UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
APPEAL NO. 23-1043

DHANANJAY PATEL, SAFDAR HUSSAIN, VATSAL CHOKSHI,
DHAVAL PATEL, NIRAL PATEL,
Plaintiffs-Appellants,

v.

7-ELEVEN, INC.,
Defendant/ Third Party Plaintiff-Appellee,

MARY CADIGAN; ANDREW BROTHERS,
Defendants,

DPNEWTO1; DP TREMONT STREET INC.; DP MILK STREET INC.;
DP JERSEY INC.,
Third Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Case No. 1:17-cv-11414-NMG
The Honorable Nathaniel M. Gorton

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Plaintiffs-Appellants respectfully request oral argument, pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Rule 34(a) of the First Circuit Local Rules. As the issue presented in this case is critically important to the rights of workers seeking to enforce their wage rights against their employers, Plaintiffs-Appellants believe oral argument will help this Court reach a resolution.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to the Class Action Fairness Act because diversity of citizenship exists between Plaintiffs-Appellants Dhananjay Patel, Safdar Hussain, Vatsal Chokshi, Dhaval Patel, and Niral Patel, and Defendant-Appellee 7-Eleven, Inc., which is a Texas Corporation with its principal place of business in Irving, Texas. There are more than 100 potential class members in the class, and the amount in controversy exceeds $5 million. See 28 U.S.C. § 1332(d)(2).

This Court has jurisdiction over Plaintiffs' appeal pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4(a)(1)(A). The District Court entered summary judgment in favor of 7-Eleven on the claims at issue in this appeal on September 28, 2022. See ADD015. Final judgment was entered in the case on January 4, 2023. See ADD016. Plaintiffs filed a timely notice of appeal the same day. See JA00029.

STATEMENT OF THE ISSUE

Whether the District Court erred in finding that 7-Eleven franchisees did not provide services to 7-Eleven and thereby declining to apply the Massachusetts test for independent contractor misclassification, known as the "ABC" test. M.G.L. ch. 149 § 148B.

STATEMENT OF THE CASE

Plaintiffs have been classified as independent contractor franchisees of Defendant 7-Eleven, Inc. ("7-Eleven"). In order to perform their jobs managing stores for 7-Eleven, the largest convenience store chain in the world, they have had to pay numerous expenses and have even had to pay for their jobs, in the form of large franchise fees. They brought this case as a class action on behalf of themselves and their fellow 7-Eleven franchisees in Massachusetts, alleging they have been misclassified as independent contractors in violation of the independent contractor misclassification test and thereby suffered wage violations, including having to pay for their jobs and being charged for various expenses they would not have had to pay as employees. See, e.g., Awuah v. Coverall N. Am., Inc., 460 Mass. 484 (2011) (holding that franchisees misclassified as independent contractors under Massachusetts law should not have been required to pay franchise fees for their jobs and other expenses).

The ABC test provides that:

> An individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:—
>
> > (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
> >
> > (2) the service is performed outside the usual course of the business of the employer; and,
> >
> > (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

M.G.L. ch. 149 § 148B(a).

On summary judgment, the District Court refused to even reach the three prongs of this test. Instead, it found that, as a matter of law, Plaintiffs had not shown that they "performed any service" for 7-Eleven and therefore that the ABC test was inapplicable. ADD014. In reaching this decision, the District Court failed even to acknowledge that the Massachusetts Supreme Judicial Court (SJC) – in this very case (on certification from this Court) – already determined that the ABC test should apply here.

The District Court also failed to acknowledge that Massachusetts courts have uniformly recognized that franchisees provide services to franchisors in determining the franchisees to be employees of the franchisor. See Awuah v. Coverall North America, Inc., 707 F. Supp. 2d 80, 83 (D. Mass. 2010) (holding cleaning franchisee to be employee under ABC test, as franchisee performed

services in usual course of business of franchisor); Coverall North America, Inc. v. Com'r of Div. of Unemployment Assistance, 447 Mass. 852, 858 (2006) (holding cleaning franchisee to be employee under ABC test because franchisees' "business" was not "independent" of franchisor under Prong C); DeGiovanni v. Jani-King Int'l, No. 1:07-cv-10066 (Dkt. 208) (D. Mass. June 8, 2012) (cleaning franchisees were employees under Prong B of § 148B), JA001160-001193; Da Costa v. Vanguard Cleaning Sys., Inc., 2017 WL 4817349 (Mass. Super. Sept. 29, 2017) (same).[1]

Rather, the District Court determined that the fact that 7-Eleven derived its revenue from the work performed by its franchisees was insufficient to establish that franchisees performed services for 7-Eleven. ADD013-014.[2] As discussed

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[1] Other courts around the country have likewise recognized that franchisees can actually be employees of their franchisors. See Roman v. Jan-Pro Franchising Int'l, Inc., 342 F.R.D. 274, 307 (N.D. Cal. 2022) (applying California's ABC test, which California Supreme Court adopted from Massachusetts); Vazquez v. Jan-Pro Franchising Int'l, Inc., 939 F.3d 1050, 1051 (9th Cir. 2019); Acosta v. Jani-King of Oklahoma, Inc., 905 F.3d 1156, 1160-61 (10th Cir. 2018) (FLSA); Williams v. Jani-King of Philadelphia Inc., 837 F.3d 314, 325 (3d Cir. 2016) (Pennsylvania law); Jason Roberts, Inc. v. Adm'r, 127 Conn. App. 780 (2011) (Connecticut law); Hayes v. Enmon Enterprises, LLC, 2011 WL 2491375, at *6 (S.D. Miss. June 22, 2011) (Mississippi law).

[2] The District Court also (somewhat confusingly) appeared to suggest that the fact that Plaintiffs' obligations to 7-Eleven were mandated by a written agreement between the parties meant that they were not "enough to constitute services under the Massachusetts ICL." ADD013. This rationale does not appear, however, to have been the basis of the District Court's ruling. Moreover, it is plainly incorrect that contractual obligations cannot constitute services under the ABC test. As

below, this reasoning cannot be squared with the SJC's decision in Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321 (2015). In that case, the Court found that the plaintiff taxi drivers performed services for taxi radio associations because "revenue to the association … was directly dependent on the drivers' work of transporting passengers." Id. at 331.[3] [4] The circumstances in this case are no

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noted infra, numerous Massachusetts courts have found that franchisees (whose obligations are necessarily defined by a franchise agreement) perform services for franchisors. See Awuah, 707 F. Supp. 2d at 83; Coverall North America, 447 Mass. at 858; DeGiovanni, No. 1:07-cv-10066 (Dkt. 208) (D. Mass. June 8, 2012); Da Costa, 2017 WL 4817349 at *5.

[3] Ultimately, the SJC found that the radio associations in Sebago satisfied all three prongs of the ABC test and thus found that the taxi drivers were properly classified as independent contractors and that judgment should have been entered in favor of the defendants. Id. at 340. What is noteworthy for purposes of this appeal, however, is that the SJC found that the plaintiffs ***did*** provide services to the radio associations and thus the ABC test had to be applied and analyzed.

[4] The SJC also found that plaintiffs arguably provided services to the taxi medallion owners because their use of the taxis could increase the value of and facilitate the sale of advertising space on the taxis. Id. The SJC ultimately determined that the drivers did not provide services to the medallion owners because "[t]he medallion owners are not concerned with the results of the plaintiffs' operations, as drivers are not required to remit a percentage of their revenues, which include both fares and tips." Sebago, 471 Mass. at 334. Indeed, the SJC distinguished O'Hare–Midway Limousine Serv., Inc. v. Baker, 232 Ill. App. 3d 108, 111 (1992), in which the Illinois court found that limousine chauffeurs who paid a percent of their earnings to limousine company did render services to the company, as there was "financial interdependence" between the two.

Here, in contrast to the medallion owners and like the limousine company, 7-Eleven charges the franchisees a specific percentage of the store profit (around 50%). See JA001261. Thus, unlike the medallion owners (and like the limousine company), 7-Eleven plainly ***is*** "concerned with the results of the plaintiffs'

different: revenue to 7-Eleven is directly dependent on the franchisees' work of running the stores; without the franchisees to run the stores, 7-Eleven would have no revenue. The District Court's decision was legal error.

This Court should reverse the District Court's decision granting 7-Eleven's motion for summary judgment and should remand the case so that the District Court can apply the ABC test.[5]

Alternatively, given that the issue in this case is a significant one of state law – one that could have a massive impact on the enforcement of Massachusetts' very

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operations", Sebago, 471 Mass. at 334; the more profit the franchisees generate, the more 7-Eleven will earn. Thus, under Sebago, it should have been clear that the franchisees provide services to 7-Eleven.

[5] Indeed, the Ninth Circuit recently applied the ABC test to 7-Eleven franchisees claiming they were misclassified (using the ABC test that California recently adopted from Massachusetts). See Haitayan v. 7-Eleven, Inc., 2022 WL 17547805, at *1 (9th Cir. Dec. 9, 2022); Dynamex Operations W. v. Superior Ct., 4 Cal. 5th 903, 956 (2018) (adopting Massachusetts ABC test). In doing so, the Ninth Circuit ruled (prematurely) —drawing its own (erroneous) conclusions -- that 7-Eleven satisfied the three prongs of the test, even though the district court in that case had not even applied the ABC test to plaintiffs' claims. The Ninth Circuit therefore reached an issue that it should not have, as application of the ABC test to the plaintiffs' claims had not even been argued or addressed below. The Court applied the ABC test in a cursory manner, without warning to the plaintiffs that it might do so (and without even holding oral argument). Here, this Court should remand for the District Court to apply the ABC test, which the parties did argue below.

strict Independent Contractor Law -- if this Court has any doubt on this question, it should certify this case once again to the SJC.[6]

STATEMENT OF FACTS AND PROCEDURAL HISTORY

7-Eleven operates an international empire of convenience stores. JA001257. It operates more than 8,000 stores across the country, including 166 stores in Massachusetts. Id. While approximately 10% of 7-Eleven convenience stores are company owned and operated and managed by acknowledged employees, the remaining approximately 90% are managed by "franchisees" who 7-Eleven classifies as independent contractors. Id.

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[6] Previously, the District Court granted summary judgment in 7-Eleven's favor on the ground that the Massachusetts Independent Contractor Law – and the strict Massachusetts ABC test – would not apply to franchisees. Patel v. 7-Eleven, Inc., 485 F. Supp. 299, 310 (2020). Recognizing the importance of this issue to the enforcement of Massachusetts law, this Court certified that decision to the SJC. Patel v. 7-Eleven, Inc., 8 F.4th 26, 29 (2021). Upon certification, the SJC disagreed with the District Court and reversed, holding that franchisees can be employees under Massachusetts law. Patel v. 7-Eleven, Inc., 489 Mass. 356, 371 (2022). Now, once again, the same District Court has declined to apply the ABC test in this case, and once again that decision could have enormous implications for the enforcement of Massachusetts law, which is widely recognized to be the strictest in the country for prohibiting independent contractor misclassification. Indeed, the California Supreme Court recognized as such in adopting the Massachusetts test whole cloth in its landmark decision in Dynamex Operations W. v. Superior Ct., 4 Cal. 5th 903, 956 n. 23 (2018). In California, the courts subsequently determined as well that franchisees can be employees under the ABC test. See, e.g., Vazquez, 939 F.3d at 1051; Roman, 342 F.R.D. at 307.

Thus, rather than allowing this case to undercut the strength of the Massachusetts Independent Contractor Law, this Court should give the SJC the opportunity to weigh in once again – if this Court has any question on the proper answer here.

In order to become a 7-Eleven "franchisee" and manage a store, franchisees are required to pay tens or hundreds of thousands of dollars to 7-Eleven in the form of "franchise fees". JA001260. In addition to these up-front fees that franchisees must pay in order to obtain the work of managing a 7-Eleven convenience store, the franchisees must then pay substantial sums, which are taken out of franchisees' share of the store revenues. For example, franchisees must pay for maintenance, cleaning products, employee payroll, and other store expenses. JA001261.

7-Eleven is in the business of running convenience stores. On its website, 7-Eleven boasts it is "the world's #1 convenience store." JA001256. It likewise holds itself out on social media platforms and to trade magazines as a convenience store company. Id.[7] That 7-Eleven is in the business of running convenience stores is also reflected in its investment in developing convenience store retail techniques and in the fact that it views fellow convenience stores as competition. Id.

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[7] For example, in its 2019 Franchise Disclosure Document, 7-Eleven describes "Our Business" in the following way:

> We introduced the **convenience store** concept in 1927, when, as an ice company, our retail outlets began selling milk, bread and eggs. We **operated all of our stores as corporate stores until 1964**, when we acquired a chain of 126 franchised stores in California.
>
> We have **operated our retail convenience stores** under the service mark 7-Eleven® (the "stores") since 1946, and have offered franchises for 7-Eleven stores since 1964.

JA001270 (emphasis added).

That 7-Eleven is in the business of running convenience stores is further demonstrated by the fact that 7-Eleven *does admittedly* run convenience stores: approximately 10% of 7-Eleven convenience stores are operated by acknowledged employee managers, while the remainder are operated by "franchisees", who have paid for the privilege of managing the stores. JA001257.[8] Moreover, 7-Eleven previously operated ***all*** of its convenience stores as corporate locations, with acknowledged employees performing the managerial role – the same duties that franchisees now perform. JA001256.

7-Eleven classifies all of its franchisees as independent contractors, rather than employees. JA001257. However, Plaintiffs contend that 7-Eleven treats its franchisees like employees (specifically, as "glorified store managers"). Id.[9] 7-Eleven tightly controls the franchisees and all operations of the stores. JA001257-60. Thus, Plaintiffs have alleged that (unlike other franchises) 7-Eleven does not merely create and sell a system which allows them to independently operate their

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[8] The fact that some of the individuals who manage 7-Eleven stores are classified as employees, and others performing the same work are classified as independent contractors, lends particular strength to the argument that the independent contractors are misclassified. See, e.g., Amero v. Townsend Oil, 2008 WL 5609064, at *2 (Mass. Super. Ct. Dec. 3, 2008) (finding plaintiff oil delivery drivers were employees where "there appears to have been absolutely no difference between the duties of the drivers [defendant] characterized as 'employees' and those it characterized as 'independent contractors.'").

[9] In fact, 7-Eleven even calls franchisees "store managers" in the email addresses it creates for them. Plaintiff Dhananjay Patel's email address, for example, is "storemanager25059]@7-11.com." JA001260.

own convenience stores; instead, 7-Eleven runs the stores itself, dictating every last detail regarding how the stores must operate, both for the corporate owned stores as well as the stores that are managed by franchisees.

7-Eleven first requires franchisees to undergo extensive training in operating the stores. JA001257-58. Thereafter, franchisees must comply with the 1,009 page 7-Eleven Manual of Operations and are subject to constant monitoring via video surveillance and regular visits by 7-Eleven field consultants (who help manage the franchisees). JA001258-59. 7-Eleven controls such details as the specific products that must be stocked on the shelves; where to place the inventory and where and what signage to place about the stores; and requires all employees to wear approved 7-Eleven uniforms. JA001259. 7-Eleven sets the hours that the stores must be open: 24 hours a day, 7 days a week, at least 364 days per year (unless otherwise barred by law). Id. Field consultants can and do issue warnings to franchisees whose stores are not in compliance with various 7-Eleven rules, and 7-Eleven may issue notices of breach and terminate the franchisee if it determines that the franchisee has violated 7-Eleven's policies. See JA001258, 001260.

7-Eleven has such detailed day-to-day involvement in the running of the stores that it controls the store temperature remotely from its headquarters in Dallas; franchisees cannot even adjust the temperature in the stores. JA001260. 7-Eleven obtains the leases for the store premises, and it is 7-Eleven, not the

franchisees, who is the signatory on the leases. Id. Likewise, it is 7-Eleven who obtains the necessary business licenses, and it is 7-Eleven, not the franchisees, whose name is on the licenses. Id. In short, 7-Eleven "takes care of real estate, zoning, store build-out, and equipment installation," so that the "store comes fully operational." Id. 7-Eleven provides training to store employees and sets the regulations and detailed procedures that must be followed in all stores. JA001260.

7-Eleven controls of all the stores' finances and accounting. Store revenues are deposited into an account that 7-Eleven controls. Franchisees receive draws from the store accounts as their compensation, and they can only withdraw funds with permission from 7-Eleven. Id. 7-Eleven divides store revenue into 7-Eleven's share and franchisees' share (typically half-and-half, though it varies somewhat). Id.

7-Eleven's share of store revenue is known as the "7-Eleven Charge". JA001261. Importantly, while it characterizes the 7-Eleven Charge as a payment from franchisees, 7-Eleven appears to acknowledge in the plain language of the franchise agreement that, as a result of the control it exerts over revenues, it in fact pays franchisees their allotted draws:

> [W]e [7-Eleven] agree to: (a) ***pay to you*** [franchisee] every week an amount equal to the Weekly Draw … (c) within ten (10) days after we received your written request … ***pay to you*** [franchisee] the amount of the available Monthly Draw and/or Excess Investment Draw that you [specified] in your request, such amount not to exceed the greater of the available Monthly Draw or Excess Investment Draw.

JA00108 (emphasis added). From the franchisees' share of the revenue, 7-Eleven makes numerous additional deductions, such as for advertising and maintenance fees. JA001261.

In Japan (where 7-Eleven's corporate parent SEI is based), 7-Eleven franchisees have been held by the courts to be employees. JA001262.[10] 7-Eleven's own counsel has previously acknowledged in an email to members of the International Franchise Association that franchisors like 7-Eleven cannot justify claiming independent contractor status for its franchisees under the ABC test. Id.

Following discovery in this case on Plaintiffs' misclassification claims, both parties moved for summary judgment on liability. The District Court entered summary judgment in 7-Eleven's favor, holding that the Massachusetts test for independent contractor misclassification could not be applied because this test "conflicts" with federal FTC regulations. Plaintiffs appealed, and this Court certified the question to the Supreme Judicial Court. See Patel, 8 F.4th at 29. On March 24, 2022, the SJC answered the certified question and concluded that federal regulations do not pre-empt application of the ABC test contained in Mass. Gen. L. 149 § 148B and that the test should therefore be applied here. Patel, 489 Mass. at 371.

[10] Japan has recognized that the 7-Eleven so-called "franchisor-franchisee" relationship allows for "systematic exploitation of some franchisees" and has adopted regulatory reform to prevent further exploitation. JA001262.

The case returned to the District Court, and the parties submitted renewed summary judgment briefing on liability. Plaintiffs moved for summary judgment in their favor, again contending that 7-Eleven could not satisfy its burden under the ABC test to show that the plaintiff franchisees were not in the same course of business as the franchisor, 7-Eleven (Prong B). 7-Eleven moved for summary judgment on the basis that Plaintiffs do not "provide services" to 7-Eleven and therefore the court could not even reach the prongs of the ABC test.

The District Court adopted 7-Eleven's flawed argument, granting summary judgment to 7-Eleven and denying Plaintiffs' motion for summary judgment. Following resolution of 7-Eleven's counterclaims, which were resolved in Plaintiffs' favor[11], Plaintiffs filed a timely notice of appeal of the District Court's decision granting summary judgment to 7-Eleven.

SUMMARY OF THE ARGUMENT

The District Court erred when it granted summary judgment to 7-Eleven on Plaintiffs' claims for independent contractor misclassification and related wage claims. The District Court's holding that Plaintiffs, who work as 7-Eleven franchisees, did not perform services for 7-Eleven simply because the language of their franchise agreement (in one place at least, though not in all places, see supra

[11] In its counterclaims, 7-Eleven sought to hold Plaintiffs responsible for its legal defense bills in this case. The District Court properly denied 7-Eleven's request.

at 17) states that Plaintiffs pay 7-Eleven its portion of store profits, rather than vice versa, is directly contrary to Massachusetts case law. Indeed, all franchisees have agreements that provide for the franchisor to receive a portion of the profits.[12] Thus, the District Court's decision that this universal fact of franchises rendered the franchisees automatically exempt from application of the ABC test runs directly counter to the SJC's decision in this very case that the Massachusetts Independent Contractor Law – and the ABC test – apply to franchisees.

In addition to cases involving franchisees, Plaintiffs are not aware of ***any*** independent contractor decision in Massachusetts (or elsewhere) that has decided the question of whether plaintiffs perform services for the defendant on this basis. Indeed, as noted above, the case on which the District Court relied, Sebago, 471 Mass. at 331, held that the plaintiff taxi drivers ***did*** perform services for the defendant radio associations; the Court there did not even consider the ***manner*** of payment in its analysis. See infra Sections I.A,B.

Moreover, the District Court's decision to construe the "performing services" language in the misclassification statute so narrowly is flatly inconsistent

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[12] See, e.g., *FAQ: What is a Franchise?*, International Franchise Association, available at https://www.franchise.org/faqs/basics/what-is-a-franchise (last accessed March 21, 2023) ("A franchise (or franchising) is a method of distributing products or services involving a franchisor, who establishes the brand's trademark or trade name and a business system, and a franchisee, ***who pays a royalty*** and often an initial fee for the right to do business under the franchisor's name and system.") (emphasis added).

with the statute's remedial purpose, which mandates that it be read liberally in favor of expansive protections for workers. See infra Section I.C. The decision also ignores that 7-Eleven has *already conceded* that franchisees provide services to it. See infra Section II.

STANDARD OF REVIEW

A district court's entry of summary judgment is reviewed *de novo*. See Chung v. StudentCity.com, Inc., 854 F.3d 97, 101 (1st Cir. 2017) ("We review a district court's entry of summary judgment *de novo*."). "On appeal from a grant of summary judgment, we view the facts and all inferences that may fairly be drawn from them in the light most favorable to the non-moving party." Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 29 (1st Cir. 1995); see also Farmers Ins. Exch. v. RNK, Inc., 637 F.3d 777, 779 (1st Cir. 2011).

ARGUMENT

I. There is No Question That Plaintiffs Provided Services to 7-Eleven So That the ABC Test Must Apply

A. The SJC Already Determined that Franchisees Can Be Employees and Thus the ABC Test Should Apply Here

As described above, the SJC has already rejected 7-Eleven's argument that the ABC test should not apply to it simply because the plaintiffs in this misclassification case are franchises. See Patel, 489 Mass. at 471. In rebuffing 7-Eleven's dire predictions that application of the Massachusetts Independent

Contractor Law to franchise arrangements would spell doom for all franchisors in Massachusetts, the SJC expressly noted that courts would need to examine each such challenge on a case-by-case basis, as "distinguishing between legitimate arrangements and misclassification requires examination of the facts of each case." Id. at 370 (quoting M.G. L. c. 149, § 148B).

The District Court's conclusion that the franchisees here did not perform services for 7-Eleven because they pay franchise fees to 7-Eleven, and thus the ABC prongs did not need to be analyzed, would effectively mean that no franchisees are employees under the Massachusetts Independent Contractor Law. But such a result contradicts the SJC's holding in this case that franchisees can be employees. See also, e.g., Coverall North Am., 447 Mass. at 858; Depianti, 465 Mass. at 625.

Thus, the ABC test should have been applied. Moreover, even under prior caselaw, there is no question that 7-Eleven franchisees perform services for 7-Eleven, as 7-Eleven's revenue is directly tied to the franchisees' work selling items in 7-Eleven's stores. And if the Court has any question on this issue, it should certify this case again to the SJC.

B. Under Sebago, Plaintiffs Provided Services to 7-Eleven Because 7-Eleven's Revenue Depends on Plaintiffs' Work

In Sebago, the SJC found that taxi drivers provided services to radio associations by providing rides to the radio association's clients who had

purchased vouchers for rides, such that "revenue flowing to the radio association" was "***directly dependent on the drivers' work*** of transporting passengers." Sebago, 471 Mass. at 331 (emphasis added).

In reaching its conclusion that Plaintiffs do not provide services to 7-Eleven, the District Court sought to draw a material distinction between the manner Plaintiffs were paid from the manner the taxi drivers were paid in Sebago. The District Court erroneously determined that Plaintiffs did not provide services to 7-Eleven simply because they are compensated from the store's profit, after 7-Eleven takes its share of the profits (known as "the 7-Eleven Charge") and store expenses, while the plaintiffs in Sebago were compensated directly by the radio association. ADD011-012.

However, the District Court got the facts wrong in this case. As the record reflected, 7-Eleven that controls the funds and the bank account – specifying how customer payments are to be deposited in the 7-Eleven-controlled bank account – and then takes its share and then allows the franchisees to draw their payments. As noted above, ***7-Eleven itself admits in its franchise agreement that it is the party that pays the franchisees their share***. JA00108. 7-Eleven directs where franchisees must physically store revenues and in which bank they must be deposited – indeed, 7-Eleven sets up the accounts. JA00108-09. 7-Eleven "establish[es] and maintain[s]" a bank account for each store, from which it debits,

among others, "all Purchases, Operating Expenses, [and] draw payments," and credits "all Receipts … provided you [franchisee] properly deposited those Receipts in the Bank…." JA00111. And 7-Eleven has the right to "withdraw for [7-Eleven's] use … any amounts [franchisees] deposit in the Bank … and to "apply Receipts [first] to the 7-Eleven Charge and then to amounts that [7-Eleven] pays on [franchisees'] behalf." JA00108.

Moreover, the District Court's limiting principle based on how the workers were paid can be found *nowhere* in the Sebago decision; indeed, the SJC in Sebago did not even mention the manner in which the taxi drivers were paid -- or that the radio association paid the drivers. The SJC's conclusion was premised *solely* on its determination that revenue to the radio association was dependent on the plaintiffs' work.[13] The same is true here, where revenue to 7-Eleven depends entirely on the work performed by its franchisees; indeed, without the labor of the franchisees, the stores (and by extension 7-Eleven itself) would derive no revenue at all.

[13] Similarly, in Ruggiero v. American United Life Insurance Co., 137 F. Supp. 3d 104 (D. Mass. 2015), the court held that plaintiff insurance agents provided services to the insurance company where he sold some of the defendant's insurance products, as well as his recruitment, training, and supervision of other agents who sold those products. Id. at 113. The court thus determined that the ABC test applied (though it found that the defendant satisfied all three prongs of the test). Id. at 125.

Other Massachusetts courts have found this financial relationship sufficient to establish that franchisees provide services to the franchisor. In Da Costa, for example, the Massachusetts Superior Court found that "[t]he plaintiffs have performed a service for Vanguard. Vanguard's revenue is derived from initial franchise fees, four percent of the gross billings from work performed by unit franchisees, and various fees imposed on unit franchisees. Vanguard's revenue, therefore, is directly dependent on commercial cleaning work of the plaintiffs and other unit franchisees." Da Costa, 2017 WL 4817349, at *5 (citing Sebago, 471 Mass. at 329). Just like Vanguard, 7-Eleven's revenue is derived from franchise fees, a percent of the profits, and various fees imposed on franchisees.

In short, the District Court's characterization of the 7-Eleven Charge as a payment made by franchisees to 7-Eleven is nothing but a legal and accounting fiction. Plaintiffs (and all franchisees) are compensated *by 7-Eleven* out of the 7-Eleven account into which they are required to deposit 7-Eleven store revenues. The District Court's hair-splitting on this issue and its subsequent conclusion that Plaintiffs did not provide services to 7-Eleven (and thus cannot even have the Massachusetts ABC test apply to it – despite the SJC's prior holding in this case) was wrong.

C. Neither Jinks v. Credico Nor Patel v. 7-Eleven Mandate a Different Result

In rejecting Plaintiffs' argument that they performed services for 7-Eleven because 7-Eleven's revenue depended upon the work they performed, the District Court erroneously concluded that Plaintiffs' argument had recently been rejected by the SJC in Jinks v. Credico (USA) LLC, 488 Mass. 691 (2021), and in its decision in this case. ADD013. Yet a close reading of both SJC decisions makes clear that neither of them rejected Plaintiffs' argument.

1. Jinks was a joint employment case involving a three-tier employment structure

Jinks has no applicability here, as it was not an independent contractor misclassification case but rather one involving the distinct issue of joint employment.[14] In Jinks, the defendant, Credico, contracted with a second company, DFW, to provide door-to-door sales of Credico's telecommunications and energy products. DFW in turn hired the plaintiffs to perform the sales. The plaintiffs sued Credico, alleging that it was their joint employer and therefore responsible for violations of the wage laws. The SJC rejected the argument advanced by the plaintiffs that "an entity is an individual's employer so long as the

[14] Indeed, in Jinks, the SJC expressly rejected the plaintiffs' attempts to apply the ABC test to joint employment inquiries. Id. at 702-03. This is the same result that California courts have reached, that the ABC test does not apply to questions of joint employment. See, e.g., Henderson v. Equilon Enterprises, LLC, 40 Cal. App. 5th 1111, 1130 (2019); Curry v. Equilon Enterprises, LLC, 23 Cal. App. 5th 289, 314 (2018).

individual is 'performing any service' from which the entity derives an economic benefit." Jinks, 488 Mass. at 515-16.

In explaining its rationale, the SJC cited and relied on its prior decision in Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607 (2013), in which it determined "that the entity for whom the individual directly performs services is ordinarily the individual's employer responsible for compliance with the wage laws." Jinks, 588 Mass. at 516. The Jinks court explained that, in Depianti, the SJC considered "a hypothetical situation in which 'company A contracts with company B for services, and company B enters into arrangements with third parties to perform the work it undertook under its contract with company A.' Even though company A derived an economic benefit from the third-party workers, we concluded that 'ordinarily, in such circumstances, company A would not be liable for misclassification of the third-party workers.'" Jinks, 488 Mass. at 516 (quoting Depianti, 465 Mass. at 624 n.17).

Unlike Jinks, this is not a joint employment case. Plaintiffs here do not work for 7-Eleven through an intermediary company, nor is their allegation based solely on the fact that 7-Eleven enjoys some attenuated economic benefit due to the work they perform. To the contrary, Plaintiffs have alleged that they provide services to 7-Eleven because they work ***directly*** for 7-Eleven, operating 7-Eleven stores in which they sell merchandise that they order through 7-Eleven's system,

pursuant to 7-Eleven's detailed instructions and oversight, depositing store earnings into a bank account established and controlled by 7-Eleven, and receiving as their pay only the amount in that account that remains after 7-Eleven withdraws its numerous fees.

With this context, it becomes clear that the District Court's reliance on Jinks and Depianti was misplaced. Jinks stands only for the proposition that, in a situation involving plaintiffs who are claiming that a defendant is a joint employer – there, that they were working for a defendant through an intermediary company -- it is insufficient to allege that the plaintiffs perform services for the defendant simply because the defendant derives an economic benefit from the plaintiffs' labor. It has no relevance here.

2. The SJC's decision in this case supports application of the ABC test

The District Court's citation to the SJC's decision in this case in support of its holding was also erroneous. Indeed, as noted above, the SJC's decision in this case makes clear that the ABC test should have been applied.

In Patel, the SJC simply cited Jinks for the general proposition that the "threshold determination whether the putative employee performs any service for the alleged employer… is not satisfied merely because a relationship between the parties benefits their mutual economic interests." Patel, 489 Mass. at 370 (citing Jinks, 488 Mass. at 696).

Again, as explained above, Plaintiffs are not alleging they are employees of 7-Eleven on the basis of an attenuated relationship that happens to benefit both parties financially. Rather, they allege that, like the taxi drivers in Sebago who provided services to radio associations by driving their customers and thereby providing revenue to the radio associations, Plaintiffs provided services to 7-Eleven because they sold products to 7-Eleven's customers and thereby directly performed labor that provided revenue to 7-Eleven.

The District Court was wrong to conclude that the SJC's decision in this case rejected Plaintiffs' argument that they perform services for 7-Eleven because 7-Eleven derives revenue from their work. Indeed, the SJC's decision makes clear that the ABC test should have been applied on remand by the District Court.

D. The District Court's Order is Wholly Inconsistent with the Remedial Purposes of Massachusetts Wage Laws

In its decision, the District Court entirely ignored that the Massachusetts Independent Contractor Law is a remedial statute, enacted "to protect employees from being deprived of the benefits enjoyed by employees through their misclassification as independent contractors." Somers v. Converged Access, Inc., 454 Mass. 582, 592 (2009). As such, it is "entitled to liberal construction." Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013) (citing Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985) (a remedial statute "is entitled to liberal construction of its terms")). Employment statutes in

particular are to be liberally construed, "with some imagination of the purposes which lie behind them." Depianti, 465 Mass. at 620 (quoting Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914)).

The District Court ignored these guiding principles, instead determining (as far as Plaintiffs are aware, for the first time ever) that workers do not provide services to a putative direct employer even where the direct employer's revenue depends on the fruits of the workers' labor. In doing so, the District Court – for the second time – deprived Plaintiffs of the analysis they are entitled to under the ABC test, which the SJC made clear.

Moreover, framing the question of whether an individual performs services for a putative employer as a significant hurdle that workers must overcome in order to reach the merits of the ABC test is flatly inconsistent with the broad remedial purpose of the Massachusetts Independent Contractor Law. As the SJC reiterated in its decision in this case, the ABC test "evinces the Legislature's broad, remedial intent 'to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees.'" Patel, 489 Mass. at 360 (quoting Depianti, 465 Mass. at 620). Indeed, California courts, applying the ABC test adopted from Massachusetts, have rejected arguments that plaintiffs must make a threshold showing that the defendant in a misclassification case is the "hiring entity" before

the ABC test can be reached. See, e.g., Mejia et al. v. Roussos Construction, Inc., 76 Cal. App. 5th 811, 819 (2022) (finding that a threshold hiring entity test was not intended by Dynamex court and would "run counter to the intent of California wage and hour laws"); People v. Uber Technologies, Inc., 56 Cal. App. 5th 266, 288 (2020) (concluding that Dynamex did not intend for additional threshold step in the ABC test and rejecting hiring entity test); see also Vazquez v. Jan-Pro Franchising Int'l, Inc., 986 F.3d 1106, 1124 (9th Cir. 2021) (defendant "could be Plaintiffs' employer under the ABC test even though it is not a party to any contract with Plaintiffs").

Allowing the District Court's decision to stand would open the floodgates for mischievous employers to misclassify workers but create payment structures that allowed them to evade application of the ABC test. As the SJC has repeatedly recognized, "[t]o allow such an 'end run'" around the wage laws would contradict their purpose, which is to provide broad remedial protection to workers." Depianti, 465 Mass. at 624 (quoting DiFiore v. American Airlines, Inc., 454 Mass. 486, 496 (2009)).

In short, the District Court's rationale, which was without support in any case law, was error, and it must be reversed. See Psy-Ed Corp. v. Klein, 459 Mass. 697, 708 (2011) (it is "an error," when construing remedial statutes, to "imply [any limitations] where the statutory language does not require it").

II. 7-Eleven Had Already Conceded that Plaintiffs Provided Services to It

The District Court's conclusion that Plaintiffs did not provide services to 7-Eleven was at odds with 7-Eleven's own concessions in the case. As Plaintiffs pointed out to the District Court, 7-Eleven argued in a discovery motion that it needed information about the assets of Plaintiffs' corporations "as their corporate assets are relevant to whether these third-party corporations, as opposed to the Named Plaintiffs themselves, *provided services to 7-Eleven*". JA00436 (emphasis added). 7-Eleven therefore had already conceded that the Plaintiffs did provide services to 7-Eleven.

Curiously, the District Court, did not even address Plaintiffs' argument on this point in its Order. Nor did the District Court wrestle with the fact that another federal court (in a parallel lawsuit under California law) has held that 7-Eleven franchisees perform services which are integral to 7-Eleven's business. See Haitayan v. 7-Eleven, Inc., Case No. 2:17-cv-7454 (N.D. Cal.), Dkt. 132 at 9 ("the services Plaintiffs collectively perform are integral to 7-Eleven's business….").

CONCLUSION

The District Court's ruling that a worker whose labor *directly* impacts the defendant's revenue does not perform services for the defendant is inconsistent with numerous Massachusetts cases, including binding precedent in Sebago, and the remedial nature of the wage laws. It also establishes a hurdle facing plaintiffs

seeking redress for their misclassification, before they can even have the benefit of the application of the Massachusetts ABC test. If allowed to stand, this ruling could have an enormous impact on Massachusetts' strict enforcement of its well-known law. It must be reversed (or at the very least, certified again to the SJC).

Dated: March 21, 2023

Respectfully submitted,

DHANANJAY PATEL, SAFDAR HUSSAIN, VATSAL CHOKSHI, DHAVAL PATEL, NIRAL PATEL, individually and on behalf of all others similarly situated,

By their attorneys,

/s/ Shannon Liss-Riordan

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UNITED STATES COURT OF APPEALS
For the First Circuit
Appeal No. 23-1043

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,522 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Shannon Liss-Riordan
Attorney for Plaintiff-Appellant

Dated: March 21, 2023

UNITED STATES COURT OF APPEALS
For the First Circuit
Appeal No. 23-1043

CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that this brief was filed through the United States Court of Appeals for the First Circuit ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), including the following counsel of record for Defendant–Appellee:

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Dated: March 21, 2023

ADDENDUM

ADDENDUM

TABLE OF CONTENTS

United States District Court
District of Massachusetts

Dhananjay Patel, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.**
	)	**17-11414-NMG**
7-Eleven, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM & ORDER

GORTON, J.

This case arises from a putative class action brought by five 7-Eleven, Inc. ("7-Eleven" or "defendant") franchise store owners and operators, Dhananjay Patel, Safdar Hussain, Vatsal Chokshi, Dhaval Patel and Niral Patel (collectively "plaintiffs"). Plaintiffs brought this putative class action on behalf of themselves and a putative class of similarly situated individuals in the Commonwealth of Massachusetts.

Plaintiffs allege that 7-Eleven (1) misclassified the franchisees as independent contractors instead of employees in violation of the Massachusetts Independent Contractor Law, Mass. Gen. L. c. 149, § 148B (Count I) and (2) has violated the Massachusetts Wage Act, Mass. Gen. L. c. 149, § 148 (Count II). Plaintiffs also initially alleged that 7-Eleven violated the

Massachusetts Minimum Wage Law, Mass. Gen. L. c. 151, §§ 1, 7 (Count III) but voluntarily withdrew that claim in July, 2020.

Pending before the Court on remand from the First Circuit Court of Appeals are the parties' cross motions for summary judgment and plaintiffs' motion for class certification. Because this dispute stretches back over five years and has been the subject of opinions of this Court, the First Circuit Court of Appeals and the Massachusetts Supreme Judicial Court, only the relevant background is included below.

I. Background

A. The Parties

7-Eleven is a Texas corporation with its principal place of business in Texas. It both sells convenience store franchises and operates its own corporate stores. There are approximately 160 franchisee-operated 7-Elevens in Massachusetts.

The named plaintiffs own and operate 7-Eleven franchises in the Commonwealth, where they reside. Two of the named plaintiffs, Dhananjay Patel and Sadar Hussain, entered into franchise agreements directly with 7-Eleven.

The remaining three named plaintiffs entered into franchise agreements with 7-Eleven on behalf of separate corporate entities: Niral Patel on behalf of DP Milk Street, Inc., Dhaval Patel on behalf of DP Tremont Street, Inc., and Vatsal Chokski

on behalf of both DP Jersey, Inc. and DPNEWTO1, Inc. These plaintiffs receive their salaries from the respective corporate franchisees.

B. The Franchise Agreements

To establish each franchise location, the plaintiffs entered into franchise agreements ("the Franchise Agreement") with 7-Eleven. Dhananjay Patel and Sadar Hussain signed these agreements as individuals while Niral Patel, Dhaval Patel and Vatsal Chokski executed the agreements on behalf of their respective corporations.

The Franchise Agreement, which is substantively identical in all cases, grants franchisees the license and right to operate a 7-Eleven store. It outlines in detail the obligations and covenants that both 7-Eleven and the franchisees agree to fulfill when an individual purchases a 7-Eleven franchise store. Section 2 of the Franchise Agreement, for example, provides that the franchisee agrees "to hold [itself] out to the public as an independent contractor."

The franchisee promises to pay several fees to 7-Eleven both upon execution of the Franchise Agreement and throughout the franchisor-franchisee relationship. In Section 3, the franchisee agrees to pay 7-Eleven a franchise fee, initial gasoline fee and down payment. Section 10(a) outlines the "7-

Eleven Charge", a fee 7-Eleven collects in exchange for providing the 7-Eleven License.

> 7-Eleven Charge. You agree to pay us the 7-Eleven Charge for the License, the Lease and our continuing services. The 7-Eleven Charge is due and payable each Collection Period with respect to the Receipts from the Collection Period at the time the deposit of those Receipts is due. . . . You may not withhold Receipts or prevent payment of the 7-Eleven Charge to us on the grounds of the alleged non-performance or breach of any of our obligations to provide services to you or any other obligations to you under this Agreement or any related agreement.

C. Procedural Background

In June, 2017, plaintiffs filed this class action in Massachusetts Superior Court for Middlesex County and in August, 2017, defendant removed the case to this Court on diversity grounds.

After this Court denied defendant's motion to dismiss, 7-Eleven counterclaimed for: (1) declaratory judgment that the plaintiffs' franchise agreements are void (Counterclaim I); (2) breach of contract (Counterclaim II); and (3) contractual indemnity (Counterclaim III). Additionally, 7-Eleven filed third-party complaints against DPNEWTO1, Inc., DP Tremont Street, Inc., DP Milk Street, Inc. and DP Jersey, Inc., the four corporations on behalf of which a named individual plaintiff signed a Franchise Agreement with 7-Eleven. This Court denied

plaintiffs' motion to dismiss the counterclaims and the third-party complaints in September, 2019.

In March, 2020, both parties filed cross motions for summary judgment and plaintiffs filed their motion for class certification. This Court allowed summary judgment in favor of defendant, 7-Eleven.

Plaintiffs appealed the summary judgment decision to the First Circuit Court of Appeals, which certified a question of law to the Massachusetts Supreme Judicial Court ("the SJC") in August, 2021. See Patel v. 7-Eleven, Inc., 8 F.4th 26 (1st Cir. 2021) ("[W]e consider the most prudent approach to be to give the SJC the first opportunity to weigh in on this issue."). The certified question was:

> Whether the three-prong test for independent contractor status set forth in Mass. Gen. Laws ch. 149 § 148B applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule?

Id. In March, 2022, the SJC answered the certified question, explaining that the Massachusetts ICL both applies to the franchisor-franchisee relationship and does not conflict with the federal franchisor disclosure requirements in the FTC Franchise Rule. Patel v. 7-Eleven, Inc., 183 N.E.3d 398 (Mass. 2022). The First Circuit Court of Appeals then vacated the

decision of this Court and remanded the case for further proceedings.

In July, 2022, the parties submitted supplemental briefing in support of their pending cross motions for summary judgment and plaintiffs' motion for class certification. The deadline for all remaining discovery is December 30, 2022, and trial is scheduled to commence in late January, 2023.

II. Motion for Summary Judgment

A. Legal Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) (quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)). The burden is on the moving party to show, through the pleadings, discovery and affidavits, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A fact is material if it "might affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where the evidence with respect to the material fact

in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." Id.

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Court must view the entire record in the light most hospitable to the non-moving party and make all reasonable inferences in that party's favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). If, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, then summary judgment is warranted. Celotex Corp., 477 U.S. at 322-23.

B. The Massachusetts Independent Contractor Law ("the Massachusetts ICL")

Massachusetts considers "an individual performing any service" for another to be an employee, unless the purported employer can rebut that presumption. Mass. Gen. L. c. 149, § 148B(a). To do so, the employer must prove the three conjunctive elements of an independent contractor relationship:

> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

> (2) the service is performed outside the usual course of the business of the employer; and,
>
> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Id. at § 148B(a)(1)-(3) ("the ABC Test"). If an employer is unable to satisfy any prong, then the individual is classified as an employee. Sebago v. Bos. Cab Dispatch, Inc., 28 N.E.3d 1139, 1146 (Mass. 2015).

C. Arguments of the Parties

7-Eleven argues that the Massachusetts ICL does not apply because (1) plaintiffs cannot meet the threshold inquiry that franchisees perform services for 7-Eleven because 7-Eleven in fact provides services to the franchisees in exchange for payment and (2) 7-Eleven is not the direct employer of Dhaval Patel, Niral Patel or Vatsal Chokshi because their separate corporate entities signed Franchise Agreements with 7-Eleven and thus 7-Eleven is, at a minimum, not liable for any alleged misclassification as to those plaintiffs. Furthermore, 7-Eleven contends that plaintiffs have not incurred any Wage Act damages because the SJC deemed franchise fees legal in Patel v. 7-Eleven, Inc., 183 N.E.3d 398 (Mass. 2022).

Plaintiffs respond that (1) the Massachusetts ICL applies because plaintiffs do perform services for 7-Eleven, (2) the

existence of plaintiffs' corporations does not render the Massachusetts ICL inapplicable and (3) the SJC opinion in Patel does not invalidate plaintiffs' Wage Act claim.

D. Application

1. Resolving the Services Inquiry on Summary Judgment

As an initial matter, 7-Eleven again reiterates in its supplemental briefing that plaintiffs do not provide services to it, and thus cannot meet the threshold inquiry for the Massachusetts ICL to apply, while plaintiffs, not surprisingly, dispute that contention.

The threshold inquiry to determine if an individual is deemed an employee under the Massachusetts ICL is whether the "individual perform[s] any service" for the alleged employer. Mass. Gen. L. c. 149, § 148B(a). "Service" is construed liberally to effectuate the remedial purpose of the statute in "protect[ing] employees from being deprived of the benefits enjoyed by employees through their misclassification." Somers v. Converged Access, Inc., 911 N.E.2d 739, 749 (Mass. 2009).

This Court initially declined to enter summary judgment for defendant on this ground after considering (1) plaintiffs' argument that the services inquiry is a low threshold issue, (2) the competing allegations and various contractual obligations of both parties and (3) the language of the Franchise Agreement.

The SJC has, however, provided additional guidance on the threshold inquiry when it resolved the First Circuit's certified question in this matter. See Patel, 183 N.E.3d at 411. The SJC explained:

> This threshold is not satisfied merely because a relationship between the parties benefits their mutual economic interests. Nor is required compliance with Federal or State regulatory obligations enough, in isolation, to satisfy this threshold inquiry.

Id. (citing Jinks v. Credico (USA) LLC, 177 N.E.3d 509, 515-16 (Mass. 2021); Sebago, 28 N.E.3d at 1147-48). This additional guidance is instructive in analyzing whether plaintiffs have satisfied their burden of demonstrating that they do in fact perform services for 7-Eleven. See Patel, 183 N.E.3d at 404 ("Once the individual has shown the performance of services for the putative employer, the alleged employer may rebut the presumption by establishing [the ABC test] by a preponderance of the evidence."). With this guidance in mind, this Court will proceed to analyze the record to determine if plaintiffs can satisfy the threshold inquiry.

2. Whether Plaintiffs Perform "Services" for 7-Eleven

7-Eleven continues to assert that the plaintiff franchisees pay it, the franchisor, for the provision of services. It denies the suggestion that 7-Eleven pays the plaintiffs for any services.

Both parties rely upon the obligations outlined in the Franchise Agreement to bolster their services inquiry arguments. Plaintiffs contend that the covenants in the Franchise Agreement constitute services that they perform for 7-Eleven. For example, plaintiffs discuss Section 19 of the Franchise Agreement, in which they promise to work full time in the store, operate the store 24 hours a day, record inventory sales, wear approved uniforms and use the 7-Eleven payroll system. Plaintiffs also refer to certain financial obligations outlined in Section 12, such as preparing and submitting a cash report and depositing receipts, as services performed for 7-Eleven. In response, defendant stresses that these contractual obligations are not, on their own, services performed for an employer within the meaning of the Massachusetts ICL.

Rather, defendant cites Sebago for the proposition that services are obligations performed by employees in exchange for payment. In Sebago, the SJC held that the plaintiff taxi drivers did perform a service for the defendant radio associations, because the radio associations paid the taxi drivers when they redeemed their passengers' vouchers that were purchased from the radio association. 28 N.E.3d at 1149. In the case at bar, however, 7-Eleven does not pay the franchisees for the performance of any alleged obligations. In fact, the

opposite is true, because 7-Eleven actually provides the franchisees with services in exchange for franchise fees.

Defendant renders the following services: both initial and ongoing training programs, including access to the 7-Eleven Operations Manual (Section 4), the grant of a license to operate the 7-Eleven store at the specified location (Section 7), bookkeeping records and payroll software (Section 12), store audits (Section 14), maintenance of 7-Eleven equipment and performance of store repairs (Section 20) and advertising services (Section 22). Per Section 15, 7-Eleven also

> procure[s] the initial inventory [for the franchisees,] help[s] [them] clean and stock the store [and] provide[s] other services to prepare the store to open for business.

In return for such services, plaintiffs pay 7-Eleven a franchise fee and down payment (Section 3) and pursuant to Section 10 of the Franchise Agreement, they "agree to pay [7-Eleven] the 7-Eleven Charge for the License, the Lease and [7-Eleven's] continuing services." As this Court previously found, 7-Eleven does not pay the plaintiffs for anything.

> 7-Eleven does not pay franchisees a salary. Instead, franchisees may withdraw weekly or monthly "draws" from the store's gross profit minus the 7-Eleven Charge and store expenses.

Patel v. 7-Eleven, Inc., 485 F. Supp. 3d 299, 303-04 (D. Mass. 2020).

The Court remains unconvinced that the plaintiffs' contractual obligations outlined in the Franchise Agreement alone are enough to constitute services under the Massachusetts ICL. The record demonstrates that they are not paid for any services performed for 7-Eleven. In contrast, the franchisees pay franchise fees to 7-Eleven in exchange for a variety of services to support the franchisee.

3. Plaintiffs' Revenue Argument

Plaintiffs suggest that because the revenue flowing to 7-Eleven is directly dependent on their stores' revenue, they provide services to 7-Eleven. That theory was, however, rejected by the SJC twice in the past year, both in Patel and Jinks. In Jinks,

> the plaintiffs urge[d] that an entity is an individual's employer so long as the individual is "performing any service" from which the entity derives an economic benefit [and the SJC remarked that it already] rejected such an approach in Depianti v. Jan-Pro Franchising.

177 N.E.3d at 515-16 (citing 990 N.E.2d 1054 (Mass. 2013)). Further, in Patel, the SJC reiterated that the services threshold is not met "merely because a relationship between the parties benefits their mutual economic interests." 183 N.E.3d at 411. Plaintiffs and 7-Eleven do have mutual economic interests, as both profit from the franchise stores' revenue. That mutual

interest is not, however, sufficient to establish that plaintiffs perform services for 7-Eleven.

The SJC insisted in Patel that

> nothing in the independent contractor statute prohibits legitimate franchise relationships among independent entities that are not created to evade employment obligations under the wage statutes.

183 N.E.3d at 411 (citing An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149 § 148B 2008/1, https://www.mass.gov/ doc/an-advisory-from-the-attorney-generals-fair-labor-division-on-mgl-c-149-s-148b-20081/download). Here, 7-Eleven's mutual economic interests with the plaintiff franchisees in the stores' sales and revenue are inherent in legitimate franchise relationships. The Franchise Agreement sets forth a legitimate franchise relationship between 7-Eleven and the individual plaintiffs who operate their own stores. The Massachusetts ICL does not prohibit those relationships, and thus, the mere fact that the parties share economic interest does not imply that plaintiffs perform services for 7-Eleven.

The Court, thus, rejects the notion that plaintiffs perform services for 7-Eleven. The franchisees, who pay franchisor 7-Eleven for a plethora of services, are merely fulfilling their

contractual obligations. The Court will, therefore, allow summary judgment in defendant's favor on both remaining counts.

Having so concluded, plaintiffs' motions for summary judgment on 7-Eleven's liability for misclassification and class certification will be denied. 7-Eleven's counterclaims and third-party claims for (1) declaratory judgment that the various franchise agreements are void; (2) breach of contract; and (3) contractual indemnity are not the subject of any summary judgment motion and, therefore, remain pending.

ORDER

For the foregoing reasons, defendant 7-Eleven, Inc.'s motion for summary judgment (Docket No. 112) is **ALLOWED**. Plaintiffs' motions for summary judgment and class certification (Docket Nos. 117, 118) are **DENIED**.

The parties are directed to submit a joint status report on defendant's pending counterclaims against plaintiffs and third-party defendants on or before Wednesday, October 19, 2022.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated September 28, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* *

Dhananjay Patel, et al.

Plaintiff

v.

CIVIL ACTION NO.:
17-11414-NMG

7-Eleven, Inc., et al.

Defendant

* *

JUDGMENT

January 4, 2023

Gorton, D.J.

In accordance with the Memorandum & Order entered on January 4, 2023 ALLOWING the Plaintiff's Cross-Motion for Summary Judgment,

Judgment is entered on behalf of the plaintiffs. This case is hereby DISMISSED.

SO ORDERED.

/s/Nathaniel M. Gorton
NATHANIEL M. GORTON
United States District Judge