



Guynn-Neupane v. Magna Legal Services. LLC

2021 | Cited 0 times | N.D. California | September 30, 2021

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NAOMI GUYNN-NEUPANE,

Plaintiff, v.

MAGNA LEGAL SERVICES. LLC, et al.,

Defendants.

Case No. 19-cv-02652-VKD ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DENYING AS MOOT CERTIFICATION; GRANTING MOTIONS TO SEAL 1 Re: Dkt. Nos. 48, 50, 51, 52, 57, 64, 68

Plaintiff Naomi Guynn-Neupane participated in a one-day jury research focus group in February 2019. Shortly after, she filed the present putative class action for alleged violations of California -and-hour laws, claiming that she and a putative class of focus group participants (i.e., mock jurors) were misclassified as independent contractors, rather than employees. conducted the focus group, and Wilkins Research Service Guynn-Neupane and other focus group participants for Magna.

Magna and Wilkins each move for summary judgment on all claims for relief, arguing that as a matter of law, Ms. Guynn-Neupane is an independent contractor, and not an employee. Ms. Guynn-Neupane opposes both motions. She also concurrently filed a separate motion for class certification, which both Magna and Wilkins oppose. The Court held a hearing on all three motions. Upon consideration of the moving and responding papers, 2

as well as the oral arguments

1 All parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by a magistrate judge. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; Dkt. Nos. 10, 12, 34. 2 The Court previously struck a portion of Ms. Guynn-

presented, the Court grants grants summary judgment, and denies as moot Ms. Guynn- certification.



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3 I. EVIDENTIARY OBJECTIONS AND REQUESTS FOR JUDICIAL NOTICE

As discussed below, the material facts in this case are undisputed. The Court nevertheless addresses Ms. Guynn- tions that are relevant to the resolution of necessary below.

Ms. Guynn-Neupane asserts a number of objections to the declarations of Mark Calzaretta (a founding partner of Magna and its Vice President of Litigation Consulting), Kellie Janke (a Magna Senior Litigation Consultant), and Lynn Wilkins 4

-owner and partner). The testimony in question and Ms. Guynn- summary judgment. See Dkt. Nos. 48-1, 48-2, 48-3, 52-1, 52-2, 52-3, 61 at 27-30, 62 at 29-30.

Accordingly, the Court addresses Ms. Guynn-

Ms. Guynn-Neupane argues that declaration , written Executive Summary Report, and a UPS

delivery receipt violate the best evidence rule Fed. R. Evid. 1002. Ms.

Guynn-

which were well in excess of the page- See Dkt. No. 56; Civil L.R. 7-3. Ms. Guynn-Neupane subsequently filed an amended opposition. Dkt. No. 62. Ms. Guynn- motion to be 2 pages too long (Dkt. No. 62 at 30). Magna submitted an amended opening brief (Dkt. No. 64), which is the brief that the Court has considered. 3 The Court finds compelling reasons to grant motions to seal certain exhibits submitted in connection with Ms Guynn- those materials reveal confidential information from the underlying personal injury litigation, and otherwise implicate personal privacy interests of the focus group participants. See *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) Those who seek to maintain the secrecy of documents attached to dispositive motions must meet the high threshold of showing that compelling reasons support secrecy. bearing on the resolution of the present motions for summary judgment. 4 Ms apparently Court refers to cited excerpts of her deposition transcripts

certain email communications between Ms. Guynn-Neupane and Wilkins. Insofar as the challenged testimony is offered to prove the contents of the referenced documents, each declarant has, for the most part, submitted copies of the pertinent documents, as to which no questions have been raised about authenticity or admissibility. See Fed. R. Evid. 1003. Ms. Guynn- objections based on the best evidence rule are overruled as to Dkt. No. 48-1 ¶¶ 13, 15; Dkt. No.

48-2 ¶ 15-18, 76-82; Dkt. No. 48-3 ¶¶ 20-22; Dkt. No. 52-1 ¶¶ 20-22; Dkt. No. 52-2 ¶ 15-18, 76- 82; Dkt. No. 52-3 ¶¶ 13, 15. However, Ms. Guynn-



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a referenced UPS delivery receipt (which Ms. Janke apparently intended to, but did not submit with her declaration) to establish that Magna sent Ms. Guynn-Neupane a replacement check. As discussed below, however, it is undisputed that Ms. Guynn-Neupane received full payment from Magna for her participation in the study.

Ms. Guynn-Neupane objects to portions of the declarations of Mr. Calzaretta, Ms. Janke, and Ms. Wilkins on the ground that the proffered testimony is either inconsistent with the local Rule 7-5(b), 5 or is both conclusory and inconsistent with deposition testimony. Ms. Guynn-Neupane requests that the Court review the entire record, including that she submitted in support of her opposition to summary judgment, and that it not rely on the . Except for matters that have been stricken or amended (as noted above), the Court has considered the briefs and supporting papers submitted by all . The Court does not find that the challenged portions of the declarations contradict the deposition testimony. Nor has Ms. Guynn-Neupane demonstrated that the challenged declarations are conclusory, notwithstanding that the - No. 48-1 ¶¶ 15, 20, 31; Dkt. No. 48-2 ¶¶ 30, 37, 38,

5 An affidavit or declaration[] may contain only facts, must conform as much as possible to the requirements of Fed. R. Civ. P. 56(e), and must avoid conclusions and argument. Any statement made upon information or belief must specify the basis therefor. An affidavit or declaration not in compliance with this rule may be stricken in whole or in part. -5(b).

41, 45, 52, 59; Dkt. No. 48-3 ¶¶ 9-11; Dkt. No. 52-1 ¶¶ 9-11; Dkt. No. 52-2 ¶¶ 30, 37, 38, 41, 45, 52, 59; Dkt. No. 52-3 ¶¶ 15, 20, 31. As discussed below, to the extent paragraph 9 of

Con deposition, the Court finds any inconsistency to be immaterial to the resolution of the issues presented. See Dkt. No. 48-2 ¶ 9; Dkt. No. 54-3, Ex. F (Janke Dep. 25:17-19); Dkt. No. 52-2 ¶ 9; Dkt. No. 61-3, Ex. F (Janke Dep. 25:17-19).

Defendants request for judicial notice of certain legislative materials (Dkt. Nos. 49, 53) concerning II. BACKGROUND

A. Defendants Defendant -to-end legal services consulting, deposition, and record retrieval services for its clients. Dkt. No. 48-1 ¶ 7.

meant to assist clients in preparing for all stages of litigation, including hearings, depositions, Id. such as in- person and online focus group research studies, jury profiling studies, attitudinal surveys, change- of-venue surveys, damages assessments, predictive modeling, mock trials, jury selection, strategic development, witness preparation training, and shadow juries Id.

Chattanooga, Tennessee, Wilkins operates a call center and currently employs approximately 111 -1 ¶ 3. Wilkins says that it has never had any employees work from California. Id. In addition to medical data collections, Wilkins also provides the following services: roundtable focus group[s] for



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consumers, shop-along market research, product placement, research panels on education, consumer issues, and politics, political research, and jury research. Id. ¶ 4.

B. Focus Group Recruitment Process In January 2019, Magna was retained by a client to provide jury consulting services in a personal injury lawsuit for the purpose of evaluating the effectiveness of trial themes and refining the overall litigation strategy in preparation for trial. Dkt. No. 48-2 ¶ 8. Magna assigned the matter - to a consulting team comprised of two litigation consultants and a consultant/research coordinator, 6

who reviewed the case file and met with the Id. ¶¶ 9, 10; Dkt. No. 54-3, Ex. F (Janke Dep. 25:17-19). Magna says that as part of many consulting engagements, it provides clients with advice and recommendations in the form of a written report based on its expertise, research, and data analysis. Dkt. No. 48-1 ¶ 23. Ma consultants produce the written work product that is provided to and which Magna says represents hundreds to thousands of hours of work by its consultants. Id. ¶ 24.

Clients do not specifically engage Magna to conduct jury research using focus groups. Dkt. No. 48-1 ¶ 10. Depending on the circumstances, Magna may conduct one or more focus groups within a single consulting engagement. However, focus groups are not always necessary, and a particular engagement may be accomplished without any focus group ever being conducted. Id. Whenever it does conduct a focus group, Magna does not itself recruit participants. Magna instead engages firms such as Wilkins to identify and recruit eligible participants. Dkt. No. 48-1 ¶ 12; Dkt. No. 48-3 ¶ 5; Dkt. No. 52-1 ¶ 5; Dkt. No. 52-3 ¶ 12; Dkt. No. 54-3, Ex. D (Calzaretta Dep. 84:20-85:14); Dkt. No. 61-3, Ex. C (Crabtree Depo 51:3-13); Dkt. No. 61-3, Ex. D (Calzaretta Dep. 85:3-14). To assist the recruiting firms, Magna develops a script to identify potential focus group participants who meet certain criteria and who are representative of the jury pool in the relevant venue. The script contains questions that screen out individuals based on several factors, including their demographic and background information. Magna also provides

6 As discussed above, Ms. Guynn-Neupane objects that in her declaration Ms. Janke refers to Ben Scrimalli as a technical consultant, but testified in deposition that he is a litigation consultant and research coordinator. Dkt. No. 61 at 29. The Court refers here to Mr. Scrimalli as both a consultant and research coordinator, but finds that his proper job title is immaterial to the resolution of the present motions for summary judgment.

the recruiting firms with an Excel template to input participant names, demographic information, and contact information. Dkt. No. 48-1 ¶¶ 13, 14, Ex. 1; Dkt. No. 48-3 ¶ 15; Dkt. No. 54-3, Ex. C (Crabtree Dep. 12:1-6, 63:4-64:20; Ex. 2); Ex. D (Calzaretta Dep. 64:9-65:1, 73:10-25, 75:15- 76:5, 76:11-17, 87:7-88:17; Exs. 14-15); Ex. F (Janke Dep. 27:12-19); Dkt. No. 61-3, Ex. C (Crabtree Dep. 63:4-64:20; Ex. 2); Ex. D (Calzaretta Dep. 75:15-76:5, 76:11-17). Ultimately, Magna determines whether an individual fits the criteria for a particular study. Dkt. No. 54-3, Ex. C (Crabtree Dep. 58:15-17); Dkt. No. 61-3, Ex. C (Crabtree Dep. 58:15-17).



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As part of its work on the AGC-012 project, on February 21, 2019 Magna convened a one- day, in-person jury research focus group in Monterey, California. Dkt. No. 48-2 ¶ 11. Magna engaged Wilkins to identify and invite focus group participants and also provided Wilkins with the script and Excel template to use in identifying eligible individuals. Dkt. No. 48-1 ¶ 14, Ex. 1; Dkt. No. 52-1 ¶¶ 6-7, Ex. 1; see also Dkt. No. 54-3, Ex. C (Crabtree Dep. 12:1-6, 53:7-21; 57:24-58:14, Ex. 2); Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-21; 56:19-58:14, Ex. 2). The AGC-012 screener script, 7

which Magna says is representative of the script used for all of its jury research focus groups, filters out individuals based on a number of factors, including those who participated in jury research in the past four years or in focus group or market research study in the past 18 months. Dkt. No. 48-1 ¶ 14, Ex. 1 at MLS000044. Upon receipt of the script, Wilkins says it posted an ad on social media, advertising the AGC-012 focus group as a one-time paid research study. Dkt. No. 48-3 ¶ 9; 52-1 ¶ 9; Dkt. No. 54-3, Ex. C (Crabtree Dep. 56:19-57:15); Dkt. No. 61-3, Ex. C (Crabtree Dep. 56:19-57:15). Wilkins called potential participants who responded to the ad and read the script to them in order to identify those who met the qualifying criteria. Dkt. No. 54-3, Ex. C (Crabtree Dep. 53:7-21, 58:3-9, 66:2-20, Ex. 2); Ex. D (Calzaretta Dep. 96:3-20);

7 Magna has redacted portions of the script that it says reveal confidential information regarding the underlying personal injury litigation, including the names of parties and third-parties. Dkt. No. 48-1 ¶ 14, Ex. 1. Similarly, Wilkins has redacted portions of the template used for the AGC-012 information. Dkt. No. 52-1 ¶ 13, Ex. 2. Although defendants have not formally moved to seal personal and confidential nature of the information. See Kamakana, 447 F.3d at 1178-79. In any event, none of that information is material to the resolution of the present motions.

Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-21, 58:3-9, 66:2-20, Ex. 2); Ex. D (Calzaretta Dep. 96:3- 20). Those who qualified were invited to participate in the focus group. Dkt. No. 54-3, Ex. C (Crabtree Dep. 53:7-17); Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-17).

Through this process, Ms. Guynn-Neupane was identified and recruited as an individual eligible to participate in the February 21, 2019 AGC-012 focus group. Dkt. No. 48-2 ¶ 20; Dkt. No. 52-2 ¶ 20; Dkt. No. 54-3, Ex. F (Janke Dep. 35:20-22); Dkt. No. 61-3, Ex. F (Janke Dep. 35:20-22). The parties do not dispute that participation in the study was voluntary. See Dkt. No. 48-3 ¶ 11; 52-1 ¶ 11; Dkt. No. 54-3, Ex. C (Crabtree Dep. 56:19-57:15); Dkt. No. 61-3, Ex. C (Crabtree Dep. 56:19-57:15). Additionally, no special training or preparation was required to pass the screening process or to participate in the focus group, and Ms. Guynn-Neupane did not attend any special training or otherwise do anything to prepare for the focus group. Dkt. No. 48-1 ¶ 15; Dkt. No. 52-3 ¶ 15; Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 33:11-16); Dkt. No. 61-3, Ex. B (Guynn-Neupane Dep. 33:11-16).

After verbally accepting the invitation to participate in the focus group, Ms. Guynn- Neupane says that she the full \$260 payment for her participation; if she was dismissed from the study within the first hour of the session, she would be paid \$150 for just showing up [ould]



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jury session, which would result in dismissal from the jury research session without pay; and she was told not to leave the site for the lunch break. Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 63:19-64:2); Dkt. No. 54-3, Ex. C (Crabtree Dep. 64:25-65:12; 66:2-20; Ex. 2); Dkt. No. 61-3, Ex. C (Crabtree Dep. 64:25-65:12; 66:2-20; Ex. 2).

At the time of the AGC-012 jury study, Ms. Guynn-Neupane was employed on a full-time basis at Employnet, a staffing agency, where she worked from approximately June 2018 until August 2019. Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 13:8-12, 14:12-19, 15:22-25); Dkt. No. 61-3, Ex. B (Guynn-Neupane Dep. 13:8-12, 14:12-19, 15:22-25). Her job duties and responsibilities at Employnet included recruiting and interviewing individuals for job placements,

calling clients, collecting time cards, and confirming that candidates were timely paid for the hours they worked. Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 13:8-14:19, 15:22-25).

Ms. Guynn-Neupane avers that no one at Magna or Wilkins ever told her whether she would function as an employee or as an independent contractor in her role as a focus group participant. Dkt. No. 54-2 ¶ 4; Dkt. No. 61-2 ¶ 4. There is no evidence that she signed any agreement as to her employee or independent contractor status. For her participation in the study, Magna paid Ms. Guynn-Neupane a lump sum of \$260, including \$10 for parking. Dkt. No. 48-2 ¶ 69; Dkt. No. 52-2 ¶ 69.

Several days prior to the AGC-012 focus group, Wilkins staff made courtesy calls to the participants to confirm that they were still interested in participating in the study and to reiterate the time and location of the study. Dkt. No. 52-1 ¶ 16. Two days before the study, on February 19, 2019, Wilkins staff emailed participants to confirm their participation in the focus group. Id. ¶ 17, Ex. 3. The February 19 email was based on a template Wilkins uses for Magna engagements and contained language similar to the invitation recited in the screener script. Id. On February 20, 2019, the day before the study, Wilkins sent a final email to participants to remind them of the study and to advise them to plan for traffic. Id. ¶ 18, Ex. 4.

Wilkins says that it ordinarily would have no further contact with the participants for this kind of in-person jury research conducted by Magna. Dkt. No. 52-1 ¶ 19. In this particular case, however, Wilkins had some further email communication with Ms. Guynn-Neupane. On the morning of the study, Ms. Guynn- advise that she was running late. Id., Ex. 3. Additionally, after the AGC-012 focus group was completed, Ms. Guynn-Neupane responded to Wilkin and requested a replacement check, stating that she lost the one given to her by Magna for her participation in the study. Id. ¶ told Ms. Guynn-Neupane that Wilkins would reach out to Magna and see what Magna could do. Id. ¶ 21, Ex. 4 staff then forwarded Ms. Guynn- . Id. ¶ 22. Magna claims that it sent a

replacement check to Ms. Guynn-Neupane at her address, 8

and it is undisputed that Ms. Guynn- Neupane received full payment from Magna for her



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participation in the study. Other than its involvement in the recruiting process described above, and the additional email communications with Ms. Guynn-Neupane, there is no indication that Wilkins had any other role in the planning or administration of the AGC-012 focus group. Dkt. No. 48-3 ¶ 23; Dkt. No. 52-1 ¶ 23.

C. The February 21, 2019 Focus Group Participants were asked to arrive at the focus group by 8:15 a.m. Dkt. No. 48-4 ¶ 3, Ex. 1 (Guynn-Neupane Dep. at 39:2-3); Dkt. No. 48-3 ¶ 17, Ex. 3; Dkt. No. 52-1 ¶ 17, Ex. 3. Ms. Guynn-Neupane did not arrive at the focus group until around 8:45 a.m., but she nonetheless was able to participate in the focus group and received the full \$260 compensation from Magna at the end of the study. Dkt. No. 48-4 ¶ 3, Ex. 1 (Guynn-Neupane Dep. at 42:13-16; 43:1-11).

cus group participants, including Ms. Guynn-Neupane, were required to sign a non- directly or indirectly, disclos[ing] to any third party any confidential

information or trade secrets Magna. Dkt. No. 48-2 ¶ 29, Ex. 4. Magna says that the NDA was necessary to protect

confidential information in the underlying litigation that would be used in the course of the study. Id. Additionally, each participant was given a hand-held keypad to be used in responding to questions during the study. Id. ¶ 28.

The AGC-012 focus group consisted of a morning session and an afternoon session. The consulting team began the morning session by administering a pre-stimulus juror questionnaire responses regarding issues pertaining to the underlying personal injury lawsuit. Dkt. No. 48-2 ¶¶ 25, 30-33 and Ex. 5 at MLS601-624. Magna says that the data collected during this portion of the study is quantitative t orientation, their desire for each party to prevail in the

8 As discussed above, Ms. Guynn- declaration are sustained.

underlying litigation, and their desire to compensate the plaintiffs with money damages. Id. ¶ 25.

lead consultant, Kellie Janke, then gave an orientation advising the participants that they would serve as mock jurors in the underlying personal injury lawsuit. Dkt. No. 48-2 ¶¶ 36-37; see also Dkt. No. 54-3, Ex. F (Janke Dep. 72:25-74:25). Ms. Janke also provided the participants with certain rules and guidelines that applied to the study. Magna says that these rules were meant to track court rules that apply during actual jury trials. Dkt. No. 48-2 ¶¶ 36, 38. Although the parties dispute the significance of those study parameters, for present purposes it is undisputed that as a focus group participant, Ms. Guynn-Neupane was asked to comply with several instructions, including that participants were (1) asked not to use their cellphones and to silence or turn their phones off; (2) instructed not to discuss the case with other participants until juror deliberations; (3) instructed not to talk during presentations and to hear all of the evidence and arguments presented by each side in order to



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deliberate; and (4) instructed to stay on site for the duration of the focus group, including during lunch and rest breaks. Id. ¶ 38; Dkt. No. 48-4 ¶ 3, Ex. 1 (Guynn-Neupane Dep. 52:18-20; 53:3-5); see also Dkt. No. 54-3, Ex. F (Janke Dep. 72:25-76:9).

Throughout the day, Magna provided several breaks lasting from 5 to 20 minutes each, as well as a lunch break. Dkt. No. 54-3, Ex. F (Janke Dep. 96:2-11, 115:9-14; Ex. 13). Before each break, Magna reminded jurors not to talk to anyone about the case, not to conduct outside research, and to stay on-site. Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 62:5-12, 63:19-64:2, 70:13-16); Ex. F (Janke Dep. 88:10-89:25, 96:12-22, 97:7-19, 103:4-12); see also Dkt. No. 48-2 ¶¶ 45-46.

Following the mock trial presentations, the consulting team read mock jury instructions to the participants and administered a post-presentation questionnaire, to which participants responded and which Magna says was attitudes about the underlying case and the parties. Dkt. No. 48-2 ¶ 49.

Completion of the post-presentation questionnaire was followed by the lunch break. Lunch was provided on site by Magna. Dkt. No. 54-3, Ex. D (Calzaretta Dep. 117:7-21). consulting team again reminded participants that during the lunch break they were not to

conduct outside research or discuss the case with one another. Dkt. No. 48-2 ¶ 52; Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. at 70:13-16); Dkt. No. 54-3, Ex. F (Janke Dep. at 103:4-12). Ms. Guynn-Neupane testified that Magna also instructed participants to stay on site during breaks, including the lunch break. Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. at 63:19-64:2). Magna does not refute that assertion, but contends that due to other lunch break duties, its staff could not monitor participants to see if they went off premises; no participant informed Ms. Janke that they were going off site during the lunch break; and if any participant did ask, Ms. Janke would have told the participant that it was fine to leave the premises for lunch. Dkt. No. 48-2 ¶ 53.

Following the lunch break, the focus group afternoon session consisted of a mock jury deliberation session and guided post-verdict discussion. Dkt. No. 48-2 ¶ 26. consulting team divided the participants into three deliberation groups of 12 participants each based on their responses to the morning session questionnaires. Id. ¶¶ 54-55. Each of the three consulting team members facilitated a deliberation group. Id. ¶ 56. Ms. Guynn-Neupane was assigned to Deliberation Group C, which was facilitated by Ms. Janke. Id. Ms. Janke provided the group with copies of the mock verdict form and the mock jury instructions, and told the participants that they could now discuss the case. She nonetheless asked that they not discuss the case unless all 12 group members were present and that they not use their cellphones during deliberations. Id. ¶¶ 57- 59; Dkt. No. 54-3, Ex. F (Janke Dep. 110:12-112:2). Ms. Janke also asked the foreperson to submit the verdict form to her at the end of the day, but says that a completed verdict form was not actually the form of the participants opinions, motivations, and attitudes, in a mock jury deliberation -2 ¶¶ 26, 60. Ms. Janke left the room she returned to the deliberation Id. ¶ 64. At the conclusion of the deliberations, Ms. Janke facilitated a post-verdict moderated discussion, which Magna says is another means for gathering qualitative data



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for analysis. Id. ¶ 66.

The AGC-012 focus group concluded at approximately 5:30 p.m., and Ms. Guynn-

Neupane was given a check from Magna for \$260. Dkt. No. 48-2 ¶ 69. consulting team subsequently provided a 151-page written report the research and quantitative and qualitative data collected during the AGC-012 focus group. Id. ¶ 74, Ex. 5.

D. Procedural History Ms. Guynn-Neupane originally filed the present lawsuit in the Monterey County Superior Court. Magna removed the matter to this Court, asserting jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). Dkt. Nos. 1, 3. The Court subsequently gran

California Private Attorneys General Act, and the California Business and Professions Code. Dkt. No. 15. The FAC remains the operative pleading and alleges that defendants failed to comply - 2001 by failing to provide meal and rest periods; pay hourly and overtime wages; pay minimum wages; provide accurate wage statements; timely pay wages; pay agreed wages; and pay all wages upon termination of employment. 9

Ms. Guynn- Magna and Wilkins are joint employers. See id. ¶ 8. No one disputes that in order to recover for the alleged wage-and-hour violations, Ms. Guynn-Neupane must establish that she was .

Magna and Wilkins each move for summary judgment on all claims for relief on the ground that Ms. Guynn-Neupane is, at most, an independent contractor, and not an employee. As

9 The claims asserted in the FAC are as follows: (1) failure to provide meal periods, Cal. Labor Code §§ 226.7, 1198; (2) failure to provide rest periods, Cal. Labor Code §§ 226.7, 1198; (3) failure to provide hourly and overtime wages, Cal. Labor Code §§ 1194, 1198, 1199; (4) failure to pay minimum wages, Cal. Labor Code §§ 1194, 1197; (5) failure to provide accurate wage statements, Cal. Labor Code §§ 226, 1174, 1175; (6) failure and refusal to pay agreed wages, Cal. Labor Code §§ 201, 202, 204, 216, 218, 221, 223, 1194, 1198; (7) failure to pay all wages upon termination, Cal. Labor Code §§ 201-203; (8) failure to timely pay wages, Cal. Labor Code § 204; (9) unfair business practices, Cal. Bus. & Prof. Code § 17200, et seq.; and (10) Private Attorneys General Act, Cal. Labor Code § 2698, et seq. Dkt. No. 15.

noted above, there are no apparent disputes regarding material facts, and the question of Ms. Guynn-Ne presents a question of law. 10

The primary point of contention is what legal test applies and what conclusions should be drawn from the undisputed facts in determining whether Ms. Guynn-Neupane properly is classified as an independent contractor or an employee with respect to her participation as a mock juror in the AGC-012 focus group. III. LEGAL STANDARD



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A. Summary Judgment A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of informing the court of the basis for the motion, and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to meet its b

have enough evidence of an essential element to carry its ultimate burden of persuasion *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

If the moving party meets its initial burden, the burden shifts to the non-moving party to produce evidence supporting its claims or defenses. See *id.* at 1102. The non-moving party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows there is a genuine issue of material fact for trial. See *id.* A genuine issue of fact is one that could reasonably be resolved in favor of either party. *Anderson*, 477

10 The determination of employee or independent contractor status is one of fact if the determination depends on the resolution of disputed evidence or inferences. But if the evidence is undisputed, the question becomes one of law. *S.G. Borello & Sons, Inc Relations*, 48 Cal. 3d 341, 349 (1989).

U.S. at 248-49.

burden of proof at trial, the moving party need only *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting *Celotex Corp.*, 477 U.S. at

325). Once the moving party meets this burden, the nonmoving party may not rest upon mere allegations or denials, but must present evidence sufficient to demonstrate that there is a genuine issue for trial. *Id.*

certification motion] when early resolution of a motion for summary judgment seems likely to protect both the parties and the *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984). *sumes* the risk that summary judgment in his favor will have only

Id.; see also *Kim v. Commandant*, 772 F.2d 521, 524 (9th Cir. 1985) (granting summary judgment before ruling on class certification motion, . 11

B. Legal Framework In , 48 Cal. 3d 341 (1989), the California Supreme Court set out a framework for classifying workers as either employees or independent contractors. *Borello* recites indicia of an employer-employee relationship, including the right to control work details



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11 respective summary judgment motions and Ms. Guynn- The Court finds that it will be more practicable and efficient to resolve de is that Ms. Guynn-Neupane properly is classified as an independent contractor. For the reasons discussed below, the Court concludes that defendants are correct. Ms. Guynn- therefore fail, and her motion for class certification is moot. The judgment will not be res judicata as to members of any class that may be certified, and the Court concludes that resolution of the present motions for summary judgment is Wright, 742 F.2d at 544.

Id. at 350-51. Nearly thirty years later, in *Dynamex Operations West, Inc. v. Super. Ct.*, 4 Cal. 5th 903 (2018), the California Supreme Court adopted a standard often referred to as

that each of three requirements is satisfied:

(a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Id. at 955-56. The California legislature has since codified the ABC test, now embodied in section 2775 of the California Labor Code. 12

The Labor Code exempts certain businesses and services from the ABC test. See Cal. Labor Code §§ 2776-2784. At issue in the present motions for summary judgment is whether exemption to the ABC test under California Labor Code § 2782. 13

then Section 2775 and the holding in *Dynamex* do not apply to that entity, and instead the determination of an individual employment status as an employee or independent contractor shall be governed by *Borello*. § 2785(d); see also id. § 2782(a)(1) (providing that if certain conditions are met, and the holding in *Dynamex* do not apply to the relationship between a data aggregator and an individual providing feedback to the data aggregator, and instead the holding in *Borello* shall apply 14

12 The ABC test previously was codified in former California Labor Code § 2750.3, which was repealed and replaced with California Labor Code § 2775, effective September 4, 2020, with the enactment of AB 2257. AB 2257 revised exemptions to the ABC test, but did not change the portion of the existing law that set out the ABC test itself. See Dkt. Nos. 49, 53. 13 exemption, notwithstanding that the statutory exemption passed into law after the February 2019 jury focus group at issue. While provisions in the current law conc shall apply to work performed on or after January 1, 2020 2776 to Section 2784 would relieve an employer from liability, those sections shall apply retroactively to existing claims and a Code § 2785(b), (c). 14 Earlier this year, the California Supreme Court held that the ABC test applies retroactively to *Dynamex* became final *Vazquez v. Jan-*

To the extent it can be said that there was any sort of employment relationship with Ms. Guynn- exemption and that under *Borello*, Ms. Guynn-Neupane properly is classified as an independent



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contractor. B - Neupane is an independent contractor, even under the ABC test. Ms. Guynn-Neupane argues that applies. In any event, she contends that defendants have not met their burden under either Borello or the ABC test to demonstrate that she is an independent contractor, as opposed to an employee. IV. DISCUSSION

A. Ms. Guynn- Continuance Pursuant to Rule 56(d) Ms. Guynn-Neupane requests that the Court defer ruling on

exemption to the ABC test.

specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take Fed. R. Civ. P. 56(d). request for additional discovery under Rule 56(d), a party must show that (1) it has set forth in

affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist;

, 10 Cal. 5th 944, 948 (2021). In so holding, the Supreme Court noted that Borello never applied to wage claims. See *id.* Borello was not a wage order case and that decision did not purport to determine who should be interpreted to be an employee for purposes of a wage order. We resolved this question for the first time in *Dynamex* conditions for a Borello is to be applied to Ms. Guynn- §§ 2785(d), 2782(a)(1); see also Cal. Assemb. Jour., 2019-2020 Reg. Sess., No. 218 decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*) and AB 5 (Chapter 296, Statutes of 2019) in state law. AB 2257 recasts the provisions of AB 5 and provides that, for specified occupations and relationships, the applicable test for determining if an individual is an employee or an independent contractor is the test set forth in the California Supreme Court decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341 (*Borello*

and (3) the sought- *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 619-20 (9th Cir. 2017) (internal quotations and citation omitted). The decision whether to defer a summary judgment ruling to *Tatum v. City & Cnty. of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006).

Ms. Guynn- avers that plaintiff requires additional written discovery and depositions are] 2257/California Labor Code section 2782. Dkt. No. 54-1 ¶ 5; Dkt. No. 61-1 ¶ 5. Counsel further

states that additional discovery is needed because the California Labor Code § exemption was enacted on September 4, 2020 judgment, filed about a week later, are the first time that Ms. Guynn-Neupane was on notice of

-1 ¶¶ 2-4, Ex. A; Dkt. No. 61-1 ¶¶ 2-4, Ex. A. Additionally, counsel notes that Ms. Guynn-Neupane has



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been diligent in discovery, but that discovery efforts focused on class certification issues. Dkt. No. 54-1 ¶ 7; Dkt. No. 61-1 ¶ 7. Ms. Guynn-Neupane explained at oral argument that in order to be able to oppose the pending summary judgment motions, she needs additional discovery regarding: (1) other mock jurors, i.e., to determine whether Magna did or would have penalized other mock jurors if they refused to

contracts to determine whether clients retain Magna to aggregate and summarize data, or whether Magna is retained to analyze data; (3) the software used in connection with the electronic keypads mock jurors use to respond to focus group questionnaires; as well as regarding the written report Magna ultimately provided to its AGC-012 client. Dkt. No. 75 at 24- 25.

Ms. Guynn-Neupane does not identify the specific facts that further discovery would have revealed, explain why such facts would be essential to justify her opposition, or indicate that deferring the resolution of defendants summary judgment motions until the additional discovery has been taken would have allowed her to produce evidence creating a genuine issue of material exemption to the ABC test or

whether she properly is classified as an independent contractor or as an employee. Although the exemption is relatively new, there is no indication in the respective businesses have changed since AB 2257 was passed. There is no dispute that all exhibits submitted in support of respective summary judgment motions were produced to Ms. Guynn-Neupane in discovery. See Dkt. No. 63-1 ¶ 7; Dkt. No. 66-1 ¶ 7. Additionally, the record indicates that Ms. Guynn-Neupane has taken extensive discovery about respective practices and procedures with respect to jury focus groups generally, and the February 2019 focus group specifically. See Dkt. No. 63-1; Dkt. No. 66-1. Therefore, the Court denies Ms. Guynn- pending summary judgment motions pursuant to Rule 56(d).

B. Statutory Purpose of Whether Ms. Guynn- under Borello or the ABC test, the focus of the analysis is the scope and purpose of the legislation in question. See Borello, 48 Cal. 3d at 353- arrangement between the parties, must be examined to determine whether they come within the

history and fundamental purposes of the statute [at issue] uotations and citation omitted); see also Dynamex Borello as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe Borello as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case. Dynamex, 4 Cal. 5th at 932 (quoting Borello, 48 Cal. 3d at 354).

As noted above, Ms. Guynn-Neupane claims that defendants violated several California wage and hour laws, as well as IWC Wage Order No. 4-2001. Dkt. No. 15. That IWC Wage , and defines Cal. Code Regs. tit. 8 § 11040.



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Wage orders are a type of remedial legislation that serve several purposes. *Dynamex*, 4 Cal. 5th at 952-53. One such objective is to ensure that workers minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers *Id.* at 952. While wage orders are primarily for the benefit of workers, they also are intended to benefit law-abiding business and such responsible companies are not hurt by unfair competition from competitor *Id.* Finally, wage orders also benefit left to assume responsibility for the ill effects to workers and their families resulting from

Id. at 953.

Altho -and-hour laws must be liberally construed in a manner that serves these remedial purposes, see *Dynamex*, 4 Cal. 5th at 953, the established analytical framework seems ill-suited to resolving the question of whether Ms. Guynn-Neupane, in her role as a mock juror in a jury research study, was an employee or independent contractor. As discussed below, the tests and principles usually considered in cases assessing employee or independent contractor status do not apply in a straightforward manner to the particular circumstances presented here. In essence, Ms. Guynn-Neupane is an individual who, while employed on a full-time basis elsewhere in an entirely unrelated occupation, voluntarily participated in a one-day research study administered by Magna. At the end of the research session, Ms. Guynn- relationship with Magna ended and she was paid a lump sum.

For the reasons discussed below, to the extent Ms. Guynn-Neupane can be said to have had any sort of relationship with defendants, under both *Borello* and the ABC test the undisputed evidence establishes that she was, at most, an independent contractor and not an employee of either Magna or Wilkins. There is no genuine dispute that any controls imposed on the study or its participants were social science research tools designed to ensure the validity of the research results. Notably, after volunteering for the study, Ms. Guynn-Neupane at all times retained independent discretion and judgment with respect to her essential function as a mock juror, which simply was to provide her unvarnished personal views and opinions about the personal injury

lawsuit that was the subject of the focus group. Ms. Guynn- do not raise a genuine dispute of material fact sufficient to prevent summary judgment in

C. emption from the ABC Test The Cal. Labor Code § organization that requests and gathers feedback on user interface, products, services, people,

Id. § 2782(a)(2)(A). The exemption applies under the following conditions:

(A) The individual is free from control and direction from the data aggregator with respect to the substance and content of the feedback. (B) Any consideration paid for the feedback provided, if prorated to an hourly basis, is an amount equivalent to or greater than the minimum wage. (C) The nature of the feedback requested requires the individual providing feedback to the data aggregator to



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exercise independent judgment and discretion. (D) The individual has the ability to reject feedback requests, without being penalized in any form by the data aggregator.

Id. § 2782(a)(1)(A)-(D). If all of these criteria are met, then the test set forth in Borello applies in determining Ms. Guyann- employee or independent contractor status. Id. § 2782(a)(1).

Preliminarily, the parties dispute whether either Magna or Wilkins meets the statutory Even if , the parties disagree about whether each defendant satisfies all four requirements for application of the exemption. The parties have not cited, and this Court has not found, any cases interpreting the To resolve this issue, the Court relies on principles of statutory interpretation.

construction. See Turnacliﬀ v. Westly, 546 F.3d 1113, 1117-18 (9th Cir. 2008). Id. at 1118 (quoting

People v. Massie, 19 Cal. 4th 550, 569 (1998)). the rules of statutory construction in MacIsaac v. Waste Mgmt. Collection & Recycling, Inc., 134 Cal. App. 4th 1076, 1082 (2005).

Courts words, assigning them their usual and ordinary meanings, Martinez v. Combs, 49 Cal. 4th 35, 51 (2010); see also Turnacliﬀ Ordinarily, the words of the statute provide the most reliable indication of legislative intent. Courts should give the language of the statute its usual, ordinary import and accord significance, if possible, to every word, phrase and sentence in pursuance of the (internal quotations and citations omitted). If the words themselves are not ambiguous, Martinez, 49 Cal. 4th at 51; see also MacIsaac, 134 Cal. App. 4th at 1083 statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial

MacIsaac, 134 Cal. App. 4th at 1083. to its Id Id. Courts do not

follow the plain meaning of the statute when doing so would frustrate the manifest purposes of the legislation as a whole or lead to absurd results. Id.

If the words of the statute are subject to more than one reasonable interpretation, courts may look to such aids as the legislative history of the measure and maxims of statutory Martinez, 49 Cal. 4th at 51; see also MacIsaac, 134 Cal. App. 4th at 1083 (same). In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy. Martinez, 49 Cal. 4th at 51 (quoting Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1190 (2006)); see also MacIsaac, 134 Cal. App. 4th at 1083 (If ambiguity remains after resort to secondary rules of construction and to the statute legislative history, then we must cautiously take the third and final step in the interpretive process. In this phase of the process, we apply reason, practicality, and common sense to the

language at hand. Where an uncertainty exists, we must consider the consequences that will flow from a particular interpretation.) (internal quotations and citations omitted).



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1. Whether defendants meet the statutory

a. Magna Magna contends that when it conducts jury research focus groups, including the February 2019 focus group at issue, quantitative and qualitative data from participants, which serves as the basis for its recommendations to its clients. See Dkt. No. 48-1 ¶¶ 10, 18; Dkt. No. 48-2 ¶¶ 11, 25, 35, 46, 73- 74. Ms. Guynn-Neupane argues that scope of its business operations indisputably encompasses more than requesting and gathering data for jury research focus groups. See Dkt. No. 48-1 ¶ 7. Further, she contends that even within Magna does not merely gather data. Here, Ms. Guynn-Neupane points out that the final product Magna presents Magna says represents many hours of work by its trained consultants. See Dkt. No. 62 at 16; Dkt. No. 64 at 5. In sum, Ms. Guynn-Neupane contends that Magna is a data analyst, not a data aggregator. T she argues, Magna must be solely in the Dkt. No. 62 at 15.

Section 2782 b as (1) a business, research institution, or (2) on user interface, products, services, from individuals willing to provide it. nization, and that Magna . . . It is also undisputed that Ms.

Guynn-Neupane willingly provided her feedback as a participant in the study. See Dkt. No. 48-3 ¶ 11; 52-1 ¶ 11; Dkt. No. 54-3, Ex. C (Crabtree Dep. 56:19-57:15); Dkt. No. 61-3, Ex. C (Crabtree Dep. 56:19-57:15).

jury research focus groups, including the AGC-012 study in which Ms. Gunn-Neupane

participated. Nothing in the language of the statute requires or even suggests t gating raw data - Neupane. The Court declines to read such a limitation into the statute. See *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385, 393 [u]nder the guise of construction, a court should not rewrite the law, add to it what has been omitted, omit from it what has been inserted, give it an effect beyond that gathered from the plain and direct import of the terms used, or read into it an exception, qualification, or modification that will nullify a clear provision or materially affect its operation so as to make it conform to a

citation omitted); *Yeager v. Blue Cross of Cal.*, 175 Cal. App. 4th 1098, 1103 (2009) it is silence.

We may not make a silent statute speak by inserting language the Legislature did not put in the legislation. . Ms. Guynn-Neupane contends that construing the in the course and scope of its otherwise complex business operations [to] similarly claim a data

ignores that a company must still satisfy the four statutory criteria before the exemption will be applied. Satisfying the statutory trigger the exemption.

Accordingly, Magna meets the definition of



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b. Wilkins As a prefatory matter, Wilkins contends that the entire framework of the discussion regarding Ms. Guyann- employee or independent contractor status is irrelevant to Wilkins and its role as a recruiter for the AGC-012 jury focus group. Here, Wilkins argues Ms. Guyann-Neupane provided no service or benefit to the company such that she could even be considered an independent contractor, much less an employee. Even assuming she did provide some benefit or service to Wilkins, Wilkins argues that -Ne (Dkt.

No. 15 ¶ 8).

In her opposition brief, Ms. Guyann-Neupane does that it derived no benefit or service from her. See Dkt. No. 61 at 14-16. When pressed on that issue at oral argument, she alleged status as joint employers. Dkt. No. 75 at 14; see also Dkt. No. 15 ¶ 8. Wilkins maintains that Ms. Guyann-Neupane has not presented evidence establishing liability on that basis.

In the context of determining which of various entities could be considered joint employers, the California Supreme Court has described three alternative tests to determine whether an employment relationship exists. See Martinez, 49 Cal. 4th at 64. In that context, Martinez wages, hours, or working Id. Ms. Guyann-Neupane has not articulated how or why

would satisfy any of these tests. The undisputed evidence demonstrates that, other than posting the ad for the research study and sending a few follow- limited to reading the screener script prepared by Magna to gather demographic and other data

from individuals who expressed an interest in participating in the AGC-012 study. Dkt. No. 52-1 ¶¶ 6-7, 9, 10, 23; Dkt. No. 52-3 ¶ 14, Ex. 1; Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-21, 56:19- 58:17, 66:2-20, Ex. 2); Dkt. No. 61-3, Ex. D (Calzaretta Dep. 96:3-20). There is no indication that Wilkins had any part in deciding (or that it even had the authority to decide) when and how the study would be conducted, who would participate in the study, or how much participants would be paid. On this record, the Court finds no basis to conclude that with Magna, standing alone, provides a sufficient basis for liability. See Martinez, 49 Cal. 4th at 70 (concluding that the transform the where neither one of the purchasers had the power to prevent the plaintiffs from working).

Ms. Guyann-Neupane argued at the motion hearing, as she does elsewhere in her opposition brief, that Wilkins essentially functioned as § 201. Case 5:19-cv-02652-VKD Document 76 Filed 09/30/21 Page 24 of 54 gets service from temporary employees by having them fulfill the roles they are assigning[.] See Dkt. No. 75 at 15; see also Dkt. No. 61 at 27 n.2. While Ms. Guyann-Neupane argues that Wilkins is similar to a temporary staffing agency in several respects, she has not demonstrated that Wilkins , 15

or



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In any event, insofar as Ms. Guynn-Neupane can be said to have had any sort of relationship with Wilkins, the Court finds that Wilkins also the plain language of Labor Code § h institution, or -Neupane for the jury focus group, Wilkins sought information about her personal background, including her education and employment experience.

15 California Labor Code § 201.3 provides, in relevant part:

an employing unit that contracts with clients or customers to supply workers to perform services for the clients or customers and that performs all of the following functions: (A) Negotiates with clients and customers for matters such as the time and place where the services are to be provided, the type of work, the working conditions, and the quality and price of the services. (B) Determines assignments or reassignments of workers, even if workers retain the right to refuse specific assignments. (C) Retains the authority to assign or reassign a worker to another client or customer when the worker is determined unacceptable by a specific client or customer. (D) Assigns or reassigns workers to perform services for clients or customers. (E) Sets the rate of pay of workers, whether or not through negotiation. (F) Pays workers from its own account or accounts. (G) Retains the right to hire and terminate workers. Cal. Labor Code § 201.3(a)(1).

See Dkt. No. 61-3, Ex. C (Crabtree Dep., Ex. 2). Ms. Guynn-Neupane offers no persuasive argument as to § 2782. Ms. Guynn-Neupane voluntarily responded to the research study ad, indicating her willingness to provide information for the research study.

Ms. Guynn-Neupane argues (1) the feedback Ms. Guynn-Neupane provided as a mock juror was provided only to Magna, not

Dkt. No. 61-3, Ex. C (Crabtree Dep. at 35:2-7, 74:12-

75:14). The statute, however, does not state or su itself, as opposed to indirectly for use by others. 16 and g

ed in the plain language of the statute. See Soto, 4 Cal. App. 5th at 393; Yeager, 175 Cal. App. 4th at 1103. To the extent Ms. Guynn- to include companies like Wil

scope of its otherwise complex business operations [to] similarly claim a data aggregator reasons stated above with respect to Magna.

2. Whether emption applies T emption applies only if Magna and Wilkins establish all of the following conditions with respect to Ms. Guynn-Neupane:

(A) The individual is free from control and direction from the data aggregator with respect to the



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substance and content of the feedback.

16 Even if the language of § 2782 were ambiguous, legislative history materials indicate that the Jour., 2019-2020 Reg. Sess., No. 218 at 148.

(B) Any consideration paid for the feedback provided, if prorated to an hourly basis, is an amount equivalent to or greater than the minimum wage. (C) The nature of the feedback requested requires the individual providing feedback to the data aggregator to exercise independent judgment and discretion. (D) The individual has the ability to reject feedback requests, without being penalized in any form by the data aggregator. Cal. Labor Code § 2782(a)(1)(A)-(D).

a. Magna With respect to Magna, Ms. Guynn-Neupane does not dispute that elements (B) and (C) are satisfied. Magna says that the focus group lasted for approximately 9 hours, and there is no dispute that Ms. Guynn-Neupane was paid \$260 (including \$10 for parking). Dkt. No. 48-2 ¶ 69. Th for Ms. Guynn- , prorated to an hourly basis, is \$27.78/ as of the AGC-012 focus group. 17 Additionally, Ms. Guynn-Neupane does not dispute that the nature of the feedback requested by Magna required her to exercise independent judgment and discretion.

The parties disagree about whether Magna has met elements (A) and (D). Element (A) requires Magna to show that Ms. Guynn- aggregator with respect to the substance and content of the feedba § 2782(a)(1)(A). Ms. Guynn-Neupane argues that Magna cannot satisfy this requirement because

Magna prohibited mock jurors from conducting any outside research or using outside data in responding to the questionnaires administered during the focus group. See Dkt. No. 54-3, Ex. F

17 § 2782(a)(2)(B). There is no indication that Monterey County or any of its cities have adopted minimum wage ordinances that are higher than the California minimum wage. See https://www.dir.ca.gov/dlse/faq_minimumwage.htm (indicating that as of January 1, 2019, the minimum wage rate was \$11/hour for employers with no more than 25 employees and \$12/hour for employers with 26 or more employees) (last accessed September 30, 2021). payment to Ms. Guynn- See id. (indicating that as of January 1, 2021, the minimum wage rate is \$13/hour for employers with no more than 25 employees and \$14/hour for employers with 26 or more employees).

(Janke Dep. at 88:24-89:25). Additionally, mock jurors were questionnaires using only the hand-held electronic keypads with a pre-set scale of 1 to 3,

corresponding to responses such as and Dkt. No. 48-2 ¶ 41; Dkt. No. 54-3, Ex. E (Calzaretta Dep. at 215:6-20), Ex. F (Janke Dep. at 79:11-80:24, 88:24- 89:25, 93:12-21). to the questionnaires that were administered, but it maintains that those conditions are social science research techniques that are used to facilitate the collection and analysis of the data that is obtained and to simulate, as feasible, the same conditions that would exist in an actual jury trial. See Dkt. No. 48-1 ¶¶ 11, 17-19, Dkt. No.



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48-2 ¶¶ 30, 34-35, 41, 43, 48, 49.

Indeed, the purpose of the AGC-012 personal opinions about various aspects of the underlying tort litigation to help effectiveness of trial themes and its overall litigation strategy in preparation for trial. See Dkt. No. 48-2 ¶ 8; Dkt. No. 48-4, Ex. 1 (Guynn-Neupane Dep. 49:8-15) wanted our they wanted an opinion from what potentially the direction of this

trial, what the outcome of the case would be. It was a study. It was opinions. And that was, that . As Ms. Guynn-Neupane acknowledged in deposition, in this context, individual opin See Dkt. No. 48-4 ¶ 2, Ex. 1 (Guynn-Neupane Dep. 88:3-7). Instead, it is the

that hold value for Magna. Magna did set certain criteria and conditions for jurors to provide their responses, but the evidence does not demonstrate that Magna controlled or directed actual opinions. results that simulated, as closely as possible, an actual jury trial so as to provide its client with reliable -making process and the strengths and weaknesses of its case. W and-held keypads with preset responses, the pre-set responses appeared to cover the field of relevant responses, and Ms. Guynn-Neupane explained in deposition that with the keypad jurors were able to decide for [them]selves what answer [they] were going to choose based on [their] individual opinion. Id.

(Guynn-Neupane Dep. 60:25-61:3.) As noted above, Ms. Guynn-Neupane has not offered any evidence or argument raising a genuine dispute about the nature of the feedback requested by Magna. For these reasons, the Court concludes that exemption because it did not control or direct the substance or content of the feedback requested from Ms. Guynn-Neupane.

As for element (D), Magna must Cal. Labor Code § 2782(a)(1)(D). Magna contends that element (D), properly understood, simply means that an individual is free to decline to participate in a study without being penalized, for example, by being paid reduced compensation for future studies or being prohibited from participation in another study. Magna argues that it satisfies element (D) because Ms. Guynn-Neupane indisputably was free to decline to participate in the mock juror study without any adverse consequence. Dkt. No. 48-3 ¶ 11. Indeed, Magna says that it never would have known if she had declined to participate in the study at all.

Ms. Guynn-Neupane focuses too narrowly on the recruiting period before any purported independent contractor relationship was established. She maintains that element (D) more broadly requires Magna to show that mock jurors who agreed to participate in the study nonetheless remained free to either leave the study altogether or to refuse to provide feedback during the study, without any form of penalty. Ms. Guynn-Neupane contends that, at a minimum, the evidence raises a genuine fact dispute about whether the mock jurors had that ability. Among other things, she points out that payment of the full \$260 was made on the condition that jurors participate until the end of the session and that jurors who chose to leave the research session would not be paid. See Dkt. No. 54-3, Ex. D (Calzaretta Dep., Ex. 15 at MLS000048); Dkt. No. 54-3, Ex. C (Crabtree Dep. 64:25-65:12; 66:2-20;



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Ex. 2).

The fact that Ms. Guynn-Neupane was free to accept or decline the invitation to participate in the AGC-012 study is of no particular moment, insofar as the statutory to the data aggregator.

Cal. Labor Code § 2782(a)(2)(A). However, to the extent Ms. Guynn-Neupane contends that Magna can satisfy element (D) only if mock jurors may leave or withdraw from the study, but still be fully paid, such an interpretation is inconsistent with the statutory purpose of § 2782. As noted above, the fundamental purpose of AB 2257 is to clarify that for certain specified occupations and

the ABC test does not apply; instead, Borello states the applicable test for determining if an individual is an employee or an independent contractor. See Cal. Assemb. Jour., 2019-2020 Reg. Sess., No. 218 at 147. Ms. Guynn- ent (D) would lead to an absurd result; and this Court finds no basis to conclude, as Ms. Guynn-Neupane seems to suggest, that the Legislature intended to establish an exemption to the ABC test accept a paid assignment, but then decline to perform the assignment and still be paid. See *Lawson v. Grubhub, Inc.*, reversed and remanded on other grounds in *Lawson v. Grubhub, Inc.*, F. 4th , No. 18-15386, 2021 WL 4258826 (9th Cir. Sept. 20, 2021).

In any event, the Court need not decide whether Ms. Guynn-Neupane correctly argues that element (D) requires Magna to show that mock jurors had the ability to during the study The unrefuted

evidence indicates that, consistent with its stated social science research goals, Magna not only did not penalize non-responsive jurors, it valued non-responsiveness as an indicator of whether mock jurors were engaged or disinterested in the mock trial presentations Vice President of Litigation Consulting, avers:

What Magna cares about is how participants think or feel and there are no right or wrong answers. Research participants are not evaluated based on their level of engagement. Participants are merely asked to observe the presentations and provide their feedback based on their own opinions and beliefs.

Magna does not penalize research participants, such as reduced compensation, for not engaging in the study in a particular manner. Participants are free to listen or not listen, answer questions or not, and actively engage in discussions or not without consequence. Just like a real trial where there are disengaged jurors,

a disengaged participant also offers important data. Dkt. No. 48-1 ¶¶ 19-20. explaining how Magna uses the hand-held keypad for questionnaires:

point. . . . Again, we are setting up the social experiment so that we can collect the data one way or another. And we might find that [for] the weren't hitting the keypads at all during the defense



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presentation.

Dkt. No. 54-3, Ex. E (Calzaretta Dep. 215:22-25, 216:3-8). Similarly, Ms. Janke confirmed that [i]t was up to the participants in Deliberation Group C, including [Ms. Guynn-Neupane], to determine how much they wanted to participate in the deliberations. They could be as vocal or inactive as they choose to be during this session, just -2 ¶ 61. Mr. Calzaretta noted that while Magna generally asks participants to respond to the questions, mock jurors will sometimes savvy will move on without requiring a response. Dkt. No. 63- 1, Ex. 4 (Calzaretta Dep. 255:3-23).

While Ms. Guynn-Neupane contends that the evidence raises a genuine fact dispute about whether mock jurors had the ability to reject feedback requests during the study without any penalty, most of the evidence she cites concerns the particular study parameters and guidelines Magna set. And although she points to some evidence indicating that Magna asked jurors to respond to questions, and waited for everyone to respond before moving to the next question, she does not claim that she or any other mock juror were forced to answer any questions or were penalized for refusing to do so. See Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 57:24-59:21); Ex. D (Calzaretta Dep., Ex. 15 at MLS000048); Ex. E (Calzaretta Dep. 214:6-24, 215:6-20, 216:22- 217:10, 254:19-255:23, 219:21-221:16); Ex. F (Janke Dep. 74:5-25, 78:11-23, 79:11-80:24, 90:16- 91:3, 98:23-99:2; Ex. 13). Ms. Guynn-Neupane also argues that a video clip of the mock deliberations shows that Magna prohibited them from taking a break, when a Magna consultant

Dkt. No. 62 at 18; Dkt. No. 51-5, Ex. 27. The video indicates that on one occasion the consultant

asked the mock jurors to delay their restroom break while they continued to discuss a particular topic. However, the video evidence does not support Ms. Guynn- generally controlled the timing and duration of restroom breaks, as the video shows that

individuals were permitted to take a restroom break at any time. None of the evidence cited by Ms. Guynn-Neupane indicates that Magna penalized any juror for failing to respond to questions or to actively participate in mock deliberations.

exemption, and that Borello therefore applies to the determination Ms. Guynn- employee or independent contractor status.

b. Wilkins exemption by virtue of Ms. Guynn- As discussed

above, Wilkins meets the definition of a § 2782.

The parties nonetheless disagree about whether Wilkins satisfies element (B) of the data aggregator exemption in view of the fact that only Magna, not Wilkins, paid Ms. Guynn-Neupane for the mock jury session. Element (B), however, does not appear to to pay compensation n language of the statute



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simply

[a]ny exceed the minimum wage. Cal. Labor Code § 2782(a)(1)(B) (emphasis added). For the reasons discussed above, nt to Ms. Guynn-Neupane indisputably was well over -012 study.

As for the remaining elements of the exemption, Ms. Guynn-Neupane incorporates by reference the same arguments she made in her opposition to Magna . Dkt. No. 61 at 16. Thus, she does not dispute that Wilkins meets element (C), i.e., the feedback requested requires the individual providing feedback to the data aggregator to With respect to element (A), the undisputed

evidence demonstrates that Ms. Guynn- [Wilkins] w Indeed, Wilkins simply read the screener script provided by Magna to gather demographic and other background data from Ms. Guynn-Neupane. See Dkt. No. 61-3, Ex. C (Crabtree Dep. 57:24-58:5; 66:2-20, Ex. 2). There is no indication that Wilkins in any way controlled or dictated Ms. Guynn- those questions or any of the questions posed by Magna during the study itself. As for element (D), rticipation in the focus group was voluntary, and Ms. Guynn-Neupane could have declined the invitation to participate in the research study, without any consequence. Dkt. No. 52-1 ¶ 11. In any event, there is no evidence that Wilkins had any authority to impose any sort of penalty on research participants.

exemption to the ABC test. Borello therefore applies to determine Ms. Guynn- employee or independent contractor status with respect to Wilkins.

D. The Borello Test In determining whether a person is an independent contractor or employee, the test of an employment relationship is whether the person to whom service is rendered has the right Borello, 48 Cal. 3d at 350 (internal quotations and citations omitted). Courts also consider secondary indicia

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Id. at 350-51. Id. at 349. Additionally, the Borello factors

applied mechanically as separate tests; they are intertwined and their weight depends often on Id. at 351 (internal quotations and citation omitted). Assuming Ms. Guynn-Neupane provided services to defendants, no one disputes that Magna and Wilkins bear the burden of establishing that she was an independent contractor rather than an employee. See id. at 349; see also Hennighan v. Insphere Ins.



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Solutions, Inc., 38 F. Supp. 3d 1083, 1097 (N.D. Cal. 2014).

1. Magna

a. Right to Control the right to control the manner and means of Borello, 48 Cal. 3d at 350 (internal quotations and citations omitted). Significantly, what matters under the common law is not how much control a hirer exercises, but how much control the hirer retains the right necessary Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 531, 533 (2014) (quoting Borello, 48 Cal. 3d at 357).

n independent contractor is one who renders service in the course of an independent results of the work, and not the means Hennighan, 38 F. Supp. 3d at 1098 (quoting Varisco v. Gateway Sci. & Eng'g, Inc., 166 Cal. App. 4th 1099, 1103 (2008)). hand, the relationship of master and servant or employer and employee exists whenever the

employer retains the right to direct how the work shall be done as well as the result to be Id. (quoting Varisco, 166 Cal. App. 4th at 1103). But this rule requires that the right to exercise complete or authoritative control, rather than mere suggestion as to detail, must be shown. Id. (quoting Varisco more concerned with the quality of the result rather than the manner in which the work is done, that is evidence of an independent- Id. (citing Missions Ins. Co. v.

amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general super Id. (quoting

Toyota Motor Sales U.S.A., Inc. v. Super. Ct., 220 Cal. App. 3d 864, 875 (1990)).

There is no question that Magna established certain parameters for the administration of the AGC-012 focus group. At issue is whether those study parameters relate to the quality of the desired result (consistent with an independent contractor relationship), or whether they demonstrate control over the manner and means of achieving the desired result (indicative of an employer-employee relationship). Ms. Guynn-Neupane argues that the undisputed facts show that Magna exercised significant control over many aspects of the focus group, including both the manner in which the mock jurors provided their views and opinions and the means by which they did so. Here again, she reiterates that mock jurors were asked not to use their cellphones and to silence or turn their phones off; were instructed not to conduct any outside research; were told not to discuss the case with other participants until juror deliberations began; were asked not to talk during presentations and to hear all of the evidence and arguments presented by each side in order to deliberate; were instructed to use the electronic hand-held keypads to respond to questions using pre-set responses; and were asked to stay on site for the duration of the focus

group, including during lunch and rest breaks, all of which were scheduled by Magna. Dkt. No. 48-2 ¶ 38, 41; Dkt. No. 48-4 ¶ 3, Ex. 1 (Guynn-Neupane Dep. 52:18-20; 53:3-5); Dkt. No. 54-3, Ex. B



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(Guynn-Neupane Dep. 50:19-51:4, 57:24-59:21), Dkt. No. 54-3, Ex. E (Calzaretta Dep. 214:6-24, 215:6-20); Dkt. No. 54-3, Ex. F (Janke Dep. 72:25-76:9, 79:11-80:24, 88:24-89:25, 93:12-21, 97:7-19, Ex. 13). As other indicia of control, Ms. Guynn-Neupane also points out that:

Magna repeated its instructions throughout the day-long session, including during

orientation and before each of the four breaks. Dkt. No. 54-3, Ex. F (Janke Dep. 89:19-25, 96:7-22, 97:7-19, Ex. 13) Pursuant to the NDA mock jurors were required to sign, mock jurors were not

permitted to take any photographs or to otherwise record the session. Dkt. No. 54-3, Ex. D (Calzaretta Dep. 177:2-178:14; Ex. 24). Magna observed the mock deliberations; and, at one point, a Magna consultant

urged jurors to continue to deliberate when they attempted to take a break. Individuals were permitted, however, to take a restroom break at any time. Dkt.

No. 51-5, Ex. 27. During the post-verdict moderated discussions, mock jurors were not free to

what topics to discuss. Dkt. No. 62 at 21; Dkt. No. 54-3, Ex. E (Calzaretta Dep. 228:14-230:18; Ex. F (Janke Dep. 117:18-120:13). For example, during the post-verdict discussions, Magna about the overall ; any questions the mock jurors might have; and for any information the mock jurors would like from either side in order to help an actual jury make an informed decision about the case. Dkt. No. 54-3, Ex. F (Janke Dep. 119:18-120:4). For present purposes, Magna does not dispute Ms. Guynn- rules and requirements for the study, but it contends that any control it exercised in the administration of the focus group related only to achieving the desired result of obtaining accurate and representative research data. Here, Magna says that all of the study parameters it implemented, such as the focus group schedule and breaks, the use of keypads, questionnaires and response options, and discussion topics are social science research techniques designed to ensure the reliability of Ms. Guynn- . Magna contends that at actual opinions, thoughts, and beliefs about the underlying personal injury litigation. For example, Magna says that:

To avoid preconditioning, the research participants are not asked to do anything to

prepare for the session and are not told until they arrive at the focus group that they would be taking part in jury research. Dkt. No. 48-1 ¶ 15. Keypads are used for the collection of quantitative data (such as opinions about who is at fault and the amount of damages they would award) and

linked to software that allows Magna to organize the data in different ways for its analyses. Dkt. No. 48-1 ¶ 18; Dkt. No. 48-2 ¶¶ 30-35, 41-50, Ex. 5 at MLS000644- 671. The moderated post-verdict discussions are designed to gather qualitative data, e.g.



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recorded and used by Magna in preparing its analysis for its client. Dkt. No. 48-1

¶ 18; Dkt. No. 48-2 ¶¶ 66-68. According to Magna, the study parameters do not indicate an employer-employee relationship in any way because Magna says that ultimately feel there are no right or wrong answers participants are not evaluated on their performance or level of engagement. Dkt. No. 48-1 ¶¶ 19-20; Dkt. No. 48-2 ¶¶ 20, 30, 41, 48-49, 61, 67; see also Dkt. No. 54-3, Ex. E (Calzaretta Dep. 215:22-25, 216:3-8).

In the present case, the quality of the desired result cannot be divorced entirely from the manner and means by which that result is achieved, and there can be no serious dispute that in administering the mock trial study, Magna has the right to control both the manner and means by which the mock jurors received the study stimuli and were prompted to deliver their responses. In other contexts, this type of control might suggest an employer-employee relationship. See generally, e.g., *Alexander v. FedEx Group Package Sys., Inc.*, 765 F.3d 981, 989-90 (9th Cir.

over the personal . As noted above, however, the Borello factors cannot be applied mechanically, and e in evaluating the infinite Borello must be considered in light of the particular facts of this case and the fundamental nature of Ms. Guynn- juror. See id

Magna did not control the manner and means by which the mock jurors performed their essential role, which was formulating their own opinions. This role necessarily depended on the mock jurors exercising independent judgment free from any direction or control by Magna over the substance of their opinions. Ms. Guynn- sole function during the one-day AGC-012 focus group simply was to provide Magna with her feedback, i.e., her views and opinions about

the underlying personal injury litigation. exemption focuses on control over - s feedback itself, here too the desired result of obtaining accurate research data concerns only the substance and content of her feedback. In concluding that Magna exemption, the Court found that Magna did not control either the substance or content of Ms. Guynn- and opinions. Indeed, Ms. Guynn-Neupane does not dispute that the nature of the feedback

Magna sought required her to exercise independent judgment and discretion. With respect to the common law Borello, the undisputed evidence of record demonstrates desired result is to obtain accurate and representative feedback from Ms. Guynn-Neupane based on her own opinions, as free as possible from improper outside influences. Magna was retained by its client to themes and to help refine 48-2 ¶ 8. And Magna convened the jury focus group and implemented the study parameters to simulate, to the extent feasible, the same conditions that would exist in an actual jury trial. See Dkt. No. 48-1 ¶¶ 11, 17-19, Dkt. No. 48-2 ¶¶ 30, 34-35, 41, 43, 48, 49, 61. Critically, the undisputed evidence demonstrates that Magna does not judgment and discretion in providing their views and opinio in the study.



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Viewed in this context, the Court does not find to be indicative of an employer-employee relationship, even though they demonstrate control over the manner and means by which the mock jurors delivered their views and opinions. When one person is performing work in which another is beneficially interested, the latter is permitted to exercise a certain measure of control for a definite and restricted purpose without incurring the *Millsap v. Fed. Express Corp.*, 227 Cal. App. 3d 425, 432 (1991) (internal quotations and citation

n the result to be accomplished by certain work is ordinarily permitted to retain some interest in the manner in which the work is done without Id.

Ms. Guynn-Neupane challenges were intended to simulate an actual jury trial. Here, she points out that pursuant to the NDA mock jurors were required to sign, they remained obliged even beyond the research session itself not to disclose to third parties any confidential information or trade secrets. See Dkt. No. 54-3, Ex. D (Calzaretta Dep., Ex. 24). Noting that Magna acknowledged in deposition that it is not aware of any instances where actual jurors signed confidentiality or nondisclosure agreements (Dkt. No. 54-3, Ex. F (Janke Dep. 121:22-123:7), Ms. Guynn-Neupane argues that NDA is not simply a research tool meant to simulate an actual jury experience. Instead, she seems to suggest that the NDA is indicative of the kind of control only an employer would wield. See Dkt. No. 62 at 20-21. Ms. Guynn-Neupane, however, has cited no authority suggesting that confidentiality agreements necessarily are a hallmark of an employment relationship, as opposed to an independent contractor relationship. In any event, there is no evidence suggesting that the terms of the NDA concerning the AGC-012 focus group had the effect of controlling the independent judgment or discretion in providing their opinions.

For these reasons, the principal factor weighs in favor of an independent contractor relationship.

b. Other Borello Factors

i. Distinct occupation or business

Harris v. Vector Mktg. Corp., 656 F. Supp. 2d 1128, 1138-39 (N.D. Cal. 2009). Generally, where a putative employer does not preclude an individual from working elsewhere, courts assessing this factor have considered whether the putative employee is engaged in a distinct occupation or business providing others with the same or similar services as those provided to the alleged employer. See, e.g., *Antelope Valley Press v. Poizner*, 162 Cal. App. 4th 839, 854-55 (2008) (concluding that this factor supported employee status where there was no evidence that any of s newspaper carriers, some of whom also worked as landscapers and contract mail carriers and in an

Cf. *Hennighan*, 38 F. Supp. 3d at

1102 (concluding that this factor supported an independent contractor relationship where the



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plaintiff insurance agent also sold insurance for other agencies and held himself out as a self-employed insurance agent).

At the time of the AGC-012 jury study, Ms. Guynn-Neupane indisputably was employed on a full-time basis at the Employnet staffing agency, where her job duties and responsibilities included recruiting and interviewing individuals for job placements, calling clients, collecting time cards, and confirming that candidates were timely paid for the hours they worked. Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 13:8-14:19, 15:22-25). No one contends that these job duties in any way resembled Ms. Guynn- function as a mock juror for the AGC-012 focus group. Additionally, Ms. Guynn-Neupane testified in deposition that she would not have been able to manage an independent business of her own while working for Employnet. Dkt. No. 48-4, ¶¶ 2-3, Ex. 1 (Guynn-Neupane Dep. 17:15-23, 18:4-7)). Relatedly, Ms. Guynn-Neupane argues that she had an employment relationship with Magna insofar as she did not set her own prices or pay. See *Duffey v. Tender Heart Home Care Agency, LLC*, 31 Cal. App. 5th 232, 257 (2019) (observing that the harvester-employees in *Borello*

More fundamentally, however, Magna contends that there is no such thing as , and that even if there were such an occupation, the use of professional mock jurors is goals; any such professional would have been screened out from the AGC-012 jury study. See

Dkt. No. 64 at 6, 19; Dkt. No. 48-1 ¶ 16 and Ex. 1 at MLS000044. Ms. Guynn-Neupane does not disagree. See self out as being an group research participants and/or mock jurors do not exist and such an occupation would be

antithetical to the purpose of jury research st This factor is neutral and does not weigh strongly in favor of either an independent contractor or employee finding.

ii. Supervision s direction, it suggests an employer-employee relationship; if the work is usually done by a specialist without Hennighan, 38 F. Supp. 3d at 1103 (citation omitted). This factor is not particularly useful here, given that there is no serious dispute that ourts have found this factor to be similar to the control factor. *Sportsman v. A Place for Rover, Inc.*, F. Supp. 3d , No. 19-cv-03053-WHO, 2021 WL 3524114, at *14 (N.D. Cal. May 6, 2021). For the reasons discussed above, Ms. Guynn- function as a mock juror was to provide her views and opinions, she admittedly maintained her independence and discretion in doing so, and nrefuted evidence demonstrates that it did not control Ms. Guynn-Neupane in that regard. If applicable, this factor weighs in favor of an independent contractor relationship.

iii. Skill required ts a conclusion that the Harris, 656 F. Supp. 2d at 1139; see also Hennighan, 38 F. Supp. 3d at 1103 (same). This factor also is not particularly useful, as the circumstances of this case do not present the usual question of whether the role at issue requires skilled or unskilled labor; Ms. Guynn-Neupane acknowledged that Magna simply wanted whatever they might be. Dkt. No. 48-4, ¶ 3, Ex. 1 (Guynn-Neupane Dep. 49:8-15, 88:3-7). The parties agree that no particular skill was needed



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for participation in the AGC-012 focus group. Ms. Guynn-Neupane received no special training and did not do anything to prepare for the study. Dkt. No. 48-1 ¶ 15; Dkt. No. 54-3, Ex. B (Guynn-Neupane Dep. 33:11- 16). Anyone who met the screening criteria was eligible to participate. Dkt. No. 54-3, Ex. C (Crabtree Dep. 53:7-17); Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-17). the demographic and background screening criteria are somehow comparable to specialized work skills is unconvincing. social science research goals, Magna decidedly did not want mock jurors to be skilled research participants in any way, and it affirmatively screened out individuals four years prior to

the study focus group or market research study prior to the study. Dkt. No. 48-1, Ex. 1 at MLS000044. If applicable, this factor weighs in favor of an employee relationship.

iv. Instrumentalities and tools majority of the tools and instrumentalities or a place to work generally weighs in favor of an employment relationship. See *Hennighan*, 38 F. Supp. 3d at 1103 (stating that this factor favors an independent contractor relationship where the defendant does not provide the majority of tools and instrumentalities and a place to work). Magna does not dispute that it provided the location, as well as all of the tools and instructions for the mock jurors to provide their feedback. For the reasons discussed above, however, this factor is much less significant in the context of this particular case where the unrefuted evidence demonstrates that vision of these tools and instructions were to ensure valid research results and that no tools or instrumentalities were required for Ms. Guynn-Neupane and the other mock jurors to formulate their opinions. See Dkt. No. 48-2 ¶¶ 11, 25, 26, 28, 30, 31, 41, 48, 49, 61, 67. This factor is neutral.

v. Length of time and right to discharge

employer looks more like an employer- *Harris*, 656 F. Supp. 2d at 1140. Id. (citing *Antelope Valley Press*, 162 Cal. App. 4th at 854. In the present case, there is no dispute that mock jurors were engaged for a single, one-day focus group, which favors an independent contractor relationship. Ms. Guynn-Neupane argues that the short-lived service period does not necessarily preclude an employer-employee relationship. However, her reliance on *Smith v. Super. Ct.*, 39 Cal. 4th 77 (2006) is misplaced, as the defendant in that case conceded that the plaintiff (a hair model hired for a one-day show) was its employee. See id. at 81. In any event, at the end of the one-day AGC-012 jury study, Magna paid Ms. Guynn-Neupane \$260 and her relationship with Magna ended. There is no indication that either side had any expectation that Ms. Guynn- Neupane would serve again as a research participant for Magna, and therefore the question of

whether she could be discharged without cause did not arise. Moreover, Magna designs its jury focus groups to avoid focus group or market research study in the recent months or years preceding a particular study. Dkt. No. 48-1, Ex. 1 at MLS000044. This factor weighs strongly in favor of an independent contractor relationship.

vi. Method of payment Where an individual is paid by the hour, such an arrangement suggests an



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employment relationship; but where an individual is paid by the job, the arrangement supports an independent contractor relationship. *Hennighan*, 38 F. Supp. 3d at 1104; *Harris*, 656 F. Supp. 2d at 1140. Magna paid Ms. Guynn-Neupane a lump sum of \$260 for her participation in the jury research. Dkt. No. 48-2 ¶ 69. This factor weighs in favor of an independent contractor relationship.

vii. Part of the regular business Magna says that jury focus groups are not always necessary for a particular engagement (Dkt. No. 48-1 ¶ Ms. Guynn-Neupane notes that jury focus groups clearly are a part of as such

suite of consulting services. Dkt. No. 48-1 ¶ 7; Dkt. No. 54- 3 Ex. D (Calzaretta Dep. 26:4-17). She further argues that her function as a mock juror is integral jury focus groups cannot be conducted without mock jurors. See Ex. F (Janke Dep. 74:5-25, 78:11-23, 90:16-91:3, Ex. 13).

hile the administration of jury focus groups and the co Ms. Guynn- function as a mock juror was neither of those things. Her sole function as a

mock juror was simply to provide the underlying data used by Magna to advise its clients. See Dkt. No. 48-1 ¶¶ 23-24. This factor favors an independent contractor relationship.

viii. There is no contract or other evidence indicating that Magna told Ms. Guynn-Neupane whether she would function as an independent contractor or an employee in her role as a mock juror. Dkt. No. 54-2 ¶ 4. Ms. Guynn-Neupane says that she believed she was employed by

Magna by virtue of her participation in the jury study, but she cites only to testimony stating that she believed Wilkins was her employer. See Dkt. No. 62 at 29; Dkt. No. 54-3, Ex. B (Guynn- Neupane Dep. 94:24-95:25). In any event, the label placed by the parties on their relationship is not dispositive. *Borello*, 48 Cal. 3d at 349. This factor is neutral.

c. Summary In sum, the evidence does not raise a triable issue of fact that Magna controlled Ms. Guynn-Neupane her role as a mock juror to employee. Fundamentally, Magna was conducting social science research, and Ms. Guynn-

unvarnished views and opinions. Although Magna did control the method and means by which Ms. Guynn-Neupane received stimuli and delivered ensuring accurate and valid research results. Magna did not assume control of Ms. Guynn-

the other *Borello* factors shows that most factors favor an independent contractor relationship or are neutral. Even if one or two of the individual factors might suggest an employment relationship, summary judgment is nevertheless proper when, as here, all the factors weighed and considered as a whole establish that [the plaintiff] was an independent contractor and not an employee . . . *Hennighan*, 38 F.Supp.3d at 1098 Id. (quoting *Arnold v. Mut. of Omaha Ins. Co.*, 202 Cal.App.4th 580,



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590 (2011)). Based on the foregoing, under Borello, Ms. Guynn-Neupane is an independent contractor with respect to Magna.

2. Wilkins To the extent Ms. Guynn-Neupane can be said to have had any sort of relationship with Wilkins at all independent contractor or otherwise the Borello factors favor an independent contractor relationship.

a. Right to Control The unrefuted evidence demonstrates that Wilkins did not exercise any control over the manner and means of any aspect of Ms. Guynn- , much less that it had any right to do so. Indeed, as discussed above, the entire focus group was planned and

administered by Magna. See Dkt. No. 52-2 ¶¶ 25-26, 30, 36-38, 41, 43, 45-46, 48-49, 52, 59, 64, 67; Dkt. No. 52-3 ¶¶ 11-20. Other than advertising the study on social media, reading screener script to ascertain the eligibility of those who responded to the ad, and sending follow-up notices to those who agreed to participate in the study, Wilkins had no role in planning or conducting the study. Dkt. No. 52-1 ¶¶ 9-10, 13, 15-23; Dkt. No. 52-2 ¶¶ 6-7, 9, 14-15; Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-21, 56:19-58:14, 63:4-64:20, 66:2-20, Ex. 2); Ex. D (Calzaretta Dep. 75:15-76:5, 76:11-17, 96:3-20). Although Wilkins did have some additional communications with Ms. Guynn-Neupane, those communications were initiated by Ms. Guynn- Neupane to advise that she was running late for the study, and later to say that she had lost her check. Dkt. No. 52-1 ¶¶ 20-21, Ex. 4.

Ms. Guynn- on the instructions Wilkins read t, including that in order to receive full payment, she needed to show up on time for the focus group and participate in the entire research session, and that she would not be paid if she chose to leave the session for any reason. Dkt. No. 61-3, Ex. C (Crabtree Dep. 64:25-65:12, Ex. 2 at MLS000048). Additionally, she argues that in its follow-up communications with participants, Wilkins reiterated these and other instructions, including that she should stay on site for the entire session (including breaks) and that to participate in the focus group, she needed to bring some form of identification with her on the day of the study. Dkt. No. 61-3, Ex. B (Guynn-Neupane Dep., Ex. 2); Ex. C (Crabtree Dep. Ex. 2 at MLS000048); Ex. D (Calzaretta Dep. 151:24-152:23, 173:6-14). Ms. Guynn-Neupane also suggests -through on her commitment to participate in the

your participation to make each rese -3, Ex. B (Guynn-Neupane Dep., Ex. 2). As for her post-study communications with Wilkins about her lost check, Ms. Guynn-Neupane says only reach out

None of Ms. Guynn- cited evidence establishes, or even raises, a triable issue

that Wilkins had any meaningful control over the manner and means of Ms. Guynn- provision of feedback as a participant in the AGC-012 focus group, or any involvement in the

is that it had no input or involvement in preparing the screener. See Dkt. No. 61-3, Ex. C (Crabtree



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Dep. 64:15-17). There is no evidence that Wilkins maintained any expectations or knowledge regarding the study beyond its recruitment efforts, or that it had any right to impose consequences on Ms. Guyann-Neupane or anyone else based on their participation in the focus group. Dkt. No. 52-1 ¶ 23. But for the fact that Ms. Guyann-Neupane contacted Wilkins regarding her tardiness and relationship with her would have ended once she arrived at the focus group. Dkt. No. 52-1 ¶¶ 19- 22. In any event, nothing about those communications concerning her lost check demonstrate that Wilkins had any control over the study or Ms. Guyann-

Citing Duffey, Ms. Guyann- recruiter for the AGC-012 study does not preclude a finding of an employer-employee

relationship. Her reliance on Duffey is misplaced. In Duffey was

31 Cal. App. 5th at 238. In reviewing the control factor under Borello, the Duffey court noted that to the client, and determines what portion o

Id. at 255. By contrast, in the present case there is no evidence that Wilkins exercised anything approaching the same level of control in the recruiting process for the AGC-012 focus group. While acknowledging that the screener script was prepared by Magna, Ms. Guyann- Neupane argues that and determination

20. Even a cursory review of the screener script, however, indicates that there was no subjective assessment involved at all.

, including whether or not an individual is a United States . And the screener script itself directs Wilkins when recruiting process depending on their answers to the questions. For example, of the questions about U.S. citizenship, California identification, or Monterey County residence

would disqualify the individual from participation in the study. Dkt. No. 61-3, Ex. C (Crabtree Dep., Ex. 2 at MLS000043).

This factor weighs in favor of an independent contractor relationship.

b. Other Borello factors imited role in the recruiting process for the study, the remaining Borello factors also either favor an independent contractor relationship or are neutral.

i. Distinct occupation As discussed above, there is no serious dispute that there is no such thing as a professional Dkt. No. 52 at 6; Dkt. No. 52-3 ¶¶ 13, 16; Dkt. No. 52-2 ¶ 15, Ex. 1; Dkt. No. 61 at 11, 21; Dkt. No. 66 at 8. This factor is neutral.



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ii. Supervision As discussed above, this factor is similar to the right-to-control test. Sportsman, F. Supp. 3d , 2021 WL 3524114, at *14. For the reasons discussed above, this factor favors an independent contractor relationship.

iii. Skill required As with Magna, the parties agree that no special skill was required of Ms. Guyann-Neupane to participate in the study, and indeed Magna did not want participants who were skilled or previously participated in jury research. Dkt. No. 52-3 ¶¶ 11-20; Dkt. No. 61-3, Ex. B (Guyann- Neupane Dep. 33:11-16); Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-14, 66:2-20; Ex. 2); Dkt. No. 61-3, Ex. D (Calzaretta Dep. 97:13-24). To the extent this factor applies at all, it favors an employer-employee relationship.

iv. Instrumentalities and tools; Right to discharge; Length of

time; Method of payment Wilkins did not provide the location or any tools or instrumentalities for Ms. Guyann- Neupane and other mock jurors to provide their feedback for the study, and the unrefuted evidence shows that Wilkins had no role in planning or conducting the study, including the length of the study or the amount and method of payment. Nor is there any evidence indicating that Wilkins retained the right to discharge any participant from the study. Finally, it is undisputed that -1 ¶¶ 6-23. All of these factors favor an independent contractor relationship.

v. Part of the regular business Wilkins maintains that recruiting focus group participants is a small portion of its business and that this factor therefore favors an independent contractor finding. Dkt. No. 52-1 ¶ 5. Ms. Guyann- because without any research participants to recruit, Wilkins would not be able to fulfill its

contractual obligations to Magna and other companies. Dkt. No. 61 at 26; Dkt. No. 52-1 ¶¶ 3, 4; Dkt. No. 61-3, Ex. D (Crabtree Dep. at 34:21-35:7). ecruting services are part of the jury research services Wilkins regularly offers to its clients, Wilkins is primarily a data collection agency. Dkt. No. 52-1 ¶ 3. And data collection essentially is the service Wilkins provides when it recruits for jury focus groups. Ms. Guyann- was not to gather data, but simply to provide it in the form of her personal views and opinions and responses to questions about her background and experiences. This factor favor an independent contractor relationship.

vi. Ms. Guyann-Neupane avers that at no point during the recruiting process did Wilkins affirmatively say whether she was a Wilkins employee or independent contractor. Nor is there any evidence that she signed any agreement as to her employee or independent contractor status. Dkt. No. 61-2 ¶ 4. In deposition, she testified that she believed Wilkins was her employer. See Dkt. No. 62 at 29; Dkt. No. 61-3, Ex. B (Guyann-Neupane Dep. 94:24-95:25). Even so, the label placed by the parties on their relationship is not dispositive. Borello, 48 Cal. 3d at 349. This factor is

neutral.



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c. Summary In sum, Wilkins exercised little or no meaningful control over any aspect of the AGC-012 jury study, and the Borello factors, including the primary control factor, weigh in favor of a finding that Ms. Guyenn-Neupane properly is classified as an independent contractor with respect to Wilkins.

E. The ABC Test Alternatively, defendants are entitled to summary judgment even if the ABC test applies. neration to be an employee, rather than an independent contractor, unless the hiring entity establishes that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity's business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Cal. Labor Code § 2775(b)(1); see also *Dynamex*, 4 Cal. 5th at 916-17.

1. Magna

a. Control and direction Part A of the ABC test considers whether a worker is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over its employees. *Dynamex*, 4 Cal. 4th at 958. Depending on the nature of the work and overall arrangement between the parties, control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. Id. Here, the parties reiterate their arguments regarding the parameters Magna established for the administration of the AGC-012 focus group. Dkt. No. 64 at 21-22, Dkt. No. 62 at 19-22. The Court finds that Magna has met its burden with respect to Part A

for the same reasons stated above with respect to the Borello See *Sportsman*, 2021 WL 3524114 at *13 (concluding that Part A of the ABC test and the Borello favored the defendant for the same reasons); see also, e.g., *Garcia v. Border Transp. Group, LLC*, 28 Cal. App. 5th 558, 569 (2018) (*Borello Curry v. Equilon Enterprises, LLC*, 23 Cal. App. 5th 289, 315 (2018), as modified on denial of

reh (May 18, 2018) (finding no triable fact issue with respect to Part A of the ABC test for the same reasons stated regarding the Borello

b. Hiring entity's business Part B of the ABC test considers whether an individual a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor *Dynamex*, 4 Cal. 5th at 959, and

usual course of business *Vazquez v. Jan-*, 986 F.3d 1106, 1125 (9th Cir. 2021). tity to establish that it was not *Vazquez*, 986 F.3d at 1125. For example, an outside plumber repairing a leak at a retail store



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or an outside electrician

seamstresses hired by a clothing manufacturer to sew clothes that the manufacturer intends to sell, and cake decorators hired by a -designed Dynamex, 4 Cal. 5th at 959-60.

Analytically, courts have framed the Prong B inquiry in several ways. Vazquez, 986 F.3d at 1125. They have considered whether the work of the employee is necessary to or merely incidental to that of the hiring entity, whether the work of the employee is continuously performed for the hiring entity, and what business the hiring entity proclaims to be in Id. In considering -sense observation of the nature of the

businesses, Case 5:19-cv-02652-VKD Document 76 Filed 09/30/21 Page 50 of 54 Id. at 1125-26.

Here, a common- litigation services business shows that Ms. Guynn-Neupane did not provide services necessary Jury , and record retrieval services. See Dkt. No. 48-1 ¶¶ 7-8; see also Dkt. No. 62 at 15 (noting that Magna various services including court reporting, records retrieval, interpretation services, trial presentation services, and jury consulting it is not always necessary to conduct a jury focus group for any particular client engagement. Dkt. No. 48-1 ¶ 10. Ms. Guynn- consulting business would likely cease entirely. Dkt. No. 62 at 22. While it is true, as Ms.

Guynn-Neupane notes, that jury focus groups cannot function without mock jurors, the fact remains that in the consulting portion of its business, Magna function is to provide litigation advice to its clients. To do so, Magna employs consultants who create and implement a plan for a particular project and conduct the necessary analyses and assessments that are provided to clients. Dkt. No. 48-1 ¶¶ 23-30. 18

In her role as a mock juror, Ms. Guynn-Neupane did not collect or analyze data or provide any sort of consulting service. She simply was a test subject providing data. Any interested individual who met certain demographic and other background criteria was eligible to participate in the focus group. Dkt. No. 54-3, Ex. C (Crabtree Dep. 53:7- 17). jurors alike. See Dkt. No. 48-1 ¶¶ 19-20; Dkt. No. 48-2 ¶¶ 41, 61; Dkt. No. 48-4, Ex. 1 (Guynn- Neupane Dep. 49:8-15, 88:3-7); Dkt. No. 54-3, Ex. E (Calzaretta Dep. 215:22-25, 216:3-8). Although the mock juror s role is that of a plumber hired to repair a leak at a retail store, Magna has met its burden to show that mock jurors do not provide services necessary to its business; rather mock jurors simply provide data, in the form of opinions, that in turn enables Magna to provide services to its clients.

Similarly Magna pays focus group participants a flat fee. There is

18 Ms. Guynn- on are overruled. Fed. R. Evid. 402.

venues are affected by the responses mock jurors provide or how actively they participate in the



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process.

Further, there is no question that Ms. Guynn-Neupane did not continuously perform any services for Magna; her relationship with Magna was limited to a single focus group. Indeed, Magna structures its focus groups in way that is designed to prevent an individual from Dkt. No. 48-1 ¶ 16 and Ex. 1 at MLS000044.

Magna has satisfied its burden with respect to Part B of the ABC test.

c. Customary occupation Part C of the ABC test examines whether an individual independent contractor. Garcia, 28 Cal. App. 5th at 572 f common usage, the

understood to refer to an individual who independently has made the decision to go into business

sual steps to establish and promote his or her independent business for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like Dynamex, 4 Cal. 5th at 962. Dynamex requires more than Garcia, 28 Cal. App. 5th at 575. Thus, [t]he fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go Dynamex, 4 Cal. 5th at 962. Accordingly, in order to satisfy part C of the ABC test, the hiring entity must prove that the worker is customarily engaged Id. at 963.

Of all the parts of the ABC test, Part C is perhaps is the most ill-suited to the research context of the present case. The undisputed evidence demonstrates that at the time of the AGC- 012 focus group, Ms. Guynn-Neupane was not customarily engaged in an independently established trade, occupation, or business as a research participant or mock juror. Critical to the analysis here, however, is that there is also no serious dispute that there is no such thing as a

and that Magna designs its studies to screen out individuals who previously participated in other market research or jury study. See Dkt. No. 64 at 6, 19; Dkt. No. 48-1 ¶ 16, Ex. 1; Dkt. No. 62 at 23. For that reason, and to the extent Dynamex applies at all within the particular context of the present case, the Court concludes that Magna has met its burden with respect to Part C of the ABC test.

2. Wilkins For many of the same reasons discussed above, Wilkins has also met its burden under the ABC test to establish that Ms. Guynn-Neupane is an independent contractor, rather than an employee.

The undisputed evidence establishes that Wilkins did not maintain the necessary control that an employer ordinarily possesses over its employees. Magna planned and administered the focus group. Aside from advertising the study a criteria, Wilkins had no role in planning or conducting the study,



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including the length of the study

or the amount and method of payment. See Dkt. No. 52-1 ¶¶ 9-10, 13, 15-23; Dkt. No. 52-2 ¶¶ 6- 7, 9, 14-15, 25-26, 30, 36-38, 41, 43, 45-46, 48-49, 52, 59, 64, 67; Dkt. No. 52-3 ¶¶ 11-20; Dkt. No. 61-3, Ex. C (Crabtree Dep. 53:7-21, 56:19-58:14, 63:4-64:20, 66:2-20, Ex. 2); Dkt. No. 61-3, Ex. D (Calzaretta Dep. 75:15-76:5, 76:11-17, 96:3-20).

Wil , and also

[s] for consumers, shop-along market research, product placement, research panels on education, consumer issues, and politics, political research, and jury Dkt. No. 52-1 ¶¶ 3, 4. In her role as a mock juror, Ms. Guynn-Neupane performed no such functions; she simply provided data in the form of responses confirming aspects of her background information, as well as personal views and opinions. While Ms. Guynn-Neupane argues that research participants are necessary for Wilkins to be able to fulfill its contractual obligations to companies like Magna, -3, Ex. C (Crabtree Dep. at 35:2-7, 74:12-75:14). There is no business depends on the

availability of mock jurors.

As with Magna, mock jurors do not continuously perform services for Wilkins. Ms. Guynn- Magna. Magna structures its focus groups in way that is designed to prevent an individual from

See Dkt. No. 52-3 ¶ 16 and Ex. 1 at MLS000044.

While the undisputed evidence demonstrates that at the time of the AGC-012 focus group, Ms. Guynn-Neupane was not customarily engaged in an independently established trade, occupation, or business as a research participant or mock juror, there is no serious dispute that no such profession exists and that Magna designs its studies to screen out individuals who recently participated in other market research or jury studies. See Dkt. No. 52-3 ¶ 16, Ex. 1; Dkt. No. 61 at 11, 21.

For these reasons, and to the extent Dynamex applies at all within the particular context of the present case, the Court concludes that Wilkins has met its burden with respect to Parts A, B and C of the ABC test. V. CONCLUSION

tion for summary judgment are granted and Ms. Guynn- as moot. The Clerk shall enter judgment accordingly and close this file.

IT IS SO ORDERED. Dated: September 30, 2021

VIRGINIA K. DEMARCHI United States Magistrate Judge

