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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated, Plaintiffs, v. OAKLAND PORT SERVICES CORP. d/b/a AB Trucking, and DOES 1 through 20, inclusive, Defendants.	Case No. RG08379099 **PROPOSED STATEMENT OF DECISION** Date: November 16, 2012 Time: 2:00 p.m. Dept.: 20 Judge: Hon. Robert B. Freedman

TABLE OF CONTENTS

Page

I. DISCUSSION ... 1

A. MEAL PERIODS AND REST BREAKS ... 1

1. Meal periods ... 1

a. AB's argument that an employer need not record meal periods after *Brinker* is not supported by legal authority ... 4

2. Rest breaks ... 5

B. FAILURE TO PAY FOR ALL HOURS WORKED ... 5

C. FAILURE TO PAY EMPLOYEES CLASSIFIED AS TRAINEES ... 6

D. CLAIMS UNDER THE OAKLAND LIVING WAGE LAW ("OLW") ... 7

E. DERIVATIVE CLAIMS: UNFAIR COMPETITION AND LABOR CODE ... 7

F. AB'S AFFIRMATIVE DEFENSES ... 8

1. AB holds the burden to overcome the presumption against preemption of California's meal and rest break laws by FAAAA ... 8

2. Background and legal standard ... 10

a. Federal precedent: pre-*Dilts* ... 10

b. Federal precedent: *Dilts* ... 12

c. California precedent ... 13

3. AB made no showing of "significant impact" on its rates, routes, or services ... 15

4. FAAAA does not preempt California's meal and rest break laws because they fall under the law's safety exemption ... 16

5. FAAAA does not preempt Plaintiffs' UCL claim ... 18

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TABLE OF AUTHORITIES

Page

Federal Cases

Air Transport Ass'n of Am. V. City & County of San Francisco, (9th Cir. 2001) 266 F.3d 1064 .... 11, 12, 16

American Airlines, Inc. v. Wolens, (1995) 513 U.S. 219 10

American Trucking Ass'ns, Inc. v. City of Los Angeles, (2011) 660 F.3d 384 .... 8, 11, 15

Californians for Safe & Competitive Dump Truck Transportation v. Mendonca, (9th Cir. 1998) 152 F.3d 1184 .... 9, 10, 12

Cardenas v. McLane FoodServices, Inc., (2011) 796 F.Supp.2d 1246 .... 13, 15, 16, 17

Charas v. Trans World Airlines, Inc., (9th Cir. 1998) 160 F.3d 1259 10

Day-Brite Lighting, Inc. v. Missouri, (1952) 342 U.S. 421 8

Dilts v. Penske Logistics LLC, (2011) 819 F.Supp.2d 1109 .... 10, 12, 15

Esquivel v. Vistar Corp., (C.D. Cal., Feb. 8, 2012, 2:11-CV-07284-JHN) 2012 WL 516094 12

Hill v. Colo., (2000) 530 U.S. 703 8

Medtronic, Inc. v. Lohr, (1996) 518 U.S. 470 8

Metropolitan Life Ins. Co. v. Massachusetts, (1985) 471 U.S. 724 8

Morales v. Trans World Airlines, Inc., (1992) 504 U.S. 374 .... 9, 10

Rowe v. N.H. Motor Transp. Ass'n, (2008) 552 U.S. 364 .... 7, 9

Thomas v. Basham, (8th Cir.1991) 931 F.2d 521 14

State Cases

Armenta v. Osmose, Inc., (2005) 135 Cal.App.4th 314 5

Bank of the West v. Superior Court, (1992) 2 Cal.4th 1254 18

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

TABLE OF AUTHORITIES (cont'd)

Page

1 *Brinker v. Superior Court*,
(2012) 53 Cal.4th 1004 ....2, 3, 4, 17

2

3 *Cicairos v. Summit Logistics, Inc.*,
(2005) 133 Cal.App.4th 949 ....2, 14, 15

4 *Cortez*,
23 Cal.4th 18

5

Fitz-Gerald v. Skywest, Inc.,
6 (2007) 155 Cal.App.4th 411 13

7 *Franco v. Athens Disposal Co., Inc.*,
(2009) 171 Cal.App.4th 1277 13

8

Gentry v. Superior Court,
9 (2007) 42 Cal.4th 443 17

10 *Ghazaryan v. Diva Limousine, Ltd.*,
(2008) 169 Cal.App.4th 1524 14

11

Hernandez v. Mendoza,
12 (1988) 199 Cal.App.3d 721 5

13 *Industrial Welfare Com. v. Superior Court*,
(1980) 27 Cal.3d 690 17

14

Jaimez v. Daiohs USA, Inc.,
15 (2010) 181 Cal.App.4th 1286 ....2, 13

16 *Janik v. Rudy, Exelrod & Zieff*,
(2004) 119 Cal.App.4th 930 18

17

Martinez v. Combs,
18 (2010) 49 Cal.4th 35 ....2, 6

19 *Morillion v. Royal Packing*,
(2000) 22 Cal.4th 575 ....3, 6

20

Murphy v. Kenneth Cole Productions, Inc.,
21 (2007) 40 Cal.4th 1094 ....5, 17

22 *People ex rel. Harris v. Pac Anchor Transp., Inc.*
(2011) 195 Cal.App.4th 765 18

23

Porter v. United Services Automobile Assn.,
24 (2001) 90 Cal.App.4th 837 14

25 *Price v. Starbucks Corp.*,
(2011) 192 Cal.App.4th 1136 7

26

Prince v. CLS Transportation, Inc.,
27 (2004) 118 Cal.App.4th 1320[....................14

28 *Thurman v. Bayshore Transit Management, Inc.*,
(2012) 203 Cal.App.4th 1112 13

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

Page

United Parcel Service, Inc. v. Superior Court, (2011) 196 Cal.App.4th 57 13

Federal Statutes

49 U.S.C. § 14501(a)(2) 17

49 U.S.C. § 14501(c)(1) 8, 9

State Statutes

Business & Professions Code §§17200, et seq. 1, 18

California Business & Professions Code section 17203 .... 7, 18

Labor Code §§ 1770 10

Labor Code §§ 206.5, 219, 1194, 2802, 2804 6

Labor Code §§226.7 and 512 1

Labor Code §§510 and 1194 1

Labor Code §§510, 1182.12, and 1194 1

Labor Code section 226 7

Labor Code section 226.7(b) 2

Labor Code section 512 .... 1, 2

Labor Code sections 201, 202 and 203 7

Federal Regulations

Code of Federal Regulations, Title 49, Sections 395.1 to 395.13 15

State Regulations

Cal. Code Regs. tit. 8, § 11090 15

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1 The operative complaint filed September 20, 2010 (the Second Amended Complaint
2 "SAC") in this wage and hour class action for violations of the California Labor Code ("Labor
3 Code") and Unfair Business Practices (Business & Professions Code §§17200, et seq., "UCL")
4 brought by former truck driver employees, Plaintiffs Lavon Godfrey and Gary Gilbert, on behalf
5 of themselves and the Class ("Plaintiffs") against AB Trucking ("AB")[1] contains eight causes of
6 action.[2]

7 The Class certified in December 2010 ("Drivers") is:

8 All drivers who performed work for Defendant out of its Oakland,
California facility from the period of March 28, 2004 through the
9 date of notice to the class [March 15, 2011] ("statutory period").

10 The action was tried to the Court over several days as reflected in the minutes of the Court
11 followed by post trial briefing.

12 ## I. DISCUSSION

13 ### A. MEAL PERIODS AND REST BREAKS

14 #### 1. Meal periods

15 Plaintiffs' meal period claims are based on the Labor Code and the applicable Wage Order
16 issued by the Industrial Welfare Commission. Labor Code section 512 requires an employee be
17 provided one thirty-minute meal period in the first 5 hours of work and a second thirty-minute
18 meal period if the employee works more than 10 hours in a shift. Under the terms of Section 512,
19 an employee may consent to waiver of the second meal period but may not consent to waive his
20 second meal period if he waived the first meal period.

21 Labor Code section 226.7(b) states, "If an employer fails to provide an employee a meal
22 period … in accordance with an applicable order of the Industrial Welfare Commission, the
23 employer shall pay the employee one additional hour of pay at the employee's regular rate of

24 [1] Reference herein to AB encompasses Oakland Port Services ("OPS") and Baymodal.

25 [2] 1) Unfair Business Practices (Business & Professions Code §§17200, et seq., "UCL"); 2) Failure to Pay for All
Hours Worked (Labor Code §§510, 1182.12, and 1194; IWC Wage Order No. 9, §4); 3) Failure to Pay for Any
26 Hours Worked Due to Misclassification of Employment Status (Labor Code §§510, 1182.12 and 1194; IWC Wage
Order No. 9, §40; 4) Failure to Pay Overtime (Labor Code §§510 and 1194; IWC Wage Order No. 9, §3); 5) Failure
27 to Pay Living Wage (Oakland City Charter §728) ("OLW"); 6) Failure to Provide Meal and/or Rest Periods (Labor
Code §§226.7 and 512; IWC Wage Order No. 9); 7) Failure to Pay Wages Owing at Discharge or Quitting (Labor
28 Code §§201, 202 and 203); and 8) Failure to Provide Accurate Itemized Wage Statements (Labor Code §226). The
fourth cause of action for failure to pay overtime was dismissed by Plaintiffs during trial, leaving seven causes of
action and eliminating the need for the Overtime Subclass.

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1 compensation for each work day that the meal … period is not provided." The applicable wage
2 order, Industrial Welfare Commission Wage Order No. 9-2001 ("Wage Order 9"), states, "No
3 employer shall employ any person for a work period of more than five (5) hours without a meal
4 period of not less than 30 minutes…." (Cal. Code Regs., tit. 8, § 11090, subd. 11(A).)
5 "Employ," under the wage order, means "to engage, suffer, or permit to work." (*Id.*, subd. 2(E).)
6 A plain reading of these provisions establishes that an employer who suffers or permits an
7 employee to work over 5 hours without a meal period (or valid waiver thereof) may be liable
8 under the statute for an additional hour of pay at the employee's regular rate of compensation.
9 The California Supreme Court has "repeatedly enforced definitional provisions the IWC has
10 deemed necessary … to make its wage orders effective, to ensure that wages are actually
11 received, and to prevent evasion and subterfuge. [Citation.]" (*Martinez v. Combs* ("*Martinez*")
12 (2010) 49 Cal.4th 35, 61-62.)

13 Plaintiffs and AB vigorously contest whether AB provided meal periods in accordance
14 with these provisions. However, the Class presented substantial and persuasive evidence that
15 class members were routinely and consistently precluded by AB from taking meal periods and
16 rest breaks. The California Supreme Court's recent decision in *Brinker v. Superior Court*
17 ("*Brinker*") (2012) 53 Cal.4th 1004 supports a finding that AB failed to comply with its
18 obligation to afford drivers meal periods because *Brinker* holds an employer's duty "is an
19 obligation to provide a meal period to its employees. The employer satisfies this obligation if it
20 relieves its employees of all duty, relinquishes control over their activities and permits them a
21 reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or
22 discourage them from doing so." (See *id.* at p. 1040.) An employer does *not* satisfy its obligation
23 if it "*impedes*" or "*discourages*" employees from taking an "*uninterrupted* 30-minute break."
24 (*Id.*, emphasis added.) An employer may not undermine a formal policy of providing meal breaks
25 by pressuring employees to perform their duties in ways that omit breaks. (*Cicairos v. Summit*
26 *Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963; see also *Jaimez v. Daiohs USA, Inc.*(2010)
27 181 Cal.App.4th 1286, 1304-1305 [proof of common scheduling policy that made taking breaks
28 extremely difficult would show violation].)

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The recent *Brinker* decision provides two examples of discouragement that would be unlawful—a scheduling policy that makes taking breaks "extremely difficult" and creating an anti-meal-break policy enforced through ridicule or reprimand. The Class established both unlawful scenarios exist here. (See *Brinker*, *supra*, at p. 1040; concurrence at p. 1053 and ft. 1.)

> An employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. ([Citation].) The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks.

(*Brinker*, 53 Cal.4th at p. 1040.)

In addition, the evidence shows AB neither maintained, nor provided drivers, any "formal" meal period policy. The first example of unlawful discouragement provided in *Brinker* presumes the existence of a formal meal period policy. AB falls far short of meeting the "provide" standard under any measurement because it provided no evidence showing drivers were, at a minimum, *informed* in any meaningful or consistent way that they could take a meal period, or the definition of any such meal period. As AB had no meal period policy to "undermine," and the evidence presented shows that, beyond that, AB regularly *discouraged* the taking of legally protected breaks, AB has not shown it provided meal periods to the Class.

The evidence reflects 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. Waiting, even in a comfortable location, is "on-duty" by definition: here, drivers were waiting to complete a task assigned by their employer. (See *Morillion v. Royal Packing* (2000) 22 Cal.4th 575, 582.) While waiting to complete an assigned task, drivers unquestionably were not free to leave to engage in personal activities. (See *Brinker*, at p. 1040; concurrence at p. 1053 and ft. 1.) In fact, the evidence showed AB discouraged off-duty meal periods, and instructed drivers to eat while in line and "on duty."

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

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1 negative reactions from their employer when they had tried to take a meal period. Despite
2 evidence drivers did not receive meal periods as required by law, AB presented no evidence that
3 it created or entered into written agreements between AB and drivers for on-the-job paid meal
4 periods. AB's designated person most knowledgeable on payroll and payroll processing admitted
5 that AB automatically deducted one hour's pay from each driver per each shift worked based on a
6 presumption that one hour meal periods were taken.

7 **a. AB's argument that an employer need not record meal periods after *Brinker* is not supported by legal authority**

8 AB argues that the holding in *Brinker* places the responsibility of accurately recording
9 meal periods on the "employee," challenging the Court's reliance on Wage Order 9(7), which
10 requires "every employer" to keep "[t]ime records showing when the employee begins and ends
11 each work period. Meal periods, split shift intervals and total daily hours worked shall also be
12 recorded." Nothing in *Brinker,* however, overrules the affirmative obligation imposed by Wage
13 Order 9(7). To the contrary, the concurrence in *Brinker* arrives at the fully opposite conclusion:

14
15 > Employers … have an obligation both to relieve their employees for at least one meal period for shifts over five hours … *and* to
16 > record having done so … (Citations.). If an employer's records show no meal period for a given shift over five hours, a rebuttable
17 > presumption arises that the employee was not relieved of duty and no meal period was provided. This is consistent with the policy
18 > underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement.
19 > (See, e.g., IWC board for wage order No. 7-63 meeting mins. (Dec. 14-15, 1966) pp. 4-5 [rejecting proposal to eliminate the meal
20 > period recording requirement because "without the recording of all
21 > in-and-out time, including meal periods, the enforcement staff would be unable to adequately investigate and enforce" a wage
22 > order's meal period provisions].)

23 (*Brinker*, 53 Cal.4th at p. 1053.)

24 The *Brinker* concurrence goes further to explain that "[a]n employer's assertion that it did
25 relieve the employee of duty, but the employee waived the opportunity to have a work-free break,
26 is … an affirmative defense, and thus the burden is on the employer, as the party asserting waiver,
27 to plead and prove it." (*Id.*) Finally, where an employer fails to keep records of hours worked,
28 employees may establish the hours worked solely by their testimony, and the burden of

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overcoming such testimony shifts to the employer. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727; see also Wage Order 9(7).)

AB's argument that employees are somehow foreclosed from recovering on a claim for a meal period not provided because the *employee* failed to accurately record the time they began and ended each meal period each day—when the employer provides no place to record a meal period nor asks the employee to do so—falls flat and is not supported by legal authority.

2. Rest breaks

Plaintiffs also claim that drivers were not provided with paid rest breaks as required under Wage Order 9. (See Cal. Code Regs., tit. 8, § 11090, subd. 12(A).) Wage Order 9 entitles each employee who works four hours, or each major fraction thereof, with a 10 minute on the clock break. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104 ["Pursuant to IWC wage orders, employees are entitled to … a paid 10-minute rest period per four hours of work."]). Drivers testified that AB did not authorize and permit ten minute rest breaks. Moreover, the evidence reflected AB typically encouraged drivers not to take, or prevented drivers from taking, rest breaks. On top of evidence AB *discouraged* drivers from taking rest breaks, AB provided no evidence of any formal policy on rest breaks. As with meal periods, there is no indication drivers were, at a minimum, *informed* in any meaningful or consistent way that they could take rest breaks, or the definition of any such rest breaks.

Under the authority of *Brinker*, it is clear that AB did not relieve class members of all duties during the periods that rest or meal breaks could be taken.

B. FAILURE TO PAY FOR ALL HOURS WORKED

Wage Order 9(4)(B) provides: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise [emphasis added]." (See *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323-4.) Wage Order 9(2)(H) defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (See *Morillion*, 22 Cal.4th at p.

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582.) "The "suffered or permitted to work" language does not limit whether time spent "subject to the control of an employer" is compensable." (*Id.*; see e.g., *Martinez,* 49 Cal.4th at p. 69.) The evidence reflected that as a direct result of AB's default practice and policy of automatically deducting one hour's pay from each driver per each shift worked, drivers worked an hour each day for which they were not paid.

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, and that any time a driver 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.

C. FAILURE TO PAY EMPLOYEES CLASSIFIED AS TRAINEES

As discussed above, Wage Order 9(4)(B) applies to this claim as well as the all hours worked claim. (See also *Morillion*, 22 Cal.4th at p. 582; *Martinez,* 49 Cal.4th at p. 69.) In addition, several sections of the Labor Code prohibit the waiver of wage claims or payment at any rate less than the minimum wage. (See e.g., Labor Code §§ 206.5, 219, 1194, 2802, 2804.)

The Class presented compelling evidence as to this claim. The evidence reflected that AB misclassified drivers who were suffered or permitted to work as non-employees, or unpaid "trainees." AB witnesses admitted there were drivers classified as non-employee trainees who were not paid at all for any hours worked. AB did not dispute its use of "trainees" during the statutory period, nor that it utilized trainees who were unpaid. The evidence reflected these trainees were suffered or permitted work by AB and were not paid at all. There are thirteen identifiable individuals who were classified as "trainees" and were not paid. These individuals are identified in Plaintiffs' damages model created from the record and documents produced by AB.

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1 D. CLAIMS UNDER THE OAKLAND LIVING WAGE LAW ("OLW")

2 Although AB meets some of the criteria for a Port Assisted Business within the meaning
3 of the OLW (Section 728 of the Oakland City Charter), the Court concludes that AB did not
4 employ the requisite number of employees during the applicable period of January 28, 2005
5 through February 10, 2006, and thus the OLW is not applicable to quantifying the recovery to
6 which the Class is otherwise entitled and other forms of relief under the OLW.

7 E. DERIVATIVE CLAIMS: UNFAIR COMPETITION AND LABOR CODE

8 California Business & Professions Code section 17203, also known as the Unfair
9 Competition Law ("UCL"), provides that the Court may restore to any person in interest any
10 money or property which may have been acquired by means of such unfair competition and to
11 which that person or persons have an ownership interest. AB violated the UCL based on its
12 violations of the Labor Code discussed herein.

13 Labor Code sections 201, 202 and 203 require an employer to pay all wages owed to an
14 employee at the time of separation of employment. The evidence reflects AB never paid monies
15 owed for its failure to pay for all hours worked, any hours worked, meal and rest period
16 violations, and Labor Code section 226 violations. Labor Code section 226 and Wage Order 9
17 require AB to provide accurate itemized wage statements showing the correct number of hours
18 worked, the applicable hourly rate for each hour worked, and each category of compensation
19 received, among other details. Plaintiffs proved they suffered injury as a result of this violation
20 because the incorrect number of hours worked set forth on wage statements made it impossible
21 for employees to calculate the wages to which they were entitled. (*Price v. Starbucks Corp.*
22 (2011) 192 Cal.App.4th 1136, 1143.)

23 AB had knowledge that drivers did not receive one hour, off-duty, uninterrupted meal
24 periods each day worked, yet AB deducted one hour each day from their pay. AB willfully paid
25 drivers less than they were owed and willfully provided wage statements reflecting false "hours
26 worked" as a result. AB knew it suffered and permitted trainees to work, preparing those drivers
27 for the day one of its trucks opened up for a new driver, without paying drivers (or providing
28 them with wage statements) at all. Finally, AB also failed to provide payment for missed meal

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and rest breaks on wage statements. The Class is entitled to recovery as to this claim.

F. AB'S AFFIRMATIVE DEFENSES

1. **<u>AB holds the burden to overcome the presumption against preemption of California's meal and rest break laws by FAAAA</u>**

Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA") in 1994 to prevent states from undermining federal deregulation of interstate trucking. (See *American Trucking Ass'ns, Inc. v. City of Los Angeles* ("*ATA*") (2011) 660 F.3d 384, 395; see also *Rowe v. N.H. Motor Transp. Ass'n* ("*Rowe*") (2008) 552 U.S. 364.) FAAAA provides in pertinent part:

> (c) Motor carriers of property.
>
> (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property [emphasis added].

(49 U.S.C. § 14501(c)(1).)

Preemption questions are approached with a presumption that "Congress did not intend to pre-empt areas of traditional state regulation." (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 740.) States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. It is a traditional exercise of the States' "police powers to protect the health and safety of their citizens," including child labor laws, minimum wage laws, and laws affecting occupational health and safety. (*Hill v. Colo.* (2000) 530 U.S. 703, 715 citing *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 475; *Day-Brite Lighting, Inc. v. Missouri* (1952) 342 U.S. 421.) Because of this presumption against preemption, courts may not interpret the FAAAA to preempt every traditional state regulation that might have some indirect connection with, or relationship to, rates, routes, or services unless there is some indication Congress intended that result. The Court finds, for reasons discussed herein, Congress did not intend preemption of California's meal and rest break laws.

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1 The initial question in determining whether Section 14501(c)(1) of the FAAAA preempts
2 state action is whether the provision "relate[s] to a price, route or service of a motor carrier;" if
3 the answer is no, the provision does not fall within the preemptive scope of Section 14501(c)(1).
4 (*ATA*, 660 F.3d at p. 395.) In *Morales v. Trans World Airlines, Inc.* ("*Morales*") (1992) 504 U.S.
5 374, in also interpreting "relates to" language, the U.S. Supreme Court held the state law in
6 question was preempted by the Airline Deregulation Act ("ADA") because the law would have a
7 "significant impact" on the airlines' fares.[3] (*Ibid.* at p. 389 [finding state promulgated guidelines
8 regarding airline fare advertising expressly preempted by ADA].)
9 In *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*
10 ("*Mendonca*") (9th Cir. 1998) 152 F.3d 1184, 1185, the Ninth Circuit found certain wage laws in
11 California qualified as state laws that had "no more than an *indirect, remote, and tenuous* effect
12 on motor carriers" and, as such, were not preempted by the FAAAA. (*Ibid.* emphasis in original.)
13 Thus, the state wage laws did not meet the "relate to" standard. *Rowe* reaffirmed this principle
14 that state laws with only a tenuous, remote, or peripheral effect on prices, services, or routes are
15 not preempted by FAAAA. (*Rowe*, 552 U.S. at p. 995.)
16 If the provision at issue does not fall within the market participant doctrine[4] *and* relates to
17 rates, routes, or services, then the court considers whether any of the FAAAA's express
18 exemptions save the regulation from preemption. (*Id.* at pp. 395-6.) The safety exemption
19 contemplated by FAAAA is discussed below.
20 //
21 //
22 //
23 //
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[3] The preemption language used in the ADA and the FAAA Act is essentially identical. The ADA was passed in 1978 and prohibits states from enforcing any law "relating to [air carriers] rates, routes, or services." 49 U.S.C.App. § 1305(a)(1). The U.S. Supreme Court, comparing the identical "relating to" language to the language found in ERISA, set forth the standard to identify "relating to" under the ADA: "State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted under 49 U.S.C.App. § 1305(a)(1)." (*Morales*, 504 U.S. at p. 384.) The test under the ADA is, thus, whether California's meal and rest break laws either (1) have a connection to or (2) reference to rates, routes or services.

[4] This doctrine is not applicable here as the state was not acting as a market participant in passing meal and rest break laws.

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2. **Background and legal standard**

a. **Federal precedent: pre-*Dilts***

In 1992, as discussed above, the U.S. Supreme Court decided *Morales* holding a state law regarding advertising guidelines for airline fares preempted by the ADA because it would have a "significant impact" on the airlines' fares. In 1995, the U.S. Supreme Court held in *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219, that claims for breach of contract and violations of state consumer protection laws arising out of changes to a frequent flyer program were preempted by the ADA as to the consumer protection law—but *not* as to common law remedies for breach of contract. (*Ibid.* at 228-9.) In *Mendonca, supra*, the Ninth Circuit squarely held that the language and structure of the FAAA Act does not evidence a clear and manifest intent on the part of Congress to preempt California's Prevailing Wage Law (Labor Code §§ 1770-80) ("CPWL"). *Mendonca* held that, while CPWL "in a certain sense" is "related to" the employer's "prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous … We do not believe that CPWL frustrates the purpose of deregulation by acutely interfering with the forces of competition." (*Mendonca*, 152 F.3d at pp. 1185, 1189.) The Court recognizes that prevailing wage laws are not identical to meal and rest break laws. However, the reasons offered by the employer (also of drivers) in *Mendonca* in support of preemption under the FAAA Act were nearly identical to the concerns raised by *Dilts, infra*, yet, the Ninth Circuit came to the opposite conclusion from the district court in *Dilts*.[5] Also in 1998, the Ninth Circuit held in *Charas v. Trans World Airlines, Inc.* (9th Cir. 1998) 160 F.3d 1259, that the ADA evidenced congressional intent to "prohibit states from regulating airlines while preserving state tort remedies that already existed at common law, providing that such remedies do not significantly impact federal deregulation." (*Ibid.* at p. 1265.)

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[5] The employer in *Mendonca* argued that CPWL "increases its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, [employer] alleges that its rates for "services" are based on: (1) costs, including costs of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, including prevailing wage requirements." (*Mendonca, supra*, at p. 1189.) AB has not raised specific examples, as is discussed further below, of how it might be compelled to re-direct or re-route, but the concerns raised—and dismissed—by the defendant in *Mendonca*, including "cost of labor," would likely be among the examples cited.

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1 In 2001 in *Air Transport Ass'n of Am. v. City & County of San Francisco,* the Ninth
2 Circuit held that a city Ordinance conditioning city contracts, including airport property lease
3 agreements, on the contractor's promise not to discriminate on the basis of several protected
4 grounds including domestic partner status, was not preempted by the ADA. The court found the
5 promise not to discriminate extended to the provision of employment benefits to the domestic
6 partners of employees. (*Air Transport Ass'n of Am. v. City & County of San Francisco* ("*Air*
7 *Transport*") (9th Cir. 2001) 266 F.3d 1064, 1068.) The airlines complained they would face an
8 increase in the cost of providing benefits to their employees' domestic partners, and that would in
9 turn force the airlines to change their "routes" and "services." (*Ibid.* at 1073.) The Ninth Circuit
10 reasoned that because "[t]he Airlines [conceded] that they will use airport property in San
11 Francisco regardless of the Ordinance ..., the Ordinance cannot be said to compel or bind the
12 Airlines to a particular route or service and there is no preemption under the connection-with
13 test." (*ATA*, 660 F.3d at p. 397 citing *Air Transport,* 266 F.3d at pp. 1071-2.) The Ninth Circuit
14 noted there might be some imaginable contract term the city could demand whose costs would be
15 so high that it would compel the airlines to change their "prices, routes, or services," but it found
16 the Ordinance at issue did not approach that level even though providing additional employee
17 benefits would raise operating costs. (*Air Transport*, 266 F.3d at p. 1075.)
18 In 2011, in *ATA*, *supra*, the Ninth Circuit held that a state may condition access to state
19 property without preemption by FAAAA, so long as the conditions do not impose costs that
20 compel the carrier to change rates, routes, or services. The laws in question in *ATA* were
21 concession agreements imposed by the Port of Los Angeles. Under *ATA*, state laws do not per se
22 affect rates, routes, or services simply because they "impose conditions" on those operating in the
23 state. (See e.g., *ATA*, 660 F.3d at p. 398.) Imposing conditions does not amount to per se
24 "significant impact."
25 Federal precedent interpreting FAAAA (or ADA) thus finds that common law contract
26 and tort claims are not preempted by the "relates to" language, though such claims would have an
27 indirect financial impact on motor carriers. Laws that make a direct substitution for competitive
28 market forces also do not withstand scrutiny. But, an imposition of conditions, such as a cost, on

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1 the motor carrier—without "compelling" a change in rates, routes, or services—is insufficient to constitute a "significant impact." A state's desire to implement prevailing wage laws did acutely interfere with market competition and was too indirect, remote, or tenuous to be preempted.

b. Federal precedent: *Dilts*

In *Dilts v. Penske Logistics LLC* ("*Dilts*") (S.D. Cal. 2011) 819 F.Supp.2d 1109, a federal district court found on the facts presented that while California's meal and rest break laws did not directly target the motor carrier industry, California's "fairly rigid" meal and break requirements impacted the types and lengths of routes that were feasible and reduced the amount of on-duty work time allowable to drivers, thus reducing the amount and level of service the employer could offer its customers without increasing its workforce and investment in equipment. (*Ibid.* at pp. 1117-1122.) *Dilts* is limited to its facts.[6] Under existing federal precedent, causing an increase in workforce or investment may constitute an imposition of conditions on AB, but as in *Air Transport* and *Mendonca*, such an increase would not necessarily rise to the level of "significant impact." This Court is not inclined to follow the limited ruling in *Dilts*.

The court in *Dilts* found "[b]oth parties agree that the [California meal and rest break] laws impact the number of routes each driver/installer may go on each day, and Plaintiffs do not oppose Penske's argument that the laws impact the types of roads their drivers/installers may take and the amount of time it takes them to reach their destination from the warehouse." (*Dilts* at p. 1119.) The court in *Dilts* continued to stretch its analysis to reach a conclusion of preemption under the facts it considered: "… these ramifications of California's [meal and rest break] laws upon Penske's routes and services all contribute to create a significant impact upon prices. Penske produces facts regarding the cost of additional drivers, helpers, tractors, and trailers that would have been needed to ensure off-duty breaks under California's rules and maintain the same level of service. [Citation.]" (*Id.*) The court determined that while Penske did not show that the meal and rest break laws would prevent them from serving certain markets, "the laws bind Penske to a

[6] AB also cites *Esquivel v. Vistar Corp.* (C.D. Cal., Feb. 8, 2012, 2:11-CV-07284-JHN) 2012 WL 516094 in which a federal district court, relying entirely on *Dilts*, granted a Motion to Dismiss the Plaintiff's Second Amended Complaint because the meal and rest period claims were "preempted" by the FAAAA. The district court in *Esquivel* did not have any "facts" before it other than those plead in the complaint, yet it determined it could conclude that the presumption against preemption was overcome and that the safety exemption to FAAAA did not apply. This Court need not adopt this approach.

schedule and frequency of routes that ensures many off-duty breaks at specific times throughout the workday in such a way that would interfere with 'competitive market forces within the ... industry.'" (*Id.*) *Cardenas*, *infra*, decided by a different federal district court in 2011, arrives at a different conclusion as discussed below.

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.[7] To the contrary, AB has made no showing of interference with competitive market forces within the industry.

c. California precedent

The trend in California law is against preemption by FAAAA of state meal and rest break laws for employees governed by Wage Order 9. In *Fitz-Gerald v. Skywest, Inc.* ("*Fitz-Gerald*") (2007) 155 Cal.App.4th 411, the California appellate court found that actions to enforce California's minimum wage laws and labor laws governing meal and rest breaks are *not* preempted by the ADA. The court rejected the defendant's argument that the state's laws resulted in "higher fares, fewer routes, and less service" as too "tenuous." (*Fitz–Gerald,* 155 Cal.App.4th at p. 423 n. 7.)[8]

Likewise, since 2000 when the most recent manifestations of California meal and rest break laws took effect, numerous California courts have decided issues in meal and rest break cases involving Wage Order 9 governing workers in the transportation industry—whether class certification, summary judgment, or otherwise—yet, none have found preemption of those claims by the FAAAA. (See e.g., *United Parcel Service, Inc. v. Superior Court* (2011) 196 Cal.App.4th 57 [holding that, as a matter of first impression, statute authorized separate premium payments for failure to provide both meal periods and rest periods]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112 [trial court properly declined to award maximum amount under PAGA, but no FAAAA preemption discussion]; *Jaimez*, *supra*, 181 Cal.App.4th at p. 1299

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[7] AB does not address how numerous other trucking companies continue to operate in California, as well as in and out of the Port of Oakland, every day seemingly without any problem of competitive advantage in the market.

[8] Preemption was found under the separate and distinct analysis of the Railway Labor Act.

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[certifying class where Wage Order 9 applicable]; *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 [Court of Appeal held class arbitration waiver was invalid with respect to alleged meal and rest period violations in putative class action brought by trash truck driver against former employer for meal and rest period violations]; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524 [proposed class of all drivers employed by company was ascertainable; sufficient community of interest existed for class certification; and class action was the superior method for resolving the dispute.]; *Cicairos v. Summit Logistics, Inc.*, *supra*, 133 Cal.App.4th 949 [Employer's obligation under Labor Code and Wage Order 9 to provide truck drivers with an adequate meal period was not satisfied by assuming that the meal periods were taken, because employers have an affirmative obligation to ensure that workers are actually relieved of all duty at such times, and employers also have a duty to record their employees' meal periods.]; *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1329 [reversing trial court's order sustaining defendant's demurrer to class allegations in complaint as premature, court observed that plaintiff had alleged "institutional practices by CLS that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis."].)

As the preemption argument is jurisdictional, California courts have possessed the authority to raise the issue independent of any argument made by the involved parties. (See, e.g., *Porter v. United Services Automobile Assn.* (2001) 90 Cal.App.4th 837, 838, ["We have the duty to raise issues concerning our jurisdiction on our own motion"]; see also *Thomas v. Basham,* 931 F.2d 521, 523 (8th Cir.1991) [stating that federal courts shall raise jurisdictional issues *sua sponte* when there is an indication that jurisdiction is lacking, even if the parties concede the issue].) Yet, no California court has raised the issue, nor held California's meal and rest break laws preempted by FAAAA.[9]

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[9] The California Supreme Court granted review of *People ex rel. Harris v. Pac Anchor Transp., Inc.* ("*Pac Anchor*") (2011) 195 Cal.App.4th 765 on August 10, 2011 to determine the question of whether California's UCL law is preempted by FAAAA. There are no meal and rest break claims at issue in *Pac Anchor*.

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Indeed, the California legislature, aware of federal law governing motor carriers, chose to create an exemption in 2002 to Wage Order 9 with regard to overtime.[10] When the defendant in *Cicairos* argued this 2002 amendment exempted it from the entirety of the Wage Order, the Court of Appeals in 2005 found the defendant's "strained argument" failed. (See *Cicairos*, 133 Cal. App. 4th at p. 959.) Thus, throughout the entirety of the period in which the California legislature considered federal law and accordingly amended Wage Order 9, and the Court of Appeals considered Wage Order 9 in *Cicairos*, the FAAAA had existed for years—since 1994. If the California legislature believed it was necessary to provide an exemption in the Wage Order in response to FAAAA, as it did in 2002 with regard to an overtime exemption for motor carriers, it would have done so. (*Id.*)

3. <u>AB made no showing of "significant impact" on its rates, routes, or services</u>

AB provided no evidence at trial beyond mere speculation with regard to any impact on its rates, routes or services.

In determining whether a provision has a connection to rates, routes, or services, the Court examines the actual or likely *effect* of a state's action. (See *ATA*, 660 F.3d at p. 396.) In *Cardenas v. McLane FoodServices, Inc.* ("*Cardenas*") (2011) 796 F.Supp.2d 1246, 1255-56, a federal district court, without reaching a conclusion on the ultimate question of preemption, summarized the law in the area finding that the relevant cases clearly suggest a finding that, like other California wage laws, California's rest and meal break laws are *not* preempted under the FAAAA.[11]

In *Cardenas*, as is the case here, the defendant proffered a "great deal of speculative evidence suggesting the impact that compliance with California's rest and meal break laws would have on its prices, service, and routes [footnote omitted]." (*Ibid.*) The court found the evidence

[10] Wage Order 9 subsection (3)(L), regarding overtime, was amended by the legislature in 2002 to provide: "The provisions of this section are not applicable to employees whose hours of service are regulated by: (1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers; or (2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and the following sections, regulating hours of drivers." (Cal. Code Regs. tit. 8, § 11090.)

[11] *Cardenas*, out of the Central District of California, decided counter motions for summary judgment in July 2011. *Dilts* was decided in the Southern District of California in October 2011.

highly speculative, and that it failed to persuade the court that such an impact would necessarily result, or, alternatively, that it would be more than attenuated. The court explained:

> To be sure, to comply with California break laws, [defendant] may choose to adjust its routes, or slightly modify its services in the ways it has suggested. But just because [defendant] may make changes to its routes does not necessarily mean that California's break laws have more than an "indirect, remote, or tenuous effect" on these decisions. The Court has concerns that MFI's evidence stretches plausibility—and the FAAAA—to suggest that nearly every state law would be preempted.

(*Id.*)

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's rates, routes or services. The evidence reflects instead an employer that claimed to provide drivers with one hour per day for a "meal period." Notwithstanding the fact that Plaintiffs established this employer did nothing to make that a reality, AB presented no evidence at trial that the provision of this "one hour meal period" acutely interfered with its prices, routes or services. To the contrary, AB instead claimed throughout the life of this case to have operated its business with each driver taking a one hour meal period each day.

As in *Air Transport*, where "[t]he Airlines [conceded] that they will use airport property in San Francisco regardless of the Ordinance ..., the Ordinance cannot be said to compel or bind the Airlines to a particular route or service," AB made no showing that it would cease operations in California should it be required to follow California law. (*Id.* at pp. 1071-2.)

AB has not sustained its burden of proving that compliance with these state laws would have a "significant" effect on its ability to market its services or rates.

4. <u>FAAAA does not preempt California's meal and rest break laws because they fall under the law's safety exemption</u>

The FAAAA does not "restrict the safety regulatory authority of a State with respect to motor vehicles." (49 U.S.C. § 14501(a)(2).) As the district court explained in *Cardenas*, "[c]ourts have explained that the safety exception to FAAAA preemption allows for state regulations that are "genuinely responsive to safety concerns," which requires a consideration of whether the "regulator 'was acting out of safety concerns.' " [Citation.]." (*Cardenas*, 796 F.Supp.2d at p.

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1256.) Making this determination requires looking to the "purpose and intent" of the law to decide whether it emerged out of concerns for safety. (*Id.* ["The focus of the safety exception to preemption must be on the legislative intent and whether the legislature was acting out of safety concerns"].) In a footnote, the *Cardenas* court emphasized the proper inquiry is whether the legislature was "acting out of safety concerns" rather than on whether they were acting out of "*motor vehicle* safety concerns." (*Id.*)

There is no question California's meal and rest break laws are regulations aimed at protecting and benefitting workers and are part of a "remedial worker protection framework." "[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026-27 citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 ("*Murphy*"), 1103, 1105.)

In *Murphy*, the Court explained that mandatory meal and rest breaks are essential to employee health and safety: "Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor. [Citations.] Indeed health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place." (*Id.* at p. 1113.) Particularly in the case of truck drivers, these laws protect not only workers, but the public. (See e.g., *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456.)

This Court finds FAAAA does not preempt California meal and rest break laws because the relationship between the impact of those laws on AB's operations is no more than *indirect, remote, and tenuous*. Even should this Court have reached a different conclusion as to that initial question, California meal and rest break laws are not preempted because they fall under the safety exception to FAAAA.

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5. **FAAAA does not preempt Plaintiffs' UCL claim**

The purpose of the UCL is "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." (*Bank of the West v. Superior* Court (1992) 2 Cal.4th 1254, 1267.) The UCL does not regulate market "competition," rather it is used to provide additional remedies for plaintiffs bringing claims arising under other statutes or at common law. The only reference in the UCL to competition is its definition of "unfair competition" as "any unlawful … act or practice …" (Bus. & Prof. Code § 17200.) In other words, the type of competition the UCL addresses is the unfair competitive advantage gained by an actor because it does *not* follow underlying laws.[12] Indeed, after a 2004 ruling in *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 947, plaintiffs' counsel generally must plead a claim for UCL in a lawsuit with underlying Labor Code claims or be potentially subject to a malpractice suit.

The equitable relief provided by the UCL is not more onerous than the remedies provided in the underlying statutes at issue in this case. At most, the UCL law extends AB's liability one additional year. (See *Cortez*, 23 Cal.4th at p. 179 finding "*[a]ny* action on *any* UCL cause of action is subject to the four-year period of limitations created by that section [emphasis in original].")

The California court of appeal in *Pac-Anchor* determined that "[w]here a cause of action is based on allegations of unlawful violations of the State's labor and unemployment insurance laws, we see no reason to find preemption merely because the pleadings raised these issues under the UCL …" (*Pac-Anchor*, 195 Cal.App.4th at p. 771, review granted.)

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[12] The California Supreme Court concluded in *Cortez v. Purolator Air Filtration Products Co.* ("*Cortez*") (2000) 23 Cal.4th 163, 177-78 that orders for payment of wages unlawfully withheld from an employee are also a restitutionary remedy authorized by section 17203: "The employer has acquired the money to be paid by means of an unlawful practice that constitutes unfair competition as defined by section 17200 … The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of "restore" includes a return of property to a person from whom it was acquired, (citation), but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitutionary remedy authorized by the UCL. The order is not one for payment of damages."

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This Court agrees that the UCL does not seek to regulate motor carriers, nor does its use here relate to AB's routes, rates or services in a way that is more than remote, indirect or tenuous. Plaintiffs' underlying claims, giving rise to its ability to seek relief under the UCL, are not preempted, thus, Plaintiffs' claim under the UCL are similarly not preempted.

Having considered the points, evidence, and arguments submitted by both AB and the Plaintiffs, the Court hereby determines that Plaintiffs prevail as to the meal period and rest break claim, failure to pay all hours worked claim, failure to pay employees classified as trainees claim, and UCL and labor code claims. Plaintiffs' supplemental damages and restitution computation is approved. The Court rejects AB's preemption claim under the Federal Aviation Administration Authorization Act.

IT IS SO ORDERED.

Dated: ____________________

BY ORDER OF THE HONORABLE ROBERT B. FREEDMAN:

DATE: ________________________

____
JUDGE OF THE SUPERIOR COURT

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On November 2, 2012, I served the following documents in the manner described below:

PROPOSED STATEMENT OF DECISION

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jwatkinson@unioncounsel.net to the email addresses set forth below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

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On the following part(ies) in this action:

Mr. Guy A. Bryant
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 2, 2012 at Alameda, California.

Joanna Son

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