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OAKLAND PORT SERVICES CORP. d/b/a
AB TRUCKING, a California Corporation,

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all other similarly situated, Plaintiffs, vs. OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, and DOES 1-20 Defendant.	Case No.: RG 08-379099 **DEFENDANT'S OBJECTIONS TO PROPOSED STATEMENT OF DECISION** Action Filed: March 28, 2008 Hearing Date: November 16, 2012 Dept.: 20 Time: 2:00 p.m. Trial Date: February 14, 2012 Before Honorable Judge Robert B. Freedman Cal. Rules of Court, Rule 3.1590(g)

Pursuant to the October 2, 2012, Notice of Intended Decision ("NOID") and October 19, 2012 Ex Parte Hearing, Defendant OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, a California Corporation, (collectively hereinafter referred to as "AB Trucking" or

"Defendant") respectfully objects to Plaintiffs' Proposed Statement of Decision ("PSOD") filed on November 2, 2012 in accordance with Cal. Rules of Court, Rule 3.1590(g).

By way of background, the Court conducted a 10 day bench trial between February 14, 2012 and March 12, 2012, which included several rulings on motions that substantially reduced the number of claims. On October 11, 2012, Defendant filed a written Request for Statement of Decision and the matter is currently scheduled for further compliance hearing on November 16, 2012. Defendant objects to the PSOD on the grounds that it omits and fails to address the following controverted issues upon which Defendant sought a determination in its Request for Statement of Decision, filed herein on October 11, 2012. The following issues have not been addressed:

1. The specific acts of Defendant that comprise the basis for the Court's determination that AB Trucking failed to pay employees classified as "trainees". Specifically, please identify which employees were classified as "trainees" and were not paid. For those employees identified as "trainees," please explain which time periods they were not paid.

2. The specific acts of Defendant that comprise the basis for the Court's determination that AB Trucking failed to pay for all hours worked for each employee. Specifically, please identify each employee that did not receive payment for all hours worked. Please identify each day that the employees identified above failed to receive payment for all hours worked (Overtime claims and OLW claims should not be included in this explanation as per Court determination).

3. Whether the grounds underlying the Court's finding that the Plaintiffs' UCL and Labor Code Claims (Business & Professions Code section 17200, et seq. and Labor Code Sections 201, 202, 203, and 226) were proven based upon, inter alia, the knowing and willful failure of Defendant to pay wages deemed owed.

4. The specific acts of Defendant demonstrating that "class members were routinely and consistently precluded by Defendant from taking meal periods and rest breaks."

5. The *Brinker* Court concluded that:

"Employees must accurately record the time they begin and end each meal period each day. If an employee finds that, due to work requirements, he or she has not been able to take one or more required daily meal periods, then the employee must report such on his or her time record. The employee will be paid for the time worked and one hour of premium pay for that day." (Emphasis added.)

However, this Court in the NOID stated the following:

"Defendant consistently failed to pay for all hours worked by deducting one hour per day for each employee. Both the Defendant's own records and the testimony of Ms. Aboudi confirmed this practice violation of Wage Order 9(4)B. The evidence is in conflict as to when, if at all, this practice ceased. Defendant's failure to keep adequate and accurate records for the period in question pursuant to Wage Order 9(7) compels the court to construe the evidence against Defendant."

Please clarify how class members complied with *Brinker* and accurately recorded the time they began and ended each meal period each day. Please clarify how the Court's evidentiary opinion relying on Wage Order 9(7) does not contradict the holding in *Brinker* set forth above.

6. The legal and factual basis for why Defendant's preemption claim under the Federal Aviation Administration Authorization Act is not applicable to the case at bar.

Because of the important omissions of specific findings and evidence by the Court, AB trucking objects to the entire PSOD and urges the Court to disregard the PSOD as an inappropriate

"closing argument" issued by opposing counsel.[1] In this case, the PSOD is written in the format of a legal brief and it omits the specific findings of the Court with regard to the issues referenced above and does not cite a single exhibit admitted into evidence or any specific testimonial evidence that could support the Court's NOID as is required under California law. Based on the foregoing, the PSOD violates CCP § 634 and AB Trucking requests that a different party be designated by the Court to draft a PSOD in compliance with Section 634.

In addition, Defendant lodges the following objections to certain allegations in the PSOD as follows:

1. Defendant objects to the following allegation: ". . . the class presented substantial and persuasive evidence that class members were routinely and consistently precluded by AB from taking meal periods and rest breaks." (PSOD at p. 2, lines 13-16.)

During the trial the Court specifically found that AB Trucking drivers and trainees were "motor carriers" required to obtain Class A commercial driver's licenses and were regulated by the Department of Transportation ("DOT") Safety federal regulations due to the weight and size of the commercial vehicles they drive (Class 8).[2]

A. Admitted Evidence That Contradicts PSOD Allegation.

The following evidence was admitted at trial:

The testimony at trial established that AB Trucking has always had a policy to encourage its employees to take all of their breaks and meal periods. This policy was communicated to all

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[1] The statement of decision process is not a vehicle for the prevailing party to make closing arguments without reference to admitted trial evidence and exhibits. It is also not a venue to ignore a trial courts findings or reasoning. Rather, it is a tool that allows parties to put the trial court on notice of omissions or ambiguities in the proposed statement of decision, and thereby avoid an implied finding on appeal in favor of the prevailing party. (Code Civ. Proc, § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d. 1130, 1132-1135.)

[2] Exempted from California overtime compensation requirements are "employees whose hours of service are regulated by . . . the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13."(IWC Wage Order, 9-2001, §3.)

employees and employees were not pressured to forego breaks or meal periods. (See Defendant's Trial Exhibit B [2006 IWC Wage Order 9 notice] admitted into evidence.)

David Blyth

Mr. Blyth testified that AB Trucking made log books available to truck drivers so drivers could log their hours behind the wheel pursuant to DOT regulations and document meal and rest breaks in accordance with the law. (See June 10, 2011 deposition of former AB Trucking truck driver David Blyth admitted as Defendant's Trial Exhibit N.)[3] Mr. Blyth testified at length that he was not prevented from taking rest breaks and meal breaks. Specifically, Mr. Blyth testified to the following among other issues relevant to meal periods and breaks: 1) he was employed with AB Trucking from 2008- 2009 and was aware of AB Trucking's policy to encourage employees to take meal breaks and rest periods; 2) dispatchers would contact him on occasion and remind him to take a break, 3) he took breaks "when ever he felt like it," 4) he could take breaks "with the engine turned off" and away from his vehicle, and 5) there were "at least 10" meal trucks available along the side of the road near the Port to obtain hot food. (See Defendant's Trial Exhibit N at pp. 23-32.) Mr. Blyth's testimony is very credible as he testified at his deposition that the reason he left AB Trucking was because Mr. Aboudi fired him. (*Id.* at p. 12.)

Jose Luis Navarro

Specifically, Mr. Navarro, with the use of an interpreter, testified to the following issues relevant to meal periods and breaks: 1) he had been employed with AB Trucking since 2004 and was aware of the AB Trucking policy encouraging employees to take meal breaks and rest periods from communications he received from the dispatcher and Mr. Aboudi; 2) the dispatcher would contact him on occasion and remind him to take a break, 3) during meal periods he was

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[3] The June 10, 2011 deposition of former AB Trucking truck driver David Blyth was admitted as Defendant's Trial Exhibit N. The portions of Exhibit N designated into the trial record are pp. 12, 23-32.

free "to do what ever he wanted" and he was never interrupted during his breaks by the office, 4) he could take breaks "with the engine turned off" and away from his vehicle, and 5) That he was able to eat meals even when he was stuck at the Port for 8 hours.[4]

Erik Gaines

Mr. Gaines testified that he had been employed with AB Trucking since 2004 and has acted as a trainer and driver. Mr. Gaines testified that he trained several of the Plaintiffs that testified at trial and that he was disappointed that the lawsuit had been brought. Mr. Gaines confirmed that the Wage Orders were posted on-site and that employees were shown how to take their breaks and meal periods. Mr. Gaines testified that employees were not discouraged or penalized for taking breaks. Mr. Gaines testified that employees are not required to make a minimum number of truck runs a day and that dispatch goes out of the way to schedule delivery and pick-up runs in a manner that gives drivers plenty of time make appointments and stop if necessary for restroom or other breaks.

James Francis

Mr. Francis testified at trial that he had been employed with AB Trucking for well over ten years. He too trained several of the Plaintiffs that testified at the trial. Mr. Francis (similar to Mr. Gaines) confirmed that the term "trainee" was developed as a result of the Port of Oakland. He testified that the Port would not let anyone on the premises unless they were designated a trainee. Mr. Francis testified that he had taken City Councilwoman Libby Schaaf to the Port as a "trainee" as well as reporters, T.V. personalities, etc. under the designation of trainee. Mr. Francis agreed with Mr. Gaines that the Port would impose penalties on drivers for any violation of its rules.

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[4] The June 13, 2011 deposition of AB Trucking truck driver Jose Luis Navarro was admitted as Defendant's Trial Exhibit O. The portions of Exhibit O designated into the trial record are pp. 20-28, 35.

Mr. Francis testified that he had trained new drivers on how to take breaks and how to obtain meals. He testified that he always takes his meal break early before noon and has never been discouraged from doing so. He testified that there was no minimum number of trips a driver had to make and that appointments were made for drivers with the understanding they would need a cushion for traffic and other contingencies. Lastly, Mr. Francis explained that drivers were not ridiculed or penalized for taking their breaks as the information regarding the right to take breaks were posted in the AB Trucking office.

Mr. William Aboudi

Mr. Aboudi testified that the Port and most of AB Trucking's vendors follow a standard meal and break time schedule: 10 minute breaks at 10:00 a.m. and 3:00 p.m., 1 hour lunch at 12:00 noon. During these break times the Port completely shuts down and no loading or unloading of trucks can occur. Mr. Aboudi explained that AB Trucking drivers generally coordinate their breaks with the break periods referenced above and they take advantage of the various restroom stations and meal trucks that are often located around company warehouses and similar areas surrounding the Port.

B. Legal Support- FAAAA Preempts California Meal & Breaks Laws.

At an Ex Parte hearing on October 19, 2012, the Court acknowledged that if the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501, was applicable to the meal and break laws Defendant would be exempt from liability. The purpose of this detailed objection is to further explain the legal rational for holding the FAAAA is applicable to this case given AB Trucking's status as a Motor Carrier.[5]

[5] The FAAAA contains a broad preemption statute which declares that a state may not enact or enforce a law or regulation that is related to a price, route, or service of any motor carrier. (49 U.S.C. § 14501(c)(1).) The term

1. Congressional Intent- Preemption Under ADA and FAAAA The Same.

A review of history establishes that Congress intended the preemption clause of the FAAAA to be a solution to several problems facing interstate commerce. (*Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir.1998).) First, Congress stated that deregulation was necessary to eliminate non-uniform state regulation of motor carriers which had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets." (H.R. Conf. Rep. No. 103–677, at 86–88 (1994), 1994 U.S.C.C.A.N. 1715, 1759–1760.) Second, by enacting a preemption provision identical to that of the Airline Deregulation Act of 1978 ("ADA") which deregulated air carriers, Congress sought to "even the playing field" between air carriers and motor carriers. (Id. at 85.)

By way of background, an imbalance between air and motor carriers arose after the 9th Circuit concluded that the company Federal Express fit within the ADA's definition of "air carrier," and held that California's intrastate economic regulations of the carrier's shipping activities were preempted. (*Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir.1991).) As a result of this ruling, ground-based shippers were faced with more strict regulation than their air-based competitors. By preempting the states' authority to regulate motor carriers like AB Trucking, Congress sought to balance the regulatory "inequity" produced by the ADA's preemption of the states' authority to regulate air carriers. (See H.R. Conf. Rep. No. 103–677, at 87, 1994 U.S.C.C.A.N. 1715, 1759; see also *Mendonca*, 152 F.3d at 1187.)

"motor carrier" means a person providing commercial motor vehicle transportation for compensation. (49 U.S.C. § 13102 [14]; Mr. Aboudi testified at trial that AB Trucking's Motor Carrier number is **MC-310575**].)

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, (1992), the Supreme Court held that state consumer protection laws were preempted by the ADA. In subsequent cases, the Supreme Court made it clear that the same standard should be used in interpreting the identical language of the FAAAA's preemption provision. (See *Rowe v. New Hampshire*, 552 U.S. 364, 370[6] ("when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." [quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85, (2006).] Congress deliberately copied the preemption provision of the ADA into the FAAAA, fully aware of the Court's interpretation of that language as set forth in *Morales*. [See H.R. Conf. Rep. No. 103–677, at 83],)[7] (*See* PSOD at p. 9, footnote 3.)

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[6] In *Rowe v. N.H. Motor Transp. Ass'n* (2008) 552 U.S. 364 ("*Rowe*"), the Supreme Court held that 49 U.S.C. §14501(c) preempted two provisions of a Maine tobacco law which regulated the delivery of tobacco to customers within the State. The first of the two Maine statutes at issue forbade licensed tobacco retailers from employing a "delivery service" unless that service followed particular delivery procedures. The Supreme Court's opinion observed that the law would require carriers to offer a system of services that the market did not provide and which the carriers would prefer not to offer, and the law would freeze into place services that carriers might prefer to discontinue in the future. The Maine law, the Court stated, thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for "competitive market forces" in determining, to a significant degree, the services that motor carriers will provide. (*Id.* at 378.)

[7] State meal and break period requirements are preempted by the FAAAA because they "relate to" carriers' rates, routes, and services in a way that interferes with the carriers' operations. When enacting the FAAAA, Congress deliberately copied the preemptive language of the Airline Deregulation Act, which deregulated air carriers and imposed broad preemption of state regulation of air carriers, and specifically sought to incorporate "the broad preemption interpretation adopted by the Supreme Court in *Morales v. Trans World Airlines*, supra. H.R. CONF. REP. No. 130-677, at 83; *see also Morales*, 504 U.S. at 388 (holding that any state law that either expressly references or significantly affects a price, route, or service of any carrier is preempted). Significantly, in *Blackwell v. SkyWest Airlines*, (S.D. Cal. 2008) WL 5103195, the Honorable Judge Sabraw held that California's meal and rest period laws were preempted by the ADA because they impact prices, routes and services. According to the court, such laws related to service because they dictated that employees must be provided with meal and rest breaks and when they should be provided. And such laws related to routes and prices because if the employer failed to provide meal and rest breaks, costs would increase, potentially leading to higher air fares and discontinued routes. The Ninth Circuit has held that "[t]here can be no doubt that when Congress adopted the FAAAA, it intended to broadly preempt state laws that were 'related to price, route or service' of a motor carrier." (49 U.S.C. §14501(c)(1); *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) and *American Trucking Associations, Inc. v. City of Los Angeles* (9th Cir. 2011) 660 F.3d 384 ("*ATA*"). And "[a] state or local regulation is related to the price, route, or service of a motor carrier if the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes or services." *Id. at 1053*, citing *Tocher v. City of Santa*

2. Motor Carriers Are Directly Impacted By Meal And Rest Break Laws

In this case, Plaintiffs are trying to recast the meal and rest break laws as mere wage violations under Labor Code sections 226.7(b) and 512 (PSOD at p. 1-2). Plaintiffs have done this in order to analogize the instant case to several cases in which courts have found California wage law violations not preempted by federal law. However, this is not an accurate representation of the true impact of meal and rest break laws on motor carriers like AB Trucking. California meal and rest break laws require off-duty breaks for employees at specific times and for specific minimum lengths of time. Thus, these are not simply wage laws which require employers to pay employees a certain wage and thus indirectly affect the prices of a service. These rules prescribe certain events (i.e., specific meal and rest breaks) that must occur during the course of the driver/trainee's day, if motor carriers like Defendant AB Trucking wish to avoid paying a penalty. Although this "penalty" has been framed as a lost wage, the meal and rest break laws are distinct in formulation from simple wages and directly impact the routes and services of motor carriers such as Defendant AB Trucking.

In *California Div. of Labor Standards Enforcement v. Dillingham Const., Inc.*, 519 U.S. 316, (1997) and *Californians for Safe and Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, supra., cert. denied at 526 U.S. 1060, (1999), it was held that California wage statutes were not preempted by federal law. In *Dillingham*, the Court found that the connection was "too tenuous" between California's prevailing wage laws and the employee

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Ana, 219 F.3d 1040, 1047(9th Cir. 2000); *ATA* 660 F.3d at 395; *See also New Hampshire Motor Transp. Ass'n v. Rowe*, supra., 552 U.S. 364 (holding that the FAAAA preempts a state regulation that "has a 'significant' and adverse 'impact' in respect to the federal act's ability to achieve its preemption-related objectives").

benefit plans of the Employee Retirement Income Security Act of 1974 (ERISA). (519 U.S. at 319.) In so determining, the Court looked to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," as well as to the "nature of the effect of the state law on ERISA plans." (Id. at 325.) The court opined that not only are the objectives of ERISA distinct from those of the FAAAA, but the California wage laws at issue in both *Dillingham* and *Mendonca* do not directly impact employers like the meal and rest break laws do in the case at bar. As outlined above, the meal and rest break laws do not require the payment of a higher wage. Instead, they establish specific requirements which directly impact a motor carrier's routes and services.

For example, Mr. Aboudi testified that California's meal and rest period regulations as interpreted by Plaintiffs relate directly to prices because wage, fuel, and vehicle wear and tear costs would increase if AB drivers had to rearrange their routes in a costly inefficient manner as a result of pulling drivers off the road to fit in their mandatory meal and rest periods. First, Mr. Aboudi testified that it would be "impossible" to force drivers off the road as they are beyond the physical control of the dispatcher.[8] Second, Mr. Aboudi explained that such an increase in costs could lead to a reduction in business, lost profits, and possibly a loss of jobs if routes become less predictable and reliable for customers.

Mr. Aboudi also testified that California's meal and rest period regulations as interpreted by Plaintiffs relate directly to *routes* because drivers would have to change the configuration of their routes to meet the strict scheduling and duration requirements of their mandated meal periods which often conflict with the daily challenges of meeting the Port of Oakland

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[8] In fact, Mr. Aboudi questioned during trial testimony how AB Trucking could force a driver to pull over while crossing the Bay Bridge to have lunch.

requirements to serve customers. For the same reason Mr. Aboudi testified that California's meal and rest period regulations as interpreted by Plaintiffs relate to AB Trucking's *services* because scheduling such breaks would likely cause delays and interrupt service to customers. All witnesses agreed that a requirement to take meal and rest period while an AB Truck was in line to enter the Port of Oakland may cause a driver to "lose his/her place in line" and be unable to complete a delivery in a single day, cause a driver to be unable to deliver at the times of day requested by customers, thus causing delay and inconvenience to the customers, and possibly the loss of customers.[9]

3. UCL Claims Are Preempted By FAAAA Under *Fitz-Gerald*

In *Fitz-Gerald,*[10] the court ruled via summary judgment that a wage & hour class action (including meals and breaks violation) filed by flight attendants was preempted by the federal Railway Labor Act (RLA; 45 U.S.C. § 151 et seq.), and specifically relevant to this case, that application of IWC Order No. 9-2001 would violate the Airline Deregulation Act of 1978 ("ADA") (49 U.S.C. §41713). (*Fitz-Gerald,* 155 Cal.App.4th at 413-414, 420.)[11]

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[9] Plaintiffs argue that "AB knew drivers were stuck in line to enter the Port, once inside the Port, and in order to exit the Port, every single day. Yet it did nothing to provide for the relief of its employees' duties during this "waiting" time." (PSOD at p. 3, lines 17-19.) While Defendant objects to the claim it did nothing, the evidence before the Court is that the Port of Oakland ***route*** was the primary cause for any alleged meal or rest break law infractions. **Defense counsel can not think of a better example of how strict compliance with the state meal and rest break laws would directly impact the routes and service of AB Trucking to its customers!**

[10] See *Fitz-Gerald v. Skywest Airlines, Inc.* (2007) 155 Cal.App.4th 411 ("*Fitz-Gerald*") [holding the UCL is preempted under the Airline Deregulation Act of 1978 because the challenged employment related practices related to the airline's "prices, routes or services"].

[11] Citing *Vinnick v. Delta Airlines, Inc.*, (2001) 93 Cal.App.4th 859 [supporting ADA preemption of state labor law claims] and two United States Supreme Court decisions holding that claims under a state unfair business practices statute are preempted by the ADA because the state claims would impose economic regulations on airlines. (See *Morales v. Trans World Airlines, Inc.*, supra., 504 U.S. 374 [class action based on frequent flier program.]; *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 [same].) In *People v. Pac Anchor Transportation, Inc.*, (2011), 195 Cal.App.4th 765 the state appellate court held that the FAAAA does not preempt California wage laws, which, as discussed above, are distinct from the meal and rest break laws at issue in this case. Moreover, *Pac Anchor* is currently on appeal before the California Supreme Court.

In *Fitz-Gerald*, the court specifically stated that the parties did not offer authority indicating that the ADA preempted the meal and rest break claims. (Id.) However, *Fitz–Gerald* specifically held that the ADA did preempt the UCL claims, which were presumably based upon the meal and rest break claims.[12]

At this time, *Fitz-Gerald* is the law in California. The allegation in the PSOD is not supported by the factual evidence and current case law cited above. Thus, the proposed damage model of Plaintiffs must be redone to eliminate all derivative UCL claims.

4. FMCSA Regulations Preempt California Meal & Breaks Laws.

The Federal Motor Carrier Safety Administration ("FMCSA") comprehensively regulates Motor carrier drivers' hours of service and safety. (*See* 49 U.S.C. §§31502, 31136; 49 C.F.R. pt. 395.) The FMCSA does not, however, require mandatory rest or meal periods within the parameters of the driving time and on-duty time permitted under its rules. (*See* Hours of Service of Drivers, 68 Fed. Reg. 22,456, 22,466 (Apr. 28, 2003) ["Of course drivers are free under the rules to take rest breaks at any time[.]"). When FMCSA revised its hours of service rules in 2005, break requirements like California's were explicitly considered and rejected. In the preamble to the current regulations, FMCSA explained that it had "considered a mandatory rest period (break)" but "concluded that such a break would be difficult for State and Federal enforcement personnel to verify *and would significantly interfere with the operational flexibility motor carriers and drivers need to manage their schedules*." (Hours of Service of drivers, 70 Fed. Reg. 49,978, 50,011 (Aug. 25, 2005), emphasis added.)

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[12] Plaintiffs admit that the California Business & Professions Code section 17203 (also known as the Unfair Competition Law, "UCL") claims are derivative in nature to meal and rest break law violations. (PSOD at p.7, lines 7-12.)

California's mandatory rest and meal period requirements are arguably preempted by the federal hours of service statutes and regulations because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) of the hours of service statutes and regulations—namely, safety and scheduling and operational flexibility. The Supreme Court has "[held] repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." (*Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *accord Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ["Federal regulations have no less pre-emptive effect than federal statutes"].)

2. Defendant objects to the following allegation: ". . . the evidence shows AB neither maintained, nor provided drivers, any "formal" meal period policy." (PSOD at p. 3, lines 9-10.) This allegation is not supported by the evidence and is irrelevant. The PSOD omits the legal analysis that California meal and rest break laws are preempted by the FAAAA as outlined above.

3. Defendant objects to the following allegation: "Several driver witnesses testified that they did not receive one hour, uninterrupted, off-duty meal periods, nor a 30-minute, uninterrupted, off duty meal period. Even driver witnesses called by AB admitted that they rarely received such a meal period, and that the AB dispatcher would "discourage" drivers from taking a meal period. Several other drivers gave examples of negative reactions from their employer when they had tried to take a meal period. Despite evidence drivers did not receive meal periods as required by law, AB presented no evidence that it created or entered into written agreements between AB and drivers for on-the-job paid meal periods. AB's designated person most knowledgeable on payroll and payroll processing admitted that AB automatically deducted one

hour's pay from each driver per each shift worked based on the presumption that one hour meal periods were taken." (PSOD at p. 3, lines 25-28; p. 4, lines 1-6.)

The allegation was not supported by the evidence at trial and is irrelevant as meal and rest break laws are preempted by the FAAAA as outlined above. Moreover, the PSOD omits the fact that both Mr. and Ms. Aboudi testified that if an employee brought any issues of a missed meal, break or payment to their attention an adjustment would be made. The PSOD further omits the specific testimony of numerous drivers as outlined above.

4. Defendant objects to the following allegation: "AB's designated person most knowledgeable on payroll and payroll processing admitted that AB automatically deducted one hour's pay from each driver per each shift worked over five hours in a day, there was always a deduction of one hour applied. The documentary evidence also reflected on its face deductions of one hour per each driver, per each shift of five hours or more worked, each day. The Class presented persuasive evidence that AB consistently failed to pay for all hours worked by deducting one hour per day for each employee." (PSOD at p. 6, lines 6-12.)

The allegation was not supported by the evidence at trial and is irrelevant as meal and rest break laws are preempted by the FAAAA as outlined above. Moreover, the PSOD omits the fact that both Mr. and Ms. Aboudi testified that if an employee brought any issues of a missed meal, break or payment to their attention an adjustment would be made.

5. Defendant objects to the following allegation: "AB willfully paid drivers less than they were owed and willfully provided wage statements reflecting false 'hours worked' as a result. AB knew it suffered and permitted trainees to work, preparing those drivers for the day one of its trucks opened up for a new driver, without paying drivers (or providing them with wage statements) at all." (PSOD at p. 7, lines 23-28.)

At this time, *Fitz-Gerald* is the law in California and derivative UCL claims are not recoverable under the FAAAA. The allegation in the PSOD was not supported by the factual evidence at trial and the PSOD omitted the fact that the allegation is not supported under current case law.

6. Defendant objects to the following allegation: "Here, AB presented no evidence of any imposed conditions or costs, let alone rising to the level of creating a "significant impact" upon its prices. No showing was made regarding the number of routes, cost of additional drivers, tractors, trailers, or other such factors that AB could have claimed it would face should it have to comply with state law. To the contrary, AB has made no showing of interference with competitive market forces within the industry." (PSOD at p. 13, lines 5-9.)

The allegation is not supported by the evidence at trial.[13] As outlined above, Mr. Aboudi testified at trial that compliance with state law would directly impact "routes and services" of AB Trucking. In fact, all of Plaintiffs drivers that testified at trial acknowledged that strict compliance with state law would cause them to "lose their place in line" when they were driving to and from the Port of Oakland for example.[14] The federal courts have repeatedly held recently that the FAAAA preempts state law with regard to motor carriers such as AB Trucking.[15]

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[13] Current defense counsel substituted into this case on the eve of trial after prior counsel suffered a medical disability. Even though Defendant was precluded from introducing evidence at trial or conducting discovery, sufficient evidence of the direct impact of strict adherence to state meal and rest break laws would have on motor carriers was provided by the many truck drivers that did testify at trial.

[14] (*See* PSOD at p. 3, lines 17-19.)

[15] Several federal courts in California since *ATA* have recently dismissed wage and hour putative class actions brought by truck drivers alleging claims based on violations of California's meal break laws, on the ground that those laws (as applied to motor carrier truck drivers) are preempted by the FAAAA. (*See Dilts v. Penske Logistics, LLC*, (S.D. Cal. Oct. 19, 2011) 819 F.Supp.2d 1109; *Esquivel et al. v. Vistar Corp. et al.*, Case No. 2:11-cv-07284 [C.D. Cal. Feb. 8, 2012]; *Campbell v. Vitran Express*, 2012 U.S. Dist. LEXIS 85509 (C.D. Cal, 2012). Please note that *Dilts, Esquivel* and *Campbell* are currently under appeal to the Ninth Circuit.

7. Defendant objects to the following allegation: "AB's unsubstantiated arguments do not persuade the Court that California's meal and rest break laws have had, or will have, a more than tenuous effect upon the price of AB rates, routes or services." (PSOD at p. 16, lines 24-26.)

The allegation is not supported by the evidence at trial. (See Defendant's Objections 1-6 above.)

8. Defendant objects to the following allegation: "California meal and rest break laws are not preempted by the FAAAA because they fall under the safety exemption of the FAAAA."

Defendant understands that the FAAAA provides that its preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . .." (49 U.S.C. § 14501(c)(2)(A).)

The Ninth Circuit has recognized this exception to the scope of FAAAA preemption for regulations that are "genuinely responsive to safety concerns."(*ATA*, 559 F.3d at 1053 [citations omitted].) But this exception to preemption should not be broadly read to include regulations involving general health concerns (*id.* at 1054)—making the exception inapplicable to California wage-and-hour laws. According to *ATA*, a court must analyze "whether the purported safety justifications will withstand scrutiny." (*Id.*, at 1055.) "It is not enough to say that the provision might enhance efficiency or reduce some kind of negative health effects[,]" rather, "[t]he narrow question . . . is whether the provision is intended to be, and is, genuinely responsive to motor vehicle safety." (*Id.*)

Plaintiffs have incorrectly claimed that California's meal and rest period regulations are safety regulations that fall within the exception to FAAAA preemption. California's meal and rest period regulations do not satisfy the requirements of a motor safety regulation. California Labor Code § 516 provides that "except as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the *health and welfare of*

those workers." (Emphasis added). The only provision in California Labor Code § 516 that may tangentially apply in the context of transportation companies like AB Trucking is California Labor Code § 512(b), which provides that "the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the *health and welfare of the affected employees*." (Emphasis added.) This is a very remote connection to motor vehicle safety indeed.

The Statement as to the basis for the IWC Wage Orders also does not support the argument that the meal and rest break provisions in the IWC Wage Orders are "genuinely responsive to motor vehicle safety." (*See* "Statement as to the Basis," available at http://www.dir.ca.gov/iwc/statementbasis.pdf.) Indeed, the California Labor Code makes it clear that the IWC is charged with investigating the "health, safety and welfare" of ***all*** California "employees" (not just employees involved with the operation of motor vehicles) (Labor Code § 1173), and that "if the [IWC] finds that hours or conditions of labor may be prejudicial to the *health or welfare of employees in any occupation, trade, or industry*" (emphasis added), it may take action, including issuing or amending wage orders pursuant to the procedures set forth in the California Labor Code § 1178.5(b). Thus, the IWC is really not specifically charged with issuing motor vehicle safety regulations as claimed by Plaintiffs.[16]

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[16] Under §31441 of the Motor Carrier Safety Act, the Secretary of Transportation has the authority to decide that "a State law or regulation on motor vehicle safety . . . may not be enforced" if the Secretary of Transportation decides (1) that the state law or regulation is "additional to or more stringent" than existing federal DOT regulations, and (2) that (A) the state law or regulation "has no safety benefit," or (B) the state law or regulation is "incompatible" with existing federal DOT regulations, or (C) "enforcement of the state law or regulation would cause an unreasonable burden on interstate commerce." (*See* 49 U.S.C. §31441(c)(4).) On December 18, 2008, the FMCSA rejected a "Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers" brought on behalf of a group of motor carriers. The FMCSA found that "the California meal and rest break rules are not 'regulations on commercial vehicle safety,'" and, accordingly, that "the [FMCSA] has no authority to preempt them under 49 U.S.C. § 31141." The FMCSA also ruled that § 31141 "does not allow the preemption [by FMCSA] of other State or local regulations merely because they have some effect on [commercial motor vehicle] operations." 73 Fed. Reg. 79,204-79,206, 2008 WL 5351180 (Dec 24, 2008). This ruling supports Defendant's conclusion that the FAAAA is applicable to the case at bar. If meal and rest break laws of California are not "regulations on commercial vehicle safety" according to the FMCSA, then they do not qualify for exemption from preemption under the FAAAA.

Given the comprehensive regulatory structure imposing safety requirements on the California trucking industry (e.g, Federal Motor Carrier Safety Regulations, "FMCSR" (Title 49 CFR 397 et seq.) and the California Vehicle Code) it is an extremely flawed argument to make that California meal and rest break laws (which apply generally to California employees across numerous industries) somehow qualify as motor carrier safety regulations under the FAAAA exception. The reasoning of the court in *Dilts* is sound in rejecting such an argument. As a result, the meal and break laws should not be granted protection from application of the FAAAA preemption under the FAAAA safety exemption.

Dated this 12th day of November, 2012.

Respectfully Submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all other similarly situated, Plaintiffs, vs. OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, and DOES 1-20 Defendant.	Case No.: RG 08-379099 **PROOF OF SERVICE** Action Filed: March 28, 2008 Date: May 11, 2012 Dept.: 20 for Trial: February 14, 2012 Before Honorable Judge Robert B. Freedman Hearing Date; November 16, 2012

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is 476 Third Street, Oakland, California, 94607.

On November 12, 2012, I served the foregoing documents described as:

DEFENDANT'S OBJECTIONS TO PROPOSED STATEMENT OF DECISION

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE MAILING LIST INCLUDED HEREIN

[X] (BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Oakland, California in the ordinary course of business.

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[ ] (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

[ ] (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

GUY A. BRYANT

Signature

SERVICE LIST

VIA U.S. MAIL AND ELECTRONIC SERVICE ON ALL PARTIES LISTED HEREIN:

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