

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 27 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SERGE HAITAYAN; JASPREET
DHILLON; ROBERT ELKINS;
MANINDER LOBANA, individually, and
on behalf of others similarly situated,

No. 18-55462

Plaintiffs-Appellants,

D.C. No.
2:17-cv-07454-JFW-JPR

v.

MEMORANDUM*

7-ELEVEN, INC., a Texas corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

SERGE HAITAYAN; JASPREET
DHILLON; ROBERT ELKINS;
MANINDER LOBANA,

No. 18-55910
18-56346

Plaintiffs-Appellants,

D.C. No.
2:18-cv-05465-DSF-AS

v.

7-ELEVEN, INC., a Texas corporation,

Defendant-Appellee.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted February 13, 2019
Pasadena, California

Before: FISHER, CALLAHAN and OWENS, Circuit Judges.

In No. 18-55462 (*Haitayan I*), plaintiff-franchisees appeal the district court's grant of judgment on the pleadings on their claims that franchisor 7-Eleven misclassified them as independent contractors rather than employees in violation of the Fair Labor Standards Act and the California Labor Code. In Nos. 18-55910 and 18-56346 (*Haitayan II*), the plaintiffs appeal the order of the district court denying their motion for a preliminary injunction and corrective notice regarding 7-Eleven's distribution of a franchise renewal agreement requiring franchisees to release their wage-and-hour claims in *Haitayan I*. We vacate and remand in both appeals.

A. *Haitayan I*

1. We vacate the judgment on the pleadings. *See Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005). In addressing the adequacy of the plaintiffs' federal and state law claims, the court erred in two respects. First, it considered the persuasiveness of the plaintiffs' factual allegations rather than the plausibility of the plaintiffs' legal claims. This was error. *See Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004) (stating that we must "accept all factual allegations in the

complaint as true and construe them in the light most favorable to [the non-moving party]” (citation omitted) (alteration in original)). Second, the court focused on the franchise agreement but did not consider the plaintiffs’ allegations regarding 7-Eleven’s actual control. This too was error. *See Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007) (in conducting a misclassification analysis, “[t]he parties’ label is not dispositive and will be ignored if their actual conduct establishes a different relationship”); *see also Real v. Driscoll Strawberry Assocs. Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (“Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.”). Accordingly, we vacate the district court’s judgment on the pleadings without prejudice to 7-Eleven seeking judgment as a matter of law at a later stage in the proceedings.

2. Following the district court’s entry of judgment, the California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018). We leave it to the district court in the first instance to address the extent to which *Dynamex* applies to the plaintiffs’ claims, including the parties’ contentions regarding retroactive application of *Dynamex*. In addition, the district court is advised that this court is currently considering the application of *Dynamex* to franchisees in *Vazquez v. Jan-Pro Franchising Int’l Inc.*, No. 17-16096, argued December 18, 2018. To the extent appropriate, proceedings in the district court

may be stayed pending this court's decision in *Vazquez*.

3. Because we vacate the underlying judgment, we need not address the district court's taxation of costs. Because we can consider Massachusetts and California state court decisions without taking judicial notice, we deny the plaintiffs' motions for judicial notice. *See* No. 18-55462, Dkts. 12, 28.

B. *Haitayan II*

1. We also vacate the denial of preliminary injunctive relief and corrective notice. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). Under California law, an employee may not waive a wage-and-hour claim by contract. *See* Cal. Labor Code §§ 206.5, 2804. This rule is relevant to the preliminary injunction factors at issue here, including the likelihood of success on the merits, irreparable harm and the balance of equities. The district court, however, did not consider this California rule. We therefore vacate the denial of relief and remand for reconsideration. We are concerned that the plaintiffs' request for relief is time sensitive. Franchisees are required to sign the challenged waivers in April 2019. We therefore urge the district court to address the plaintiffs' requests for relief on an expedited basis.

2. Because they may arise on remand, we also provide guidance to the district court on several of the other issues raised on appeal. *See United States v. Hernandez-Vasquez*, 513 F.3d 908, 917 (9th Cir. 2008).

a. Likelihood of Success on the Merits

In addressing the likelihood of success on the merits, the district court relied on *Ahussain v. GNC Franchising, LLC*, 2008 WL 11336812 (C.D. Cal. Mar. 19, 2008). The plaintiffs contend this reliance was unwarranted. We agree. *Ahussain* applies to general releases in franchise renewal agreements, but it does not address California's prohibition on the contractual waiver of the plaintiffs' claims. The district court should bear this distinction in mind on remand.

We reject 7-Eleven's suggestion that the waiver is permissible as a settlement. Labor claims may be settled only by release and payment, which has not occurred here. *See Watkins v. Wachovia Corp.*, 92 Cal. Rptr. 3d 409, 417 (Ct. App. 2009).

We also reject 7-Eleven's contention that the plaintiffs are contractually obligated to sign the general release because the franchise agreements they signed in 2004 said a general release would be required for renewal. 7-Eleven has not shown that this provision negates California's prohibition on contractual waiver of wage-and-hour claims.

b. Irreparable Harm

Although putative class members must sign the waiver to protect their livelihoods, it is not clear how 7-Eleven will proceed once they sign. The district court correctly noted that if class members are ultimately found to be employees,

the waiver will likely be deemed unconscionable and unenforceable. If they are ultimately found to be independent contractors, however, 7-Eleven may attempt to hold them in breach of contract for participating in *Haitayan I*. These uncertainties place franchisees in a difficult position. If they do not sign the waiver, they may forfeit their livelihoods. If they sign the waiver, they may have to choose between (1) participating in *Haitayan I* (as parties or witnesses), thereby risking civil liability for breach of contract, or (2) foregoing their right to participate in *Haitayan I*. This uncertainty imposes immediate and irreparable harm by deterring franchisees from participating in the case. This harm warrants consideration on remand.

c. Balance of the Equities

With regard to the balance of the equities, the district court focused on the public interest in enforcing valid contracts but did not consider California's interest in allowing colorable wage-and-hour claims to proceed. The plaintiffs argue that the court should have done so, and we agree. The public interest here is substantial. *See Dynamex*, 416 P.3d at 5 (“[T]he misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.”). In balancing the equities, the district court should also consider the parties' relative size and

strength. *See Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 827 (9th Cir. 1993).

C. Consolidation

To serve the interest of judicial efficiency, and for the convenience of the parties, we encourage the district court to consolidate these two cases before a single district judge.¹

D. Conclusion

In No. 18-55462, the appellants' motions for judicial notice, filed October 1, 2018 (Dkt. 12), and December 21, 2018 (Dkt. 28), are **DENIED**.

In No. 18-55462, the judgment is vacated and the case is remanded. In Nos. 18-55910 and 18-56346, the order of the district court is vacated and the case is remanded.

In Nos. 18-55462, 18-55910 and 18-56346, costs of appeal are awarded to the plaintiffs.

In Nos. 18-55462, 18-55910 and 18-56346, no petitions for rehearing will be entertained and the mandates shall issue forthwith. *See Fed. R. App. P. 2.*

VACATED AND REMANDED.

¹ At oral argument, both parties agreed consolidation would be appropriate.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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