for unit franchisees to bring individual claims, given that the vast majority of them are  
10 unsophisticated with regard to legal matters.

11 Defendant argues individualized issues predominate under Prong B, including “plaintiffs’  
12 employment of others to perform work for them,” “plaintiffs’ filing of business tax returns,”  
13 “plaintiffs’ business dealings with parties other than [defendant],” “whether plaintiffs held  
14 themselves out as independent businessmen,” and whether unit franchisees established limited  
15 liability companies (Opp. 24–25). That argument is unpersuasive. *First*, all three  
16 considerations under Prong B involve common questions. *Second*, the focus of Prong B is on  
17 defining the hirer’s business and whether that definition encompasses the hirees’ work *for the*  
18 *hirer*. The issues defendant raises, however, go to determining whether hirees were engaged in  
19 independent businesses and worked *for themselves* rather than for the hirer. Thus, the issues  
20 defendant raises are relevant only to Prong C — not Prong B.

21 Accordingly, plaintiffs have satisfied FRCP 23(b)(3) as to the misclassification claim  
22 under *Dynamex*. The misclassification claim under *Dynamex* is **CERTIFIED**.

23 \* \* \*

24 As mentioned above, a different classification test applies for purposes of labor code  
25 claims and issues that fall outside of the California wage orders. *Borello* outlined that test:

26 While conceding that the right to control work details is the  
27 “most important” or “most significant” consideration, the  
28 authorities also endorse several “secondary” indicia of the nature  
of a service relationship.

1 Thus, we have noted that “strong evidence in support of an  
 2 employment relationship is the right to discharge at will, without  
 3 cause.” Additional factors have been derived principally from the  
 4 Restatement Second of Agency. These include: (a) whether the  
 5 one performing services is engaged in a distinct occupation or  
 6 business; (b) the kind of occupation, with reference to whether, in  
 7 the locality, the work is usually done under the direction of the  
 8 principal or by a specialist without supervision; (c) the skill  
 9 required in the particular occupation; (d) whether the principal or  
 10 the worker supplies the instrumentalities, tools, and the place of  
 11 work for the person doing the work; (e) the length of time for  
 12 which the services are to be performed; (f) the method of payment,  
 13 whether by the time or by the job; (g) whether or not the work is a  
 14 part of the regular business of the principal; and (h) whether or not  
 15 the parties believe they are creating the relationship of employer-  
 16 employee. “Generally, . . . the individual factors cannot be applied  
 17 mechanically as separate tests; they are intertwined, and their  
 18 weight depends often on particular combinations.”

19 48 Cal. 3d at 350–51 (citations omitted).

20 Here, plaintiffs have not satisfied FRCP 23(b)(3) as to the misclassification claim under  
 21 *Borello*. Foremost, plaintiffs have not even briefed whether predominance is satisfied under  
 22 *Borello*. This alone precludes a finding of predominance — but only as to labor code issues  
 23 that rely on *Borello*. *Haitayan v. 7-Eleven, Inc.*, 2021 WL 757024, at \*5–6 (C.D. Cal.  
 24 Feb. 8, 2021) (Judge Dale S. Fischer).

25 Moreover, two significant *Borello* factors would require individualized inquiries.  
 26 “Whether [unit franchisees] engaged in a distinct occupation or business” cannot be  
 27 determined without asking unit franchisees individually. 48 Cal. 3d at 351. District courts  
 28 have found this factor “critical” to the predominance analysis. *Bowerman v. Field Asset Servs.,*  
*Inc.*, 2014 WL 4676611, at \*12 (N.D. Cal. Sep. 17, 2014) (Judge William H. Orrick) (denying  
 class certification); *see James*, 338 F.R.D. at 138–39; *Narayan v. EGL, Inc.*, 285 F.R.D. 473,  
 480 (N.D. Cal. 2012) (Judge Ronald M. Whyte). Although unit franchisees’ contracts  
 contained non-compete provisions, “the appropriate inquiry . . . is whether the person . . .  
*actually has* such an independent business, occupation, or profession, not whether he or she  
*could have one.*” *Dynamex*, 4 Cal. 5th at 962 n. 30 (emphasis added) (citation omitted).  
 Notably, plaintiff Roman actually engaged in an independent business that cleaned houses  
 (Roman Dep. 160). Thus, this order finds the “distinct occupation or business” factor would  
 add significant individualized inquiries to the classification analysis here under *Borello*.

1 Similarly, “whether or not the [unit franchisees] believe[d] they [were] creating the  
2 relationship of employer-employee” is subject to individualized inquiries. *Borello*, 48 Cal. 3d  
3 at 351. Our court of appeals stated that “a fair characterization may be that plaintiffs  
4 understood themselves to be ‘Jan-Pro cleaners’ but did not necessarily think they were  
5 contracting with a company called ‘Jan-Pro Franchising International.’” *Vazquez*, 986 F.3d  
6 at 1120. Thus, individual variations in putative class members’ legal sophistication and  
7 English-language proficiency would be relevant. *See ibid.*; *Bowerman*, 2014 WL 4676611,  
8 at \*11. Individual variations in what master franchisees told putative class members about  
9 defendant’s business would also be relevant. Thus, this order finds that the putative class  
10 members’ beliefs regarding their relationships with defendant would also add significant  
11 individualized inquiries to the classification analysis here under *Borello*.

12 Further, “the hirer’s right to fire at will and the basic level of skill called for by the job,  
13 are often of inordinate importance.” And, “the ‘ownership of the instrumentalities and tools’  
14 of the job, may be of ‘only . . . evidential value,’ relevant to support an inference that the hiree  
15 is, or is not, subject to the hirer’s direction and control.” Thus, the two factors that require  
16 individualized inquiries weigh heavy here. *Ayala v. Antelope Valley Newspapers, Inc.*,  
17 59 Cal. 4th 522, 539 (2014) (citations omitted).

18 Thus, plaintiffs fail to satisfy predominance for misclassification under *Borello*.  
19 Certification of the misclassification claim under *Borello* is **DENIED**.

20 ***B. LABOR CODE CLAIMS.***

21 Uniform policies and practices of employment misclassification alone are insufficient to  
22 establish that common questions predominate as to liability for labor code claims. *Sotelo v.*  
23 *MediaNews Grp., Inc.*, 207 Cal. App. 4th 639, 654–55 (2012). Thus, “[e]ven if ‘common  
24 questions predominate the threshold question of employee classification,’ [this order] must still  
25 consider whether ‘plaintiffs’ individual claims also pass the predominance test.’” *James*,  
26 338 F.R.D. at 139 (citations omitted). For example, “[a] class . . . may establish liability by  
27 proving a uniform policy or practice by the employer that has the effect on the group of  
28

1 making it likely that group members will work overtime hours without overtime pay” or will  
2 receive less than minimum wage per hour of work. *Sotelo*, 207 Cal. App. 4th at 654.

3 California wage orders encompass claims for minimum wage and overtime under Labor  
4 Code Sections 1194 and 510. Cal. Indus. Welfare Comm’n, Wage Ord. Nos. MW-2022, 5-  
5 2001(3)(A). *Dynamex*, therefore, provides the applicable test for whether unit franchisees  
6 were misclassified for purposes of minimum wage and overtime. 4 Cal. 5th at 913–14.  
7 Because this order has found the misclassification question suitable for class treatment under  
8 *Dynamex*, this order may consider whether class treatment of plaintiffs’ minimum wage and  
9 overtime claims is appropriate.

10 (i) ***Minimum Wage.***

11 Labor Code Section 1194 provides:

12 Notwithstanding any agreement to work for a lesser wage, any  
13 employee receiving less than the legal minimum wage or the legal  
14 overtime compensation applicable to the employee is entitled to  
15 recover in a civil action the unpaid balance of the full amount of  
16 this minimum wage or overtime compensation, including interest  
17 thereon, reasonable attorney’s fees, and costs of suit.

18 Here, there was no policy regarding minimum wage. Plaintiffs argue the lack of a  
19 minimum wage policy alone shows common questions predominate. Not so. The absence of a  
20 minimum wage policy is not the same as an existing, unlawful policy. Such an absence could  
21 suggest that defendant was unaware of the minimum wage requirement, but it does not  
22 evidence an unlawful practice that makes defendant likely to have failed to pay minimum  
23 wage. Further, plaintiffs cite *Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150  
24 (9th Cir. 2016), to support their position. But *Vaquero* involved an existing, unlawful pay  
25 policy: the employer had a policy to not pay employees anything beyond commissions.  
26 The policy guaranteed that the employees would not earn wages for work hours that did not  
27 culminate in a sale. *Vaquero v. Ashley Furniture Indus., Inc.*, 2013 WL 12172124, at \*1  
28 (C.D. Cal. June 17, 2013) (Judge Percy Anderson). By contrast, here, defendant did not have a  
minimum wage policy that made it likely for unit franchisees not to receive minimum wage.

1 There was no policy at all. Thus, the absence of a minimum wage policy would not be useful  
2 to resolve the merits on a class-wide basis.

3 The only item of common evidence regarding minimum wage comes from deposition  
4 testimony. Vice President Thompson of defendant stated that defendant provided master  
5 franchisees with a suggested range at which to pay unit franchisees. That range was between  
6 \$16 and \$25 per hour. But master franchisees had discretion to choose the pay rates for their  
7 unit franchisees (Thompson Dep. 25). Thus, this evidence would raise individualized  
8 inquiries, such as (1) whether a given master franchisee paid its unit franchisees at a different  
9 rate than other master franchisees paid their unit franchisees, and (2) whether a given master  
10 franchisee varied the rates of pay amongst its own unit franchisees.

11 Although the absence of proper time and pay records does not preclude class  
12 certification, the burden is on plaintiffs to show that any individual inquiries would be  
13 manageable. Other decisions have relied on expert statistical analyses in place of common  
14 evidence to establish liability. *See, e.g., Vaquero*, 824 F.3d at 1155. Here, by contrast,  
15 plaintiffs have not provided *any* such evidence by which to efficiently determine the rate of  
16 pay for unit franchisees on a class-wide basis. Plaintiffs make only a cursory reference to (1)  
17 potential testimony by class members, and (2) “pricing agreements” and “bid worksheets”  
18 between master franchisee Connor-Nolan and cleaning customers.<sup>4</sup> Cursory references will  
19 not suffice.

20 Nevertheless, this order briefly explores the evidence. Each pricing agreement in  
21 evidence was between Connor-Nolan and one cleaning customer. The pricing agreements  
22 provided the monthly cleaning fee that cleaning customers paid to master franchisees,  
23 the number of days per week that unit franchisees cleaned the customers’ locations, and,  
24 sometimes, a breakdown of the price per type of cleaning (*e.g.*, washing, mopping, sweeping,  
25 etc.). From the pricing agreements alone, one could not determine the number of hours a unit  
26 franchisee worked or the rate per hour worked (*see, e.g.*, Dkt. No. 247-3 at 34).

27  
28 <sup>4</sup> Connor-Nolan was one of many master franchisees in California. Connor-Nolan contracted  
with plaintiffs Aguilar and Roman, among other unit franchisees.

1           Additionally, there are documents that state plaintiff Roman’s gross cleaning revenue and  
2 all deductions for certain months between 2004 and 2008 (Dkt. No. 313-2 at 2–3). But, again,  
3 those documents do not provide a means of calculating hours worked.

4           Defendant purportedly implemented a proprietary system for master franchisees to  
5 estimate cleaning times and costs. The system, which was based on publicly available  
6 standards, estimated cleaning rates (square feet per hour) based on: type of cleaning required;  
7 types of equipment and supplies used; and state of the item being cleaned. Based on those  
8 standard rates and the square footage of each customer location, it is theoretically possible to  
9 estimate the number of hours per day unit franchisees spent cleaning each customer location.  
10 From there, one could estimate hourly rates using the monthly cleaning fees and the number of  
11 days of service per week.

12           But, as our court of appeals noted, it is unclear whether Connor-Nolan or the many other  
13 master franchisees in California used this system to estimate hours. Moreover, using this  
14 system would be unmanageable. To check each individual cleaning service against the  
15 standard rates would be inefficient at best. The standard category for “hard floor care” alone  
16 contains hundreds of possible cleaning rates (Dkt. No. 247-3 at 335–37). Further, the evidence  
17 includes several “complaint reports,” indicating that plaintiffs Roman and Aguilar did not  
18 complete all services on all occasions, which would reduce the estimated number of hours  
19 worked (*see, e.g., id.* at 87, 167). Moreover, some unit franchisees had third-party individuals  
20 help them clean certain locations, which would reduce the estimated time such unit franchisees  
21 spent cleaning (*see, e.g., Roman Dep.* 35). And, given there were potentially thousands of  
22 cleaning customers, and each unit franchisee serviced multiple cleaning customers,  
23 individualized inquiries would abound.

24           Some of Connor-Nolan’s pricing agreements, but not all, are accompanied by bid  
25 worksheets. For pricing agreements not accompanied by bid worksheets, the method outlined  
26 above would be the only means of determining hours worked and rates of pay. For pricing  
27 agreements that are accompanied by bid worksheets, those bid worksheets showed estimated  
28 hours worked and rates of pay. Connor-Nolan, however, consistently used an hourly rate of



1 \$15 to estimate cleaning costs (*see, e.g.*, Dkt. No. 247-3 at 61–62). This rate exceeds all  
2 applicable minimum wage rates throughout the proposed class period. Lab. Code § 1182.12.

3 In sum, there was no uniform pay policy. It would be unmanageable to determine hours  
4 worked and rates of pay from the pricing agreements and cleaning standards. The available bid  
5 worksheets are all from Connor-Nolan and show a rate of \$15 per hour. This order has no  
6 information about whether other master franchisees in California used the cleaning standards  
7 or bid worksheets. And, plaintiffs have not provided any common evidence of liability.  
8 Individualized inquiries predominate.

9 True, individualized inquiries regarding damages calculations alone do not preclude class  
10 certification. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010).  
11 But the foregoing analysis goes to whether plaintiffs can prove liability in the first place, *i.e.*,  
12 whether the wages paid to unit franchisees were below minimum wage or whether unit  
13 franchisees were paid for all hours of cleaning work.

14 **Travel Time.** One issue deriving from the minimum wage claim that deserves separate  
15 consideration from the above is travel time. But that issue is also uncertifiable.

16 To be sure, the history of the definition of “hours worked” in the wage orders indicates  
17 that travel time during work is compensable. In 1943, Wage Order 7NS stated “‘hours  
18 employed’ includes all time during which . . . an employee is required or instructed to travel on  
19 the employer’s business after the beginning and before the end of her workday.” *Frlekin v.*  
20 *Apple Inc.*, 8 Cal. 5th 1038, 1048 (2020). Construing the wage orders liberally, this order finds  
21 that travel time from one cleaning customer to another during the workday is governed by the  
22 wage orders and, therefore, *Dynamex*. *See* 4 Cal. 5th at 953.<sup>5</sup>

23 But predominance as to liability for travel time is not satisfied. It is true that none of the  
24 pricing agreements account for travel time (*see id.* at 34–187). And, for unit franchisees to  
25 have been able to service multiple customers in a single day, unit franchisees must have taken  
26 some time to travel between customers. But, as relevant here, the pricing agreements show  
27

28 <sup>5</sup> This finding does not cover time unit franchisees spent commuting from their homes before the  
workday or to their homes after the workday. Plaintiffs have not shown such time is compensable.



1 only the days of the week and the initial month of service for each customer location.  
 2 For defendant to be found liable to a given unit franchisee, therefore, one would have to  
 3 compare all the unit franchisee's pricing agreements. Defendant would not be liable to the unit  
 4 franchisee unless and until we locate two pricing agreements with matching weekdays and  
 5 dates of service.<sup>6</sup> This would have to be repeated for every unit franchisee. Moreover, unit  
 6 franchisees sometimes sent their own workers to clean certain locations (*see, e.g.*, Roman Dep.  
 7 35), and unit franchisees sometimes altered their schedules with their customers (Roman Dep.  
 8 144; Vazquez Dep. 94). Those issues could affect the liability determinations and would  
 9 require that unit franchisees provide information based on their unaided memories.

10 Thus, individualized issues would predominate as to liability for travel time pay.

11 ***Mandatory Training.*** There is, however, one issue deriving from the minimum wage  
 12 claim susceptible to common proof: failure to pay unit franchisees for mandatory training.  
 13 Defendant's standard unit-franchisee agreement provided that each unit franchisee must attend  
 14 an "initial training program" (Dkt. No. 359-1 at 145, *see* Dkt. No. 292-11 § 5(A)). Plaintiff  
 15 Vazquez declares he did not receive pay for this mandatory training (Vazquez Decl. ¶ 7).  
 16 Plaintiff Aguilar testified that he underwent safety training, and there is no evidence that he  
 17 was paid for that time (Aguilar Dep. 29–30). Whether defendant must pay minimum wage for  
 18 training time under California law is, therefore, a question common to all unit franchisees.  
 19 Moreover, based on defendant's standard times for the training program, testimony of  
 20 defendant, and testimony of a sample of putative class members, one could determine a  
 21 common time duration for the training program (Dkt. No. 359-1 at 122). Thereafter, one could  
 22 pay each class member at the same rate for the time required to complete the training program.

23 Thus, the mandatory training issue is **CERTIFIED**. Certification of all other issues  
 24 deriving from the minimum wage claim, including wages for cleaning work and travel time,  
 25 is **DENIED**.

26 \_\_\_\_\_  
 27 <sup>6</sup> Establishing the dates of service for a given unit franchisee for a given customer location would  
 28 entail comparing the pricing agreement for that customer to other records (if there are any)  
 showing the unit franchisee's last date of service for that customer. This poses an additional layer  
 of individualized inquiry.

1 (ii) *Overtime.*

2 Plaintiffs' claim for overtime pay fails the predominance standard. To determine  
3 liability, one would have to determine whether the unit franchisees worked in excess of eight  
4 hours per day or 40 hours per week. Lab. Code § 510. Plaintiffs do not provide *any* common  
5 evidence making it likely that unit franchisees worked overtime hours. Without common  
6 evidence, one would have to use the unmanageable methods described above to determine  
7 hours worked. But plaintiffs do not present any means of efficiently and accurately estimating  
8 overtime hours given those individualized inquiries. Certification of the overtime claim is  
9 **DENIED.**

10 (iii) *Expense Reimbursements.*

11 Labor Code Section 2802(a) provides:

12 An employer shall indemnify his or her employee for all necessary  
13 expenditures or losses incurred by the employee in direct  
14 consequence of the discharge of his or her duties, or of his or her  
15 obedience to the directions of the employer, even though unlawful,  
16 unless the employee, at the time of obeying the directions, believed  
17 them to be unlawful.

18 The California wage orders encompass two issues that derive from plaintiffs' expense  
19 reimbursement claim. Wage Order 5-2001(9)(A) states that, if wearing uniforms is a condition  
20 of employment, an employer must provide uniforms to its employees. The same wage order  
21 states an employer must provide to its employees tools and equipment necessary for the  
22 performance of their jobs. Thus, certification of those two issues relies on plaintiffs showing  
23 predominance of their misclassification claim under *Dynamex*, which plaintiffs have already  
24 done. Thus, plaintiffs need only further show that common questions predominate as to  
25 liability for those issues.

26 As to both issues, plaintiffs satisfy predominance. Deposition testimony reveals  
27 defendant required all unit franchisees to wear the "Jan-Pro" logo when they worked  
28 (Kissane Dep. 173). Cleaning supplies and equipment, moreover, were necessary for all unit  
franchisees to work. And, defendant had a common practice of failing to replace unit  
franchisees' cleaning supplies and uniforms (Kissane Dep. 157).

1 Defendant argues, however, that it supplied an initial set of uniforms and cleaning  
2 supplies to each unit franchisee. But that is misleading. Defendant had a common practice *not*  
3 to provide a unit franchisee with those items *unless* the unit franchisee paid the franchise fee up  
4 front and in full (Dkt. No. 359-1 at 148). Thus, defendant cannot avoid liability on a class-  
5 wide basis.

6 That practice nevertheless raises an individualized liability issue — whether each unit  
7 franchisee paid the franchise fee up front and in full. But by simply looking at each unit  
8 franchisee’s initial payment in his or her franchise agreement, one could conclude whether  
9 each unit franchisee received an initial set of equipment and uniforms. Thus, one could  
10 efficiently determine liability. Individualized issues would not predominate.

11 Defendant next argues that individualized issues would predominate as to damages.  
12 Specifically, defendant argues damages calculations would be “excessively difficult” because:  
13 (1) unit franchisees may have used their cleaning supplies for work at businesses not affiliated  
14 with defendant; (2) customers sometimes provided cleaning supplies to unit franchisees; and  
15 (3) unit franchisees may not have records of cleaning supply purchases. Defendant’s argument  
16 is unconvincing. *Bowerman v. Field Asset Serv., Inc.*, 39 F.4th 652, 663 (9th Cir. 2022).

17 True, *Bowerman* reversed class certification where damages calculations were  
18 “excessively difficult.” But its discussion of damages calculations was dicta. *Bowerman* held  
19 that class certification was inappropriate because “class members failed to demonstrate . . .  
20 *liability* was subject to common proof” and because “class members [could not] show that the  
21 whole class suffered damages traceable to their alleged misclassification.” By contrast, the  
22 “excessive difficulty” of calculating damages was neither necessary nor sufficient to reverse on  
23 certification. That difficulty was a problem *Bowerman* only “sought to avoid.” 39 F.4th  
24 at 662–663 (emphasis added).

25 The rule in this circuit remains that “damages calculations *alone* cannot defeat  
26 certification.” *Yokoyama*, 594 F.3d at 1094 (emphasis added). Here, moreover, damages  
27 calculations would not be excessively difficult. There is a list of initial equipment that  
28 defendant would have given to qualifying unit franchisees, which is common evidence to

1 calculate damages (Dkt. No. 359-1 at 169). At least Connor-Nolan kept records showing  
2 deductions for cleaning equipment that it sold to unit franchisees, which is another useful tool  
3 to estimate damages (Dkt. No. 313-2 at 2). And, any receipts from unit franchisees would also  
4 help us estimate damages.

5 True, Wage Order 5-2001(9)(B) provides an exception: “an employee whose wages are  
6 at least two (2) times the minimum wage provided herein may be required to provide and  
7 maintain hand tools and equipment customarily required by the trade or craft.” But that  
8 exception is inapplicable here. The Industrial Welfare Commission has stated that “[t]his  
9 exception is quite narrow and is limited to hand (as opposed to power) tools and personal  
10 equipment, such as tool belts or tool boxes, that are needed by the employee to secure those  
11 hand tools.” None of the unit franchisees here used hand tools, tool belts, or tool boxes.  
12 Thus, the exception does not raise individualized issues here. Indus. Welfare Comm’n,  
13 *Statement as to the Basis*, at 19, <https://www.dir.ca.gov/iwc/Statementbasis.pdf>.

14 \* \* \*

15 The remaining issues that derive from plaintiffs’ expense reimbursement claim —  
16 insurance and gas expenses — rely on the *Borello* misclassification standard because they do  
17 not arise under the California wage orders. *See Dynamex*, 4 Cal. 5th at 915–16 n. 5; *Moreno v.*  
18 *JCT Logistics, Inc.*, 2019 WL 3858999, at \*8, \*12 (C.D. Cal. May 29, 2019) (Judge Jesus G.  
19 Bernal). Because plaintiffs have failed to show predominance for misclassification under  
20 *Borello*, plaintiffs cannot show predominance for any of those issues that rely on *Borello*.  
21 *See Haitayan*, 2021 WL 757024, at \*5–6.

22 Plaintiffs’ arguments that the remaining expense reimbursement issues rely on the ABC  
23 test are incorrect.

24 *First*, plaintiffs assert “the Legislature has now codified the ABC test with respect to the  
25 entire labor code . . . and that statute applies retroactively” (Opp. 8). Namely, plaintiffs refer to  
26 Labor Code Section 2775, or “AB5,” which codified the ABC test. AB5 extended the reach of  
27 the ABC test to the labor code *generally* and to “violations of [the] code *relating to* wage  
28 orders.” *Ibid.*; Lab. Code § 2785(a) (emphasis added). Thus, plaintiffs argue that, even if the

1 wage orders do not encompass the remaining expense reimbursement issues, those issues still  
 2 rely on the ABC test because (1) they arise out of the labor code generally or relate to wage  
 3 orders, and (2) AB5 was retroactive.

4 But only *Dynamex* was retroactive. And, *Dynamex* applied only to wage orders. 4 Cal.  
 5 5th at 913–14. Thus, to the extent that AB5 covered claims arising out of the labor code  
 6 generally or relating to wage orders, AB5 was an expansion of *Dynamex*. That expansion was  
 7 not retroactive. AB5 applied only to “work performed on or after January 1, 2020.” Lab.  
 8 Code § 2785(c). Because all three of our plaintiffs terminated their work with defendant by  
 9 2017, AB5’s expansion of *Dynamex* does not apply here. Thus, issues not covered under the  
 10 wage orders, even if they relate to wage orders or arise out of the labor code generally, rely on  
 11 *Borello* in this action.

12 Moreover, whether existing law provides that the ABC test applies to claims *relating to*  
 13 the wage orders is inconsequential. This order finds that neither Wage Order 9-2001(8) nor  
 14 Wage Order 5-2001(8) is related to the remaining expense reimbursement issues. Those wage  
 15 order sections prohibit employers from requiring reimbursement “*from an employee;*” they do  
 16 not mandate that employers give reimbursements *to* employees. (Emphasis added). And,  
 17 neither section refers to automobile or insurance expenses.

18 *Second*, plaintiffs contend *Gonzales v. San Gabriel Transit, Inc.* is binding here, which  
 19 found that “failure to reimburse expenses . . . in violation of [Labor Code] Section 2802 is  
 20 encompassed by Wage Order No. 9(8).” 40 Cal. App. 5th 1131, 1157 (2019). But *Becerra v.*  
 21 *McClatchy Co.* disagreed with *Gonzales*, finding the wage orders do not cover certain issues  
 22 under Section 2802. 69 Cal. App. 5th 913, 934 (2021). Even the California appellate court  
 23 that heard *Dynamex* found the wage orders do not cover gas expenses under Section 2802.  
 24 4 Cal. 5th at 915–16 n. 5. (The California Supreme Court did not express a view on that issue.)  
 25 As California appellate courts are split on this issue, this order may follow either route.<sup>7</sup>

26  
 27  
 28 <sup>7</sup> Plaintiffs also cite *Duffey v. Tender Heart Home Care Agency, LLC*, to support their position. But *Duffey* did not apply the ABC test to a misclassification claim for purposes of the Domestic Worker Bill of Rights. It applied *Borello*. 31 Cal. App. 5th 232, 254 (2019).

1 As to only the issues of reimbursement for uniforms and cleaning supplies, the expense  
2 reimbursement claim is **CERTIFIED**. Certification of all other issues deriving from the expense  
3 reimbursement claim is **DENIED**.

4 (iv) *Unlawful Deductions.*

5 The California wage orders encompass unlawful deductions for operational expenses  
6 under Labor Code Section 221. That section provides “[i]t shall be unlawful for any employer  
7 to collect or receive from an employee any part of wages theretofore paid by said employer to  
8 said employee.” To that end, Wage Order 5-2001(8) provides:

9 No employer shall make any deduction from the wage . . . for any  
10 cash shortage, breakage, or loss of equipment, unless it can be  
11 shown that the shortage, breakage, or loss is caused by a dishonest  
or willful act, or by the gross negligence of the employee.

12 Regarding cash shortages, breakage, and loss of equipment under former Wage Order 5-  
13 57, the California Supreme Court stated in 1962 that “[i]t does not seem unjust to require the  
14 employer to bear such losses *as expenses of management*.” Moreover, a California court of  
15 appeal recently recognized that that Supreme Court decision was “based on the  
16 impermissibility of transferring to the employee, by way of wage deductions, the financial  
17 burden of business expenses that otherwise would be borne by the employer.” That court of  
18 appeal found that certain operational expenses “appear[ed] on their face to be for standard  
19 business practices, not chargeable to an employee,” including “promotional mailers and  
20 stationery . . . and advertisements.” *Kerr’s Catering Serv. v. Dep’t of Indus. Rels.*, 57 Cal. 2d  
21 319, 329 (1962) (emphasis added); *Davis v. Farmers Ins. Exch.*, 245 Cal. App. 4th 1302,  
22 1334–35 (2016); *see Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217, 232 (2007).

23 Here, plaintiffs allege defendant unlawfully deducted a “management fee” and a “sales  
24 and marketing fee” from unit franchisees’ pay. As *Kerr* and *Davis* demonstrate, former  
25 Wage Order 5-57 supported that an employer may not shift operational expenses for managing  
26 and advertising its business to its employees. Thus, construing the wage orders “liberally . . .  
27 in a manner that serves [their] remedial purposes,” and considering that the suffer or permit to  
28 work standard is “exceptionally broad,” this order finds that Wage Order 5-2001(8)

1 encompasses Labor Code Section 221 for purposes of the management fee and the sales and  
2 marketing fee. *Dynamex*, 4 Cal. 5th at 952–53.

3 Thus, certification of the unlawful deduction claim for those issues relies on plaintiffs  
4 showing predominance of their misclassification claim under *Dynamex*, which plaintiffs have  
5 already done. Plaintiffs need only further show predominance for the management fee and the  
6 sales and marketing fee claims. Plaintiffs have done so.

7 **Management Fee.** Defendant had a uniform policy of providing a template agreement to  
8 all master franchisees, which master franchisees used to create their agreements with unit  
9 franchisees. That template agreement provided that the master franchisee would deduct a  
10 management fee from its unit franchisee’s pay (Dkt. No. 359-1 at 150). All of plaintiffs’  
11 agreements with their master franchisees, moreover, included deductions for management fees  
12 (*see, e.g.*, Dkt. No. 292-12 § 7(D)). Plaintiff Roman and Massachusetts-plaintiff Giovanni  
13 Depianti suffered such deductions (Dkt. No. 313-2 at 2–3, 8). Based on this common evidence  
14 and the master franchisees’ records, predominance for liability is satisfied.

15 As to damages for management fees, defendant had a common policy that master  
16 franchisees would deduct five percent of each unit franchisee’s gross cleaning revenue per  
17 month (Dkt. No. 359-1 at 150). Thus, the total amount owed to the class would be:  
18 five percent of the total gross revenue of all master franchisees in California during the class  
19 period. (Master franchisees must have records of their gross revenue for purposes of filing  
20 taxes and verifying such information with defendant.) One could provide each unit franchisee  
21 with exact damages by summing all deductions for management fees based on master  
22 franchisee records (*see* Dkt. No. 313-2 at 2–3, 8).

23 **Sales and Marketing Fee.** Similarly, defendant’s template agreement (and all of  
24 plaintiffs’ agreements) provided that the master franchisee would deduct a sales and marketing  
25 fee from the unit franchisee’s pay (Dkt. No. 359-1 at 149; Dkt. No. 292-12 § 7(B)).<sup>8</sup> Thus, one  
26

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27 <sup>8</sup> Specifically, master franchisees were to impose a sales and marketing fee for all “additional  
28 customer accounts” that master franchisees provided to unit franchisees. Whether an account was  
an additional customer account depended on the amount of gross annual revenue guaranteed to the  
unit franchisee. As a master franchisee provided a unit franchisee with more customer accounts,



1 could determine liability and exact damages based on defendant's common practices and  
2 master franchisees' records of fee deductions.

3 Defendant argues, however, that predominance for liability is not satisfied because  
4 master franchisees were free not to charge management fees and sales and marketing fees.  
5 But defendant has not pointed to any evidence that suggests master franchisees did not charge  
6 such fees. Moreover, by looking at a sample of franchise agreements for each master  
7 franchisee, one can readily determine whether each master franchisee had a policy of deducting  
8 such fees. There is, thus, sufficient common evidence to adjudicate liability for unlawful  
9 deductions as to (1) management fees and (2) sales and marketing fees on a class-wide basis.

10 **Chargeback Fee.** Plaintiffs also request that this order certify the issue of chargeback  
11 fees. At the hearing, plaintiffs represented that defendant had a common policy to impose  
12 chargeback fees on unit franchisees whenever customers failed to pay for cleaning services.  
13 Such a fee might fall under the wage orders as a deduction for a cash shortage. But, regardless,  
14 plaintiffs' post-hearing briefing failed to point to a common policy regarding such a fee  
15 (*see* Dkt. No. 368). Neither does this order find such a provision in any of plaintiffs'  
16 individual agreements. And, plaintiffs' declarations fail to address such a fee. Thus, there is  
17 no evidence supporting this theory of chargeback fees.

18 It seems, however, that the chargeback fee to which plaintiffs referred was called a  
19 "service fee." Defendant's template agreement provided that a master franchisee could assess  
20 a service fee of \$50 for every hour that the master franchisee spent rectifying a customer  
21 complaint (Dkt. No. 359-1 at 150). That comports with a fee in plaintiff Roman's pay  
22 statement, described as: "Service Fee - [Customer Name] . . . Charge Backs . . . \$50.00"  
23 (Dkt. No. 313-2 at 2). Such a fee, however, does not fall within the wage orders because it  
24 does not represent a routine operational expense. As such, it relies on the *Borello*  
25 misclassification standard. Because plaintiffs have failed to show predominance for

26  
27  
28 the unit franchisee's expected annual revenue would increase. After the unit franchisee's expected  
annual revenue surpassed the guaranteed annual revenue, any new customer account that the  
master franchisee provided was deemed "additional."



1 misclassification under *Borello*, plaintiffs cannot show predominance for chargebacks  
2 (*i.e.*, service fees). *See Haitayan*, 2021 WL 757024, at \*5–6.

3 \* \* \*

4 The remaining issues deriving from plaintiffs’ unlawful deduction claim — franchise  
5 fees, royalty fees, and insurance fees — rely on the *Borello* misclassification standard because  
6 they do not arise under the California wage orders. Because plaintiffs have failed to show  
7 predominance for misclassification under *Borello*, plaintiffs cannot show predominance for the  
8 remaining unlawful deduction issues. *See Haitayan*, 2021 WL 757024, at \*5–6.

9 As to only the issues of management fees and sales and marketing fees, the unlawful  
10 deduction claim is **CERTIFIED**. Certification of all other issues deriving from the unlawful  
11 deduction claim is **DENIED**.

12 (v) *Wage Statements.*

13 Additionally, plaintiffs request damages for defendant’s failure to provide itemized wage  
14 statements under Labor Code Section 226. This issue is governed by Wage Order 5-2001(7).  
15 But plaintiffs failed to claim such a violation in the operative complaint. As discussed below,  
16 this order construes plaintiffs’ actions as a request to amend pursuant to FRCP 15(b), but this  
17 order denies that request for undue delay and prejudice to defendant. Thus, the Section 226  
18 issue is not certifiable.

19 This order **CERTIFIES**: (1) plaintiffs’ minimum wage claim, but only as to the issue of  
20 mandatory training; (2) plaintiffs’ expense reimbursement claim, but only as to the issues of  
21 (a) required uniforms, and (b) necessary cleaning supplies and equipment; and (3) plaintiffs’  
22 unlawful deduction claim, but only as to the issues of (a) management fees, and (b) sales and  
23 marketing fees. Certification of the overtime claim and other issues deriving from the  
24 minimum wage, expense reimbursement, and unlawful deduction claims is **DENIED**.  
25 Certification of a claim for itemized wage statements is **DENIED AS MOOT**.

1                   **3. SUMMARY JUDGMENT AS TO MISCLASSIFICATION.**

2                   As discussed above, Prong B of the ABC test is susceptible to common proof. This order  
3 now turns to the merits of Prong B, aided by the guidance of our court of appeals. Thereafter,  
4 this order briefly addresses Prong A and Prong C.

5                   Summary judgment is proper when the pleadings, discovery, and affidavits show that  
6 there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a  
7 matter of law.” FRCP 56(a). Material facts are those that “might affect the outcome of the  
8 suit” under the governing, substantive law. A factual dispute is genuine “if the evidence is  
9 such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*  
10 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

11                   The record is viewed in the light most favorable to the nonmoving party, and ““all  
12 reasonable inferences that may be drawn from the facts placed before the court must be  
13 drawn”” in favor of the nonmoving party. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065  
14 (9th Cir. 2003) (citations omitted). The judge does not make credibility determinations or  
15 weigh the evidence. *Anderson*, 477 U.S. at 255. A trial court may consider only admissible  
16 evidence. FRCP 56(c).

17                   Here, both parties have moved for summary judgment. Defendant, however, has the  
18 burden of persuasion at trial to satisfy the ABC test. *Dynamex*, 4 Cal. 5th at 964. A finding  
19 against defendant on any prong directs a finding of an employer-employee relationship.

20                   **A. PRONG B OF THE ABC TEST.**

21                   Prong B requires the employer to show “that the worker performs work that is outside the  
22 usual course of the hiring entity’s business . . . .” *Ibid.* Our court of appeals identified three  
23 considerations relevant to Prong B: (1) whether the work of the hiree is necessary or merely  
24 incidental to that of the hirer; (2) whether the hiree continuously performs work for the hirer;  
25 and (3) what business the hirer proclaims to be in. *Vazquez*, 986 F.3d at 1125.

26                   *First*, this order considers whether the work of unit franchisees was necessary or merely  
27 incidental to the work of defendant. Our court of appeals stated that “[i]n some cases, this  
28 inquiry can be conducted through a common-sense observation of the nature of the

1 businesses.” “In other cases, courts view the ‘necessary’ versus ‘incidental’ distinction in  
2 more economic terms.” Where the hirer’s revenue is dependent on the amount of work that the  
3 hirees perform, the hirees are deemed necessary to the hirer’s work. *Id.* at 1125–26.

4 Here, as a matter of common sense, unit franchisees remained at all times necessary to  
5 defendant’s business. Defendant’s business depended on unit franchisees performing cleaning  
6 services. Without a consistent supply of unit franchisees, defendant’s business would have  
7 cratered. And, defendant earned four percent of all cleaning revenue that master franchisees  
8 collected from unit franchisees (Kissane Dep. 34). Defendant’s revenue, therefore, depended  
9 on the amount of work that unit franchisees performed.

10 Defendant does not dispute these common-sense conclusions. Rather, defendant states  
11 our court of appeals’ decision is “no longer good law.” Defendant construes our court of  
12 appeals’ decision to mean that an entity is an employer whenever it derives an economic  
13 benefit from its workers (Opp. 20). Defendant’s argument is a stretch. Our court of appeals  
14 stated that one consideration in the misclassification analysis is whether a hirer earns revenue  
15 based on hirees’ output. Our court of appeals’ decision is still good law.

16 *Second*, this order considers whether unit franchisees continuously performed work for  
17 defendant. Here, unit franchisees did not “perform incidental services for [an] otherwise  
18 unrelated business[.]” Rather, they performed cleaning services “on a regular or continuous  
19 basis, without regard to the substantiality of the activity in relation to [defendant’s] other  
20 business activities.” *Vazquez*, 986 F.3d at 1126. As plaintiffs point out, the template unit  
21 franchisee agreement provided for a ten-year term (Dkt. No. 359-1 at 144; *see* Dkt. No. 292-11  
22 § 18). Unit franchisees continuously — not occasionally — performed cleaning services.  
23 And, as shown below, defendant was in the business of cleaning, so unit franchisees’ services  
24 were for a related business.

25 Defendant contends that our court of appeals’ approach is “unreasonable at best” because  
26 it would not be economically feasible for a franchisor to contract with a franchisee for ““a term  
27 too short for the franchisee to recoup his or her investment”” (Opp. 21) (citation omitted). But  
28 our court of appeals’ approach is reasonable because it “helps capture the distinction between

1 independent contractor arrangements designed to evade requirements placed on employers and  
2 traditional contractors like electricians and plumbers, who perform incidental services for  
3 otherwise unrelated businesses.” *Vazquez*, 986 F.3d at 1126. And, again, whether unit  
4 franchisees continuously worked for defendant is but one consideration under Prong B.

5 *Third*, this order considers whether defendant held itself out as a cleaning business.  
6 Of importance to this inquiry is how defendant described itself in public advertisements and  
7 websites. As our court of appeals stated, defendant’s “websites and advertisements . . .  
8 promote[d] [defendant] as being in the business of cleaning.” And, defendant’s website  
9 described defendant as an ““environmentally responsible commercial cleaning company”” that  
10 provided ““cleaning services.”” *Vazquez*, 986 F.3d at 1127. Furthermore, in defendant’s  
11 contracts with its master franchisees, defendant described itself as “in the business of *operating*  
12 and franchising *comprehensive cleaning and maintenance businesses . . .*” (Dkt. No. 292-2 § 1)  
13 (emphasis added).

14 Moreover, our court of appeals was “skeptical” of defendant’s argument that it was in the  
15 business of franchising rather than cleaning:

16 “Franchising is not in itself a business, rather a company is in  
17 business of selling goods or services and uses the franchise model  
18 as a means of distributing the goods or services to the final end  
user without acquiring significant distribution costs.”

19 *Vazquez*, 986 F.3d at 1127 (citation omitted). This order also finds defendant’s argument  
20 unconvincing. Defendant was plainly in the business of selling cleaning services. To conclude  
21 otherwise would ignore the entire foundation of defendant’s business. The prior summary  
22 judgment order in this action, which our court of appeals vacated, did not conclude otherwise.

23 Defendant argues that, at the least, the question of whether it satisfies Prong B should be  
24 submitted to a jury. It cites numerous pages of its officers’ deposition testimony for the  
25 proposition that its usual course of business was supporting master franchisees — not cleaning.  
26 True, the testimony shows that defendant’s officers provided training, advice on regulatory  
27 compliance, and general business guidance to master franchisees (Dkt. No. 247-4 at 10–164).  
28 But, at best, that evidence goes to only the third consideration laid out in *Vazquez* — what

1 business the hirer proclaims to be in. The other two considerations hurt defendant’s case.  
2 Moreover, as to the third consideration, defendant did not hold itself out *to the public* as  
3 supporting master franchisees. It held itself out as a cleaning business. Thus, the officers’  
4 deposition testimony does not raise a genuine dispute as to Prong B.

5 Defendant also argues that treating unit franchisees as employees would be inconsistent  
6 with California and federal franchise regulations. But the Federal Trade Commission  
7 Franchise Rule states that “[a] law is not inconsistent with [the rule] if it affords prospective  
8 franchisees equal or greater protection . . . .” 16 C.F.R. § 436.10(b). The ABC test affords  
9 franchisees greater protection by broadening the definition of “suffer or permit to work.”  
10 Thus, this order finds franchise regulations consistent with finding unit franchisees to be  
11 employees under the ABC test. *See Goro v. Flowers Food, Inc.*, 2021 WL 4295294, at \*10–11  
12 (S.D. Cal. Sep. 21, 2021) (Judge Todd W. Robinson).

13 Finally, defendant argues the ABC test requires that plaintiffs show defendant was the  
14 “hiring entity.” But *People v. Uber Technologies, Inc.*, a California appellate decision,  
15 expressly rejected this argument. *Uber Technologies* found the phrase “hiring entity” was  
16 “intended to be expansive for reasons specific to California wage and hour laws and the  
17 longstanding social safety net objectives of those laws in this state.” And, defendant’s  
18 suggestion that this order must decide whether the cleaning customers or defendant was the  
19 hiring entity would present an “artificial choice” resting on a “false dichotomy.” It is possible  
20 that unit franchisees rendered services to both defendant and the cleaning customers. 56 Cal.  
21 App. 5th 266, 287–88 (2020).

22 In sum, on their motion for summary judgment, plaintiffs have met their burden to show  
23 an absence of a genuine dispute of material fact as to all three considerations under Prong B.  
24 Defendant has failed to raise a genuine dispute of material fact. No reasonable juror could find  
25 in favor of defendant on any of the three considerations. Furthermore, on its own motion for  
26 summary judgment, defendant has failed to meet its initial burden to show an absence of a  
27 genuine dispute of material fact. Because defendant has failed to satisfy Prong B, this order  
28 finds unit franchisees were employees of defendant. Summary judgment for plaintiffs on the

1 misclassification claim under *Dynamex* is **GRANTED**. Defendant’s motion for summary  
2 judgment as to misclassification under *Dynamex* is **DENIED**.

3 **B. PRONG A OF THE ABC TEST.**

4 Although the above is sufficient to find in favor of plaintiffs on the misclassification  
5 claim, this order briefly considers the remaining prongs of the ABC test. Prong A requires the  
6 hirer to show “that the worker is free from the control and direction of the hirer in connection  
7 with the performance of the work, both under the contract for the performance of the work and  
8 in fact.” *Dynamex*, 4 Cal. 5th at 955. “[A] business need not control the precise manner or  
9 details of the work . . . to have maintained the necessary control that an employer ordinarily  
10 possesses over its employees.” *Id.* at 958. That the hirer dictates how the work is to be  
11 performed is significant to this inquiry. *See id.* n. 27.

12 Here, defendant had the contractual “right to establish company policies and/or  
13 procedures pertaining to the operation of [master franchisees’] franchised business . . . or the  
14 business of any unit franchisee” (Dkt. No. 292-2 § 4.28). Defendant had the contractual right  
15 to inspect master and unit franchisees’ premises to ensure quality of service (*id.* § 4.29).  
16 By contract, unit franchisees were subject to a mandatory training program, through which  
17 defendant dictated how unit franchisees were to perform cleaning services (Dkt. No. 359-1  
18 at 145). And, unit franchisees were subject to a non-compete provision (Dkt. No. 359-1  
19 at 157). Thus, unit franchisees were not free from defendant’s control and direction under  
20 contract for the performance of the work.

21 “As a practical matter,” however, there may have been “less control at all levels than  
22 what is contemplated in the agreements.” *Vazquez*, 986 F.3d at 1120. Plaintiff Roman  
23 engaged in an independent business that cleaned houses, contravening the non-compete  
24 provision (Roman Dep. 160). The testimony of defendant’s Vice President supports that  
25 “[defendant]’s officials rarely make site visits to its master franchisees.” “They also rarely, if  
26 ever, inspect the books and records of their master franchisees” (*see* Thompson Dep. 39–41).  
27 *Vazquez*, 986 F.3d at 1120. Although defendant provided a proprietary system for master  
28 franchisees to use to estimate cleaning hours, defendant counters that master franchisees could

1 choose not to use that system (Kissane Dep. 42–43). Further, one master franchisee declared  
 2 defendant “has declined to get involved” with “compliance matters relating to our business”  
 3 (Dkt. No. 247-3, Conner Decl. ¶ 5).

4 As to both defendant and plaintiffs’ motion for summary judgment, this order finds there  
 5 are genuine disputes of material fact regarding control that preclude summary judgment on  
 6 Prong A. Thus, Prong A is not amenable to summary judgment.

7 **C. PRONG C OF THE ABC TEST.**

8 Prong C requires the hirer to show “that the worker is customarily engaged in an  
 9 independently established trade, occupation, or business of the same nature as that involved in  
 10 the work performed.” *Dynamex*, 4 Cal. 5th at 955–56. Furthermore:

11 Courts in other states that apply the ABC test have held that the  
 12 fact that the hiring business permits a worker to engage in similar  
 13 activities for other businesses is not sufficient to demonstrate that  
 14 the worker is “customarily engaged in an independently  
 15 established . . . business” for purposes of [Prong C]. . . .  
 “[T]he appropriate inquiry under [Prong C] is whether the person  
 engaged in covered employment actually has such an independent  
 business, occupation, or profession, not whether he or she could  
 have one.”

16 *Id.* at 962 n. 30 (citations omitted).

17 Here, at least plaintiff Roman actually engaged in an independent business that cleaned  
 18 houses (Roman Dep. 160). Plaintiffs’ argument that unit franchisees, such as plaintiff Roman,  
 19 expanded defendant’s customer base by engaging in independent businesses is invalid. By  
 20 definition, unit franchisees who engaged in independent businesses did not provide customers  
 21 to defendant’s separate business. Moreover, this order finds plaintiff Roman’s housekeeping  
 22 business to be “of the same nature” as defendant’s commercial cleaning business. Both  
 23 businesses involved janitorial work. Plaintiffs do not cite case law that distinguishes between  
 24 housekeeping and commercial cleaning. And, that unit franchisees agreed not to compete with  
 25 defendant is irrelevant under Prong C. *Dynamex*, 4 Cal. 5th at 962 n. 30. Thus, as to  
 26 defendant’s motion, there is no genuine dispute of material fact that defendant satisfies  
 27 Prong C. Thus, Prong C is amenable to summary judgment in favor of defendant.  
 28



1 Of course, this order’s findings regarding Prong A and Prong C do not change that  
2 defendant cannot satisfy Prong B. All unit franchisees were employees under *Dynamex*.

3 **D. THE BUSINESS-TO-BUSINESS EXCEPTION DOES NOT APPLY.**

4 Defendant argues *Borello* is the correct test under the business-to-business exception.  
5 Labor Code Section 2776 provides, in part:

6 Section 2775 and the holding in *Dynamex* do not apply to a bona  
7 fide business-to-business contracting relationship, as defined  
8 below, under the following conditions:

9 (a) If an individual acting as a sole proprietor, or a business entity  
10 formed as a partnership, limited liability company, limited  
11 liability partnership, or corporation (“business service  
12 provider”) contracts to provide services to another such business  
13 or to a public agency or quasi-public corporation (“contracting  
14 business”), the determination of employee or independent  
15 contractor status of the business services provider shall be  
16 governed by *Borello*, if the contracting business demonstrates  
17 that all of the following criteria are satisfied: [list of (1)–(12)].

18 Here, defendant asserts that unit franchisees were business service providers who  
19 contracted to provide services to master franchisees (contracting businesses). But common  
20 evidence shows at least one of the statute’s criteria is unmet. Subsection (a)(10) requires that  
21 “[t]he business service provider can negotiate its own rates.” But common evidence shows  
22 unit franchisees could not negotiate their own rates. Defendant’s CEO testified that “[e]ach  
23 master franchisee determines the pricing [of cleaning contracts] based on local conditions . . .”  
24 (Kissane Dep. 39). Defendant’s Vice President confirmed that “the masters . . . [i]t’s their  
25 discretion what they input [into defendant’s payment formula]” (Thompson Dep. 25).  
26 Because less than all of the statute’s criteria are met, the exception does not apply.  
27 *Dynamex*, not *Borello*, is the applicable misclassification test here.

28 **E. THE JOINT EMPLOYER TEST DOES NOT APPLY.**

Defendant argues the joint employer test applies here instead of the ABC test.  
Defendant’s argument relies on the following language: “Where a party is the agent of  
misclassification, it may be directly liable under the ABC test, even where it utilizes a proxy to  
make arrangements with its employees.” *Vazquez*, 986 F.3d at 1124 (quoting *Depianti v. Jan-  
Pro Franchising Int’l, Inc.*, 990 N.E.2d 1054, 1068 n. 17 (Mass. 2013)). Defendant further



1 asserts that, in three-tier systems, ordinarily the middle tier is the agent of misclassification.  
2 According to defendant, however, there are two exceptions under which the top tier is the  
3 agent of misclassification: “first, where the law of corporate disregard is applicable and,  
4 second, where an entity has engaged in an ‘end run’ around its wage law obligations.” *Jinks v.*  
5 *Credico (USA), LLC*, 177 N.E.3d 509, 516 (Mass. 2021). Defendant argues that, because  
6 plaintiffs have not met either exception, defendant is not the agent of misclassification.  
7 For that reason, defendant states the ABC test cannot apply.

8 Defendant’s argument fails for a number of reasons. *First*, our court of appeals  
9 instructed this order to apply the ABC test. *Vazquez*, 986 F.3d at 1122. To ignore a mandate  
10 from our court of appeals and to employ a different test would contravene our judicial process.  
11 *Second*, neither our court of appeals nor *Dynamex* required that the hirer be the “agent of  
12 misclassification” before the ABC test can apply.

13 *Third*, even if there were an “agent of misclassification” standard in California, defendant  
14 was, in fact, the agent of misclassification. The Massachusetts Supreme Judicial Court stated  
15 that the top tier is the agent of misclassification if it “‘design[s] and implement[s] the  
16 contractual framework under which [the bottom-tier] was misclassified as an independent  
17 contractor,’ specifically to evade obligations under the wage laws.” This would amount to an  
18 “end run” around the top tier’s wage law obligations. *Jinks*, 177 N.E.3d at 517 (quoting  
19 *Depianti*, 990 N.E.2d at 1068 n. 17).

20 Defendant did just that. Defendant designed and implemented a contractual framework  
21 — through its template agreement — that classified unit franchisees as independent  
22 contractors. Unlike *Jinks*, in which the middle-tier classified the plaintiffs as independent  
23 contractors “[w]ithout any apparent input from [the top-tier],” here, defendant — the top tier  
24 — classified unit franchisees as independent contractors. In fact, master franchisees’  
25 agreements with unit franchisees “substantially follow[ed] [defendant]’s requirements” by  
26 “describ[ing] the unit franchisee[s] as independent contractor[s] . . . .” *Vazquez*, 986 F.3d  
27 at 1119–20 (emphasis added). Thus, the ABC test would apply even if there were an “agent of  
28 misclassification” standard in California.

1 Having found that unit franchisees were employees of defendant under *Dynamex*'s ABC  
 2 test, this order next considers whether any of the certified labor code issues are amenable to  
 3 summary judgment.

4 **4. SUMMARY JUDGMENT AS TO CERTIFIED LABOR CODE ISSUES.**

5 This order has certified the following issues for class treatment: (1) whether defendant is  
 6 liable to unit franchisees for failure to pay for mandatory training; (2) whether defendant is  
 7 liable to unit franchisees for failure to reimburse them for (a) required uniforms, and  
 8 (b) necessary cleaning supplies and equipment; and (3) whether defendant unlawfully deducted  
 9 from unit franchisees' wages (a) management fees, and (b) sales and marketing fees. These are  
 10 discussed in turn.

11 **A. MANDATORY TRAINING.**

12 Plaintiffs have pointed to no published California decision that explicitly recognizes an  
 13 employee's right to minimum wage for mandatory training; this order finds none.  
 14 But "California courts have long recognized that California's wage laws are patterned on  
 15 federal statutes and that authorities construing those federal statutes provide persuasive  
 16 guidance to state courts." "A review of our labor statutes reveals a clear legislative intent to  
 17 protect the minimum wage rights of California employees to a greater extent than federally."  
 18 *Armenta*, 135 Cal. App. 4th at 322, 324.

19 Under the Fair Labor Standards Act, a hirer must meet six elements to show that its  
 20 trainees do not qualify for minimum wage for mandatory training. One such element is that  
 21 "[t]he employer that provides the training derives no immediate advantage from the activities  
 22 of the trainees, and on occasion his operations may actually be impeded." *Harris v. Vector*  
 23 *Mktg. Corp.*, 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010) (Judge Edward M. Chen);  
 24 *see Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). In other words, "where the  
 25 company is the primary beneficiary of the trainee's labors, an employment relationship exists,  
 26 and federal minimum wage and overtime laws apply." Cal. Prac. Guide Emp. Litig. § 11-B  
 27 (Mar. 2022) (citing *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 (4th Cir. 1989)).  
 28

1 Here, defendant required master franchisees to train all unit franchisees on proper  
2 cleaning methods (Dkt. No. 292-2 § 4.22). Defendant also provided master franchisees with  
3 manuals regarding cleaning and safety to provide to unit franchisees (Dkt. Nos. 292-15, 292-  
4 16). Master franchisees, in turn, required unit franchisees to attend a training program on  
5 proper cleaning methods (Dkt. No. 359-1 at 145). Plaintiff Vazquez declares that he attended  
6 such a training program, and defendant did not pay him for training time (Vazquez Decl. ¶ 7).  
7 Plaintiff Aguilar also took part in a training (Aguilar Dep. 29–30). Defendant, however, fails  
8 to provide evidence disputing the above facts.

9 Defendant was the primary beneficiary of the mandatory trainings. Defendant reinforced  
10 proper cleaning techniques to ensure satisfactory services and to establish goodwill with  
11 customers. In other words, defendant’s trainings “buil[t] and ke[pt] customer trust by ensuring  
12 consistency and uniformity in the quality of goods and services.” Without such trust,  
13 defendant’s business would have faltered for lack of customers. Moreover, defendant included  
14 safety protocols in the trainings to decrease its risk for tort liability. And, although defendant  
15 counterargues that unit franchisees benefited because defendant gave them “access to resources  
16 [they] otherwise would not have [had],” defendant’s argument describes the benefits to unit  
17 franchisees of entering into the franchise relationship — not the benefits of the *trainings*.  
18 Thus, defendant’s counterargument is off point. *Patterson*, 60 Cal. 4th at 490.

19 Defendant was the primary beneficiary of the trainings. This order finds that defendant is  
20 liable for minimum wage pay to unit franchisees who underwent mandatory training.

21 Thus, as to plaintiffs’ motion for summary judgment, there is no genuine dispute of  
22 material fact, and summary judgment in favor of plaintiffs on the mandatory training issue is  
23 **GRANTED**. Defendant’s motion for summary judgment fails to meet its burden and, as to the  
24 mandatory training issue, is **DENIED**.

25 **B. EXPENSE REIMBURSEMENTS.**

26 “[T]he elements of a [Labor Code] Section 2802 claim are: ‘(1) the employee made  
27 expenditures or incurred losses; (2) the expenditures or losses were incurred in direct  
28 consequence of the employee’s discharge of his or her duties, or obedience to the directions of

1 the employer; and (3) the expenditures or losses were necessary.” *USS-Posco Indus. v. Case*,  
 2 244 Cal. App. 4th 197, 205 (2016) (citation omitted).

3 Deposition testimony reveals defendant required unit franchisees to wear the “Jan-Pro”  
 4 logo when they worked. Unit franchisees also needed cleaning equipment to work. Each unit  
 5 franchisee had to pay for an initial set of cleaning supplies and uniforms unless he or she paid  
 6 all franchise fees up front (Dkt. No. 359-1 at 151). Unit franchisees also had to pay for all  
 7 replacement cleaning supplies and uniforms themselves (Kissane Dep. 173). Moreover, all  
 8 three of plaintiffs’ declarations state they “made expenditures” for uniforms and cleaning  
 9 supplies, and defendant did not reimburse them for such expenses (Vazquez Decl. ¶ 9; Aguilar  
 10 Decl. ¶ 8; Roman Decl. ¶ 9). In fact, their franchise agreements confirm that fact because none  
 11 of them paid their franchise fees in full and up front (*see, e.g.*, Dkt. No. 292-11 § 7(A)).  
 12 Plaintiffs incurred such expenses “in direct consequence of the . . . discharge of [their] duties”  
 13 to clean businesses. And, such expenses were “necessary” for plaintiffs to secure employment  
 14 and to clean businesses. *USS-Posco*, 244 Cal. App. 4th at 205. Defendant does not dispute the  
 15 above facts. All elements of Labor Code Section 2802 are satisfied.

16 Thus, as to plaintiffs’ motion for summary judgment, there is no genuine dispute of  
 17 material fact, and summary judgment in favor of plaintiffs for reimbursement for uniforms and  
 18 cleaning supplies is **GRANTED**. Defendant’s motion for summary judgment fails to meet its  
 19 burden and, as to those issues, is **DENIED**.

20 **C. UNLAWFUL DEDUCTIONS.**

21 “Under Labor Code Sections 221 and 224, the employer bears the burden of establishing  
 22 that . . . deductions are authorized by law.” Employers may not make deductions from wages  
 23 “except in very narrowly defined circumstances provided by statute.” In fact, “[d]ebiting an  
 24 employee’s earned wages to cover a normal operating expense of the employer is not allowed  
 25 in California.” California courts have found deductions to cover advertising and management  
 26 expenses unlawful. *Davis*, 245 Cal. App. 4th at 1334, 1336–37 (citations omitted); *see Kerr*,  
 27 57 Cal. 2d at 329.

1 Here, defendant had a uniform policy of providing a template agreement to all master  
2 franchisees, which master franchisees used to create their agreements with unit franchisees.  
3 That template agreement provided that the master franchisee would deduct a management fee  
4 and a sales and marketing fee from its unit franchisees' pay (Dkt. No. 359-1 at 149–150).  
5 All of plaintiffs' agreements with their master franchisees, moreover, included deductions for  
6 management fees and sales and marketing fees (*see, e.g.*, Dkt. No. 292-11 §§ 7(B), 7(D)).  
7 And, master franchisees made the deductions directly from unit franchisees' wages (Dkt. No.  
8 313-2 at 2–3, 8). Defendant does not dispute the above facts. Thus, this order finds defendant  
9 liable for unlawfully deducting both management fees and sales and marketing fees under  
10 Labor Code Section 221. *See Davis*, 245 Cal. App. 4th at 1336–37.

11 Defendant argues the fees did not constitute deductions at all. Defendant asserts the  
12 franchise agreements defined unit franchisees' wages as the cleaning costs less the contractual  
13 fees. Thus, defendant states the contractual fees were used to calculate final wages, from  
14 which it did not thereafter make deductions. But *Quillian v. Lion Oil Co.* rejected a similar  
15 argument regarding a deduction from an employee's bonus, which the employee expressly  
16 agreed to in writing:

17 Appellant herein describes the subject bonus as a calculated  
18 amount consisting of the computed sales component less the  
19 computed shortage component and argues that no deductions are  
20 made from the final computation. It appears to this court that this  
21 is merely a clever method of circumventing the statutory definition  
22 of wages. . . . Rather than call [the bonus] a commission and then  
deduct for shortages, in contravention to *Kerr*, appellant deducts  
shortages from the payment and calls the final result a bonus.  
Appellant then self-righteously proclaims that no deductions were  
made from the bonus. Unfortunately, the result is the same. The  
[employee] carries the burden of losses . . . .

23 *Quillian* held the bonus scheme contravened public policy. 96 Cal. App. 3d 156, 162–63  
24 (1979) (citing *Kerr*, 57 Cal. 2d 319).

25 Likewise, this order finds defendant's argument unconvincing. “[Defendant] cannot  
26 avoid a finding that its . . . policy is unlawful simply by asserting that the deduction is just a  
27 step in its calculation of [wages].” *Hudgins v. Neiman Marcus Grp., Inc.*, 34 Cal. App. 4th  
28 1109, 1124 (1995).

1 Defendant also argues the deductions were lawful under Labor Code Section 224.

2 In relevant part, that section provides:

3 The provisions of [Labor Code] Section[] 221 . . . shall in no way  
4 make it unlawful for an employer to withhold or divert any portion  
5 of an employee’s wages . . . when a deduction is expressly  
6 authorized in writing by the employee to cover insurance  
premiums, hospital or medical dues, or other deductions not  
amounting to a rebate or deduction from the standard wage arrived  
at . . . pursuant to wage agreement . . . .

7 True, unit franchisees agreed in writing to the deductions. “That fact, however, is not  
8 dispositive: ‘The one tool that is not available to the employer is an employment agreement by  
9 which it requires its employees to consent to unlawful deductions from their wages.’”  
10 “‘Even if a contract exists, an employer cannot shift the cost of doing business to an  
11 employee.’” *Davis*, 245 Cal. App. 4th at 1332–33 (citations omitted).

12 The management fee and the sales and marketing fee were unlawful. Those fees  
13 impermissibly shifted the cost of defendant’s routine operational expenses to unit franchisees.  
14 Thus, the fact that unit franchisees consented to those fees is irrelevant. *See Davis*, 245 Cal.  
15 App. 4th at 1333; *Quillian*, 96 Cal. App. 3d at 163.

16 Finally, defendant argues it is not liable for management fees and sales and marketing  
17 fees because it never deducted or received those fees; master franchisees deducted and retained  
18 them. It is true that plaintiffs have not provided case law to establish defendant’s liability for  
19 fees it did not receive. But defendant implemented the system that resulted in  
20 misclassification. Defendant then encouraged master franchisees to make such deductions by  
21 giving them a template agreement that included those fees (Dkt. No. 359-1 at 143). In the  
22 interest of fairness and justice, defendant must be held liable.

23 In turn, as to plaintiffs’ motion for summary judgment, there is no genuine dispute of  
24 material fact, and summary judgment in favor of plaintiffs for management fees and sales and  
25 marketing fees is **GRANTED**. Defendant’s motion for summary judgment fails to meet its  
26 burden and, as to those issues, is **DENIED**.

27

28

1                   **5. PLAINTIFFS' REQUEST TO AMEND THE PLEADINGS.**

2                   Plaintiffs did not claim violations of Labor Code Section 226 in the operative complaint  
 3                   (see Second Amd. Compl.). Nevertheless, plaintiffs move for summary judgment under that  
 4                   section. Thus, this order construes plaintiffs' motion as a request to amend the pleadings out of  
 5                   time pursuant to FRCP 15(b). *Apache Survival Coal. v. U.S.*, 21 F.3d 895, 910 (9th Cir. 1994).  
 6                   Whether plaintiffs may expand their complaint by adding a claim raised for the first time on  
 7                   summary judgment lies within the district court's discretion. *See Brass v. Cnty. of L.A.*,  
 8                   328 F.3d 1192, 1197 (9th Cir. 2003).

9                   “When considering a motion for leave to amend, a district court must consider whether  
 10                  the proposed amendment results from undue delay, is made in bad faith, will cause prejudice to  
 11                  the opposing party, or is a dilatory tactic.” *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003  
 12                  (9th Cir. 2002). Although “leave to amend should normally be ‘freely given,’ once a case has  
 13                  progressed to the summary judgment stage ‘the liberal pleading standards are inapplicable.’”  
 14                  *Soublet v. Cnty. of Alameda*, 2019 WL 12517063, at \*8 (N.D. Cal. Dec. 6, 2019) (Judge Jon S.  
 15                  Tigar) (citations omitted). “Simply put, summary judgment is not a procedural second chance  
 16                  to flesh out inadequate pleadings.” *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d  
 17                  989, 992 (9th Cir. 2006) (citation omitted).

18                  Here, plaintiffs have had over a decade to amend their complaint to include a claim under  
 19                  Labor Code Section 226. In fact, plaintiffs have amended their complaint twice. But plaintiffs  
 20                  have never claimed a violation of Section 226. Thus, plaintiffs have unduly delayed.

21                  Moreover, to allow plaintiffs to amend the complaint now would prejudice defendant.  
 22                  This order has found that defendant waived its right to arbitrate. Defendant's delay in asserting  
 23                  that right supported our finding. It would be unfair to allow plaintiffs to amend their complaint  
 24                  after delaying for the same duration as defendant did.

25                  Although plaintiffs' conduct does not appear to be dilatory or made in bad faith, it is  
 26                  within this order's discretion to deny plaintiffs' request to amend for inexcusable delay.  
 27                  *See Brass*, 328 F.3d at 1197. As to Labor Code Section 226, both parties' motions for  
 28                  summary judgment are, therefore, **DENIED AS MOOT.**



**CONCLUSION**

For the foregoing reasons, and to the extent stated herein, plaintiffs’ motion for class certification is **GRANTED IN PART AND DENIED IN PART**. Plaintiffs’ motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**. Defendant’s motion for summary judgment as to all certified issues is **DENIED**.

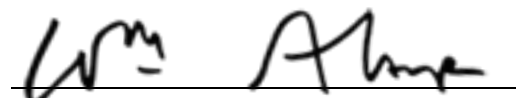
Specifically, this order **GRANTS** plaintiffs’ motion for class certification as to (1) failure to pay minimum wage for mandatory training, (2) failure to reimburse for expenses incurred for (a) required uniforms and (b) necessary cleaning supplies and equipment, and (3) unlawful deductions of (a) management fees and (b) sales and marketing fees for the following group: all unit franchisees who signed a franchise agreement with a master franchisee in the state of California and who performed cleaning services for defendant from December 12, 2004, to the latest date on which a named plaintiff terminated employment. The limit on the class period is proper because plaintiffs cannot show that their experience was similar to that of persons who worked for defendant after the last of plaintiffs was terminated. This order **DENIES** class certification as to the remaining labor code claims and issues.

This order **GRANTS** summary judgment in favor of plaintiffs on all certified issues. As to Labor Code Section 226, this order **DENIES AS MOOT** both parties’ motions for summary judgment. A separate order on the instant briefing shall resolve the parties’ motions for summary judgment as to the uncertified, individual claims and issues that remain.

The parties shall please provide a form of class notice for approval. They shall also provide a plan of distribution (which must include first-class mail) and a timetable for distribution of notice and for opt outs. Given the need for these steps, trial and the pretrial conference shall not be held in September. Those events shall be set for early 2023. Counsel shall meet and confer and propose a window of trial dates convenient to both sides.

**IT IS SO ORDERED.**

Dated: August 2, 2022.

  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

United States District Court  
Northern District of California