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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICKEY HENRY, an individual,
on behalf of himself, and on
behalf of all persons
similarly situated,

Plaintiff,

v.

CENTRAL FREIGHT LINES, INC.,
a Corporation, and DOES 1
through 50, Inclusive,

Defendants.

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

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

Rickey Henry ("Henry" or "Plaintiff") worked for Central Freight Lines, Inc. ("CFL" or "Defendant") as a truck driver from April 2014 to February 2015. Henry alleges CFL intentionally and illegally misclassified him, and other putative class member-truck drivers, as independent contractors to deny them statutory benefits owed under the California Labor Code. CFL contends that Henry, and the putative class members, were properly classified as independent contractors and therefore not entitled to certain protections and benefits under the California Labor Code.

1 CFL moves for summary judgment on all of Henry's claims.
2 Mot., ECF No. 72-1. Henry opposes and cross-moves for summary
3 judgment. Henry Opp'n/Cross-Mot., ECF No. 73. CFL opposes
4 Henry's cross-motion. CFL Opp'n, ECF No. 76.

5 For the reasons set forth below, the Court GRANTS IN PART
6 and DENIES IN PART Defendant's motion and DENIES Plaintiff's
7 cross-motion.¹

8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 Defendant Central Freight Lines, Inc. is a federally
10 registered and permitted motor carrier headquartered in Texas and
11 incorporated under the laws of Texas. Henry Response to CFL
12 Facts ("CFL UF"), ECF No. 73-3, ¶ 1 (all citations to CFL UF
13 refer to Section I of the document). CFL contracts services from
14 long-haul truck drivers and trucking service companies, generally
15 to move freight from one CFL terminal to another. Id. ¶¶ 2-3.

16 In May 2014, Plaintiff Rickey Henry and CFL entered into an
17 independent contractor agreement (the "ICA"), under which Henry
18 agreed to provide services to CFL as an owner-operator truck
19 driver. CFL UF ¶ 4; ICA, ECF No. 72-2 at Exhibit 2. Henry
20 hauled CFL's customers' freight between CFL terminals, under
21 CFL's DOT operating authority. CFL Response to Henry Facts
22 ("Henry UF"), ECF No. 76-12, ¶¶ 4, 36. The ICA, which was for an
23 initial term of one year, would automatically renew year-to-year
24 but could be terminated sooner by either party. CFL UF ¶ 15;
25 Henry UF ¶ 105. Henry provided services to CFL under the ICA

26
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for March 19, 2019.

1 until February 2015, when CFL elected to terminate the agreement.
2 CFL ¶ 8. Henry was a California resident during his time with
3 CFL, though Henry did not drive exclusively in California. Henry
4 UF ¶¶ 126, 129.

5 Henry received weekly "settlement statements" from CFL that
6 calculated his pay. Henry UF ¶ 132. Under the ICA, the parties
7 set forth which costs and expenses CFL would initially cover and
8 then deduct from Henry's weekly settlements ("charge-backs").
9 CFL UF ¶ 11; Henry UF ¶¶ 130, 132. Henry was also required to
10 furnish his own truck and to carry insurance to drive for CFL.
11 Henry UF ¶¶ 27-31, 37, 130. Henry leased a truck through Wasatch
12 Leasing, and CFL deducted the lease payments directly from
13 Henry's settlement statements. Henry UF ¶ 41. CFL reported the
14 compensation it paid Henry as payments to a contractor and CFL
15 issued Henry a Form 1099. CFL UF ¶ 40.

16 CFL did not prescribe or guarantee Henry any specific number
17 of shipments or revenue, or prescribe Henry any minimum amount of
18 hours or jobs. CFL UF ¶ 17. When he was not providing services,
19 he kept his truck at a private lot and not at the CFL terminal.
20 CFL UF ¶ 22. Henry was not barred from performing work for other
21 motor carriers, but he could not use the same truck he leased for
22 his CFL jobs for that other work. CFL UF ¶ 23; Henry UF ¶ 125.

23 On October 20, 2015, Henry filed the Complaint against CFL
24 in Sacramento County Superior Court (Case No. 34-2015-00185756).
25 Compl., ECF No. 1-5. On December 10, 2015, Henry filed a First
26 Amended Complaint. FAC, ECF No. 1-6. CFL removed the case to
27 this Court on February 11, 2016. ECF No. 1. Henry moved to remand
28 the case back to Sacramento County Superior Court and that motion

1 was granted on October 6, 2016. ECF No. 34. CFL appealed the
2 Court's Order and the Ninth Circuit reversed and remanded the
3 case back to this Court in July 2017. ECF Nos. 38, 40. This Court
4 subsequently denied CFL's motion to transfer venue to the Western
5 District of Texas. ECF No. 45

6 In the FAC, Henry alleges causes of action for (1) Unfair
7 Competition in violation of Cal. Bus. & Prof. Code §§ 17200 et
8 seq.; (2) Failure to Pay Minimum Wages in Violation of Cal. Lab.
9 Code §§ 1194, 1197, and 1197.1; (3) Failure to Provide Accurate
10 Itemized Statements in Violation of Cal. Lab. Code § 226; (4)
11 Failure to Provide Wages When Due in Violation of Cal. Lab. Code
12 §§ 201, 202, and 203; (5) Failure to Reimburse Employees for
13 Required Expenses in Violation of Cal. Lab. Code § 2802; (6)
14 Illegal Deductions from Wages in Violation of Cal. Lab. Code §
15 221; and (7) Violation of the Private Attorneys General Act, Cal.
16 Lab. Code §§ 2698, et seq. See FAC. Henry brings this putative
17 class action on behalf of a class consisting of all individuals
18 who worked for CFL in California as truck drivers and were
19 classified as independent contractors at any time beginning: (a)
20 October 20, 2011, with respect to the first cause of action; (b)
21 October 20, 2012, with respect to the second, third, fourth,
22 fifth, and sixth causes of action; and (c) October 20, 2014, with
23 respect to the seventh cause of action. Id. ¶¶ 23, 33, 97.

24 II. OPINION

25 A. Judicial Notice

26 Henry ask this Court to take judicial notice of: (1) a March
27 27, 2018, Order Denying Summary Judgment in Raul Villareal v.
28 Central Freight Lines, Inc., Los Angeles County Superior Court

1 Case No. NS032922; and (2) a July 18, 2018, Minute Order in
2 Johnson v. VCG-IS, LLC, Orange County Superior Court Case No. 30-
3 2015-00802813-CU-CR-CXC. RJN, ECF No. 78-3. Since judicial
4 notice of the existence of court records is "routinely accepted,"
5 the requests for judicial notice are granted as to the existence
6 of the records but not as to the truth of their contents. Mendez
7 v. Optio Sols., LLC, 219 F. Supp. 3d 1012, 1014 (S.D. Cal. 2016).

8 Additionally, CFL objects to certain evidence submitted by
9 Henry in opposition to CFL's motion and in support of his cross-
10 motion. ECF No. 76-11. This Court has reviewed these
11 evidentiary objections, but declines to rule on them as courts
12 self-police evidentiary issues on motions for summary judgment
13 and a formal ruling is unnecessary to the determination of these
14 motions. See Burch v. Regents of the University of California,
15 433 F.Supp.2d 1110, 1118-1122 (E.D. Cal. 2006).

16 B. Collateral Estoppel Issues

17 1. Collateral Estoppel Against CFL

18 As in this case, in Raul Villareal v. Central Freight Lines,
19 Inc., Los Angeles County Superior Court Case No. NS032922, CFL
20 moved for summary judgment arguing that plaintiff Raul Villareal
21 was an independent contractor and not subject to the California
22 Labor Code, that the Truth-in-Leasing regulations preempted
23 certain of Villareal's causes of action, and that the application
24 of California's wage and hour laws violated the dormant Commerce
25 Clause. ECF No. 73-2, Exhibit 16, at 379-393. The court denied
26 CFL's motion. *Id.* Henry argues that CFL is now precluded from
27 arguing these same issues against Henry. Henry Reply, ECF No.
28 78, at 13-16. This Court disagrees.

1 Offensive non-mutual collateral estoppel, which Henry seeks
2 to apply here, "is appropriate only if (1) there was a full and
3 fair opportunity to litigate the identical issue in the prior
4 action; (2) the issue was actually litigated in the prior action;
5 (3) the issue was decided in a final judgment; and (4) the party
6 against whom issue preclusion is asserted was a party or in
7 privity with a party to the prior action." Syverson v. Int'l
8 Bus. Machines Corp., 472 F.3d 1072, 1078 (9th Cir. 2007)
9 (internal citations omitted). A denial of a motion for summary
10 judgment is generally not a final judgment. United States v.
11 Caballero, No. 2:11-MJ-00035-EFB-1, 2017 WL 5564900, at *4 (E.D.
12 Cal. Nov. 20, 2017) (citing Jones-Hamilton Co. v. Beazer
13 Materials & Servs., Inc., 973 F.2d 688, 693-94 (9th Cir. 1992)).

14 Thus, offensive non-mutual collateral estoppel does not
15 apply here.

16 2. One-Way Intervention Rule and the Propriety of
17 Henry's Cross-Motion

18 The Ninth Circuit has held that Federal Rule of Civil
19 Procedure 23(c)(2) bars "the intervention of a plaintiff in a
20 class action after an adjudication favoring the class ha[s] taken
21 place. Such intervention is termed 'one way' because the
22 plaintiff would not otherwise be bound by an adjudication in
23 favor of the defendant." Schwarzschild v. Tse, 69 F.3d 293, 295
24 (9th Cir. 1995). The rule exists in part to protect defendants
25 from an imbalanced system in which members of a not-yet-certified
26 class wait for a court's substantive ruling and either opt in to
27 a favorable ruling or avoid being bound by an unfavorable one.
28 See Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 2:13-cv-

1 05693-PSG-GJS, 2015 WL 4776932, at *4 (C.D. Cal. May 27, 2015).

2 CFL argues that, under the same rationale which bars one-way
3 intervention, this Court should not rule on Henry's cross-motion
4 for summary judgment because Henry has not yet moved for class
5 certification. CFL Reply/Opp'n, ECF No. 76, at 1-2 (citing
6 Schwarzchild). This Court agrees. CFL here faces the precise
7 risk that prompted the Ninth Circuit to find one-way intervention
8 impermissible: Henry's summary judgment motion if successful
9 could bind CFL as to the putative class and if unsuccessful would
10 not prevent other putative class members from filing their own
11 suits in the hopes of a more favorable ruling. See Villa v. San
12 Francisco Forty-Niners, Ltd., 104 F. Supp. 3d 1017, 1020-21
13 (N.D. Cal. 2015). Consequently, ruling on Henry's cross-motion
14 would also waste valuable judicial resources.

15 Furthermore, this Court is not persuaded that CFL has waived
16 its right to prevent this tactical maneuver by signing a
17 stipulation consenting to the timing of Henry's "opposition, and
18 any related cross-motion pursuant to L.R. 230(e)." ECF No. 70.
19 The Local Rules do require the filing of cross-motions "related
20 to the general subject matter of the original motion" but the
21 rule against one-way intervention provides an exception in this
22 case. Nevertheless, Henry can properly cross-move for summary
23 judgment on his PAGA claim because that claim need not be
24 certified under Rule 23. Magadia v. Wal-Mart Assocs., Inc., 319
25 F. Supp. 3d 1180, 1186-87 (N.D. Cal. 2018) (collecting cases).

26 Additionally, the rule against one-way intervention does not
27 prevent this Court from ruling on CFL's motion for summary
28 judgment. Wright v. Schock, 742 F.2d 541, 544 (9th Cir. 1984)

1 ("Where the defendant assumes the risk that summary judgment in
2 his favor will have only stare decisis effect on [the named
3 plaintiff], it is within the discretion of the district court to
4 rule on the summary judgment motion first.").

5 Thus, under the one-way intervention rule, this Court denies
6 Henry's cross-motion except as to his PAGA claim. This denial is
7 without prejudice, and, should a class be certified, the putative
8 class will be permitted to move for summary judgment on any
9 remaining claims after class certification.

10 C. Preemption of California Meal and Rest Break Rules by
11 FMCSA Order

12 On December 28, 2018, the Federal Motor Carrier Safety
13 Administration ("FMCSA") published an Order concluding that
14 California's meal and rest break rules, codified in California
15 Labor Code sections 226.7 and 512 and sections 11 and 12 of IWC
16 Order 9-2001, are preempted, under 49 U.S.C. 31141(c), as applied
17 to property-carrying commercial motor vehicle (CMV) drivers
18 covered by the FMCSA's hours of service regulations. See
19 California's Meal and Rest Break Rules for Commercial Motor
20 Vehicle Drivers; Petition for Determination of Preemption
21 ("FMCSA Preemption Order"), Docket No. FMCSA-2018-0304, 83 Fed.
22 Reg. 67470 (Dec. 28, 2018).

23 A petition for judicial review of an FMCSA preemption
24 determination may only be filed in a circuit court. See 49
25 U.S.C. § 31141(f). Therefore, this Court is without authority to
26 determine the validity of the FMCSA Preemption Order. Thus,
27 unless and until the Ninth Circuit determines otherwise, this
28 Court will follow the FMCSA Preemption Order and will not enforce

1 the preempted provisions. See 49 U.S.C. § 31141(a) (“A State may
2 not enforce a State law or regulation on commercial motor vehicle
3 safety that the Secretary of Transportation decides under this
4 section may not be enforced.”); see also, Ayala v. U.S Xpress
5 Enterprises, Inc., No. 5:16-cv-00137-GW-KK, 2019 WL 1986760, at
6 *3 (C.D. Cal. May 2, 2019); Supplemental Authority, ECF No. 85.
7 ///

8 Accordingly, this Court grants summary judgment to CFL on
9 Henry’s claims alleging violations of California’s meal and rest
10 break rules under California Labor Code sections 226.7 and 512.

11 Henry may, however, move for reconsideration of this order
12 should the Ninth Circuit invalidate the FMCSA Preemption Order.
13 Four petitions for review challenging the FMCSA Preemption Order
14 are currently pending before the Ninth Circuit. Petition Nos.
15 18-73488, 19-70323, 19-70329, and 19-70413.

16 D. Preemption of Application of California’s Wage and
17 Hour Laws by Dormant Commerce Clause

18 The Constitution grants Congress the power to “regulate
19 Commerce ... among the several States.” U.S. Const. art. I, § 8,
20 cl. 3. “Although the Commerce Clause is by its text an
21 affirmative grant of power to Congress to regulate interstate and
22 foreign commerce, the Clause has long been recognized as a self-
23 executing limitation on the power of the States to enact laws
24 imposing substantial burdens on such commerce.” S.-Cent. Timber
25 Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984). This negative
26 implication of the Commerce Clause has come to be called the
27 “dormant Commerce Clause.” Dep’t of Revenue of Ky. v. Davis, 553
28 U.S. 328, 337 (2008). CFL argues California’s wage and hour

1 laws, as applied to CFL, violate the dormant Commerce Clause
2 doctrine and thus Henry's claims thereunder fail. Mot. at 20-25.

3 When conducting a dormant Commerce Clause analysis, the
4 court first asks "whether a challenged law discriminates against
5 interstate commerce. A discriminatory law is virtually *per se*
6 invalid, and will survive only if it advances a legitimate local
7 purpose that cannot be adequately served by reasonable
8 nondiscriminatory alternatives." Davis, 553 U.S. at 338-39
9 (internal quotes and citations omitted). Absent such prohibited
10 discrimination, "[w]here a statute regulates even-handedly to
11 effectuate a legitimate local public interest, and its effects on
12 interstate commerce are only incidental, it will be upheld unless
13 the burden imposed on such commerce is clearly excessive in
14 relation to the putative local benefits." Pike v. Bruce Church,
15 Inc., 397 U.S. 137, 142 (1970). "State laws frequently survive
16 this Pike scrutiny..." Davis, 553 U.S. at 339.

17 There is no allegation here that California's wage and hour
18 laws facially discriminate against interstate commerce. See
19 Sullivan v. Oracle Corp., 662 F.3d 1265, 1271 (9th Cir. 2011)
20 ("California applies its Labor Code equally to work performed in
21 California, whether that work is performed by California
22 residents or by out-of-state residents. There is no plausible
23 Dormant Commerce Clause argument when California has chosen to
24 treat out-of-state residents equally with its own.").

25 Rather, the only argument is that the laws, as applied to
26 CFL's interstate trucking operations, impose a burden on
27 interstate commerce that is impermissible under Pike. Mot. at
28 20-25. CFL contends the administrative and financial burdens are

1 “unfathomable” because it would have to “carefully track the time
2 each driver spent in each state,” “sort out” and “reconcile” each
3 state’s wage and hour laws, and put forward this “monumental
4 effort[]” without an in-house legal department. *Id.* This Court
5 does not find these arguments persuasive. As discussed *supra*,
6 CFL’s motion for summary judgment, brought before class
7 certification, is being considered only as to Henry’s claims.
8 The Court is not prepared, on the record before it, to find the
9 application of California’s wage and hour laws to CFL for the
10 time worked by Henry in California imposes a “clearly excessive”
11 burden on interstate commerce relative to the legitimate local
12 public interest California has in regulating employment matters.
13 See Yoder v. W. Express, Inc., 181 F. Supp. 3d 704, 722 (C.D.
14 Cal. 2015); Henry UF ¶¶ 82, 95-96.

15 Thus, this Court denies CFL’s motion for summary judgment on
16 the grounds that the application of California’s wage and hour
17 laws to CFL violate the dormant Commerce Clause doctrine.

18 E. Preemption by TIL Regulations

19 CFL argues federal Truth-in-Leasing (“TIL”) Regulations bar
20 Henry’s unlawful deduction, waiting time, and reimbursement
21 claims under the doctrine of conflict preemption. *Mot.* at 16-19.
22 CFL contends that the TIL regulations, specifically 49 C.F.R. §
23 376.12, explicitly permit the particular charge-back arrangement
24 entered into by the parties, and that Henry now seeks to
25 essentially rewrite the terms of the ICA. *Id.*

26 While CFL did not raise this exact defense in its Answer,
27 its Affirmative Defense Thirty-Eight was sufficient to put Henry
28 on notice of this defense. *Answer*, ECF No. 46, ¶ 38

1 ("Plaintiffs' claims are preempted by federal and state law,
2 including, but not limited to, the Federal Aviation
3 Administration Authorization Act and the Federal Motor Carrier
4 Safety Act."). Moreover, "[i]n the absence of a showing of
5 prejudice ... an affirmative defense may be raised for the first
6 time at summary judgment." Camarillo v. McCarthy, 998 F.2d 638,
7 639 (9th Cir. 1993). Henry has not demonstrated prejudice.

8 "Conflict preemption exists when either: (i) a state law
9 indirectly conflicts with a federal law because it interferes
10 with the objectives of the federal law or is an obstacle to the
11 accomplishment of the federal purpose ('indirect preemption' or
12 'obstacle preemption'); or (ii) a state law directly conflicts
13 with a federal law because it is impossible to comply with both
14 ('direct preemption' or 'impossibility preemption')." Valadez v.
15 CSX Intermodal Terminals, Inc., No. 3:15-cv-05433-EDL, 2017 WL
16 1416883, at *7 (N.D. Cal. Apr. 10, 2017) (citing Sprietsma v.
17 Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 64-65
18 (2002)).

19 Conflict pre-emption does not apply here. It is not
20 impossible to comply with both California labor law and the TIL
21 regulations. The TIL regulations only require that the
22 deductions and allocation of expenses be specified and disclosed
23 in the parties' agreement, not that they be allocated in a
24 certain manner. Deductions and allocations of expenses can both
25 comply with the California Labor Code and be specified in the
26 agreement as the TIL regulations require. See Goyal v. CSX
27 Intermodal Terminals, Inc., No. 3:17-cv-06081-EMC, 2018 WL
28 4649829, at *3 (N.D. Cal. Sept. 25, 2018). Nor is the California

1 Labor Code an obstacle to the accomplishment of the purpose of
2 the TIL regulations at issue. “[T]he primary purpose of the TIL
3 regulations is to protect drivers by ensuring full disclosure in
4 leases,” and compliance with the California Labor Code does not
5 interfere with that objective. Valadez, 2017 WL 1416883, at *8.

6 This Court therefore denies CFL’s motion for summary
7 judgment on the grounds that the TIL regulations bar Henry’s
8 unlawful deduction, waiting time, and reimbursement claims
9 through conflict preemption.

10 F. Costs and Expenses Claim for Leasing the Truck

11 CFL argues, as a matter of law, Henry cannot recover money
12 he paid to own or lease the vehicle used in service of his
13 contract with CFL. Mot. at 19-20.

14 The California Division of Labor Standards Enforcement
15 (“DLSE”) has stated that although the costs of *operating* a motor
16 vehicle in the course of employment may be covered by California
17 Labor Code section 2802, the costs of *furnishing* the vehicle
18 itself are not. See DLSE Interpretive Bulletin No. 84-7 (Jan. 8,
19 1985) (“Bulletin 84-7”). Relying on Bulletin 84-7, in Estrada v.
20 FedEx Ground Package System, Inc., the California Court of Appeal
21 affirmed that, under California law, an employer is not required
22 to reimburse employee-drivers for the costs of purchasing or
23 leasing their vehicles. 154 Cal. App. 4th 1, 21-25 (Cal. Ct.
24 App. 2007).

25 Nevertheless, while Estrada provides strong support for
26 CFL’s argument, prior to a determination that Henry is an
27 employee and therefore entitled to bring claims under the
28 California Labor Code, this Court is not in a position to rule on

1 whether the lease payments in this case are or are not subject to
2 reimbursement. Smith v. Cardinal Logistics Mgmt. Corp.,
3 No. 3:07-cv-02104-SC, 2009 WL 2588879, at *5 (N.D. Cal. Aug. 19,
4 2009). As discussed *infra*, this Court cannot make a
5 determination of Henry's employment classification at this stage.

6 Thus, this Court denies CFL's motion for summary judgment as
7 to Henry's claims for a reimbursement of lease payments.

8 G. Dynamex ABC Test

9 In 2018 the California Supreme Court clarified that the ABC
10 test is the applicable standard to determine whether a worker is
11 an employee or an independent contractor for purposes of applying
12 California wage orders. Dynamex Operations W. v. Superior Court,
13 4 Cal. 5th 903 (Cal. 2018), reh'g denied (June 20, 2018).

14 Primarily, CFL argues this Court should determine Henry's
15 employment classification under the long-used standard described
16 in S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 48
17 Cal. 3d 341 (Cal. 1989) ("Borello"), as opposed to the newly-
18 announced Dynamex ABC test. Mot. at 6-16. In turn, CFL contends
19 the ABC test should not be applied retroactively to Henry's
20 claims. CFL further argues that even if Henry were considered an
21 employee under the ABC test, such a determination only applies to
22 claims brought under California wage orders.

23 1. Retroactivity of the ABC Test

24 The Ninth Circuit recently held that Dynamex applies
25 retroactively. Vazquez v. Jan-Pro Franchising Int'l, Inc., 923
26 F.3d 575, 586-90 (9th Cir. 2019). In Vazquez, the Ninth Circuit
27 addressed the retroactive application of the ABC test under
28 California law and with respect to due process concerns of

1 fairness and reliance interests, the same arguments CFL raises
2 here. Id.; Mot. at 6-9. This Court follows the reasoning and
3 holding of Vazquez and thus applies the ABC test discussed in
4 Dynamex to Henry's claims brought under California wage orders.

5 2. Preemption of the ABC Test by FAAAA

6 The Federal Aviation Administration Authorization Act
7 ("FAAAA") provides that states "may not enact or enforce a law,
8 regulation, or other provision having the force and effect of law
9 related to a price, route, or service of any motor carrier."
10 49 U.S.C. § 14501(c)(1). While Congress intended this "related
11 to" preemption to be broad, "the FAAAA does not preempt state
12 laws that affect a carrier's prices, routes, or services in only
13 a tenuous, remote, or peripheral manner with no significant
14 impact on Congress's deregulatory objectives." California
15 Trucking Ass'n v. Su, 903 F.3d 953, 960 (9th Cir. 2018), cert.
16 denied, 139 S. Ct. 1331 (2019) (internal citations and quotes
17 omitted). The FAAAA will not preempt a "generally applicable
18 background regulation in an area of traditional state power that
19 has no significant impact on a carrier's prices, routes, or
20 services." Su, 903 F.3d at 957, 961.

21 CFL contends that the FAAAA fully preempts the Dynamex ABC
22 test, or, at a minimum, preempts Part B of the test. CFL
23 Reply/Opp'n at 4-5, 10-13. While the Ninth Circuit has yet to
24 rule on the issue, it has stated, in dicta, "the ABC test may
25 effectively compel a motor carrier to use employees for certain
26 services because, under the ABC test, a worker providing a
27 service within an employer's usual course of business will never
28 be considered an independent contractor." Su, 903 F.3d at 964

1 (holding, on the other hand, that the Borello standard is not
2 preempted by the FAAAA because the multi-factored standard does
3 not compel the use of employees or independent contractors).
4 Moreover, lower courts in this circuit are divided on the issue.
5 Alvarez v. XPO Logistics Cartage LLC, No. 2:18-cv-03736-SJO-E,
6 2018 WL 6271965, at *5 (C.D. Cal. Nov. 15, 2018) (finding the
7 FAAAA fully preempts the Dynamex ABC test); Valadez, 2019 WL
8 1975460, at *8 (finding the FAAAA preempts only Part B of the
9 Dynamex ABC test); W. States Trucking Ass'n v. Schoorl, No. 2:18-
10 cv-01989-MCE-KJN, 2019 WL 1426304, at *10 (E.D. Cal. Mar. 29,
11 2019) (finding the FAAAA does not preempt the Dynamex ABC test).

12 This Court finds that the FAAAA does not preempt the
13 application of the Dynamex ABC test to claims arising under
14 California wage orders. The Dynamex ABC test is a general
15 classification test that does not apply to motor carriers
16 specifically and does not, by its terms, compel a carrier to use
17 an employee or an independent contractor. The test does "not set
18 prices, mandate or prohibit certain routes, or tell motor
19 carriers what services they may or may not provide, either
20 directly or indirectly." Dilts v. Penske Logistics, LLC, 769
21 F.3d 637, 647 (9th Cir. 2014). Nor does it " 'bind' motor
22 carriers to specific prices, routes, or services." Id. The
23 Dynamex ABC test merely requires employers to classify employees
24 appropriately and comply with generally applicable wage orders.
25 W. States Trucking Ass'n, 2019 WL 1426304, at *10. CFL has
26 failed to demonstrate how the Dynamex ABC test significantly
27 affects its prices, routes, or services to warrant preemption.

28 Thus, this Court finds the Dynamex ABC test is not preempted

1 by the FAAAA.

2 3. Scope of Determination Under the ABC Test

3 The California Supreme Court explicitly limited its adoption
4 of the ABC test to “one specific context” – determining “whether
5 workers should be classified as employees or as independent
6 contractors *for purposes of California wage orders.*” Dynamex,
7 4 Cal. 5th at 913-14 (emphasis in original). Dynamex involved
8 alleged violations of both Industrial Welfare Commission Wage
9 Order No. 9 and the California Labor Code. The term “employ” in
10 IWC wage orders means not only “to exercise control over the
11 wages, hours or working conditions,” but also “to suffer or
12 permit to work.” Id. at 942-944. This distinction was central
13 to the reasoning of the Dynamex Court, which found the “suffer or
14 permit to work” definition embodied the broad remedial purpose of
15 the wage orders and thus determined the ABC test was the
16 appropriate standard for claims arising under the wage orders,
17 rather than the common-law “control” test described in Borello.
18 Id. at 952-54, 958-64. This Court declines to expand the
19 application of the Dynamex ABC test beyond the “one specific
20 context” endorsed by the California Supreme Court.

21 This Court agrees with CFL that Henry’s claims for
22 reimbursement, unlawful deductions, waiting time penalties, wage
23 statement penalties, and violations of PAGA are not grounded in
24 the wage orders, but rather in the California Labor Code, and
25 must therefore be decided based on Henry’s classification under
26 the Borello standard. Thurman v. Bayshore Transit Mgmt., Inc.,
27 203 Cal. App. 4th 1112, 1132 (Cal. Ct. App. 2012) (holding that
28 “PAGA does not create any private right of action to directly

1 enforce a wage order” because “a wage order is not a statute”).

2 4. Application of ABC Test

3 The ABC test “presumptively considers all workers to be
4 employees, and permits workers to be classified as independent
5 contractors only if the hiring business demonstrates that the
6 worker in question satisfies each of three conditions: (a) that
7 the worker is free from the control and direction of the hiring
8 entity in connection with the performance of the work, both under
9 the contract for the performance of such work and in fact; and
10 (b) that the worker performs work that is outside the usual
11 course of the hiring entity’s business; and (c) that the worker
12 is customarily engaged in an independently established trade,
13 occupation, or business of the same nature as the work
14 performed.” Dynamex, 4 Cal. 5th at 955-56. “Application of
15 Prongs A and C is most likely to trigger the need for further
16 factual development, because the considerations relevant to those
17 prongs are the most factually oriented. But the ABC test is
18 conjunctive, so a finding of any prong against the hiring entity
19 directs a finding of an employer-employee relationship. Prong B
20 may be the most susceptible to summary judgment on the record
21 already developed.” Vazquez, 923 F.3d at 596.

22 Despite the substantial factual disagreements presented on
23 this motion, Henry has compelling arguments that his employment
24 by CFL fails Prong B of the ABC test, making Henry an employee.
25 Indeed, Henry moved this Court to determine the ABC test applies
26 and that he was CFL’s employee under the test. Opp’n/Cross-Mot.
27 at 16-23. However, this Court, as discussed *supra*, finds, except
28 as to his PAGA claim which rests on the Borello standard, Henry’s

1 cross-motion to be improper as violating the one-way intervention
2 rule. CFL did not move for a determination that Henry was
3 properly classified as an independent contractor under the ABC
4 test; rather CFL only presented arguments limiting the
5 applicability of the ABC test to Henry's claims, which are
6 addressed above. Mot. at 6-16. This Court therefore does not
7 reach the merits of whether CFL properly classified Henry as an
8 independent contractor under the ABC test.

9 H. Borello Standard

10 "The California Labor Code ... confers certain benefits on
11 employees that it does not afford independent contractors."
12 Narayan v. EGL, Inc., 616 F.3d 895, 897 (9th Cir. 2010). CFL
13 argues Henry's claims for violations of the California Labor Code
14 fail because, under the Borello standard, Henry is properly
15 classified as an independent contractor, not an employee.
16 Mot. at 9-12.

17 Borello is the "seminal California decision" providing the
18 standard for determining whether to classify a worker as an
19 employee or independent contractor. Dynamex, 4 Cal. 5th at 929.
20 Under the Borello standard, the most significant factor in this
21 determination is the right of the principal to control the manner
22 and means of accomplishing the result desired. Borello, 48 Cal.
23 3d at 349-50 (noting that "[t]he label placed by the parties on
24 their relationship is not dispositive, and subterfuges are not
25 countenanced."). Moreover, the right to terminate a worker at
26 will, without cause, is considered "[s]trong evidence in support
27 of an employment relationship." Id. at 350-51 (quoting Tieberg
28 v. Unemployment Ins. App. Bd., 2 Cal. 3d 943, 949 (Cal. 1970)).

1 Nevertheless, in Borello, the California Supreme Court also
2 explained that additional, "secondary" factors may be relevant in
3 making the classification determination, including: "(a) whether
4 the one performing services is engaged in a distinct occupation
5 or business; (b) the kind of occupation, with reference to
6 whether, in the locality, the work is usually done under the
7 direction of the principal or by a specialist without
8 supervision; (c) the skill required in the particular occupation;
9 (d) whether the principal or the worker supplies the
10 instrumentalities, tools, and the place of work for the person
11 doing the work; (e) the length of time for which the services are
12 to be performed; (f) the method of payment, whether by the time
13 or by the job; (g) whether or not the work is part of the regular
14 business of the principal; and (h) whether or not the parties
15 believe they are creating the relationship of employer-employee."
16 Id. at 350-51. These factors "[g]enerally ... cannot be applied
17 mechanically as separate tests; they are intertwined and their
18 weight depends often on particular combinations." Id. at 351
19 (quoting Germann v. Workers' Comp. Appeals Bd., 123 Cal. App. 3d
20 776, 783 (Cal. Ct. App. 1981)).

21 On this record, there are factual disputes regarding control
22 over Henry's working condition, including required adherence to
23 certain CFL policies and procedures (CFL UF ¶¶ 14, 16; Henry UF
24 ¶¶ 56-60, 65-72, 82-86); possession of and leasing of his truck
25 (CFL UF ¶ 10; Henry UF ¶¶ 38-40); his ability to accept or
26 decline loads and do so without reprisal (CFL UF ¶ 18; Henry UF
27 ¶¶ 43-44, 52-54); his ability to choose his route (CFL UF ¶ 21;
28 Henry UF ¶¶ 48-51); his ability to hire other drivers to assist

1 him (CFL UF ¶¶ 24-25; Henry UF ¶¶ 97-101); the circumstances of
2 his hiring and training (CFL UF ¶¶ 34-35; Henry UF ¶¶ 10-17, 19-
3 26, 61); his pay (CFL UF ¶¶ 36-37; Henry UF ¶¶ 77-80); and his
4 post-CFL work (CFL UF ¶¶ 41-44; Henry UF ¶¶ 102-104). Given the
5 numerous factual disputes having a bearing on the multi-factored
6 Borello standard, this Court cannot, as a matter of law, grant
7 summary judgment to either party. Narayan, 616 F.3d at 904.
8 There exist sufficient indicia of both an employer-employee and
9 principal-independent contractor relationship between Henry and
10 CFL such that a reasonable jury could find the existence of
11 either such relationship.

12 Accordingly, this Court denies CFL's motion for summary
13 judgment as to Henry's remaining claims arising under the
14 California Labor Code, and denies Henry's motion for summary
15 judgment on his PAGA claim.

16 III. ORDER

17 For the reasons set forth above, this Court GRANTS IN PART
18 and DENIES IN PART Defendants' Motion for Summary Judgment (ECF
19 No. 72-1) and DENIES Plaintiff's Cross-Motion for Summary
20 Judgment (ECF No. 73).

21 CFL's motion is:

22 1. Granted as to Henry's claims alleging violations of
23 California's meal and rest break rules under California Labor
24 Code sections 226.7 and 512, which are hereby dismissed;

25 2. Denied as to Henry's claims alleging violations of
26 California wage orders, for which Henry's employment
27 classification will be determined under the Dynamex ABC test,
28 which applies retroactively and is not preempted by the FAAAA;

