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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICKY HENRY,

Plaintiff,

v.

CENTRAL FREIGHT LINES, INC.,

Defendant.

No. 2:16-cv-00280-JAM-JDP

**ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION**

Ricky Henry ("Plaintiff") worked for Central Freight Lines, Inc. ("Defendant") as a truck driver from April 2014 to February 2015. Plaintiff alleges Defendant intentionally and illegally misclassified him, and other putative class member-truck drivers, as independent contractors to deny them benefits owed under California Wage Orders and the California Labor Code. The Court previously granted in part and denied in part Defendant's motion for summary judgment and denied Plaintiff's cross-motion for summary judgment. See Order, ECF No. 87.

Plaintiff now requests reconsideration of that Order. See Mot. for Recons. ("Mot."), ECF No. 96. Plaintiff asks the Court to hold that the ABC test, set forth in Dynamex Ops. W. Inc. v. Superior Court, 4 Cal.5th 903 (2018), shall apply to Plaintiff's wage order claims and labor code claims. Id. Defendant opposes

1 the motion. See Opp'n, ECF No. 102. Plaintiff filed a reply.
2 See Reply, ECF No. 104. For the reasons discussed below, the
3 Court DENIES Plaintiff's motion for reconsideration.¹

4
5 I. BACKGROUND²

6 On June 13, 2019, the Court granted in part and denied in
7 part Defendant's motion for summary judgment and denied
8 Plaintiff's cross-motion for summary judgment. See Order, ECF
9 No. 87. The Court found that the ABC test only applies to
10 Plaintiff's claims alleging violations of wage orders. Order at
11 21. Plaintiff's other claims for reimbursement, unlawful
12 deductions, waiting time penalties, wage statement penalties, and
13 violations of the California Private Attorney General Act of 2004
14 ("PAGA") should be analyzed under the S.G. Borello & Sons, Inc.
15 v. Dep't of Indus. Rel., 48 Cal.3d 341 (1989) standard. Id. at
16 22.

17 On November 13, 2019, the Court granted Defendant's motion
18 to stay the action until the California Supreme Court answered
19 the Ninth Circuit Court of Appeal's certified question regarding
20 the retroactivity of the court's decision in Dynamex. See Order,
21 ECF No. 105. The California Supreme Court has since answered the
22 certified question, holding that Dynamex does apply
23 retroactively. See Vazquez v. Jan-Pro Franchising Int'l, Inc.,
24 10 Cal.5th 944, 948 (2021). Accordingly, the Court's stay

25 ¹ This motion was determined to be suitable for decision without
26 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for June 22, 2021.

27 ² The facts of the case are set forth in detail in the Court's
28 previous order. See Order, ECF No. 87. They will not be reduced
into writing again here.

1 expired. See Notice of Expiration of Stay, ECF No. 107.

2 On October 21, 2019, the parties stipulated to withdrawing
3 Plaintiff's motion for class certification without prejudice to
4 refile the motion following the Court's rulings on the motion to
5 stay and the instant motion. See Stip., ECF No. 97. As a
6 result, Plaintiff's request for leave to withdraw without
7 prejudice and refile the motion for class certification is moot.
8 See Mot. at 12.

9 Plaintiff's present motion for reconsideration is based upon
10 an October 8, 2019, California Court of Appeals decision in
11 Gonzales v. San Gabriel Transit, Inc., 40 Cal.App.5th 1131,
12 (2019). Plaintiff argues that, pursuant to Gonzales, the ABC
13 test should apply to all his claims. See Mot. at 1. Plaintiff
14 also contends that the Court should reconsider its decision on
15 the motion for summary judgment because of California Assembly
16 Bill 5 ("AB5"), which went into effect on January 1, 2020. Id.
17 at 1-2.

18 19 II. OPINION

20 A. Judicial Notice

21 Plaintiff requests judicial notice of the full text of AB5,
22 signed by Governor Newsom on September 18, 2019. See Pl.'s Req.
23 for Judicial Notice ("RJN"), ECF No. 96-2. Defendant does not
24 oppose this request. Defendant requests judicial notice of a
25 letter from the California Employment Law Council, dated October
26 22, 2019, and filed with the California Court of Appeals, Second
27 Appellate District, requesting depublication of Gonzales. See
28 Def.'s RJN, ECF No. 102-1. Plaintiff objects to this request.

1 See Objs. to Def.'s RJN, ECF No. 103. The letter, filed with
2 the court of appeals, is the proper subject of judicial notice.
3 As is AB5. The Court need not address Plaintiff's evidentiary
4 objections to the substance of the letter because only its
5 existence is judicially noticed. The Court does not take
6 judicial notice of any disputed or irrelevant facts within
7 either document.

8 Accordingly, Plaintiff and Defendant's requests for
9 judicial notice are GRANTED.

10 B. Legal Standard

11 A court may alter, amend, or reconsider its previous
12 judgment pursuant to Federal Rule of Civil Procedure 59(e). See
13 Fed. R. Civ. P. 59(e); Sch. Dist. No. 1J, Multnomah Cty., Or. v.
14 ACandS, Inc., et al., 5 F.3d 1255, 1263 (9th Cir. 1993).

15 Reconsideration is appropriate if: (1) there is an intervening
16 change in controlling law; (2) the court is presented with newly
17 discovered evidence; or (3) the court committed clear error and
18 its decision was manifestly unjust. 389 Orange St. Partners v.
19 Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

20 C. Analysis

21 Plaintiff argues the Court should reconsider its prior
22 decision based on an intervening change in controlling law. See
23 Mot. at 3, 5-6. Plaintiff contends that Gonzales requires the
24 ABC test "be applied to assess [wage order] violations and []
25 [l]abor [c]ode violations that enforce [w]age [o]rder
26 requirements." Mot. at 5-6. Specifically, Plaintiff requests
27 that the ABC test be applied to his claims alleging violations
28 of the following labor code provisions: (1) §§ 1194, 1197, and

1 1197.1 for failing to pay minimum wage; (2) § 226 for failing to
2 list hours worked on wage statements; (3) § 203 for failing to
3 provide wages when due to terminated employees; and (4) § 2802
4 for failing to reimburse employees for required fuel expenses.
5 See Mot. at 9. Defendant counters that Gonzales is not
6 controlling law; the relevant language in Gonzales is dicta;
7 and, moreover, California courts of appeal are split on the
8 issue. See Opp'n at 5-8.

9 In Gonzales, the plaintiff was a driver for a transit
10 company. 40 Cal.App.5th at 1139. The plaintiff sued the
11 transit company for allegedly misclassifying him as an
12 independent contractor and violating various provisions of the
13 labor code and wage orders as a result. Id. In considering
14 whether the trial court improperly denied class certification,
15 the Second District Court of Appeals found that the ABC test
16 applies to labor code claims "which are either rooted in one or
17 more wage orders, or predicated on conduct alleged to have
18 violated a wage order." Id. at 1157. Any other labor code
19 claims should be analyzed using the Borello test. Id. Thus, an
20 argument could be made that the Second District somewhat
21 expanded the applicability of the ABC test beyond strict wage
22 order violations.

23 However, in Garcia v. Border Transp. Group, LLC, a lawsuit
24 involving a taxicab driver, the Fourth District Court of Appeals
25 found that the ABC test only applied to the plaintiff's wage
26 order claims and the Borello test applied to the plaintiff's
27 other claims. 28 Cal.App.5th 558, 570-71 (2018). In so
28 finding, the Fourth District explained that "Dynamex did not

1 purport to replace the Borello standard in every instance where
2 a worker must be classified as either and independent contractor
3 or an employee for purposes of enforcing California's labor
4 protections." Id. at 570 (citing Cal. Trucking Assn. v. Su, 903
5 F.3d 953, 959 n. 4 (9th Cir. 2018)) (internal quotation marks
6 omitted). "To the contrary, the [California] Supreme Court
7 recognized that different standards could apply to different
8 statutory claims" Id.

9 Defendant is, therefore, correct that California courts of
10 appeals are split on the applicability of the ABC test beyond
11 strict wage order claims. Defendant is also correct that
12 Gonzales does not control this Court. See Opp'n at 5.
13 "Decisions of the six [California] district appellate courts are
14 persuasive but do not bind each other or [the Ninth Circuit]."
15 Muniz v. United Parcel Service, Inc., 738 F.3d 214 (9th Cir.
16 2013). As a result, Plaintiff cannot argue reconsideration of
17 the Court's decision is required based upon an intervening
18 change in controlling law. See 389 Orange St. Partners, 179
19 F.3d at 665. The Court "declines to expand the application of
20 the Dynamex ABC test beyond the 'one specific context' endorsed
21 by the California Supreme Court." Order at 17 (quoting Dynamex,
22 4 Cal.5th at 913-14); see also Haitayan v. 7-Eleven, Inc., 2021
23 WL 757024, at *5 (C.D. Cal. 2021) (finding that, in Vazquez, the
24 court also "emphasized that Dynamex applies only to wage
25 orders.") (emphasis in original).

26 Plaintiff's claims for reimbursement, unlawful deductions,
27 waiting time penalties, wage statement penalties, and violations
28 of PAGA are not grounded in wage orders. See Haitayan, 2021 WL

1 757024, at *5 (finding the Borello test applies to plaintiff's
2 § 2802 claim); Thurman v. Bayshore Transit Mgmt., Inc., 203
3 Cal.App.4th 1112, 1132 (2012) (holding that "PAGA does not
4 create any private right of action to directly enforce a wage
5 order" because "a wage order is not a statute."); First Amended
6 Complaint ("FAC"), ECF No. 1-6 (none of these claims in the FAC
7 allege the violation of a wage order). They are instead based
8 on the labor code and must, therefore, be analyzed using the
9 Borello test. This Court's previous determination stands unless
10 and until a binding court says otherwise.

11 Plaintiff also argues that the Court should reconsider its
12 order based upon AB5. This argument is without merit. "AB5 is
13 not retroactive and, therefore, applies only to work performed
14 after January 1, 2020, when the statute went into effect."
15 Haitayan, 2021 WL 757024, at *5 (citing Evangelatos v. Superior
16 Court, 44 Cal.3d 1188, 1209 (1988) ("[I]n the absence of an
17 express retroactivity provision, a statute will not be applied
18 retroactively unless it is very clear from extrinsic sources
19 that the Legislature of the voters must have intended a
20 retroactive application.")). The work at issue here was
21 performed well before January 1, 2020. Thus, AB5 is of no
22 consequence.

23 In sum, the Court declines to reconsider its decision to
24 apply the ABC test to Plaintiff's wage order claims and the
25 Borello test to all others. See id. ("Because Dynamex applies
26 retroactively, but only to wage orders, and AB5 is not
27 retroactive, the ABC test applies to Plaintiffs' Wage Order
28 claim and the Borello test applies to Plaintiffs' Labor Code

1 claim.”).

2 D. Sanctions

3 Plaintiff exceeded the Court’s 5-page limit on reply
4 memoranda. See Reply; see also Order re Filing Requirements
5 (Order), ECF No. 2-2. Violations of the Court’s standing order
6 require the offending counsel (not the client) to pay \$50.00 per
7 page over the page limit to the Clerk of the Court. Order at 1.
8 Moreover, the Court will not consider arguments made past the
9 page limit. Id. In total, Plaintiff’s reply memorandum
10 exceeded the Court’s page limit by 5 pages. Plaintiff’s counsel
11 must therefore send a check payable to the Clerk for the Eastern
12 District of California for \$250.00 no later than seven days from
13 the date of this order.

14
15 III. ORDER

16 For the reasons set forth above, the Court DENIES
17 Plaintiff’s motion for reconsideration of the Court’s order
18 granting in part and denying in part Defendant’s motion for
19 summary judgment and denying Plaintiff’s cross-motion for summary
20 judgment at ECF No. 87.

21 IT IS SO ORDERED.

22 Dated: July 27, 2021

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24 
25 JOHN A. MENDEZ,
26 UNITED STATES DISTRICT JUDGE
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