No. 18-15386

IN THE

United States Court of Appeals for the Ninth Circuit

RAEF LAWSON, individually and on behalf of other similarly situated individuals, and in his capacity as Private Attorney General Representative,

Plaintiff-Appellant,

v.

GRUBHUB HOLDINGS INC. and GRUBHUB INC.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California
Case No. 15-cv-05128 JSC

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

The Court stayed this appeal on September 26, 2019, in light of the Court's decision in *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 2019 WL 4648399 (9th Cir. Sep. 24, 2019), which certified to the California Supreme Court the question of whether the decision in *Dynamex Ops. W. Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), applies retroactively. The California Supreme Court has now answered that *Dynamex* **does** apply retroactively, meaning that the *Dynamex* ABC misclassification test is applicable in this case. *See Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 478 P.3d 1207, 1210-16 (Cal. 2021). Following this recent *Vazquez* decision, this Court lifted the stay (Dkt. 73), and Plaintiff-Appellant Raef Lawson now submits this Supplemental Brief in order to apprise the Court of several important developments in the law during the pendency of the stay.[1]

First, it is now beyond question that the *Dynamex* ABC test governs the claims in this case. The holding in *Vazquez*, 478 P.3d at 1210-16, makes clear that the ABC test applies retroactively to nonfinal cases. Even if the Court had any doubt regarding the retroactive applicability here of *Dynamex*, the codification of the ABC test in A.B. 5 also applies retroactively. *See James v. Uber Technologies*,

[1] Also at issue in Plaintiff's appeal is the District Court's decision to preemptively deny class certification prior to Plaintiff even submitting a motion for class certification. *See* Opening Brief at pp. 45-51 (Dkt. 28) and Reply Brief at pp. 25-28 (Dkt. 61).

Inc., 2021 WL 254303, at *17 (N.D. Cal. Jan. 26, 2021). GrubHub's argument that *Dynamex* does not apply to Plaintiff's claim for expense reimbursement under Cal. Lab. Code § 2802 has also been rejected by recent authority, namely *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131, 1157 (2019) (holding that expense reimbursement claims for the use of vehicles are rooted in the wage orders and thus subject to *Dynamex*). Moreover, the California Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE") issued an opinion letter on May 3, 2019 (attached as Exhibit A to Plaintiff's accompanying Motion for Judicial Notice), reaching the same conclusion as *Gonzales***.**

Second, under the ABC test, there can be no doubt that Plaintiff was GrubHub's employee. The California Court of Appeal in *People v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266, 291-02 (2020), which affirmed a lower court's preliminary injunction ordering Uber and Lyft to reclassify their drivers as employees under the ABC test, noted that the ABC test can be resolved early in a case even without extensive discovery. Here, the Court has the benefit of a full record following a trial, and the District Court has already held (both at summary judgment and following trial) that Plaintiff, as a delivery driver, performed services within GrubHub's regular course of business as a food delivery company. ER0030, ER1797. Thus, GrubHub cannot satisfy Prong B of the ABC test. While this factor was just one of many factors considered under the common law test set

forth in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989) (and thus the District Court determined that a trial would be necessary to consider and weigh all the factors), this factor is dispositive under the conjunctive ABC test. *See Vazquez*, 478 P.3d at 1214. As this factor was decided (correctly) in Plaintiff's favor, both at summary judgment *and* after a full-fledged trial, no new trial is needed, this Court should hold that Plaintiff was GrubHub's employee and remand with direction that judgment be entered in his favor.[2]

Third, any argument that GrubHub may raise that Proposition 22 precludes the application of the ABC test in this case must be rejected, since Proposition 22 **does not** apply retroactively. *See James*, 2021 WL 254303, at *17.

ARGUMENT

I. Dynamex Applies to All Claims in this Case

A. *Dynamex* Applies Retroactively

It is now beyond dispute that the *Dynamex* ABC test applies to all claims in this case. The California Supreme Court's unanimous decision in *Vazquez* has foreclosed GrubHub's argument that applying the ABC retroactively would contravene due process and fairness. *Vazquez* ruled that *Dynamex* applies

[2] The Court should remand the case to determine GrubHub's liability for overtime and minimum wage damages, to assess what damages are owed to Plaintiff for GrubHub's failure to reimburse expenses in violation of Cal. Lab. Code § 2802, and to assess PAGA penalties.

retroactively to nonfinal cases such as this, explaining that because the ABC test was used simply to clarify the definition of "suffer or permit" in the wage orders, the court "reject[s] the contention that it is unfair to putative employers to apply the ABC standard to work settings that predate the *Dynamex* opinion." *Vazquez*, 478 P.3d at 1215.[3] Moreover, while this case was stayed, the California legislature enacted Assembly Bill 5 ("A.B. 5"), which went into effect on January 1, 2020, in order to codify the *Dynamex* ABC test. A.B. 5, like *Dynamex*, has also been found to be retroactive. *See James*, 2021 WL 254303, at *17 (acknowledging that A.B. 5 contains a statement that it is a declaration of current existing law, rendering it retroactively applicable). Whether under *Dynamex* or under A.B. 5, it is now clear that the ABC test must be applied to Plaintiff's claim in this case retroactively.

B. *Dynamex* Applies to Plaintiff's Expense Reimbursement Claim

Recent developments in the law have also made it crystal clear that the ABC test also must be applied to Plaintiff's claim for reimbursement for the use of his vehicle under Cal. Lab. Code § 2802. In *Dynamex*, the California Supreme Court

[3] *Vazquez* also disposes of GrubHub's argument that it lacked sufficiently fair notice of what could subject it to penalties under the Private Attorneys General Act ("PAGA"), Cal Lab. Code § 2699 *et seq.* The court noted that "it is important to understand that California's wage order have included the suffer or permit to work standard [that forms the basis for the ABC test] as one basis for defining who should be treated an employee for purposes of the wage order for more than a century," and moreover "the ABC test articulated in *Dynamex* was within the scope of what employers reasonably could have foreseen." *Vazquez*, 478 P.3d at 1212, 1214.

declined to address whether the ABC test would apply to § 2802, but that was only because the parties in that case had not briefed it. *See Dynamex*, 4 Cal.5th at 916, n.5. As Plaintiff explained in his Opening Brief at pp. 29-30 (Dkt. 28), following *Dynamex*, the court in *Johnson v. VCG-IS, LLC* held that the ABC test *does* apply to claims for expense reimbursement under Labor Code § 2802, because claims for expense reimbursement under §2802 are "rooted in the wage orders." Case No. 30-2015-00802813-CU-CR-CXC, Ruling on Motion in Limine, at *4-5 (Super. Ct. Cal. July 18, 2018) (ER-0161-71).

Soon after (and while this matter was stayed), the California Court of Appeal in *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131 (Oct. 8, 2019), similarly concluded that the *Dynamex* ABC test applies to claims brought under Labor Code § 2802. In *Gonzales*, the court determined that the that the *Dynamex* ABC test applies to Labor Code claims that are either "rooted in one or more wage orders, or predicated on conduct alleged to have violated a wage order." 40 Cal. App. 5th at 1157, 1160 (noting that "[i]n a wage and hour action where the purposes served by the Labor Code and wage order provisions are coextensive, there is no principled reason to treat the claims differently"). The *Gonzales* court[4]

[4] Importantly, while the California Supreme Court granted review of *Gonzales* pending its consideration of the certified question regarding the retroactivity of *Dynamex* in *Vazquez*, *see Gonzales v. San Gabriel Transit, Inc.*, 456 P.3d 1, 1 (Jan. 16, 2020), the Supreme Court then dismissed review of *Gonzales* following the

determined further that the ABC test applied to plaintiffs' expense reimbursement claim (which included claims for vehicle-related expenses), which was encompassed by the wage orders. Id. at 1157, 1160.[5]

Following the decision in *Gonzales*, the DLSE issued an opinion letter on May 3, 2019, agreeing that *Dynamex* applies to expense reimbursement claims brought under Cal. Lab. Code § 2802 (Exhibit A to Motion for Judicial Notice). In

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issuance of its decision in *Vazquez*. *See Gonzales v. San Gabriel Transit, Inc.*, --- P.3d ---, 2021 WL 1031870, at *1 (Cal. March 17, 2021). As such, *Gonzalez* is binding on this Court. *See Taylor v. Cox Communications California, LLC*, 776 Fed. Appx. 544, 546 (9th Cir. 2019) ("In the absence of any decision on this issue from the California Supreme Court, we are bound by . . . the ruling of the highest state court issued to date") (internal citation omitted).

As explained in Plaintiff's Reply Brief at pp. 10-11 (Dkt. 61), GrubHub relies on *Garcia v. Border Transportation Group, LLC*, 28 Cal. App. 5th 558, 571 n.11 (2018), for the proposition that *Dynamex* does not apply to expense reimbursement claims. GrubHub's reliance on *Garcia* is completely unfounded, as the issue of *Dynamex*'s application to expense reimbursement claims was not even argued or raised in that case. The *Garcia* court's statement was purely *dicta* based on the erroneous assumption that a claim under Cal. Lab. Code § 2802 is a non-wage order claim. The question at issue in *Garcia* was whether the plaintiff's claims for wrongful termination and waiting times penalties would be covered by *Dynamex*, *see Garcia*, 28 Cal. App. 5th at 571-72, and such claims are not at issue here. In contrast, the *Gonzales* court addressed explicitly whether expense reimbursement claims are covered by *Dynamex* and held that they are. *See Gonzales*, 40 Cal. App. 5th at 1157, 1160.

[5] The wage orders require an employer to provide its employees with any "tools or equipment" that are "necessary to the performance of a job" (with certain exceptions not applicable here). *See* Wage Order No. 9 at ¶ 9(B), Cal. Code Regs., tit. 8, § 11090. This requirement mirrors that of Cal. Lab. Code § 2802, which requires that employees be reimbursed for their reasonable and necessary business expenses.

this letter, the DLSE explained that:

> All IWC wage orders contain provisions enforceable through section 2802 (*See, e.g.*, Wage Order No. 1-2001, §§ 8, 9.) Thus, reimbursement claims under section 2802 that enforce specific requirements directly set forth in the wage orders are also governed by the ABC test. (*See Dynamex, supra* 4 Cal.5th at pp. 915-16, 942).

DLSE Letter at p. 3 (Exhibit A to Motion for Judicial Notice). Moreover, the Letter was framed in terms of Wage order No. 1-2001 (applicable to employers in the manufacturing industry), which employs *exactly the same* language as the relevant wage order in this case, Wage Order 9-2001, ¶ 9(B), with respect to the employer's responsibility to provide the "tools and equipment" necessary to perform the job. *See Owino v. CoreCivic, Inc.*, 2019 WL 1367815, at *2 (S.D. Cal. March 26, 2019) ("[C]ourts are to 'give DLSE opinion letters consideration and respect.'") (quoting *Harris v. Super. Ct.*, 53 Cal. 4th 170, 190 (2011)).[6] *Dynamex* thus compels the conclusion that the ABC test be applied here because the record shows (and the

[6] As explained more fully in Plaintiff's Reply Brief at pp. 11-12 (Dkt. 61), Plaintiff's argument that the ABC test governs expense reimbursement claims is further bolstered by *Duffey v. Tender Heart Home Care Agency, LLC*, 31 Cal. App. 5th 232, 249 (2019), which explained that the determination of which misclassification test applies to a given statutory claim must be made in light of the language ***and the purpose*** of the relevant statute. Here, the strong worker-protective purpose behind the expense reimbursement statute counsels in favor of applying the ABC test. *See id.* at 248. *Gonzales* (like the *Johnson* court) also noted the difficulty in applying different tests to different statutory claims. *See Gonzales*, 40 Cal. App. 5th at 1158. ("Moreover, the suggestion that different tests govern statutory wage and hour claims is contrary to *Dynamex*'s stated purpose of providing clarity and consistency in analyzing this thorny issue.").

District Court agreed, *see* ER0007, ER0011), that GrubHub did not reimburse Plaintiff for use of his vehicle,[7] which falls under the category of "tools and equipment" that Wage Order 9-2001(B) requires the employer to provide.[8]

In light of the decisions[9] and the DLSE Opinion Letter that have been issued

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[7] The District Court also found that GrubHub did not reimburse Plaintiff for the use of his cell phone, *see* ER0011.

[8] *See also Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 24 (2007) (recognizing that Wage Order No. 9 would allow employers to require their employees to provide their own vehicle, *so long as the "employer agree[s] to reimburse the employee for all the costs incurred by the employee in the operation of the equipment*.") (emphasis added). Plaintiff's Section 2802 claim is also clearly covered by the ABC test from A.B. 5, which states that the ABC test governs for the purposes of "the provisions of this code [the Labor Code], and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission." Cal. Lab. Code § 2750.3(a)(1).

[9] Plaintiff anticipates that GrubHub may argue that an unpublished decision, *Sepah v. County of Los Angeles*, 2020 WL 1038078, at *4 (Cal. Ct. App. March 2, 2020), contradicts *Gonzales*. However, *Sepah* concerned a whistleblower retaliation claim, which has no relation to any wage order, and the plaintiff in that case "never asserted wage order-based claim and the jury was never asked to decide a wage-order-related issue." *Id.*

The other cases that GrubHub cites in its Answering Brief also falter in the face of *Gonzales*. GrubHub cites an unpublished decision in *Rosset v. Hunter Engineering Co.*, 2018 WL 4659498, at *1-3 (Cal. Ct. App. Sept. 27, 2018), but in that case, the discussion of *Dynamex* noted simply that "the *Dynamex* court discusses and reaffirms *Borello* and *Ayala* but adopts a different standard for the 'specific context' of interpreting California wage orders." *Id.* at *3 n.2. *Rosset* (decided prior to *Gonzales*) is not persuasive, because it simply stated that the plaintiffs' expense reimbursement claims were not wage order claims, while providing no analysis or rationale. Likewise, GrubHub cites *Salgado v. Daily Breeze*, 2018 WL 2714766, at *4, 15 & n.6 (Cal Ct. App. June 6, 2018) (unpublished), but in that case, *Dynamex* was only mentioned in a footnote

since this case was stayed, GrubHub can no longer seriously argue that the ABC test is inapplicable to *any* of Plaintiff's claims.[10]

II. The District Court's Decision Must be Reversed Under the ABC Test

Because it is now clear that the ABC test governs the misclassification cases for the purposes of each of Plaintiff's claims, the Court should now reverse the District Court's holding that Plaintiff was an independent contractor under *Borello*

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explaining that a worker could be considered both an independent contractor for purposes of Employment Development Department regulations and an employee for Labor Code purposes. *Id.* at *15 n.6. The court in *Karl v. Zimmer Biomet Holdings, Inc.*, 2018 WL 5809428, at *3 (N.D. Cal. Nov. 6, 2018), merely stated as a truism (with no analysis) that a claim for business expenses does not fall under a wage order. Lastly, *Alvarez v. XPO Logistics Cartage LLC*, 2018 WL 6271965, at *7-8 (C.D. Cal. Nov. 15, 2018), did not explicitly address the question of whether expense reimbursement claims are rooted in the wage orders but instead that the Truth in Leasing Act regulations preempt Section 2802.

[10] In its Answering Brief (Dkt. 41), GrubHub also argues that Plaintiff cannot prevail on his overtime and minimum wage claims because he failed to prove those claims at trial. GrubHub must concede that these claims are subject to the ABC test, in light of the California Supreme Court's holding in *Vazquez* that *Dynamex* applies retroactively. As Plaintiff explained in his Reply Brief at p. 13 (Dkt. 61), GrubHub's argument puts the cart before the horse. The District Court did not reach the question of whether Plaintiff proved his minimum wage and overtime claims at trial, because it held as a predicate matter that he was an independent contractor. This Court should reverse that decision, because Plaintiff was quite clearly an employee under the ABC test, and then remand the case to the District Court to make findings on his minimum wage and overtime claims from the evidentiary record already before it. Additionally, while the District Court already determined that GrubHub failed to reimburse Plaintiff's vehicle expenses, *see* ER0007, ER0011, it did not assess the damages due to Plaintiff as a result and should now be ordered to make those findings, based on the trial record already presented.

and instead hold that Plaintiff was an employee under the ABC test.

Key to the ABC test analysis in this case is the recent decision in *People v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266, 291-02 (2020), which recognized that "the simplicity of the ABC test ma[kes] it possible to decide at [an] early stage in [] litigation", without the need for extensive discovery or a robust record. *Id.* at 302; *see also Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1125 (9th Cir. 2021) (observing that Prong B is "susceptible to summary judgment . . .").[11] The court went on to affirm the lower court's issuance of a preliminary injunction ordering Uber and Lyft to reclassify their drivers in California as employees pursuant to the ABC test. *See People*, 56 Cal. App. 5th at 317. Here, the Court has the benefit of a full record, given the fact that the District Court's decision came as the result of a trial on the far more complicated *Borello* test. While GrubHub

[11] *See also Carey v. Gatehouse Media Mass. I Inc.*, 92 Mass. App. Ct. 801, 804-10 (2018) (noting that Prong B is particularly amenable to resolution at the summary judgment stage). *Dynamex* expressly adopted the Massachusetts version of the ABC test, and thus Massachusetts court interpretations of the test are instructive. *See Vazquez*, 986 at 1122 ("In particular, *Dynamex* embraced the Massachusetts version of the test."); *see also Shuster v. BAC Home Loans Serv., LP*, 211 Cal. App. 4th 505, 507-08 (2012) (acknowledging that California courts may look to authorities from other jurisdictions for when considering novel issues, such as application of the ABC test). Moreover, in *Dynamex*, the California Supreme Court cited Massachusetts cases in explaining the ABC test, including *Awuah v. Coverall North America, Inc.*, 707 F. Supp. 2d 80, 82 (D. Mass. 2010) (granting summary judgment on Prong B to cleaning workers who claimed they were misclassified) (cited in *Dynamex*, 4 Cal. 5th at 963).

argues that a new trial is necessary if *Dynamex* applies to this case, this argument is groundless. As Plaintiff explained in his Reply Brief at pp. 7-8 (Dkt. 61), the *Dynamex* factors of the ABC test overlap with three of the *Borello* factors. *See also Vazquez*, 478 P.3d at 1214 ("[T]he three elements of the ABC test are prominent factors already listed in *Borello* . . . ."). [12] The critical difference is that while *Borello* considers these factors as part of a balancing test, these factors are each independently dispositive under the ABC test. *See Dynamex*, 4 Cal. 5th at 963. There are no further facts to explore, as GrubHub has already put forth its evidence on each of the ABC test factors in the context of its *Borello* argument – the only thing left for the Court to do is to reverse the District Court's legal conclusion in light of *Dynamex*.

The Court should determine that Plaintiff was GrubHub's employee on the basis of Prong B alone, under which GrubHub must demonstrate that Plaintiff performed work that was outside the usual course of GrubHub's business. *See Dynamex*, 4 Cal.5th at 956-57. The District Court, both at the summary judgment stage and following the bench trial in this matter, held that Plaintiff's work as a delivery driver was part of "the regular business" of GrubHub, a food delivery

[12] Prong B's requirement that GrubHub demonstrate that "the worker performs work that is outside the usual course of [GrubHub's] business," *see Dynamex*, 4 Cal. 5th at 957, is virtually identical to the *Borello* factor that considers whether Plaintiff's work was a part of GrubHub's "regular business." *See Borello*, 48 Cal. 3d at 350.

company. ER0030, ER1797. At summary judgment, the District Court found that "Grubhub drivers are also central to the Grubhub business," and "Grubhub is a food ordering and delivery business." ER1797. Again at trial, the District Court found that GrubHub "is in the business of online restaurant ordering and . . . of also providing food delivery for certain restaurants." ER0030. Plaintiff, as a food delivery driver for GrubHub, falls into GrubHub's usual course of business, and thus Plaintiff was GrubHub's employee. The inquiry can end here, as the Court's holding demonstrates that GrubHub cannot satisfy Prong B.[13]

GrubHub has argued that it is a merely an online ordering platform rather

[13] Indeed, in Massachusetts, state and federal courts have routinely ruled on summary judgment that plaintiffs were misclassified under the ABC test. *See, e.g., Carey*, 92 Mass. App. Ct. at 805-11 (affirming trial court's decision on summary judgment that newspaper delivery drivers were misclassified, based on Prong B of the ABC test); *Granite State Ins. Co. v. Truck Courier, Inc.*, 2014 WL 316670, at *4 (Mass. Super. Ct. Jan. 17, 2014) (finding truck couriers to be employees as a matter of law under Prong B of Massachusetts ABC test); *Martins v. 3PD, Inc.*, 2013 WL 1320454 (D. Mass. Mar. 28, 2013) (holding delivery drivers to be employees of delivery company under Prong B of Massachusetts ABC test); *Awuah et al v. Coverall North America*, 707 F. Supp. 2d 80 (D. Mass. 2010) (granting summary judgment to cleaning "franchisees" on misclassification claims under Prong B of the ABC test); *Oliveira v. Advanced Delivery Sys., Inc.*, 2010 WL 4071360 (Mass. Super. Jul. 16, 2010) (holding delivery drivers to be employees of delivery company under the ABC test); *Chaves v. King Arthur's Lounge*, 2009 WL 3188948, at *1 (Mass Super. July 30, 2009) (granting summary judgment to plaintiff exotic dancers under all three prongs of ABC test and noting that "failing to prove the second prong of the test is sufficient to find that Chaves was an employee under the statute"); *Amero v. Townsend Oil*, 2008 WL 5609064 (Mass. Super. Ct. Dec. 3, 2008) (holding delivery drivers to be employees of delivery company under the ABC test).

than a food delivery company, but this argument is unavailing and was specifically rejected by the District Court (both on summary judgment, *see* ER1797, and at trial, *see* ER0029-30). Indeed, the court in *People* rejected the "gig economy" defendant companies' attempt to escape the ABC test's reach by hiding behind their technology and instead stressed that the ABC test is perfectly amenable to app or internet-based work, finding that there was "considerable evidence that the ride-share drivers…meet this test, despite the changes in the traditional workplace enabled by modern technology." Id. at 294.[14] And while GrubHub also argued that Plaintiff's delivery work was "incidental," Plaintiff reiterates that "a service need not be the sole, principal, or core product that a business offers its customers, or inherently essential to the economic survival of that type of business, in order to be furnished in the usual course of that business." *Carey*, 92 Mass. App. Ct. at 808.[15]

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[14] Recent cases have echoed this point. In *Rogers v. Lyft, Inc.*, the court explained that the ABC "test is obviously met here: Lyft drivers provide services that are squarely within the usual course of the company's business, and Lyft's argument to the contrary is frivolous." *Rogers v. Lyft, Inc.*, 452 F.Supp.3d 904, 911 (N.D. Cal. 2020). The court went on to scold these "gig economy companies", stating that "rather than comply[ing] with a clear legal obligation, companies like Lyft are thumbing their noses at the California Legislature, not to mention the public officials who have primarily responsibility for enforcing A.B. 5." *Id.*

[15] GrubHub's additional arguments also fail, as Plaintiff explained in his Opening Brief at pp. 10-16 (Dkt. 28) and his Reply Brief at pp. 14-16 (Dkt. 61) for a fuller discussion. Although there is no need to even address the other ABC test prongs in light of the fact that the District Court's findings already demonstrate

III. Proposition 22 is Irrelevant to this Case

On December 17, 2020, Cal. Bus. & Prof. Code § 7451went into effect, which codified ballot initiative Proposition 22 that passed last year. Under Proposition 22, certain "app-based" drivers are independent contractors under California law, so long as the company meets various requirements. GrubHub may argue that Proposition 22 counsels against the application of the ABC test. However, because Plaintiff's claims accrued prior to December 16, 2020, Proposition 22 is inapplicable. As the recent decision in *James*, 2021 WL 254303, at *17, stated "[u]nlike A.B. 5, Prop 22 does not contain any statement that it is a declaration of current existing law, or any express retroactivity provision." Moreover, the court noted that "[t]he Supreme Court and the California Supreme Court have long held that statutes [and ballot initiatives] are presumptively prospective absent a clear intent that the statute [or ballot initiative] be applied retroactively." *Id.* (internal citations omitted).[16] Because Proposition 22 thus does

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that GrubHub cannot satisfy Prong B, *see People*, 56 Cal. App.5th at 288 ("there are three steps to the ABC test, these steps may be considered in any order, and the analysis is at an end if the putative employer fails at any step"), Plaintiff also respectfully directs the Court to his Opening Brief at pp. 16-25 (Dkt. 28) and his Reply Brief at pp. 16-18(Dkt. 61) for discussions of Prongs A and C.

[16] Even if Proposition 22 were retroactive, which it is not, it applies only if the company meets various requirements. GrubHub would bear the burden of demonstrating that it meets said requirements. *See* Cal. Bus. & Prof. Code § 7451.

not apply retroactively, it has no impact whatsoever on this case. [17]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff's Opening Brief (Dkt. 28) and Reply Brief (Dkt. 61), this Court should reverse the District Court's decision finding that Plaintiff was an independent contractor rather than GrubHub's employee. The Court should remand the case for a determination on whether GrubHub violated the minimum wage and overtime statutes, a calculation of Plaintiff's damages (including for GrubHub's failure to reimburse expenses), and assessment of appropriate PAGA penalties. The Court should also reverse the District Court's premature order denying class certification.

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[17] GrubHub may also try to argue that Proposition 22 effectively repealed A.B. 5 for app-based drivers under the common law doctrine of abatement. This argument may be easily dismissed. A.B. 5 has neither been expressly repealed by statute, nor has it been repealed by implication. Implied repeals are extremely disfavored, rarely found, and completely unwarranted here. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 569 (1998) ("The law shuns repeals by implication."). To meet its burden to show that Proposition 22 impliedly repealed A.B. 5, GrubHub would have to show that there is "*no possibility* of concurrent operation" and that Proposition 22 and A.B. 5 are "irreconcilable," and even then, "an implied repeal should not be found unless…the later provision gives *undebatable evidence* of an intent to supersede the earlier…" *W. Oil & Gas Ass'n. v. Monterey Bay Unified Air Pollution Control Dist.*, 49 Cal. 3d 408, 419-420 (1989) (emphasis in original). Here, Proposition 22 and A.B. 5 can and do operate concurrently; A.B. 5 mandates an "ABC" test for employee status, and Proposition 22 creates a narrow exception to A.B. 5 that applies only to certain "app-based drivers" and *only if* the company meets a set of stringent conditions.

Dated: April 2, 2021

Respectfully submitted,

RAEF LAWSON, individually and on behalf of other similarly situated individuals, and in his capacity as Private Attorney General Representative,

By his attorneys,

/s/ Shannon Liss-Riordan_____
Shannon Liss-Riordan
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The brief contains 4,658 words, and does not exceed 15 pages, excluding the parties of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a 14-point proportionally spaced typeface using Microsoft Word.

Dated: April 2, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2021, I caused the foregoing document to be filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using CM/ECF system, which will provide notification of this filing to all counsel of record.

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