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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 SUPPLEMENTAL AUTHORITY IN SUPPORT OF OBJECTION TO PROPOSED STATEMENT OF DECISION** Action Filed: March 28, 2008 Hearing Date: May 10, 2013 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)

I. Introduction:

After 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") objected to Plaintiffs' Proposed Statement of Decision ("PSOD") filed on November 2, 2012 in accordance with Cal. Rules of Court, Rule 3.1590(g). On April 8, 2013, the Court issued an Order ("Order") authorizing the submission of supplemental authority with regard to the Statement of Decision ("SOD"), Proposed Judgment, and Claims Administration Issues.

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.

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).[1] As a result of this determination, Plaintiffs voluntarily dismissed their claims for damages related to failure to receive overtime payments. The Court has also made a determination that AB Trucking never employed "more than 20 employees" and was therefore not in violation of the Oakland Living Wage Ordinance ("OLW"). The Court has dismissed all of Plaintiffs claims with regard to any alleged OLW violation.

At this time, the Court has no reason to look outside of California Law for guidance on the application or scope of FAAAA preemption on the motor carrier industry. The reasoning of *Fitz-Gerald* and *Tanen* is the law in California with regard to the scope and application of

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[1] 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.) It was also conceded at trial that Plaintiffs are exempt from FLSA over time coverage per 29 U.S.C. § 213(b) [exemption from FLSA over-time laws].

FAAAA preemption. If the Court chooses to seek additional guidance under Federal law, then the pending U.S. Supreme Court decision in *ATA* or the various pending Ninth Circuit decisions (e.g., *Dilts*, *Campbell*, *Esquivel*) are the most persuasive precedent that a California Superior Court should follow.[2]

II. Argument:

1. Under California Law 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[3] Defendant would be exempt from liability.[4]

Congress passed the Federal Aviation Administration Authorization Act ("FAAAA") in 1994, effective on January 1, 1995. As part of the FAAAA, Congress also enacted §§14501(c)(1).

There is a current split in the Court of Appeal over whether California wage and hour laws are preempted by 49 U.S.C. §14501(c). (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") and *People ex rel. Harris v. Pac Anchor Transportation, Inc.*(2011) 195 Cal.App.4th 765 (holding the UCL is not preempted by 49 U.S.C. §14501(c)

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[2] Full citations of the cases cited will be provided *infra*.

[3] State law requires employers to make meal periods and paid rest breaks available to employees. Employers must provide employees who work more than five hours in one day with at least a 30-minute, off-duty meal period and an additional 30-minute meal period when employees work more than 10 hours in one day. (Labor Code § 512(a); Wage Order 9(11).)

[4] 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 "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**].)

because Pac Anchor's allegedly improper practice of treating its truckers as independent contractors and not employees and not paying various employment taxes was not sufficiently related to a motor carrier's "prices, routes or services.") On August 12, 2011 the California Supreme Court granted Pac Anchor's petition for review in Case No. S194388. As a result, the *Pac Anchor* decision cannot be cited,[5] and **the decision in *Fitz-Gerald* is the current expression of California law on the issue**.

In *Fitz-Gerald,* 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.)[6]

Similarly, in *Tanen v. Southwest Airlines* (2010), 187 Cal.App. 4th 1156 the California Court of Appeal upheld the *Fitz-Gerald* reasoning and held that the ADA (49 U.S.C. 41713(b)(4)) can preempt California laws including a UCL cause of action for a violation of California Civil Code §1749.5, which makes it unlawful for any person or entity to sell a gift certificate to a purchaser containing an expiration date. The Court of Appeal in *Tanen* directly found that the gift certificates at issue in the case were within the realm of an airline's "service" and preemption applied because the offending regulation related to the airline's "prices, routes or services." (*Id.*)

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[5] The grant of review determines that the court of appeal opinion will not be published unless the supreme court determines otherwise. [Cal. Rules of Court, Rule 8.1105] Unpublished opinions may not be cited as precedent. [Cal. Rules of Court, rule 8.1115].

[6] 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.* (1992) 504 U.S. 374 [class action based on frequent flier program.]; *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 [same].)

2. Under Federal Law FAAAA Preempts California Meal & Breaks Laws.

The FAAAA's preemption provisions establish that Congress intended for such provisions to be applied in an identical manner as the preemption provision of the ADA.[7] Thus, cases interpreting the Airline Deregulation Act's preemption clause are instructive in interpreting section 14501(c) of the FAAAA. (See *Rowe v. N.H. Motor Transp. Ass'n* (2008) 552 U.S. 364 ("*Rowe*").)

In *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.) The construction of the exemption given by the Supreme Court in *Rowe* was applied in the two Ninth Circuit decisions of *Am. Trucking Ass'ns, Inc. v. City of L.A.* (9th Cir.2009) 559 F.3d 1046 and *American Trucking Associations, Inc. v. City of Los Angeles* (9th Cir. 2011) 660 F.3d 384 ("*ATA*").[8] The Ninth Circuit's *ATA* decision dealt with the Concession Agreements adopted by the Ports of Los Angeles and Long Beach which required trucking firms to register and comply with various operating requirements in furtherance of the Clean Air Act initiatives. The ATA challenged five requirements of the Concession Agreements on §14501

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[7] **FAAAA** Section 14501(c)(1) and **ADA** Section 41713(b)(4) are related preemption statutes which remove the states' regulatory power over motor and intermodal carriers. The FAAAA's preemption provisions show that Congress intended for such provisions to be applied in an identical manner as the preemption provision of the Airline Deregulation Act.

[8] Petition for Certiorari filed, 80 USLW 3404 (Dec 22, 2011)(NO. 11-798).

preemption grounds, the most significant of which was the requirement that the concessionaires transition over five years to using 100% employee drivers rather than using independent owner-operators ("owner-operator provision"). The Ninth Circuit specifically found that the owner-operator provision was "... pre-empted because it is tantamount to regulation" and improperly related to the motor carrier's "prices, routes or services" in violation of the FAAAA. (*ATA,* 660 F.3d 384 at 403.)[9] If the U.S. Supreme Court upholds the Ninth Circuit's decision in *ATA*, then the preemption regarding the owner-operator provision will stand and this result will support AB Trucking's position in this case.[10] If the U.S. Supreme Court overturns the Ninth Circuit to impose a broader application of the FAAAA preemption doctrine to the entire Concession Agreement, then AB Trucking's position in this case is even stronger.

It is important to acknowledge that the vast majority of federal courts have repeatedly held that the FAAAA preempts state law with regard to motor carriers such as AB Trucking.[11] In *Dilts v. Penske Logistics, LLC, supra.*, (S.D. Cal. Oct. 19, 2011) 267 F.R.D. 625, a federal court held that the FAAAA preempted the application of California's meal and rest break laws on truck drivers. According to this federal court, the meal and rest break law interfered with competitive market forces (price, route or service) affecting motor carriers in violation of the FAAAA. The term "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

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[9] Oral arguments occurred before the U.S. Supreme Court on April 16, 2013. Thus, a decision is expected before July 16, 2013.

[10] The Ninth Circuits decision on the owner-operator provision was never challenged on appeal.

[11] 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.

Trucking's Motor Carrier number is **MC-310575**].) Relation to price, route, or service is found where "the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." Even if the law does not directly regulate motor carriers, preemption will apply if the effect of the regulation would be to make carriers offer different services than what the market would dictate. In *Dilts*, the court concluded the California meal break laws imposed conditions that affected the "frequency and scheduling of transportation" and the laws impacted Penske's "prices" because of the increased cost of additional drivers, helpers, tractors, and trailers necessary to ensure off-duty breaks under California law.

The fact that *Dilts* was specifically cited by *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 without disapproval is worth noting. It strongly suggests that the California Supreme Court is indeed sensitive to the fact that the commercial trucking industry may deserve special consideration to be deemed exempt from California meal break laws. This interpretation is consistent with the following statement: "What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceedings delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker* at p. 1040.)

Please be advised that it was improper for Plaintiffs in this case to request this Court to take judicial notice of the "11/19/12 Order Denying Defendants' Motion for Summary Judgment issued by the Honorable Judge Claudia Wilken in the U.S. District Court for Northern California" (*Mendez v. R & L Carriers, Inc.*, Case No C 11-2478 CW).[12] The Court in its April 8, 2013 Order stated: "So far as this court has been able to determine, the *Mendez* decision has not

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[12] Unpublished opinions may not be cited as precedent. [Cal. Rules of Court, rule 8.1115].

been published in F.Supp or been the subject of an appeal to the Ninth Circuit. Thus, the decision **has informational value, but not precedential effect**." (Order at p. 3, para. 4; Emphasis added.) Defendant objected to Plaintiffs tardy submission of the *Mendez* case via e-mail transmission to the Court on November 21, 2013. (11/21/13 e-mail was entered into this Court's Registry of Court Actions.) In summary, defense counsel noted in the 11/21/13 e-mail that Judge Wilken did not follow *Rowe v. N.H. Motor Transp. Ass'n, supra.,* 552 U.S. 364, when she denied a Motion for Summary Judgment (a disfavored motion) seeking the "express" application of the FAAAA preemption doctrine. *Rowe*, held that the FAAAA preempts a state regulation that "has a 'significant' and/or adverse 'impact' in respect to the federal act's ability to achieve its preemption-related objectives". (*Rowe,* supra., 552 U.S. 364.)

It remains AB Trucking's position that no court has ever held that the motor carrier that raises the FAAAA preemption affirmative defense has an additional duty to further "mitigate" the "adverse impact" of the state law as Judge Wilken suggested in her opinion. Judge Wilken discusses a speculative alternative of the motor carrier just paying for the meal periods to offset the impact of the California law. (*Mendez* at page 12.) Judge Wilken wrote, "the wage alternative thus significantly reduces section 226.7's impact on motor carrier prices, routes, and services and undercuts the reasoning of the four cases that Defendants cite, all of which assume that section 226.7 inflexibility requires motor carriers to provide drivers with numerous breaks through out the day." (*Id.*, Emphasis added.) Judge Wilken acknowledges but dismisses the actual requirement that motor carriers "must actually provide drivers. . . "meal breaks." (Id.) Judge Wilken also acknowledged and similarly dismissed (and speculated) about the fact that California law only permits the meals and breaks to be "partially waived at the employee's discretion." (Cal. Lab. Code section 512(a); *Mendez* at page 13.)) The language of

the FAAAA says nothing about the motor carrier's obligation to mitigate a state law that directly impacts the prices, route, and services!

III. Conclusion:

At this time, the Court has no reason to look outside of California Law for guidance on the application or scope of FAAAA preemption on the motor carrier industry. The reasoning of *Fitz-Gerald* and *Tanen* is the law in California with regard to the scope and application of FAAAA preemption. If the Court chooses to seek additional guidance under Federal law, then the pending U.S. Supreme Court decision in *ATA* or the various pending Ninth Circuit decisions (*Dilts*, *Campbell*, *Esquivel*) are far more instructive than *Mendez*. **In fact, Defendant requests that the Court postpone any decision in this case until after the U.S. Supreme Court decision in *ATA* is rendered.**

Based on the foregoing, the PSOD or SOD is not supported by the factual evidence and current case law cited above. Defendant respectfully submits that the proposed damage model of Plaintiffs must be rejected. Moreover, the meal and break laws should not be granted protection from application of the FAAAA preemption under the FAAAA safety exemption.

Dated this 3rd day of May, 2013.

Respectfully Submitted,

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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 3, 2013
Dept.: 20 for Trial: February 14, 2012
Before Honorable Judge Robert B. Freedman

Hearing Date: May 10, 2013

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 May 3, 2013, I served the foregoing documents described as:

DEFENDANT'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF OBJECTION 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.

[X] (BY FACSIMILE/E-MAIL) by faxing or e-mailing a true and correct copy thereof to the person(s) at the fax number or e-mail address set forth below.

[ ] (BY FEDERAL EXPRESS) by using express mail service and causing to be delivered overnight next day delivery a true copy thereof to the person(s) at the address set forth above.

[ ] (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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