No. _____

# In the Supreme Court of the United States

VITRAN EXPRESS, INC., a Pennsylvania Corporation
Formerly Known as VITRAN EXPRESS WEST, INC.,
a Nevada Corporation,
*Petitioner*,

v.

BRANDON CAMPBELL and RALPH MALDONADO,
Individually, and on Behalf of Members of the General
Public Similarly Situated, and as Aggrieved Employees
Pursuant to the Private Attorneys General Act ("PAGA"),
*Respondents*.

*On Petition for Writ of Certiorari to the*
*United States Court of Appeals for the Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether the Ninth Circuit erred by holding, in conflict with the decisions of this Court, and other Courts of Appeals, that for purposes of preemption under the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501, *et. seq.* ("FAAAA"), a state law of general applicability only "relates to prices, routes and services" when it "*binds* the carrier to a *particular* price, route or service"?

(2) Whether California's meal and rest break requirements impermissibly "relate to" motor carriers' prices, routes or services under the FAAAA when they require truck drivers to alter and deviate from their preferred routes and suspend services up to five times a day, every day?

## PARTIES TO PROCEEDING

Petitioner in this case is Vitran Express, Inc. Petitioner was the defendant-appellee below. Vitran Corporation, a Nevada corporation, is the parent of Petitioner Vitran Express, Inc.

The Respondents are Brandon Campbell and Ralph Maldonado. Respondents purport to represent a class of drivers Petitioner employed in the State of California.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Vitran Express, Inc. certifies that it is a wholly owned subsidiary of Vitran Corporation, a Nevada corporation. Other than Vitran Corporation, there is no other parent or publicly held corporation that directly owns ten percent or more of Vitran Express, Inc.'s stock.

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## PETITION FOR A WRIT OF CERTIORARI

Vitran Express, Inc., by its undersigned counsel, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was not reported and is reprinted in the Appendix ("App.") hereto at App. A. That opinion referenced and relied upon the Ninth Circuit's opinion in *Dilts v. Penske Logistics, LLC*, reported, as amended, at 769 F.3d 637 (App. E). This case and the *Dilts* case were jointly argued and a joint post-hearing brief was submitted, as permitted by the hearing panel. The Ninth Circuit's opinions in this case and the *Dilts* case were issued the same day.

Based on the reasoning in *Dilts*, the Ninth Circuit's memorandum opinion in this case reversed and remanded the decision of the United States District Court for the Central District of California, Case No. CV 11-05029-RGK (SHx), issued on June 8, 2012 (App. F).

The June 8, 2012 Order of the United States District Court for the Central District of California, granting Petitioner's motion for judgment on the pleadings on the grounds that Respondents' claims were preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501, *et seq.*, was not reported.

## JURISDICTION

The Ninth Circuit denied Petitioner's motion for rehearing *en banc* on September 28, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTIUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution ("Commerce Clause") provides in part:

> The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several states . . . .

Article VI, Clause 2, of the United States Constitution ("Supremacy Clause") provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1) provides:

> . . . a State . . . 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.

California's Wage Order No. 9-2001, (Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry), codified as Cal. Code Regs. tit. 8, § 11090,[1] provides:

> **11. <u>Meal Periods.</u>**
>
> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.
>
> (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written

[1] References hereinafter shall be to the Wage Order.

agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

…

**12. <u>Rest Periods.</u>**

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

The full text of Wage Order No. 9-2001 (Cal. Code Regs. tit. 8, § 11090) is set forth in the appendix to this petition (App. G).

California Labor Code § 226.7 provides, in relevant part:

…

> (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
>
> (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, . . . , the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

…

Lastly, California Labor Code § 512 provides, in relevant part:

> (a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if

the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

…

(e) Subdivisions (a) and (b) do not apply to an employee specified in subdivision (f) if both of the following conditions are satisfied:

(1) The employee is covered by a valid collective bargaining agreement.

(2) The valid collective bargaining agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

…

(f) Subdivision (e) applies to each of the following employees:

…

(2) An employee employed as a commercial driver.
…

## INTRODUCTION

The Ninth Circuit has, yet again, refused to follow this Court's instructions in *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008), and, more recently, *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014). While other Circuits have noted this Court's disapproval of the Ninth Circuit's restrictive reading of preemption under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") and the Airline Deregulation Act ("ADA"), the Ninth Circuit steadfastly adheres to the narrow preemption doctrine it first espoused in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied* at 526 U.S. 1060 (1999), and then applied in *Ginsberg v. Nw., Inc.*, 695 F.3d 873 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1422 (2014).

In this latest iteration, the Ninth Circuit held that the FAAAA does not preempt California's onerous meal and rest break laws, reversing the district court's well-reasoned opinion and thirteen other California district courts holding that the FAAAA preempts such laws because they relate to the routes, services and prices of trucking companies. In so holding, the Ninth Circuit disregarded this Court's instruction in *Ginsberg* that courts must address real-world consequences when determining whether state action impermissibly "relates to" routes, services or prices in violation of the FAAAA or the ADA. Specifically, the Ninth Circuit held in this case that a law that requires Petitioner's drivers to alter and deviate from their preferred routes

in order to take the mandatory breaks does not "relate to" routes, and that a law that requires Petitioner to allow its drivers to stop providing services up to five times a day does not "relate to" services. The Ninth Circuit further suggests that Petitioner could minimize the law's impact on services by increasing its labor force, but does not acknowledge the significant impact this increase in labor and related equipment costs would have on Petitioner's prices.

In so holding, the Ninth Circuit disregarded the broad "related to" language in the FAAAA and instead substituted its own preferred analysis: to wit, that a state law must "bind" a carrier to specific prices, routes or services for FAAAA preemption to apply to laws that do not single out motor carriers for regulation and, with respect to routes, the FAAAA reaches only "point-to-point transport" and not disruptions during the course of travel.

The Ninth Circuit's "bind to" analysis, as applied, would mean that the states would actually have to mandate or prohibit certain prices, routes or services to invoke FAAAA preemption. This Court has long rejected such a restrictive test. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (rejecting the contention that the ADA "only pre-empts the States from actually prescribing rates, routes, or services," because that would "simply read the words 'relating to' out of the statute."). Instead, the test the Court articulated in *Morales* analyzes whether the state law "has 'a connection with, or reference to, … prices, routes or services.'" *Ginsberg*, 134 S.Ct. at 1430 (quoting *Morales*, 504 U.S. at 384). The Ninth Circuit's analysis in *Dilts* is therefore in direct conflict with this

Court's decisions. It also conflicts with numerous other Circuit courts which have followed this Court's guidance. *See, e.g., Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 19-21 (1st Cir. 2014) (declining to extend the reasoning in *Dilts* to analysis of whether FAAAA preempted a state law regarding the classification of independent contractors).

Petitioner respectfully requests that the Court grant its petition to address the Ninth Circuit's impermissibly narrow FAAAA and ADA preemption analysis and to resolve the Circuit split.

## STATEMENT OF THE CASE

Petitioner Vitran Express, Inc. ("Vitran") is an interstate trucking and transportation company. (App., 158) Vitran's truck drivers haul freight for Vitran's customers in most of the 48 contiguous United States. (*Id.*) During the relevant time period, Vitran operated four terminals in California. (*Id.*)

Vitran employed Respondents Brandon Campbell and Ralph Maldonado as truck drivers; both individuals held the title "City Driver." (App., 91-92) Campbell was a City Driver from February 2009 to January 2010 and Maldonado from October 2008 to December 2009. (*Id.*)

### A. The Logistics Of Driving And Parking A 70-Foot Truck In California.

The standard Vitran tractor and trailer rig (hereinafter "truck") is approximately 70 feet long and is often loaded with several tons of freight. (App., 159) When a break is required, the driver must pull the truck off the route and detour to find a safe and legal

space to park and secure the truck. (*Id.*) Due to California's idling laws, the truck must be shut down while parked. (App., 159-160) Before resuming the route, the driver is required to inspect the equipment, start the truck back up, navigate the 70-foot vehicle out of the parking space, reverse the detour and accelerate back to roadway speeds. (App., 159) On average, it takes a Vitran driver of a 70-foot truck a half hour to exit a freeway, park the truck, shut it down, inspect the truck, restart the engine, pull out of a parking spot, and resume a route. (App., 159, 161-162)

Locating a suitable parking area for a 70-foot truck has become increasingly difficult, particularly in California. (App. 159-160) If a driver wants to – or is required to – park his truck and take a break, there are limited places to do so, especially in metropolitan areas. (*Id.*) California law prohibits truck drivers from pulling over to the side of the highway/freeway, or on an exit or entrance ramp, to take a break. (*Id.*) Rest and truck stops are often full, and occasionally closed. (App., 160) California leads the nation in the shortage of overall private and public commercial vehicle parking space, and has been closing rest areas due to lack of funding. (*Id.*) Even if, therefore, a meal and rest break is scheduled at a particular location, and even if the driver makes it to that location without being impeded by traffic, weather, construction or the seemingly infinite number of causes of traffic delay in California, the driver may not be able to actually park the truck when he arrives at the planned break location (a problem almost certainly exacerbated if mandatory meal and rest breaks are enforced on truck drivers).

### B. The FMCSA's Regulation Of Vitran And Other Trucking Companies.

Respondents and all other City Drivers and "Local Drivers"[2] Vitran employed in California were, during the relevant time period, subject to certain federal hours-of-service ("HOS") regulations established by the Federal Motor Carrier Safety Administration ("FMCSA") and the Department of Transportation ("DOT"). For example, FMCSA regulations limit consecutive hours of driving time. *See* 49 C.F.R. § 395.3(a). During the relevant time period, the FMSCA promulgated HOS regulations mandating that a driver take a 30-minute rest break after 8 consecutive hours of on-duty time. However, in *American Trucking Ass'n v. Federal Motor Carrier Safety Administration*, 724 F.3d 243 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 914 (2014), the new regulation was challenged and the D.C. Circuit Court found that while the FMCSA had the authority to require such breaks of long and short haul drivers alike, it failed to adequately articulate the grounds for imposing the 30-minute break requirement on short-haul drivers. *Am. Trucking Ass'n*, 724 F.3d at 253.

### C. The Operative Complaint, Its Allegations, And California's Meal And Rest Break Requirements.

In May 2010, Respondents filed a putative Class Action Complaint against Vitran in the Superior Court of the State of California for the County of Los Angeles.

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[2] The putative class includes individuals employed both as "City Drivers" and "Local Drivers" during the relevant time period.

(App. H) The action was removed to the United States District Court for the Central District of California. Respondents' Complaint alleged that Vitran failed to provide Respondents and the putative class meal and rest breaks in alleged violation of California Labor Code §§ 226.7 and 512(a) and the applicable Industrial Welfare Commission Wage Orders.[3] (App. H)

California Labor Code § 512(a) requires that employees who work more than five hours per day be provided with a 30 minute meal period. Employees who work more than 10 hours per day must be provided with a second 30 minute meal period. *Id.* California Labor Code § 226.7 prohibits employers from requiring employees to work during their mandated meal breaks and requires employers to pay their employees an additional hour of pay at the regular rate for any day during which a meal period is not provided.

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[3] Respondents additionally alleged various derivative claims including: (a) alleged violation of the requirement contained in California Labor Code § 204 that all wages be paid on regular paydays, based on the theory that wages were owed because of the missed meal and rest breaks and not paid on regular paydays; (b) alleged violation of the California Labor Code §§ 201-202's requirement that wages be timely paid following separation of employment, based on this same theory; (c) alleged violation of California Labor Code § 226 because Vitran's wage statements did not indicate that the employees had earned wages based on the alleged missed meal and rest breaks; (d) alleged violation of California Labor Code § 1174's requirement that Vitran maintain accurate payroll records, based on the identical theory; and (e) alleged violations of the California Business & Professions Code § 17200 for alleged unlawful business acts related to the missed meal and rest breaks and purported derivative violations. (App. H) If the underlying meal and rest breaks claims fail, all of these many claims fail with them.

These requirements are applied to the transportation industry through Wage Order No. 9-2001 (Cal. Code Regs. tit. 8, § 11090) (App. G). Employers must relieve the employees of all duties for the designated meal periods and must allow employees to leave their places of employment during the meal periods. *Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 532 (Cal. 2012).

With respect to rest breaks, California Labor Code § 226.7(b) also prohibits an employer from requiring an employee to work during a rest break mandated pursuant to an order of the Industrial Welfare Commission. Industry Wage Order No. 9-2001 requires 10 minute paid rest periods every four hours (or "major fraction"[4] thereof) worked. Wage Order No. 9-2001 § 12(A) (App., 77). As with the meal breaks, if an employer fails to provide a rest break, it must pay the employees an extra hour of compensation. *Id.* at § 12(B) (App., 77).

An employer may not choose to pay the hour instead of providing the required breaks; the hour of pay is a premium wage, not an election. *Kirby v. Immoos Fire Protection, Inc.*, 274 P.3d 1160, 1168 (Cal. 2012) ("[S]ection 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay.... The failure to provide required meal and rest breaks is what triggers a violation of Section 226.7."). In addition to the hour premium wage per violation, California Labor Code §§ 558 and 2699(f) provide for civil penalties for missed meal and rest breaks.

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[4] "Major fraction" means greater than one-half (*i.e.* more than two hours here). *Brinker*, 273 P.3d at 528.

### D. The Significant Impact On Vitran If California Meal And Rest Breaks Applied.

Vitran's business suffers significantly when its deliveries are late. (App., 162) The key to providing interstate transportation services is to ensure uniformity and integration throughout the entire delivery chain. (*Id.*) A breakdown in deliveries has a ripple effect throughout Vitran's operations and can result in re-routing other drivers in order to maintain customer service. (*Id.*) To maximize on-time delivery and limit re-routing to the extent possible, Vitran trains its drivers to plan their own routes, taking into account commuter traffic, common high-volume periods of time on highways, and other factors such as weather. (App., 162-163)

For Vitran to track and ensure that meal and rest breaks are taken at the times required by California law, Vitran would need to take over the planning of the routes and specifically schedule additional daily stops in the drivers' schedules for meal and rest breaks. However, the drivers' schedules and routes can vary on a daily basis and there is no guarantee that the driver will be able to break within the mandated times or that the drivers will be within striking distance of acceptable parking spots within the mandated times. (App., 163)

Further, these stops for breaks would take up a significant portion of time during each work day. Vitran's Vice President of Human Resources and Safety testified that the average time for a Vitran driver to safely pull his 70-foot truck off the road and park it in a permissible location, and then return to the route,

would be 30 minutes (and could take up to an hour). (App., 161)

If the meal and rest break requirements apply, for an eight hour shift, there needs to be one 30 minute meal break and two 10 minute rest breaks. (App., 76-77) Because it takes, on average, 30 minutes to facilitate each break, in an eight hour shift, 140 minutes (two hours and 20 minutes), or 29% will be consumed by breaks. If the driver works one minute over 10 hours, there will need to be two 30 minute meal breaks and three 10 minute rest breaks (*Id.*), each requiring the 30 minutes to facilitate the break. This equates to 240 minutes (four hours), up to 40% of the shift, consumed by breaks, during which time no services can be provided to Vitran's customers.

Forcing Vitran to schedule multiple additional daily stops for drivers to take meal and rest breaks at the times required by California law thus will have a significant prohibitive impact on Vitran's services. Requiring these stops will reduce the drivers' capacity by 29-40% per day. Vitran can only transport the product it is carrying if the drivers are actually moving it to the desired end location. Taking Vitran's drivers off the road 29-40% of the day will necessarily make Vitran up to 40% less effective in completing desired services.

Finally, requiring drivers to make three to five additional detours to make stops for meal and rest breaks, at locations where such is legally possible, will significantly impact Vitran's routes. Instead of traveling efficiently from one stop to the next, drivers will need to zigzag their way across California roads. (App., 163) Vitran will need to re-design these routes

to ensure that drivers are near locations, like truck and rest stops, which provide safe and legal parking space for a 70 foot truck, and provide amenities that enable a driver to take meal and rest breaks.

### E. The District Court In This Case And The Majority Of District Courts In California Correctly Concluded That The FAAAA Preempts California's Meal And Rest Breaks Requirements.

On April 26, 2012, Vitran filed a motion for judgment on the pleadings or, alternatively, a motion for summary judgment, on the grounds that the FAAAA preempts California's meal and rest period requirements. (App. I). On June 8, 2012, the district court granted Vitran's motion for judgment on the pleadings, concluding that the FAAAA preempts California's meal and rest break requirements because they "relate to the rates, services and routes offered by [Vitran]." (App., 13) The district court explained,

> As other courts have noted, the length and timing of meal and rest breaks affects the scheduling of transportation. *See Esquivel v. Vistar Corp.*, 2012 WL 516094 *5 (C.D. Cal. 2012); *Dilts v. Penske Logistics, LLC*, 819 F.Supp.2d 1109, 1119 (C.D. Cal. 2011). When employees must stop and take breaks, it takes longer to drive the same distance and companies may only use routes that are amenable to the logistical requirements of scheduled breaks. Further, Plaintiffs have argued that the inability to take meal or rest breaks comes from their need to otherwise comply with Defendant's tight scheduling requirements. . . . The

> conclusion that the FAAAA preempts California's meal and rest break requirements is consistent with the broad preemptive scope of the statute.

(App., 13)

The vast majority of California district courts addressing whether the FAAAA (or ADA) preempts California's meal and rest breaks came to this same, correct, conclusion. *See Blackwell v. Sky West Airlines, Inc.*, 2008 WL 5103195 (S.D. Cal. Dec. 3, 2008); *Dilts v. Penske Logistics LLC*, 819 F.Supp.2d 1109 (C.D. Cal. Oct. 19, 2011); *California Dump Truck Owners Ass'n v. Nichols*, 2012 WL 273162 (E.D. Cal. Jan. 30, 2012); *Esquivel v. Vistar Corp.*, 2012 WL 516094 (C.D. Cal. Feb. 8, 2012); *Aguiar v. California Sierra Express, Inc.*, 2012 WL 1593202 (E.D. Cal. May 4, 2012); *Jasper v. C.R. England, Inc.*, 2012 WL 7051321 (C.D. Cal. Aug. 30, 2012); *Cole v. CRST, Inc.*, 2012 WL 4479237 (C.D. Cal. Sept. 27, 2012); *Aguirre v. Genesis Logistics*, 2012 WL 4864092 (C.D. Cal. Nov. 5, 2012); *Miller v. Sw. Airlines, Co.*, 923 F.Supp.2d 1206 (N.D. Cal. 2013); *Burnham v. Ruan Transp.*, 2013 WL 4564496 (C.D. Cal. Aug. 16, 2013); *Ortega v. J.B. Hunt Transport, Inc.* 2013 WL 5933889 (C.D. Cal. Oct. 2, 2013); *Parker v. Dean Transp., Inc.*, 2013 WL 7083269 (C.D. Cal. Oct. 15, 2013); *Rodriguez v. Old Dominion Freight Line, Inc.*, 2013 WL 6184432 (C.D. Cal. Nov. 27, 2013).[5]

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[5] A minority of California district courts held that FAAAA did not preempt California meal and rest break requirements. *See Villalpando v. Exel Direct, Inc.*, 2014 WL 1338297 (N.D. Cal. Mar. 28, 2014); *Brown v. Wal-Mart Stores, Inc.*, 2013 WL 1701581 (N.D. Cal. Apr. 18, 2013); *Mendez v. R+L Carriers, Inc.*, 2012 WL

In *Dilts*, the leading district court decision on the issue, District Judge Sammartino concluded that California's "fairly rigid meal and rest break requirements impact the types and lengths of routes that are feasible." *Dilts*, 819 F.Supp.2d at 1118. The meal and rest break requirements significantly impact the trucking company's routes because,

> [w]hile the laws do not strictly bind Penske's drivers *to* one particular route, they have the same effect by depriving them of the ability to take any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes. In essence, the laws bind motor carriers to a smaller set of possible routes.

*Id.* at 1118-19. Judge Sammartino similarly found that the meal and rest break requirements would have a significant impact on the company's services. *Id*. at 1119. The parties agreed that the scheduling of the off-duty meal periods would require fewer deliveries per day and the court credited the company's argument, which the plaintiffs did not dispute, that the mandated 10 minute duty-free rest breaks every four hours, and 30 minute duty-free rest break every five hours "reduce driver flexibility, interfere with customer service," and "by virtue of simple mathematics," reduce the amount of time drivers can work, and thus reduce the amount of services the company can provide with the existing labor force. *Id.*

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5868973 (N.D. Cal. Nov. 19, 2012); *Reinhardt v. Gemini Motor Transp.*, 869 F.Supp.2d 1158 (E.D. Cal. 2012).

With respect to prices, Judge Sammartino concluded, correctly, that the "ramifications of California's M&RB laws upon Penske's routes and services all contribute to create a significant impact upon prices." *Id.* Judge Sammartino distinguished the meal and rest break requirements from wage laws:

> [T]hese 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 (meal and rest breaks) that must occur over the course of the driver/installer's day, if Penske wishes to avoid paying a penalty. Although this penalty has been framed as a wage, the laws are distinct in formulation and impact.

*Id.* at 1120.

And finally, Judge Sammartino recognized that not finding preemption would subject companies like Penske (and Vitran) to a patchwork of inconsistent and varying state laws across different states. "[T]o allow California to insist exactly when and for exactly how long carriers provide breaks for their employees would allow other States to do the same and to do so differently." *Id.*

### F. The Ninth Circuit Refused To Follow *Rowe* And *Ginsberg*, Continued To Narrowly Apply FAAAA Preemption, And Incorrectly Concluded That California's Meal And Rest Break Requirements Do Not "Relate To" Petitioner's Routes, Prices Or Services.

The district court's decision in this case and the *Dilts* decision were both separately appealed to the

Ninth Circuit. They were consolidated for oral argument and supplemental briefing following oral argument. On July 9, 2014, the Ninth Circuit panel issued its initial decision, holding that the FAAAA did not preempt California's meal and rest breaks requirements and reversing the district courts.

Both Vitran and Penske filed petitions for rehearing *en banc*. On September 8, 2014, the Ninth Circuit denied these petitions and issued an amended decision in *Dilts* only. (App. D, E) In the amended decision, the Ninth Circuit panel reaffirmed its conclusion that the FAAAA does not preempt California's meal and rest break requirements. (App. E)

In framing the preemption analysis, the Ninth Circuit cited its own earlier precedent, holding that, where a law "does not refer directly to rates, routes, or services," "'the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with competitive market forces within the industry.'" (App., 32) (citing *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 395-96 (9th Cir. 2011), *rev'd in part,* 133 S.Ct. 2096 (2013)).

**1. The Ninth Circuit's Conclusions With Respect To Routes.**

The Ninth Circuit conceded that "laws mandating motor carriers' use (or non-use) of particular … routes … in order to comply with the law are preempted." (App., 32-33) It concluded, however, that the FAAAA does not preempt the meal and rest break requirements at issue in this case because they purportedly do not "bind" motor carriers to specific

routes (App., 35-36), or "freeze into place" these routes (*Id.*).

While acknowledging that the meal and rest breaks may require "minor deviations" from routes, the Ninth Circuit found that this was not the sort of "route control" that Congress sought to prevent because "[t]he requirement that a driver briefly pull on and off the road during the course of travel does not meaningfully interfere with a motor carrier's ability to select its starting points, destinations, and routes." (App., 39)

**2. The Ninth Circuit's Conclusions With Respect To Services.**

The Ninth Circuit rejected the notion that the meal and rest breaks effectively halt services up to five times a day by drawing an illogical distinction between the company and its employees. It reasoned, "the state law requires only that *each individual employee* take an off-duty break at some point within specified windows – not that a motor carrier suspend its service. Defendants are at liberty to schedule service whenever they choose." (App., 37) (emphasis in original) The Ninth Circuit seemingly ignores the fact that the company can only continue service by and through its employees. Put another way, if the driver stops driving, the truck will stop moving. The Ninth Circuit brushes this problem aside with a suggestion that the companies can continue service by "hir[ing] a sufficient number of drivers" and "stagger[ing] breaks." (App., 37-38)

Relatedly, the Ninth Circuit dispensed with the truism that the meal and rest breaks would impact the frequency and scheduling of transportation – which it

conceded relates to services – because it claimed that this "argument conflates requirements for *individual drivers* with requirements imposed on motor carriers." (App., 38) (emphasis in original) Continuing to assert the fiction that a company's services are not necessarily dependent on the schedules of the individuals it employs to carry out those services, the Ninth Circuit declared, "[m]otor carriers may schedule transportation as frequently or as infrequently as they choose, at the times that they choose, and still comply with the law. They simply must take drivers' break times into account…" (App., 38).

**3. The Ninth Circuit's Disregard For The Laws' Relation To Prices.**

The Ninth Circuit suggested that companies may continue offering the same services, despite the requirement that their employees stop work multiple times a day, by simply increasing their labor force. (App., 37-38) The concurrence acknowledged, "substitution crews may now be needed when hours of service are reached with some expense, delay and impact on service." (App., 43) The majority opinion ignored the substantial impact that this increased labor force and equipment cost would have on Petitioner's prices.

**4. The Ninth Circuit's Circular Rejection Of The Patchwork Problem And Incorrect And Unworkable Distinction Between Short Haul/Long Haul Drivers.**

The Ninth Circuit sidestepped the argument that application of the meal and rest break requirements would contribute to an impermissible patchwork of

state-specific laws, defeating Congress' deregulatory objectives, by citing to its own conclusion that "[a] state law governing hours is . . . not 'related to' prices, routes or services and therefore does not contribute to 'a patchwork of state *service-determining* laws, rules, and regulations." (App., 36) (citing *Rowe*, 552 U.S. 373) (emphasis added by the Ninth Circuit panel in *Dilts*).[6] The Ninth Circuit did not deny that motor carriers might be subject to a multitude of varying and inconsistent state laws with respect to meal and rest break requirements.[7]

Regarding the potential conflict between state and federal law with respect to meal and rest breaks, both the concurrence and the Secretary of Transportation, as amicus, relied on the immaterial distinction between short and long haul drivers in determining and arguing, respectively, that the meal and rest breaks requirements were not preempted.[8] But *Dilts* has already been extended by the California courts to long-haul drivers who are covered by FMSCA rest break requirements. *See Godfrey v. Oakland Port Serv. Corp.*, 179 Cal. Rptr. 3d 498, 509 (Cal. Ct. App. 2014)

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[6] The panel analogized the meal and rest break requirements to wage laws. *Id*.

[7] As addressed below, numerous other states have meal and rest break requirements, many of which conflict with California's requirements.

[8] The concurrence claims that this case is not about "FAAAA preemption in the context of interstate trucking." (App., 44) This, of course, is not true. While the drivers at issue do not cross state lines, Vitran is an interstate trucking company moving goods in interstate commerce.

(relying heavily on *Dilts* and concluding that "[e]ven if AB's drivers in the class were subject to federal hours-of-service regulation, compliance with California meal and rest break laws will not conflict with federal requirements. As with the *Dilts* drivers, AB would not be confronted with an unworkable 'patchwork' of regulation.").

**5. The Ninth Circuit's Failure To Acknowledge The Laws' Anti-Competitive Impact.**

Finally, the Ninth Circuit declared that "all motor carriers are subject to the same laws, so all intrastate carriers like Defendants are equally subject to the relevant market forces." (App., 39) In so finding, the Ninth Circuit disregarded the fact that many motor carrier employers of unionized commercial drivers are not subject to the minimum number and timing of meal break requirements if the qualifying Collective Bargaining Agreement provides for any form of meal breaks. Cal Labor Code § 512(e),(f).

## WHY THE PETITION SHOULD BE GRANTED

### A. BACKGROUND AND PURPOSE OF THE FAAAA.

In 1978, Congress passed the Airline Deregulation Act ("ADA") because it "'determined that maximum reliance on competitive market forces would favor lower airline fares and better airline service…'" *Rowe*, 552 U.S. at 367-68 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)) (internal quotation marks omitted). To prevent the States from undoing federal deregulation through state regulation, the ADA included a preemption provision providing

that "no State … shall enact or enforce any law … relating to rates, routes, or services of any air carrier." *Rowe*, 552 U.S. at 368 (citing *Morales*, 504 U.S. at 378; 49 U.S.C.App. § 1305(a)(1) (1988 ed.)). The Court has noted that this preemption language is "conspicuous for its breadth." *Morales*, 504 U.S. at 383-84. Indeed, the phrase "related to" "expresses a 'broad pre-emptive purpose.'" *Ginsberg*, 134 S.Ct. at 1428 (citing *Morales*, 504 U.S. at 383).

In 1980, Congress deregulated trucking. *Rowe*, 552 U.S. at 368 (citing Motor Carrier Act of 1980, 94 Stat. 793). In 1994, Congress acted to preempt state trucking regulation via the FAAAA. *Rowe*, 552 U.S. at 368. It did so to prevent "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." *Rowe*, 552 U.S. at 372. This "ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read . . . to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of [a motor] carrier.'" *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n. 5 (1995).

The FAAAA largely borrowed the preemption language of the ADA, adding only "with respect to the transportation of property." *See* 49 U.S.C. § 14501(c)(1). Congress passed the FAAAA following this Court's decision in *Morales* and "did so fully aware of this Court's interpretation of that [pre-emption] language as set forth in *Morales*." *Rowe*, 552 U.S. at 370 (citing H.R. Conf. Rep., at 83, U.S.Code Cong. & Admin.News 1994, pp. 1676, 1755).

Applying this preemption language in *Morales*, this Court articulated four guiding principles:

> (1) that "[s]tate enforcement actions *having a connection with, or reference to*," carrier "'rates, routes, or services' are pre-empted;" (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect;" (3) that, in respect to pre-emption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives.

*Rowe*, 552 U.S. 370-71 (internal citations omitted) (emphasis in *Rowe*).

This Court recently emphasized in *Ginsberg*, 134 S.Ct. at 1430, that the effect of the state law on the deregulatory aim is most important, not the form of the law. "As the First Circuit has recognized, '[i]t defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of clear intrusion into a federally regulated industry.'" *Id.* (citing *Brown v. United Airlines, Inc.*, 720 F.3d 60, 68 (1st Cir. 2013)) (emphasis added).

## B. THE NINTH CIRCUIT'S REFUSAL TO FOLLOW SUPREME COURT PRECEDENT AND RESULTING CIRCUIT SPLIT.

Ignoring real-world consequences to give dispositive effect to the form of a state law is exactly what the Ninth Circuit has done in this case and in *Dilts*. Relying on the Ninth Circuit's pre-*Rowe* jurisprudence,

including *Mendonca*, and *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), the Ninth Circuit held that California's meal and rest break laws are not preempted because they do not "regulate" or "bind" a motor carrier to specific prices, routes or services, ignoring that, in the real world, the breaks require that Vitran and other carriers alter their routes and suspend services numerous times a day, every day.

In so holding, the Ninth Circuit refused to follow this Court's most recent guidance in *Ginsberg*. In *Ginsberg*, this Court concluded that the ADA preempted a state law claim for alleged breach of the implied covenant of good faith and fair dealing as applied to a frequent flier program. *Ginsberg*, 134 S.Ct. at 1426. Applying the Ninth Circuit's "bind to" test to the facts in *Ginsberg* would have necessarily compelled an entirely different result. The common-law implied covenant of good faith and fair dealing does not refer directly to "prices, routes or services" and there was no suggestion in *Ginsberg* that the implied covenant would have bound the airline to a particular price, route or service. Instead, the FAAAA preempted the implied covenant because it had "a connection with or reference to" prices, routes or services given that it indirectly impacted the rates the airline could charge for tickets and the services the airline would have to provide (the frequent flier program allowed the passenger to pay reduced rates and obtain enhanced services). *Id*. at 1430-31.

In continuing to circumvent this Court's precedent, the *Dilts* holding further exacerbates the clear split with the First and other Circuits. This Circuit split is abundantly illustrated by the recent First Circuit

decision in *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 20-21 (1st Cir. 2014) (reversing the district court's conclusion that the FAAAA did not preempt state law regarding independent contractors because the "logical effect" of the law would be to impact services, prices and routes and refusing to extend the reasoning in *Dilts*).[9] Indeed, the Ninth Circuit's preemption analysis is one of the most restrictive interpretations of the FAAAA (and ADA) preemption clauses. *See, e.g., Ginsberg v. Nw., Inc.*, 695 F.3d 873 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1422 (2014); *Bower v. Egyptair Airlines Co.*, 731 F.3d 85, 95 (1st Cir. 2013), *cert. denied* 134 S.Ct. 1788 (2014)) (rejecting the Ninth Circuit's narrow reading of "service" in *Charas* because "the Supreme Court's opinion in *Rowe* . . . treat[s] service more expansively" and "[b]y narrowly interpreting 'service' to relate to scheduling and 'service to' certain destinations, the [Ninth Circuit] does little to distinguish 'service' from 'route.'"); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 n. 9 (1st Cir. 2011) (declining to follow the Ninth Circuit's narrow interpretation of "service"); *Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 224 (2d Cir. 2008) (noting that

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[9] As with the implied covenant in *Ginsberg*, the independent contractor law at issue in *Coakley* would surely have survived preemption under the Ninth Circuit's *Dilts* test because it in no way "binds" a carrier to a particular price, route or service. Regardless, the First Circuit concluded that FAAAA preemption applied because of the law's potential, indirect, impact on prices, routes and services. *Coakley*, 769 F.3d at 23. It is no surprise that the recent California Appellate decision in *Godfrey*, which followed *Dilts* and expressly extended it to drivers covered by FMSCA rest break regulations, rejected the First Circuit's reasoning in *Coakley*. *Godfrey*, 179 Cal. Rptr. 3d at 509.

the Ninth Circuit's narrow interpretation of "service" in *Charas* is inconsistent with *Rowe*).

The Ninth Circuit's restrictive interpretation of FAAAA preemption in *Dilts* is therefore in direct conflict with: (1) this Court's decisions in *Morales, Rowe,* and *Ginsberg*; (2) the First Circuit's opinions in *Brown, Bower, Coakley* and *DiFiore*; and (3) the Second Circuit's opinion in *Cuomo*.

## C. CALIFORNIA'S MEAL AND REST BREAK REQUIREMENTS UNDENIABLY "RELATE TO" VITRAN'S ROUTES, SERVICES, AND PRICES.

### 1. California's Meal And Rest Break Requirements Require Carriers To Alter And Deviate From Preferred Routes.

The Ninth Circuit conceded that the FAAAA preempts "laws mandating motor carriers' use (or non-use) of particular … routes … in order to comply with the law ...." (App., 32-33) While it is true that meal and rest break laws do not mandate expressly that motor carriers use or not use a certain route (*i.e.*, there is nothing in the statute stating that motor carriers may or may not take Route 66), the indirect impact is the same. As the district court explained in *Parker v. Dean Transportation, Inc.*, 2013 WL 7083269, at *8 (C.D. Cal. Oct. 15 2013) (one of the many district court decisions *Dilts* invalidated):

> [f]ive separate times…drivers must pull their trucks off the road, find a place to park, and then rest or eat without any job-related duties. Not only must the drivers stop hauling cargo for a total of ninety minutes through the day, they

> also are forced to travel only on routes that have access to five different locations where they can find a place to park their truck throughout the workday. Common sense dictates that an eighteen-wheeled vehicle cannot simply park on the side of any given road. Consequently these required meal and rest breaks certainly add a layer of complexity to a motor carrier's schedule planning, undoubtedly limit the number of routes available, and absolutely reduce the total time a driver can possibly be on the road actually hauling cargo. This impact strikes the Court as significant.

The Ninth Circuit's conclusion that the meal and rest break requirements do not "bind" motor carriers to specific routes (App., 36), or "freeze into place" these routes (*Id.*) – presumably because they do not name specifically these routes expressly – therefore fails to consider what must actually happen on the road for the companies to comply with the break requirements. *See Cole*, 2012 WL 4479237, at **4-6 (California's laws limit a carrier's routes to those that logistically allow for stopping and breaking).

As a practical matter, the requirement that drivers deviate from their routes to take meal and rest breaks, of course, "relates to" and has "a connection with" those routes. The Ninth Circuit admitted that "minor deviations" may be required but found that this was not the sort of "route control" that Congress sought to prevent. (App., 39)[10] But labelling such deviations as

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[10] The concurrence made a point of "express[ing] no opinion" as to this conclusion, and found that Penske had not put forth sufficient

"minor" in an attempt to minimize their impact evidences a complete misunderstanding of what drivers must actually do in the real world to take these breaks. *See* Statement of the Case, Section A. And, again, a "connection with or reference to" routes, not rigid "route control," is what is required for FAAAA preemption. *Ginsberg*, 134 S.Ct. at 1430.

**2. California's Meal And Rest Break Requirements Relate To Services Because They Require Carriers To Suspend Services Multiple Times A Day, Every Day.**

The Ninth Circuit rejected the argument that the meal and rest breaks effectively halt services up to five times a day by drawing a false and illogical distinction between the company and its employees. It stated, "the state law requires only that *each individual employee* take an off-duty break at some point within specified windows – not that a motor carrier suspend its service. Defendants are at liberty to schedule service whenever they choose." (App., 37) (emphasis in original) The Ninth Circuit summarily dismisses the real-world problem that, if a driver stops driving, the truck and its cargo will stop moving. It held that the companies can continue service by "hir[ing] a sufficient number of drivers" and "stagger[ing] breaks." (App., 37-38)

While this is easy to say, it is impossible to accomplish without overhauling the industry. Vitran sends one driver out with a 70-foot truck to drive to

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evidence for such a conclusion to be reached. (App., 43) That is incorrect. Regardless, in the instant case, such evidence was provided. *See* Declaration of Dean Kuska. (App., J)

various locations to deliver and pick up goods in interstate commerce. Unlike stationary places of employment such as a store, a factory, or an office, another employee is not at the ready to "tag in" at break time. There is nobody else there. If the driver takes his foot off the gas pedal and parks his truck, the company's service – transportation of cargo – grinds to a halt. While the Ninth Circuit may suggest that the company can hire another worker to ride along with the truck driver to take the wheel at breaks (thus, at least, doubling labor costs), this would not fix the problem. California requires that the employee be relieved of all duty at a break – he may not be confined to the workplace. *Brinker Rest. Corp.*, 273 P.3d at 534 ("the wage order's meal period requirement is satisfied if the employee (1) has at least 30 minutes uninterrupted, (2) is free to leave the premises, and (3) is relieved of all duty for the entire period"). If he is forced to sit in the cab of the truck while the "service" continues, that is a violation.[11]

Although it acknowledged that the frequency and scheduling of transportation "relates to" services, the Ninth Circuit disregarded the impact the mandatory meal and rest breaks have on transportation frequency and scheduling because it claimed that this "argument conflates requirements for *individual drivers* with requirements imposed on motor carriers." (App., 38) (emphasis in original) "Motor carriers," it reasoned, "may schedule transportation as frequently or as infrequently as they choose, at the times that they

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[11] The concurrence acknowledged, "substitution crews may now be needed when hours of service are reached with some expense, delay and impact on service." (App., 43)

choose, and still comply with the law. They simply must take drivers' break times into account…" (App., 38) This, of course, is internally inconsistent. It is obviously more accurate to say: motor carriers may not schedule transportation as frequently as they choose because they must take drivers' break times into account.

In *Rowe*, this Court concluded that a Maine tobacco statute was preempted because it would require the carrier to examine each package delivered, thereby "directly regulat[ing] a significant aspect of the motor carrier's package pickup and delivery service." *Rowe*, 552 U.S. at 373. The statute in question in *Rowe* compelled the carriers' employees to "perform certain services, thereby limiting their ability to provide incompatible alternative services." *Id.* at 376. The same is true here, only to a greater extent. This law mandates not that Vitran's employees perform certain alternative tasks but instead that Vitran permit them to perform no tasks at all for up to five separate periods per day. It therefore impermissibly dictates the essential details of what the drivers are actually doing on a daily basis. *See Rowe*, 552 U.S. at 373 (federal law "must pre-empt state regulation of the essential details of a motor carrier's system for picking up, sorting, and carrying goods – essential details of the carriage itself.").

### 3. The California Meal And Rest Breaks Relate To Prices Because Carriers Would Have To Exponentially Increase Labor And Equipment Costs To Attempt To Provide The Same Services, And This Would Drive Up Prices.

The Ninth Circuit suggests that carriers may provide the same services, even with the mandatory breaks, merely by increasing staffing. (App., 37-38) The associated substantial increase in labor costs to provide (nearly but not quite) the same services is demonstrated simply by examining what would have to happen for Vitran to attempt to provide the same services. Again, California's meal and rest break requirements mandate up to five breaks per day. Each time, the driver must pull off the road and stop Vitran's transportation of cargo. In order to attempt to provide the same services, Vitran would have to deploy a fleet of substitution drivers to meet the drivers in transit, wherever they were stopping, to continue to drive the truck to the end location. The relieved drivers could then take their break and then, presumably, Vitran could transport them to some other location to relieve another set of drivers or back to headquarters. Thus, in order for Vitran to attempt to keep its cargo in motion, it will have to (a) employ an entirely additional set of relief drivers and (b) become a taxi service transporting its drivers all over the state (with additional labor costs for the drivers transporting the other drivers around, who also must take breaks). The only alternative would be to add up to 40% more trucks and drivers to provide the same level of delivery and pick-up services during the time drivers are taking their breaks.

The immense increase in labor and equipment costs associated with this driver-swapping circus or adding additional drivers and trucks would, of course, result in higher prices as Vitran and other companies would not be able to maintain the same profit margins. The Ninth Circuit ignores this completely. But the intent of the FAAAA was to prevent this precise ill, that is, the state substituting its own public policies on the operations of a motor carrier in interference with market forces. *Wolens*, 513 U.S. 219, 229 n. 5.

### D. PERMITTING SUCH LAWS WILL SUBJECT PETITIONER AND OTHER CARRIERS TO A PATCHWORK OF VARYING AND INCONSISTENT LAWS AND REGULATIONS.

Numerous states, in addition to California, have specific laws requiring meal periods and/or rest periods for employees. *See* Col. Min. Wage Order No. 22; Conn. Gen. Stat. Ann. § 31-51ii (West); Del. Code Ann. tit. 19, § 707 (West); IL ST CH 820 § 140/3; Ky. Rev. Stat. Ann. §§ 337.355, 337.365 (West); Mass. Gen. Laws Ann. ch. 149, § 100 (West); Me. Rev. Stat. Ann. tit. 26 § 601; Minn. Stat. Ann. §§ 177.253, 177.254 (West); Neb. Rev. Stat. § 48-212; Nev. Rev. Stat. Ann. § 608.019 (West); N.D. 46-02-07-02(5); N.H. Rev. Stat. Ann. § 275:30-a; N.Y. Lab. Law § 162 (McKinney); Or. Admin. R. 839-020-0050; R.I. Gen. Laws § 28-3-14 (West); Tenn. Code Ann. § 50-2-103(h) (West); Vt. Stat. Ann. tit. 21 § 304 (West); Wash. Admin. Code 296-126-092; W. Va. Code Ann. § 21-3-10a (West).

Many of these states' requirements vary significantly. For meal breaks, while California requires a 30 minute meal period to commence within the first five hours of work, Illinois requires 20

minutes, Minnesota requires "sufficient" time; and Vermont requires "reasonable opportunities" for a meal. For rest breaks, California requires multiple 10 minute paid rest breaks, Illinois requires a 15 minute paid rest break, Minnesota requires "adequate" rest breaks and Vermont mandates "reasonable opportunities" for rest breaks.

*Rowe* counsels against this exact situation:

> To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.

*Rowe*, 552 U.S. at 373 (citing H.R. Conf. Rep., at 87.).

## E. FIELD PREEMPTION AND THE FALSE DICHOTOMY BETWEEN SHORT HAUL AND LONG HAUL DRIVERS.

In determining that the hours-of-service requirements do not apply to the drivers here, and in relying upon the Department of Transportation in reaching this conclusion, the Ninth Circuit impliedly found no field preemption with respect to California's meal and rest breaks. (App., 36-37, n. 2) Field preemption occurs when Congress indicates an intent to occupy a given field to the exclusion of state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Here, at Congress's instruction, the FMCSA

has promulgated hours-of-service regulations governing commercial truck drivers. Under those regulations, most drivers are permitted to drive up to 11 hours per day, within a 14-hour duty window, after which they must remain off-duty for at least 10 hours. 49 C.F.R. § 395.3(a)(1)-(3)(i). In addition, most drivers, with the exception of "short haul drivers" as defined by the FMCSA regulations, are required to take a 30-minute off-duty break within 8 hours of going on duty, *id.* § 395(a)(3)(ii), and are subject to cumulative weekly driving limits, *id.* § 395.3(b).

The Ninth Circuit incorrectly concluded that the federal hours-of-service requirements did not apply to the drivers at issue here because they are "short haul" drivers. (App., 37 n. 2) This is obviously false. Numerous requirements apply to the short haul drivers, the drivers could lose the "short haul" designation if they drove in excess of 100 air miles from their terminal (49 C.F.R. §§ 393.3)a)(ii); 395.1(e)), and the FMCSA could impose properly supported break requirements on them. *See American Trucking Ass'n*, 724 F.3d at 253-54 (discussing how it took the FMCSA three attempts to establish the rules the D.C. Circuit was approving). Congress has demonstrated an intent to occupy the field pertaining to hours-of-service and related break requirements for motor carriers. In addition, therefore, to being expressly preempted by the FAAAA, California's meal and rest break requirements are impliedly preempted.

## F. THE NINTH CIRCUIT IMPROPERLY IGNORED THE ANTI-COMPETITIVE IMPACT OF CALIFORNIA'S MEAL AND REST BREAK REQUIREMENTS.

In enacting the ADA and FAAAA, Congress' "overarching goal [wa]s [to] help[] ensure transportation rates, routes and services that reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality." *Rowe*, 552 U.S. at 371 (internal quotation marks omitted). The Ninth Circuit concluded that the meal and rest break requirements are not anti-competitive because they apply across all industries generally and the transportation industry specifically. (App., 35, 39) But this is false. None of the California meal break requirements apply to trucking companies that employ unionized drivers with a collective bargaining agreement that provides for any type of meal period. Cal. Labor Code § 512(e),(f). Thus, carriers with unionized employees now enjoy a substantial competitive advantage over Vitran and other carriers with non-unionized employees, which competitive advantage is the direct and proximate result of the state's imposition of its public policies on the industry.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2015

# APPENDIX

# APPENDIX

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## APPENDIX A

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 12-56250**

**D.C. No. 2:11-cv-05029-RGK-SH**

**[Filed July 9, 2014]**

BRANDON CAMPBELL; and RALPH MALDONADO, individually and on behalf of members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"),

Plaintiffs - Appellants,

v.

VITRAN EXPRESS, INC., a Pennsylvania corporation, fka Vitran Express West, Inc., a Nevada corporation,

Defendant - Appellee.

App. 2

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted March 3, 2014
Pasadena, California

Before: KOZINSKI, Chief Judge, GRABER, Circuit Judge, and ZOUHARY,[**] District Judge.

Plaintiffs Brandon Campbell and Ralph Maldonado, representing a certified class of drivers employed by Defendant Vitran Express, Inc., a motor carrier, appeal from a judgment dismissing their claims under California's meal and rest break laws, California Labor Code §§ 226.7, 512, and 8 California Code of Regulations § 11090. Following Dilts v. Penske Logistics LLC, 819 F. Supp. 2d 1109, 1119–20 (S.D. Cal. 2011), the district court held that those state laws as applied to motor carriers are preempted under the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") and granted judgment on the pleadings for Defendant. Reviewing de novo the interpretation and construction of the FAAAA, Tillison v. Gregoire, 424 F.3d 1093, 1098 (9th Cir. 2005), and a judgment on the pleadings, Peterson v. California, 604 F.3d 1166, 1169 (9th Cir. 2010), we reverse.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

In Dilts v. Penske Logistics LLC, No. 12-55705, decided this date, we hold that California's meal and rest break laws are not meaningfully "related to" prices, routes, or services and therefore are not preempted under the FAAAA. See 49 U.S.C. § 14501(c)(1). Those are the same state laws that are at issue here.

In light of our holding in Dilts, the district court erred by granting judgment on the pleadings to Defendant on a theory of FAAAA preemption. We therefore reverse and remand for further proceedings consistent with Dilts.

**REVERSED and REMANDED.**

## APPENDIX B

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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**Case No. 2:11-cv-05029-RGK-SH**

**[Filed June 11, 2012]**

BRANDON CAMPBELL and RALPH MALDONADO; individually, and on behalf of members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA")

Plaintiffs,

v.

| | |
|---|---|
| VITRAN EXPRESS, INC., a Pennsylvania corporation formerly known as VITRAN EXPRESS WEST, INC., a Nevada corporation; and DOES 1 through 100, inclusive | ) |
| Defendant. | ) |

**~~[PROPOSED]~~ JUDGMENT**

Complaint Filed: May 7, 2010
Trial Date: None set
Judge: Hon. Judge R. Gary Klausner

DATE: May 29, 2012
TIME: 9:00 a.m.
DEPT: 850

Defendant Vitran Express, Inc's Motion for Judgment on the Pleadings or, alternatively, for Summary Judgment came on for hearing in this Court on May 29, 2012. Based on the papers filed relating to this Motion, and ~~oral~~ argument presented by the Parties, IT IS HEREBY ORDERED that Vitran's Motion for Judgment on the Pleadings is GRANTED, and thus Plaintiffs' claims are DISMISSED based on preemption of the Federal Aviation Administration Authorization Act.

DATED: 06·11·2012

/s/Gary R. Klausner
Honorable Gary R. Klausner
United States District Judge

## APPENDIX C

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 11-05029-RGK (Shx) Date June 8, 2012

Title BRANDON CAMPBELL et al. v. VITRAN EXPRESS, INC.

Present:
The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

| Sharon L. Williams | Not Reported | N/A |
|---|---|---|
| Deputy Clerk | Court Reporter / Recorder | Tape No. |

| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
|---|---|
| Not Present | Not Present |

**Proceedings: (IN CHAMBERS) Order Re: Defendant's Motion for Summary Judgment (DE 30)**

## I. INTRODUCTION

On May 7, 2010, Brandon Campbell ("Campbell") and Ralph Maldonado ("Maldonado") (collectively,

"Plaintiffs") filed the present class action Complaint in Superior Court for the County of Los Angeles against Vitran Express, Inc. ("Defendant"). On June 14, 2010, Defendant removed the case to this Court on the grounds that jurisdiction was proper under the Class Action Fairness Act ("CAFA"). This Court remanded the case on August 25, 2011, a decision that was reversed by the Ninth Circuit Court of Appeals on March 30, 2012.

Plaintiffs, acting under the Private Attorney General Act ("PAGA"), allege seven violations of state laws in their Complaint: 1) California Labor Code §§ 226.7 and 512(a), 2) California Labor Code § 226.7, 3) California Labor Code § 204, 4) California Labor Code §§ 201 and 202, 5) California Labor Code § 226(a), 6) California Labor Code §1174(d), and 7) California Business and Professions Code § 17200.

On April 26, 2012, Defendant filed the present Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment. For the reasons discussed below, the Court **GRANTS** Defendant's Motion.

## II. FACTUAL BACKGROUND

Campbell was employed by Defendant as a city driver from February 2009 to January 2010. Maldonado was employed by Defendant as a city driver from October 2008 to December 2009. Defendant owns and operates a delivery truck company.

The heart of Plaintiffs' allegations is that Defendant did not allow them to take the meal and rest breaks that they were entitled to under California law. Further, Defendant did not pay Plaintiffs for the

missed meal breaks. Plaintiffs additionally allege that Defendant failed to provide them with complete and accurate wage statements or pay them properly upon termination. Lastly, Plaintiffs allege that these practices constitute an unlawful business practice in violation of California Business and Professions Code § 17200.

## III. LEGAL STANDARD

Defendant moves for Judgment on the Pleadings under Federal Rule of Civil Procedure ("Rule") 12(c) or, in the alternative, for Summary Judgment under Rule 56.

### A. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is "functionally identical" to a motion to dismiss for failure to state a claim; the only significant difference is that a Rule 12(c) motion is properly brought "after the pleadings are closed – but early enough not to delay trial." Fed. R. Civ. P. 12(c); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). The Court may grant a Rule 12(c) motion for judgment on the pleadings only if, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). When considering a motion for judgment on the pleadings, a court may also consider properly judicially noticed facts. *Heliotrop Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999)

### B. Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is proper only where "there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such showing, the court may grant summary judgment "on all or part of the claim." Fed. R. Civ. P. 56(a).

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See id.* at 326.

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp.*, 477 U.S. at 324.

## IV. DISCUSSION

Defendant's sole argument is that the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501 *et seq* preempts Plaintiffs' claims under California law. Defendant argues that

California's meal and rest break laws "relate to" the price, route, or service they are able to offer and are therefore preempted by the FAAAA. *See* 49 U.S.C. § 14501(c)(1).

Because the type of material properly before the Court differs between a Motion for Judgment on the Pleadings and a Motion for Summary Judgment, the Court will examine each of Defendant's alternative bases for relief separately.

## A. Motion for Judgment on the Pleadings

The Court must first define the scope of the FAAAA's preemption clause and then determine whether the state law claims alleged here fall within the scope of that clause.

### 1. *Scope of the FAAAA's Preemption Clause*

Federal preemption occurs when: (1) a Congressional statute explicitly preempts state law, (2) state law actually conflicts with federal law, or (3) federal law occupies a legislative field to such an extent that one can reasonably conclude that Congress left no room for state regulation in that field. *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (quoting *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424 (2002)). A presumption against preemption exists. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (holding that federal laws do not supersede the historic police powers of the States unless Congress clearly intends to do so).

The FAAAA explicitly preempts certain state laws; according to the statute, the 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." 49 U.S.C. § 14501(c)(1). This clause has been interpreted to mean that state laws "having a connection with, or reference to [motor] carrier rates, routes, and services are preempted." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Morales v. Trans. World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (interpreting an identical provision of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1))) (internal quotation marks and emphasis omitted); *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011). The Supreme Court has noted that the use of the words "related to" suggests that Congress intended to give a statute broad preemptive scope. *See Morales*, 504 U.S. at 383-84 (noting that similar language is used in the Employee Retirement Income Security Act of 1974 (ERISA)). Accordingly, a state law may have a connection with or reference to rates, services, or routes even if that connection is only indirect or is consistent with the federal regulation. *Rowe*, 552 U.S. at 370-371 (citing *Morales*, 504 U.S. at 386-87). However, the effect must be more than tenuous or remote. *Id.* at 371 (citing *Morales*, 504 U.S. at 390); *Am. Trucking*, 660 F.3d at 397.

Because the FAAAA's preemptive scope is so broad, the Ninth Circuit has noted that in borderline cases where the connection is more tenuous, the state law must bind motor carriers to a particular rate, route, or service "thereby interfer[ing] with competitive market

forces within the industry." *Am. Trucking*, 660 F.3d at 397 (internal changes omitted).

The services of a motor carrier refers to "the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Am. Trucking*, 660 F.3d at 396 (quoting *Air Transp. Ass'n of Am. v. City & Cnty. of S.F.*, 266 F.3d 1064, 1071 (9th Cir. 2001)). Rates of a motor carrier refers to the prices it charges for its services. *Id.* Routes refer to the courses of travel used by the motor carrier. *Id.*

2. *Application to California's Meal and Rest Break Requirements*

At issue in the present case is whether California's meal and rest break requirements relate to the rates, routes, and services provided by Defendant and are therefore preempted by the FAAAA.

California Labor Code § 512(a) requires that employees who work more than five hours per day be provided with a thirty minute meal period, although that may be waived by mutual consent provided that the employee is not working more than six hours per day. An employee who works more than ten hours per day must be provided with a second thirty minute meal period, although the second period may be waived by mutual consent if the employee is not working more than twelve hours per day and has not waived the first break. Cal. Lab. Code § 512(a). California Labor Code § 226.7 states that employer may not require employees to work during their mandated meal breaks and must pay the employee an additional hour of pay

at the regular rate for any day during which a meal period is not provided.

The California Supreme Court recently clarified that this first break must come at some point within the first five hour period and the second break, if applicable, before the employee's tenth work hour. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1041 (2012). The law makes no other formal timing requirements besides these basic parameters. *Id.* Furthermore, although a company has an obligation to provide rest periods to its eligible employees, it need not "police" the meal breaks to ensure that employees are taking their required time off. *Id.* at 1040-41.

The Court finds that as a matter of law, these meal and rest break requirements, even as clarified by *Brinker*, relate to the rates, services, and routes offered by Defendant. As other courts have noted, the length and timing of meal and rest breaks affects the scheduling of transportation. *See Esquivel v. Vistar Corp.*, 2012 WL 516094 *5 (C.D. Cal. 2012); *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1119 (C.D. Cal. 2011). When employees must stop and take breaks, it takes longer to drive the same distance and companies may only use routes that are amenable to the logistical requirements of scheduled breaks. Further, Plaintiffs have argued that the inability to take meal or rest breaks comes from their need to otherwise comply with Defendant's tight scheduling requirements. (RJN Ex. C (Pls' Opp. to Def's Mtn. to Stay), 2:25-3:2.) The conclusion that the FAAAA preempts California's meal and rest break requirements is consistent with the broad preemptive scope of the statute.

Because all of Plaintiffs' claims concern the failure of Defendant to abide by California's meal and rest break requirements, the Court **grants** Defendant's Motion for Judgment on the Pleadings.

**B. Motion for Summary Judgment**

Because the Court concludes that the FAAAA, as a matter of law, preempts California's meal and rest break requirements, the Court need not discuss Defendant's alternative basis for relief.

## V. REQUEST FOR JUDICIAL NOTICE

To the extent that the Court has relied on documents that are subject to a request for judicial notice, that request is hereby granted.

## VI. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's Motion for Judgment on the Pleadings.

**IT IS SO ORDERED.**

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## APPENDIX D

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 12-56250**

**D.C. No. 2:11-cv-05029-RGK-SH**
**Central District of California, Los Angeles**

**[Filed September 8, 2014]**

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|---|---|
| BRANDON CAMPBELL; RALPH MALDONADO, individually and on behalf of members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"), | ) |
| Plaintiffs - Appellants, | ) |
| v. | ) |
| VITRAN EXPRESS, INC., a Pennsylvania corporation, fka Vitran Express West, Inc., a Nevada corporation, | ) |
| Defendant - Appellee. | ) |

ORDER

Before: KOZINSKI, Chief Judge, GRABER, Circuit Judge, and ZOUHARY,* District Judge.

Chief Judge Kozinksi and Judge Graber have voted to deny the petition for rehearing en banc, and Judge Zouhary has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

## APPENDIX E

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 12-55705**
**D.C. No. 3:08-cv-00318-CAB-BLM**

**[Filed September 8, 2014]**

MICKEY LEE DILTS; RAY RIOS; and DONNY DUSHAJ, on behalf of themselves and all others similarly situated,
*Plaintiffs-Appellants*,

v.

PENSKE LOGISTICS, LLC; and PENSKE TRUCK LEASING CO., L.P., a Delaware corporation,
*Defendants-Appellees*,

and

DOES 1–125, inclusive,
*Defendants*.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted
March 3, 2014—Pasadena, California

Filed July 9, 2014
Amended September 8, 2014

Before: Alex Kozinski, Chief Judge, Susan P. Graber, Circuit Judge, and Jack Zouhary,[*] District Judge.

Opinion by Judge Graber;
Concurrence by Judge Zouhary

## SUMMARY[**]

### Federal Preemption

The panel filed an order amending its previous opinion and concurrence, and in the amended opinion the panel reversed the district court's dismissal, based on federal preemption, of claims brought by a certified class of drivers alleging violations of California's meal and rest break laws.

The panel held that California's meal and rest break laws as applied to the motor carrier defendants were

[*] The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

not "related to" defendants' prices, routes, or services, and therefore they were not preempted by the Federal Aviation Administration Authorization Act of 1994.

District Judge Zouhary concurred, and wrote separately to emphasize that the defendant failed to carry its burden of proof on its preemption defense.

## COUNSEL

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Jeffrey Clair (argued) and Stuart F. Delery, Assistant Attorneys General, Civil Division, United States Department of Justice; Kathryn B. Thomson, Acting General Counsel, Paul M. Geier, Assistant General Counsel for Litigation, and Peter J. Plocki, Deputy Assistant General Counsel for Litigation, United States Department of Transportation; and T.F. Scott Darling, III, Chief Counsel, and Debra S. Straus, Senior Attorney, Federal Motor Carrier Safety Administration, Washington, D.C., for Amicus Curiae United States of America.

Richard Pianka, ATA Litigation Center, and Prasad Sharma, American Trucking Associations, Inc., Arlington, Virginia; Paul DeCamp, Jackson Lewis LLP,

Reston, Virginia; Douglas J. Hoffman, Jackson Lewis LLP, Boston, Massachusetts; and Robin S. Conrad and Shane B. Kawka, National Chamber Litigation Center, Inc., Washington, D.C.; Guillermo Marrero, International Practice Group, P.C., San Diego, California; and Andrew J. Kahn and Richard G. McCracken, Davis, Cowell & Bowe, LLP, San Francisco, California, for Amici Curiae.

**ORDER**

The opinion filed on July 9, 2014, and published at 2014 WL 3291749, are amended by the opinion and concurrence filed concurrently with this order.

With these amendments, Chief Judge Kozinski and Judge Graber have voted to deny the petition for rehearing en banc, and Judge Zouhary has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing en banc is **DENIED**. No further petitions for rehearing may be filed.

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**OPINION**

GRABER, Circuit Judge:

Plaintiffs, a certified class of drivers employed by Defendants Penske Logistics, LLC, and Penske Truck Leasing Co., L.P., appeal from a judgment dismissing their claims under California's meal and rest break laws. The district court held on summary judgment that the Federal Aviation Administration

Authorization Act of 1994 ("FAAAA") preempts those state laws as applied to motor carriers. Reviewing de novo the interpretation and construction of the FAAAA and the question of federal preemption, *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir. 2005), we hold that the state laws at issue are not "related to" prices, routes, or services, and therefore are not preempted by the FAAAA. Accordingly, we reverse.

## FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Mickey Lee Dilts, Ray Rios, and Donny Dushaj brought this class action against Defendants, which are motor carriers, alleging that Defendants routinely violate California's meal and rest break laws, Cal. Lab. Code §§ 226.7, 512; Cal. Code Regs. tit. 8, § 11090. Plaintiffs represent a certified class of 349 delivery drivers and installers, all of whom are assigned to the Penske Whirlpool account. Plaintiffs work exclusively on routes within the state of California, typically work more than 10 hours a day, and frequently work in pairs, with one driver and one deliverer/installer in each truck.

California law generally requires a 30-minute meal break for every five hours worked, Cal. Lab. Code § 512, and a paid 10-minute rest break for every four hours worked, Cal. Code Regs. tit. 8, § 11090. Plaintiffs allege that Defendants automatically program 30-minute meal breaks into employees' shifts while failing to ensure that employees actually take those breaks and that Defendants create a working environment that discourages employees from taking their meal and rest breaks.

Plaintiffs initially filed this action in state court. Defendants removed the case to federal district court under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(2), 1441(b), 1453. Following removal, Defendants moved for summary judgment, claiming a preemption defense. Defendants argued that the state meal and rest break laws as applied to motor carriers are preempted under the FAAAA, which provides that "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Concluding that California's meal and rest break laws impose "fairly rigid" timing requirements, dictating "exactly when" and "for exactly how long" drivers must take breaks, and restricting the routes that a motor carrier may select, the district court held that California's meal and rest break laws meet the FAAAA preemption standard and granted summary judgment for Defendants. *Dilts v. Penske Logistics LLC*, 819 F. Supp. 2d 1109, 1119–20 (S.D. Cal. 2011).[1] Plaintiffs timely appeal.

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[1] Since *Dilts* was decided, eight other California district court decisions have held that the FAAAA preempts California's meal and rest break laws, while four have held that it does not. The other cases that followed *Dilts* are: *Rodriguez v. Old Dominion Freight Line, Inc.*, No. CV13-891DSF(RZx), 2013 WL 6184432, at *4 (C.D. Cal. Nov. 27, 2013); *Parker v. Dean Transp. Inc.*, No. CV13-02621BRO(VBKx), 2013 WL 7083269, at *9 (C.D. Cal. Oct. 15, 2013); *Ortega v. J.B. Hunt Transp., Inc.*, No. CV07-08336(BRO)(FMOx), 2013 WL 5933889, at *7 (C.D. Cal. Oct. 2, 2013); *Burnham v. Ruan Transp.*, No. SACV12-0688AG(ANx), 2013 WL 4564496, at *5 (C.D. Cal. Aug. 16, 2013); *Cole v. CRST, Inc.*, No. EDCV08-1570-VAP(OPx), 2012 WL 4479237, at *4–6 (C.D. Cal. Sept. 27, 2012); *Campbell v. Vitran Express, Inc.*, No. CV11-05029-RGK(SHx), 2012 WL 2317233, at *4 (C.D. Cal. June

## DISCUSSION

### A. California's Meal and Rest Break Laws

California Labor Code sections 226.7 and 512, and the related regulations for the transportation industry promulgated by California's Industrial Welfare Commission as California Code of Regulations title 8, section 11090, together constitute the state's meal and rest break laws.

Employers must provide a meal break of 30 minutes for an employee who works more than five hours a day, plus a second meal break of 30 minutes for an employee who works more than 10 hours a day. Cal. Lab. Code § 512(a). For employees who work no more than six

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8, 2012); *Aguiar v. Cal. Sierra Express, Inc.*, No. 2:11-cv-02827-JAM-GGH, 2012 WL 1593202, at *1 (E.D. Cal. May 4, 2012); *Esquivel v. Vistar Corp.*, No. 2:11-cv-07284-JHN-PJWx, 2012 WL 516094, at *4–6 (C.D. Cal. Feb. 8, 2012) (unpublished decisions); *see also Miller v. Sw. Airlines Co.*, 923 F. Supp. 2d 1206, 1212–13 (N.D. Cal. 2013) (holding California's break laws preempted under the analogous provision of the Airline Deregulation Act); *Helde v. Knight Transp., Inc.*, 982 F. Supp. 2d 1189, 1195–96 (W.D. Wash. 2013) (applying similar analysis to Washington's rest break provisions and holding them preempted under the FAAAA). The cases holding that California's meal and rest break laws are not preempted by the FAAAA are: *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137JCS, 2014 WL 1338297, at *12 (N.D. Cal. Mar. 28, 2014); *Brown v. Wal-Mart Stores, Inc.*, No. C08-5221SI, 2013 WL 1701581, at *3–4 (N.D. Cal. Apr. 18, 2013); *Mendez v. R+L Carriers, Inc.*, No. C11-2478CW, 2012 WL 5868973, at *4–7 (N.D. Cal. Nov. 19, 2012) (unpublished decisions); *Reinhardt v. Gemini Motor Transp.*, 869 F. Supp. 2d 1158, 1165–67 (E.D. Cal. 2012).

This is the first time that the question is before us. It is also before us in *Campbell v. Vitran Express, Inc.*, No. 12-56250, which we decided concurrently in a memorandum disposition.

hours, the meal break may be waived by mutual consent of the employer and employee; for employees who work no more than 12 hours, one of the two meal breaks may be waived by mutual consent. *Id.* If the nature of the work prevents an employee from taking an off-duty meal break, the employer and employee may agree to an on-duty meal break by mutual consent. *Id.* For transportation workers whose daily work time is at least three and one-half hours, employers must provide a paid rest period of 10 minutes for every four hours "or major fraction thereof." Cal. Code Regs. tit. 8, § 11090(12)(A). The regulations governing transportation workers are consistent with those governing workers in other industries. *See id.* §§ 11010–11170.

An employer may not require an employee to work during any meal or rest period. Cal. Lab. Code § 226.7(b). An employer must pay an employee for an additional hour of work at the employee's regular rate for each workday for which a meal or rest period is not provided. Cal. Lab. Code § 226.7(c). "[S]ection 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay. . . . The failure to provide required meal and rest breaks is what triggers a violation of section 226.7." *Kirby v. Immoos Fire Prot., Inc.*, 274 P.3d 1160, 1168 (Cal. 2012). "The 'additional hour of pay' . . . is the legal remedy . . . ." *Id.*

The California Supreme Court, in an opinion published after the order on summary judgment issued in this case, clarified that state laws allow some flexibility with respect to the timing and circumstances of meal breaks. *Brinker Rest. Corp. v. Superior Court*,

273 P.3d 513 (Cal. 2012). In the absence of a waiver, California law "requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work," but "does not impose additional timing requirements." *Id.* at 537. "[A]n employer must relieve the employee of all duty for the designated [meal] period, but need not ensure that the employee does no work." *Id.* at 532. When the nature of the work makes off-duty meal breaks infeasible, the employer and employee may, by mutual written agreement, waive the off-duty meal break requirement. *Id.* at 533 (citing California's Industrial Welfare Commission Wage Order No. 5). Finally, "as a general matter, one rest break should fall on either side of the meal break. [But s]horter or longer shifts and other factors that render such scheduling impracticable may alter this general rule," and employers have flexibility in scheduling breaks according to the nature of the work. *Id.* at 531 (citation, brackets, and internal quotation marks omitted).

### B. The "Related to" Test for FAAAA Preemption

In considering the preemptive scope of a statute, congressional intent "is the ultimate touchstone." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007) (internal quotation marks omitted). "Congress' intent . . . primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed . . . through the reviewing court's reasoned understanding of the way in

which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (citations and internal quotation marks omitted).

"Preemption analysis begins with the presumption that Congress does not intend to supplant state law. Although Congress clearly intended FAAAA to preempt some state regulations of motor carriers who transport property, the scope of the pre-emption must be tempered by the presumption against the pre-emption of state police power regulations." *Tillison*, 424 F.3d at 1098 (citation and internal quotation marks omitted); *Medtronic, Inc.*, 518 U.S. at 485; *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (noting that the presumption against preemption applies "in all preemption cases" and is especially strong in areas of traditional state regulation (internal quotation marks and brackets omitted). Wage and hour laws constitute areas of traditional state regulation, although that fact alone does not "immunize" state employment laws from preemption if Congress in fact contemplated their preemption. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 330–34 (1997).

"Where, as in this case, Congress has superseded state legislation by statute, our task is to identify the domain expressly pre-empted. To do so, we focus first on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (citation and internal quotation marks omitted) (interpreting the FAAAA). The FAAAA's

preemption clause provides, in relevant part: "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The statutory "related to" text is "deliberately expansive" and "conspicuous for its breadth." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992) (internal quotation marks omitted). That said, the FAAAA does not go so far as to preempt state laws that affect prices, routes, or services in "only a tenuous, remote, or peripheral manner, such as state laws forbidding gambling." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (internal quotation marks and alteration omitted). As the Supreme Court recently observed, "the breadth of the words 'related to' does not mean the sky is the limit." *Dan's City Used Cars*, 133 S. Ct. at 1778.

Because "everything is related to everything else," *Dillingham Constr.*, 519 U.S. at 335 (Scalia, J., concurring), understanding the nuances of congressional intent is particularly important in FAAAA preemption analysis. We must draw a line between laws that are significantly "related to" rates, routes, or services, even indirectly, and thus are preempted, and those that have "only a tenuous, remote, or peripheral" connection to rates, routes, or services, and thus are not preempted. *Rowe*, 552 U.S. at 371. To better discern congressional intent, we turn next to the legislative history and broader statutory framework of the FAAAA. *Lohr*, 518 U.S. at 486.

Enacted in 1994, the FAAAA was modeled on the Airline Deregulation Act of 1978. In 2008, the Supreme Court summarized the history behind the FAAAA:

> In 1978, Congress "determin[ed] that 'maximum reliance on competitive market forces'" would favor lower airline fares and better airline service, and it enacted the Airline Deregulation Act. *Morales*[, 504 U.S. at 378] (quoting 49 U.S.C. App. § 1302(a)(4) (1988 ed.)); see 92 Stat. 1705. In order to "ensure that the States would not undo federal deregulation with regulation of their own," th[e Airline Deregulation] Act "included a pre-emption provision" that said "no State . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier." *Morales*, *supra*, at 378; 49 U.S.C. App. § 1305(a)(1) (1988 ed.).
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> In 1980, Congress deregulated trucking. See Motor Carrier Act of 1980, 94 Stat. 793. And a little over a decade later, in 1994, Congress similarly sought to pre-empt state trucking regulation. See Federal Aviation Administration Authorization Act of 1994, 108 Stat. 1605–1606; see also ICC Termination Act of 1995, 109 Stat. 899. In doing so, it borrowed language from the Airline Deregulation Act of 1978 and wrote into its 1994 law language that says: "[A] State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1); see also § 41713(b)(4)(A) (similar provision for combined motor-air carriers).

*Rowe*, 552 U.S. at 367–68.

By using text nearly identical to the Airline Deregulation Act's, Congress meant to create parity

between freight services provided by air carriers and those provided by motor carriers. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998). Therefore, the analysis from *Morales* and other Airline Deregulation Act cases is instructive for our FAAAA analysis as well. The one difference between the Airline Deregulation Act and the FAAAA is that the latter contains the additional phrase "with respect to the transportation of property," which is absent from the Airline Deregulation Act and which "massively limits the scope of preemption ordered by the FAAAA." *Dan's City Used Cars*, 133 S. Ct. at 1778 (internal quotation marks omitted). Here, the parties do not dispute that the transportation of property is involved, so our analysis turns on the "related to price, route, or service" element of the FAAAA preemption test.

The principal purpose of the FAAAA was "to prevent States from undermining federal deregulation of interstate trucking" through a "patchwork" of state regulations. *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 395–96 (9th Cir. 2011). The sorts of laws that Congress considered when enacting the FAAAA included barriers to entry, tariffs, price regulations, and laws governing the types of commodities that a carrier could transport. H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. The FAAAA expressly does *not* regulate a state's authority to: enact safety regulations with respect to motor vehicles; control trucking routes based on vehicle size, weight, and cargo; impose certain insurance, liability, or standard transportation rules; regulate the intrastate transport of household goods and certain aspects of tow-truck operations; or create certain

uniform cargo or antitrust immunity rules. 49 U.S.C. § 14501(c)(2), (3). This list was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756. Accordingly, Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services. Consistent with that instruction, we have held that the FAAAA does not preempt a state's prevailing wage law, *Mendonca*, 152 F.3d at 1189, or a state law requiring that towing services obtain express authorization to tow from private property, *Tillison*, 424 F.3d at 1099–1100, and that the Airline Deregulation Act does not preempt a generally applicable city anti-discrimination law, *Air Transp. Ass'n of Am. v. City of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001).

In 2008, after reviewing the relevant statutory text, legislative history, and jurisprudence, the Supreme Court identified four principles of FAAAA preemption: (1) "'state enforcement actions having a connection with, or reference to,' carrier 'rates, routes or services' are pre-empted"; (2) "such pre-emption may occur even if a state law's effect on rates, routes or services 'is only indirect'"; (3) "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation"; and (4) "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Rowe*, 552 U.S. at 370–71 (brackets and emphasis omitted) (quoting the Airline Deregulation Act analysis in *Morales*, 504 U.S. at 384, 386–87, 390).

Contrary to Defendants' argument, *Rowe* did not represent a significant shift in FAAAA jurisprudence. Nor did it call into question our past FAAAA cases, such as *Mendonca*, 152 F.3d at 1187–89. *See also Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc) (holding that a three-judge panel may ignore binding circuit precedent only if it is "clearly irreconcilable with the reasoning or theory of intervening higher authority"). *Rowe* instructs us to apply to our FAAAA cases the settled preemption principles developed in Airline Deregulation Act cases, including the rule articulated in *Morales* that a state law may "relate to" prices, routes, or services for preemption purposes even if its effect is only indirect, 504 U.S. at 385–86, but that a state law connected to prices, routes, or services in "too tenuous, remote, or peripheral a manner" is not preempted, *id.* at 390 (internal quotation marks omitted). *See also* H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755 (noting that the drafters of the FAAAA did "not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*"). We applied precisely that rule in *Mendonca*, 152 F.3d at 1187–89. *Rowe* simply reminds us that, whether the effect is direct or indirect, "the state laws whose effect is forbidden under federal law are those with a *significant* impact on carrier rates, routes, or services." 552 U.S. at 375 (internal quotation marks omitted).

*Rowe* concerned a Maine law requiring tobacco retailers to use a delivery service that provided recipient verification. The Supreme Court held that the verification requirement interfered with the de-regulatory goals behind the FAAAA's preemption

clause because it would "require carriers to offer a system of services that the market does not provide[,] . . . would freeze into place services that carriers might prefer to discontinue in the future," and would directly substitute Maine's "own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." 552 U.S. at 372 (internal quotation marks omitted). The Maine statute also required that carriers provide a special checking system to receive any shipment originating from a known tobacco retailer. *Id.* at 373. The Supreme Court held that requiring the carriers to check packages in this way would "regulate a significant aspect of the motor carrier's package pickup and delivery service" and, again, could freeze into place services that the market would not otherwise provide. *Id.*

In short, the Maine statute required carriers to provide or use certain special services in order to comply with the law. The statute was, as we have described other preempted laws, one in which "the existence of a price, route or service [was] essential to the law's operation." *Air Transp. Ass'n*, 266 F.3d at 1071 (internal quotation marks and brackets omitted). In an Airline Deregulation Act case following *Rowe*, we held that, in "'borderline' cases" in which a law does not refer directly to rates, routes, or services, "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry." *Am. Trucking*, 660 F.3d at 397 (emphasis added) (internal quotation marks and alterations omitted). Thus, laws mandating motor

carriers' use (or non-use) of particular prices, routes, or services in order to comply with the law are preempted.

Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices. In *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431 (2014), the Supreme Court held that an airline customer's claim against the airline for breach of an implied covenant, stemming from the termination of his frequent flyer account, was "related to" prices, routes, and especially services. The Court held that, because frequent flyer credits could be redeemed for services offered for free or at reduced prices, the state law contract claim met the "related to" test, *id.*, and, because the state law claim sought to enlarge the contractual relationship that the carrier and its customer had voluntarily undertaken, was preempted under the Airline Deregulation Act, *id.* at 1433; *see also S.C. Johnson & Son v. Transp. Corp. of Am.*, 697 F.3d 544, 558 (7th Cir. 2012) (noting that *Morales* and *Mendonca* both stand for the proposition that the Airline Deregulation Act and FAAAA do not preempt "laws that regulate . . . inputs [that] operate one or more steps away from the moment at which the firm offers its customer a service for a particular price"); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) (the preempted law "directly regulates how an airline service is performed and how its price is displayed to customers—not merely how the airline behaves as an employer or proprietor").

On the other hand, generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if

employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide. Such laws are not preempted even if they raise the overall cost of doing business or require a carrier to re-direct or re-route some equipment. *Mendonca*, 152 F.3d at 1189. Indeed, many of the laws that Congress enumerated as expressly *not* related to prices, routes, or services—such as transportation safety regulations or insurance and liability rules, 49 U.S.C. § 14501(c)(2)—are likely to increase a motor carrier's operating costs. But Congress clarified that this fact alone does not make such laws "related to" prices, routes, or services. Nearly every form of state regulation carries some cost. The statutory text tells us, though, that in deregulating motor carriers and promoting maximum reliance on market forces, Congress did not intend to exempt motor carriers from every state regulatory scheme of general applicability. 49 U.S.C. § 14501(c); *see also, e.g.*, *Rowe*, 552 U.S. at 375 (holding that a state law is not preempted when it "prohibits certain forms of conduct and affects, say, truckdrivers, only in their capacity as members of the public").

Nor does a state law meet the "related to" test for FAAAA preemption just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services *relative* to others, leading the carriers to reallocate resources or make different business decisions. For example, a San Francisco city ordinance requiring equal protection for domestic partners did not "compel or bind the Airlines to a particular route or service," even though it might increase the cost of doing business at the San Francisco

airport relative to other markets. *Air Transp. Ass'n*, 266 F.3d at 1074. Despite the potential cost increase associated with using the San Francisco airport as a result of the city ordinance, carriers could still "make their own decisions about where to fly and how many resources to devote to each route and service." *Id.*

In short, even if state laws increase or change a motor carrier's operating costs, "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services"—that is, those that do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services— are not preempted by the FAAAA. *Id.* at 1072.

### C. California's Meal and Rest Break Laws are Not Preempted

Although we have in the past confronted close cases that have required us to struggle with the "related to" test, and refine our principles of FAAAA preemption, we do not think that this is one of them. In light of the FAAAA preemption principles outlined above, California's meal and rest break laws plainly are not the sorts of laws "related to" prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly. They are "broad law[s] applying to hundreds of different industries" with no other "forbidden connection with prices[, routes,] and services." *Air Transp. Ass'n*, 266 F.3d at 1072. They are normal background rules for almost *all* employers doing business in the state of California. And while motor carriers may have to take into account the meal

and rest break requirements when allocating resources and scheduling routes—just as they must take into account state wage laws, *Mendonca*, 152 F.3d at 1189, or speed limits and weight restrictions, 49 U.S.C. § 14501(c)(2)—the laws do not "bind" motor carriers to specific prices, routes, or services, *Am. Trucking*, 660 F.3d at 397. Nor do they "freeze into place" prices, routes, or services or "determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide," *Rowe*, 552 U.S. at 372.

Further, applying California's meal and rest break laws to motor carriers would not contribute to an impermissible "patchwork" of state-specific laws, defeating Congress' deregulatory objectives. The fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption. In the preemption provision, Congress was concerned only with those state laws that are significantly "related to" prices, routes, or services. A state law governing hours is, for the foregoing reasons, not "related to" prices, routes, or services and therefore does not contribute to "a patchwork of state *service-determining* laws, rules, and regulations." *Rowe*, 552 U.S. at 373 (emphasis added). It is instead more analogous to a state wage law, which may differ from the wage law adopted in neighboring states but nevertheless is permissible. *Mendonca*, 152 F.3d at 1189.[2]

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[2] We recently noted that it was an "open issue" "whether a federal law can ever preempt state law on an 'as applied' basis, that is, whether it is proper to find that federal law preempts a state regulatory scheme sometimes but not at other times, or that a federal law can preempt state law when applied to certain parties, but not to others." *Cal. Tow Truck Ass'n v. City of San Francisco*,

Defendants argue that California's meal and rest break laws are "related to" routes or services, "if not prices too," in six specific ways. None of those examples convinces us that California's laws are "related to" prices, routes, or services in the way that Congress intended.

First, Defendants argue that the state break laws impermissibly mandate that *no* motor carrier service be provided during certain times because the laws require a cessation of work during the break period. But the state law requires only that *each individual employee* take an off-duty break at some point within specified windows—not that a motor carrier suspend its service. Defendants are at liberty to schedule service whenever they choose. They simply must hire a sufficient number

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693 F.3d 847, 865 (9th Cir. 2012). We need not resolve that issue here. For the reasons discussed in this section, we hold that California's meal and rest break laws, as generally applied to motor carriers, are not preempted.

Were we to construe Defendant's argument as an "as applied" challenge, we would reach the same conclusion and, if anything, find the argument against preemption even stronger. Plaintiff drivers work on short-haul routes and work exclusively within the state of California. They therefore are not covered by other state laws or federal hours-of-service regulations, 49 C.F.R. § 395.3, and would be without *any* hours-of-service limits if California laws did not apply to them. *See Hours of Service of Drivers*, 78 Fed. Reg. 64,179-01, 64,181 (Oct. 28, 2013) (amending 49 C.F.R. § 395.3 to exclude short-haul drivers, in compliance with *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 914 (2014)). Consequently, Defendants *in particular* are not confronted with a "patchwork" of hour and break laws, even a "patchwork" permissible under the FAAAA.

of drivers and stagger their breaks for any long period in which continuous service is necessary.

Second, Defendants argue that mandatory breaks mean that drivers take longer to drive the same distance, providing less service overall. But that argument equates to nothing more than a modestly increased cost of doing business, which is not cause for preemption, *Air Transp. Ass'n*, 266 F.3d at 1071; *Mendonca*, 152 F.3d at 1189. Motor carriers may have to hire additional drivers or reallocate resources in order to maintain a particular service level, but they remain free to provide as many (or as few) services as they wish. The law in question has nothing to say about *what* services an employer does or does not provide.

Third, Defendants argue that break laws require carriers to alter "the frequency and scheduling of transportation," which directly relates to services under *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265–66 (9th Cir. 1998) (en banc). *Charas* held that, under the Airline Deregulation Act, services include "such things as the frequency and scheduling of transportation, and . . . the selection of markets to or from which transportation is provided." *Id.* Again, this argument conflates requirements for *individual drivers* with requirements imposed on motor carriers. Motor carriers may schedule transportation as frequently or as infrequently as they choose, at the times that they choose, and still comply with the law. They simply must take drivers' break times into account—just as they must take into account speed limits or weight restrictions, 49 U.S.C. § 14501(c), which are not preempted by the FAAAA.

Fourth, Defendants argue that California break laws require motor carriers to schedule services in accordance with state law, rather than in response to market forces, thereby interfering with the FAAAA's deregulatory objectives. But the mere fact that a motor carrier must take into account a state regulation when planning services is not sufficient to require FAAAA preemption, so long as the law does not have an impermissible effect, such as binding motor carriers to specific services, *Am. Trucking*, 660 F.3d at 397, making the continued provision of particular services essential to compliance with the law, *Rowe*, 552 U.S. at 372; *Air Transp. Ass'n*, 266 F.3d at 1074, or interfering at the point that a carrier provides services to its customers, *Nw., Inc.*, 134 S. Ct. at 1431. Moreover, all motor carriers in California are subject to the same laws, so all intrastate carriers like Defendants are equally subject to the relevant market forces.

Turning to routes, Defendants' fifth argument is that the requirement that drivers pull over and stop for each break period necessarily dictates that they alter their routes. To the extent that compliance with California law requires drivers to make minor deviations from their routes, such as pulling into a truck stop, we see no indication that this is the sort of "route control" that Congress sought to preempt. "'[R]outes' generally refer[s] to . . . point-to-point transport . . . [and] courses of travel." *Charas*, 160 F.3d at 1265. The requirement that a driver briefly pull on and off the road during the course of travel does not meaningfully interfere with a motor carrier's ability to select its starting points, destinations, and routes. Indeed, Congress has made clear that even more onerous route restrictions, such as weight limits on

particular roads, are not "related to" routes and therefore are not preempted. 49 U.S.C. § 14501(c).

Sixth, and relatedly, Defendants argue that finding routes that allow drivers to comply with California's meal and rest break laws will limit motor carriers to a smaller set of possible routes. But Defendants, who bear the burden of proof in establishing the affirmative defense of preemption, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2587 (2011), submitted no evidence to show that the break laws in fact would decrease the availability of routes to serve the Whirlpool accounts, or would meaningfully decrease the availability of routes to motor carriers in California. Instead, Defendants submitted only very general information about the difficulty of finding parking for commercial trucks in California. Although compliance with California's meal and break laws may require some minor adjustments to drivers' routes, the record fails to suggest that state meal and rest break requirements will so restrict the set of routes available as to indirectly bind Defendants, or motor carriers generally, to a limited set of routes, *Am. Trucking*, 660 F.3d at 397, or make the provision or use of specific routes necessary for compliance with the law, *Air Transp. Ass'n*, 226 F.3d at 1074. Moreover, drivers already must incorporate into their schedule fuel breaks, pick ups, drop offs and, in some cases, time to install products or wait for their partner to complete an installation.

Finally, in an amicus brief filed at our invitation, the Secretary of Transportation argued that: (1) state laws like California's, which do not directly regulate prices, routes, or services, are not preempted by the

FAAAA unless they have a "significant effect" on prices, routes, or services; (2) in the absence of explicit instructions from Congress, there is a presumption against preemption in areas of traditional state police power, including employment; and (3) there is no showing of an actual or likely significant effect on prices, routes, or services, and so the California laws at issue are not preempted. *See also Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers*, 73 Fed. Reg. 79,204-01, 79,206 (Dec. 24, 2008) (determining, in an order issued by the Department of Transportation, that the agency lacked jurisdiction to preempt California's meal and rest break laws under another statute, 49 U.S.C. § 31141, because those state laws are not "laws [or] regulations on commercial motor safety").

Although the Department of Transportation's interpretation of the FAAAA is not controlling, we find it persuasive in light of: (1) the agency's general expertise in the field of transportation and regulation, (2) the fact that the position taken in the brief represents the agency's reasoned consideration of the question, and (3) the fact that the government's position is generally consistent with its approach to other preemption questions concerning California's meal and rest break laws (although this is the first time that the government has taken a position on FAAAA preemption specifically). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that a non-controlling agency opinion may carry persuasive weight, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *see also Van Asdale v. Int'l*

*Game Tech.*, No. 11-16538, 2014 WL 3973388, at *3 (9th Cir. Aug. 15, 2014) (applying *Skidmore* deference to the Department of Labor's view on the appropriate statutory interpretation of a damages provision in the Sarbanes-Oxley Act of 2002, as expressed in the agency's amicus brief).

For the reasons discussed above, we agree with the Department of Transportation. Although we would reach the same result in the absence of the agency's brief, the government's position provides additional support for our conclusion that the FAAAA does not preempt California's meal and rest break laws.

## CONCLUSION

The FAAAA does not preempt California's meal and rest break laws as applied to Defendants, because those state laws are not "related to" Defendants' prices, routes, or services. The district court dismissed this action on summary judgment because of Defendants' preemption defense, so it has not yet considered the merits of Plaintiffs' claims. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

**REVERSED and REMANDED.**

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ZOUHARY, District Judge, concurring:

I write separately to emphasize several aspects of this case. As the Majority notes, Penske bears the burden of proof on its preemption defense. *See supra* at 22. But Penske did not offer specific evidence of (for example) the actual effects of the California law on Penske's own routes or services. Instead, Penske relied

on a general hypothetical likelihood that a Penske delivery driver, with limited flexibility in traveling from point A to point B, is further restricted to certain routes that would allow a driver to park his or her truck and enter "off-duty" status.

Penske failed to carry its burden. I consequently express no opinion, for example, that the possibility a "driver [must] *briefly* pull on and off the road during the course of travel *does not meaningfully interfere* with a motor carrier's ability to select its starting points, destinations, and routes." *Id.* (emphases added). Maybe so. Maybe not.

Further, the Majority incorrectly posits that Defendants are at liberty to schedule as they choose, tempered only by hiring more drivers and staggering breaks. Customer demands and practicalities must also be considered. As in air and train transportation, substitution crews may now be needed when hours of service are reached with some expense, delay, and impact on service. With respect to costs-of-labor, Penske did produce specific evidence, reflecting an estimated 3.4 percent increase in annual pricing to service a relevant account. Without more, that minimal increase in pricing is an insufficient basis for preempting the decades-old meal and rest break requirement. *Mendonca*, 152 F.3d at 1189 (finding California's prevailing wage requirement, which increased a motor-carrier defendant's prices by 25 percent, "in a certain sense . . . 'related to' [the motor carrier-defendant's] prices, routes and services," but had an effect that was "no more than indirect, remote, and tenuous").

Finally, I note what this case is *not* about. This case is not an occasion for us to reexamine prior precedent – the discussion of *Rowe*, *Northwest Airlines, Inc.*, and *Gammie* makes that clear. Nor is this case about FAAAA preemption in the context of interstate trucking – though one gets the sense that various *amici* wish it were. On this record, and in the intrastate context, California's meal and rest break requirements are not preempted.

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

**Civil No. 08cv318-CAB (BLM)**

**[Filed March 22, 2012]**

| | |
|---|---|
| MICKEY LEE DILTS, RAY RIOS, and DONNY DUSHAJ, on behalf of themselves and all others similarly situated, | ) |
| Plaintiffs, | ) |
| v. | ) |
| PENSKE LOGISTICS, LLC, PENSKE TRUCK LEASING CO., L.P., a Delaware corporation, and DOES 1 through 125, inclusive, | ) |
| Defendants. | ) |

**ORDER GRANTING MOTION FOR ENTRY OF JUDGMENT PURSUANT TO RULE 54(B)**

**[Doc. No. 118.]**

This matter is before the Court on Defendants' motion for Entry of Judgment pursuant to Fed. R. Civ. P. 54(b). [Doc. No. 118.] The Court notes that Plaintiffs do not oppose this motion, [Doc. No. 121,] and intend to appeal the order on the Partial Summary Judgment.

[*See* Doc. 118 at 3.] The Court held a hearing on this matter on March 22, 2012. James J. Hill, Esq. and Michael D. Singer, Esq. appeared on behalf of the plaintiffs and Christopher McNatt, Jr., Esq., and James H. Hanson, Esq. appeared on behalf of the defendants. Having considered the briefing of the parties, the authority cited therein, and the representations made by counsel at the hearing, the motion is **GRANTED**.

Pursuant to Fed. R. Civ. P. 54(b), a district court may certify an issue for interlocutory appeal prior to the ultimate disposition of the case so long as there is no just reason for delay. *See Curtiss-Wright Corp. v. Gen. Elec. Co.,* 446 U.S. 1, 3 (1980). Defendants seek Rule 54(b) certification on the Second and Third Causes of Action to the complaint, in which plaintiffs claim that defendants violated certain provisions of the California Labor Laws with respect to meal and rest periods for employees. On October 19, 2011, the Court granted Partial Summary Judgment as to these claims, as well as the Fifth Cause of Action to the extent that it alleges an Unfair Competition Law claim derivative of those claims.[Doc. No. 112.] Specifically, the Court found that the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501, preempts plaintiffs' claims for violations of California meal and rest break laws. *Id.* at 20.

The Court finds that the causes of action relating to meal and rest periods are legally and factually distinct and severable from the remaining claims in this litigation, which relate to overtime compensation and alleged failure to comply with itemized employee wage statement provisions pursuant to the California Labor

Code. Thus, immediate appellate review of the Second and Third causes of action will not result in later duplicative proceedings in the trial or appellate courts. *See Wood v. GCC Bend, LLC*, 422 F.3d 873, 878-879 (9th Cir. 2005). The Court also finds that, in light of Defendants' representation that several other motor carrier operators in California are subject to litigation upon which the determination of the preemption of California's meal and rest break laws depend, there is no just reason for delay in pursuing the appeal of the Second and Third causes of action. *Id.*

Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED that Defendants' motion for Entry of Judgment under Rule 54(b) [Doc. No. 118] is GRANTED.

DATED: March 22, 2012

/s/Cathy Ann Bencivengo
**CATHY ANN BENCIVENGO**
United States District Judge

## APPENDIX G

**OFFICIAL NOTICE**

**INDUSTRIAL WELFARE COMMISSION**
**ORDER NO. 9-2001**
**REGULATING**
**WAGES, HOURS AND WORKING**
**CONDITIONS IN THE**

**TRANSPORTATION INDUSTRY**

***Effective July 1, 2002 as amended***

***Sections 4(A) and 10(C) amended and republished by the Department of Industrial Relations, effective July 1, 2014, pursuant to AB 10, Chapter 351, Statutes of 2013 and AB 1835, Chapter 230, Statutes of 2006***

***This Order Must Be Posted Where Employees Can Read It Easily***

IWC FORM 1109 (Rev. 07-2014)
OSP 06 98767

**• Please Post With This Side Showing •**
**OFFICIAL NOTICE [SEAL]**
***Effective July 1, 2002 as amended***

***Sections 4(A) and 10(C) amended and republished by the Department of Industrial Relations, effective July 1, 2014 pursuant to AB 10, Chapter 351, Statutes of 2013 and AB 1835, Chapter 230, Statutes of 2006***

**INDUSTRIAL WELFARE COMMISSION**
**ORDER NO. 9-2001**
**REGULATING**
**WAGES, HOURS AND WORKING CONDITIONS IN THE TRANSPORTATION INDUSTRY**

**TAKE NOTICE:** To employers and representatives of persons working in industries and occupations in the State of California: The Department of Industrial Relations amends and republishes the minimum wage and meals and lodging credits in the Industrial Welfare Commission's Orders as a result of legislation enacted (AB 10, Ch. 351, Stats of 2013, amending section 1182.12 of the California Labor Code, and AB 1835, Ch. 230, Stats of 2006, adding sections 1182.12 and 1182.13 to the California Labor Code .) The amendments and republishing make no other changes to the IWC's Orders.

**1. APPLICABILITY OF ORDER**

This order shall apply to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except that:

(A) Provisions of Sections 3 through 12 of this order shall not apply to persons employed in administrative, executive, or professional capacities. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

(1) Executive Exemption. A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,

together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(2) Administrative Exemption. A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(i) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his/her employer's customers; or

(ii) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

(d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(e) Who executes under only general supervision special assignments and tasks; and

(f) Who is primarily engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.

(3) Professional Exemption. A person employed in a professional capacity means any employee who meets *all* of the following requirements:

(a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection,

"learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b).

(d) Who earns a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515 (c) as 40 hours per week.

(e) Subparagraph (b) above is intended to be construed in accordance with the following provisions

of federal law as they existed as of the date of this wage order: 29 C.F.R. Sections 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

(f) Notwithstanding the provisions of this subparagraph, pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subparagraph unless they individually meet the criteria established for exemption as executive or administrative employees.

(g) Subparagraph (f) above shall not apply to the following advanced practice nurses:

(i) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.

(ii) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.

(iii) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.

(iv) Nothing in this subparagraph shall exempt the occupations set forth in clauses (i), (ii), and (iii) from meeting the requirements of subsection 1(A)(3)(a)-(d) above.

(h) Except, as provided in subparagraph (i), an employee in the computer software field who is paid

on an hourly basis shall be exempt, if *all* of the following apply:

(i) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(ii) The employee is primarily engaged in duties that consist of one or more of the following:

—The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

—The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

—The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(iii) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(iv) The employee's hourly rate of pay is not less than forty-one dollars ($41.00). The Office of Policy, Research and Legislation shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer

Price Index for Urban Wage Earners and Clerical Workers.*

(i) The exemption provided in subparagraph (h) does not apply to an employee if *any* of the following apply:

(i) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(ii) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(iii) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(iv) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

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* Pursuant to Labor Code section 515.5, subdivision (a)(4), the Office of Policy, Research and Legislation, Department of Industrial Relations, has adjusted the minimum hourly rate of pay specified in this subdivision to be $49.77, effective January 1, 2007. This hourly rate of pay is adjusted on October 1 of each year to be effective on January 1, of the following year, and may be obtained at www.dir.ca.gov/IWC or by mail from the Department of Industrial Relations.

(v) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(vi) The employee is engaged in any of the activities set forth in subparagraph (h) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

(B) Except as provided in Sections 1, 2, 4, 10, and 20, and with regard to commercial drivers, Sections 11 and 12, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district. The application of Sections 11 and 12 for commercial drivers employed by governmental entities shall become effective July 1, 2004 or following the expiration date of any valid collective bargaining agreement applicable to such commercial drivers then in effect but, in any event, no later than August 1, 2005. Notwithstanding Section 21, the application of Sections 11 or 12 to public transit bus drivers shall be null and void in the event the IWC or any court of competent jurisdiction invalidates the collective bargaining exemption established by Sections 11 or 12 for those drivers.

(C) The provisions of this order shall not apply to outside salespersons.

(D) The provisions of this order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(E) Except as provided in Sections 4, 10, 11, 12, and 20 through 22, this order shall not be deemed to cover those employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act, 45 U.S.C. Sections 151 et seq.

(F) The provisions of this Order shall not apply to any individual participating in a national service program, such as AmeriCorps, carried out using assistance provided under Section 12571 of Title 42 of the United States Code. (See Stats. 2000, ch. 365, amending Labor Code § 1171.)

**2. DEFINITIONS**

(A) An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

(B) "Commission" means the Industrial Welfare Commission of the State of California.

(C) "Commercial driver" means an employee who operates a vehicle described in subdivision (b) of Section 15210 of the Vehicle Code.

(D) "Division" means the Division of Labor Standards Enforcement of the State of California.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means 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.

(I) "Minor" means, for the purpose of this order, any person under the age of 18 years.

(J) "Outside salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(L) "Public Transit Bus Driver" means a commercial driver who operates a transit bus and is employed by a governmental entity.

(M) "Shift" means designated hours of work by an employee, with a designated beginning time and quitting time.

(N) "Split shift" means a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(O) "Teaching"means, for the purpose of Section 1 of this order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(P) "Transportation Industry" means any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection therewith; and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles.

(Q) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

(R) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day.

(S) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

**3. HOURS AND DAYS OF WORK**

(A) Daily Overtime-General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked

on the seventh (7th) consecutive day of work in a workweek; and

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

(B) Alternative Workweek Schedules

(1) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a 40 hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by the agreement up to 12 hours a day or beyond 40 hours per week shall be paid at one and one-half (1½) times the employee's regular rate of pay. All work performed in excess of 12 hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek agreement shall be paid at double the employee's regular rate of pay. Any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift. Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative

workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime. No hours paid at either one and one-half (1½) or double the regular rate of pay shall be included in determining when 40 hours have been worked for the purpose of computing overtime compensation.

(2) If an employer whose employees have adopted an alternative workweek agreement permitted by this order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee's regular rate of pay for all hours worked in excess of 12 hours for the day the employee is required to work the reduced hours.

(3) An employer shall not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

(4) An employer shall explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision(j) of Section 12940 of the Government Code.

(5) An employer shall make a reasonable effort to find a work schedule not to exceed eight (8) hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this section and who is unable to work the alternative workweek schedule established as the result of that election.

(6) An employer shall be permitted, but not required, to provide a work schedule not to exceed eight (8) hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election.

(7) Arrangements adopted in a secret ballot election held pursuant to this order prior to 1998, or under the rules in effect prior to 1998, and before the performance of the work, shall remain valid after July 1, 2000 provided that the results of the election are reported by the employer to the Office of Policy, Research and Legislation by January 1, 2001, in accordance with the requirements of subsection (C) below (Election Procedures). If an employee was voluntarily working an alternative workweek schedule of not more than ten (10) hours a day as of July 1, 1999, that alternative workweek schedule was based on an individual agreement made after January 1, 1998 between the employee and employer, and the employee submitted, and the employer approved, a written request on or before May 30, 2000 to continue the agreement, the employee may continue to work that alternative workweek schedule without payment of an overtime rate of compensation for the hours provided in the agreement. The employee may revoke his/her voluntary authorization to continue such a schedule with 30 days written notice to the employer. New arrangements can only be entered into pursuant to the provisions of this section.

(C) Election Procedures

Election procedures for the adoption and repeal of alternative workweek schedules require the following:

(1) Each proposal for an alternative workweek schedule shall be in the form of a written agreement

proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(2) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees' work site. For purposes of this subsection, "affected employees in the work unit" may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(3) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least 14 days prior to voting, for the specific purpose of discussing the effects

of the alternative workweek schedule. An employer shall provide that disclosure in a non-English language, as well as in English, if at least five (5) percent of the affected employees primarily speak that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. Failure to comply with this paragraph shall make the election null and void.

(4) Any election to establish or repeal an alternative workweek schedule shall be held at the work site of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section. Upon a complaint by an affected employee, and after an investigation by the labor commissioner, the labor commissioner may require the employer to select a neutral third party to conduct the election.

(5) Any type of alternative workweek schedule that is authorized by the California Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two- thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within 60 days. Upon proper showing of undue hardship, the

Division of Labor Standards Enforcement may grant an extension of time for compliance.

(6) Only secret ballots may be cast by affected employees in the work unit at any election held pursuant to this section. The results of any election conducted pursuant to this section shall be reported by the employer to the Office of Policy, Research and Legislation within 30 days after the results are final, and the report of election results shall be a public document. The report shall include the final tally of the vote, the size of the unit, and the nature of the business of the employer.

(7) Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least 30 days after the announcement of the final results of the election.

(8) Employers shall not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. No employees shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. However, nothing in this section shall prohibit an employer from expressing his/her position concerning that alternative workweek to the affected employees. A violation of this paragraph shall be subject to California Labor Code Section 98 et seq.

(D) One and one-half (1½) times a minor's regular rate of pay shall be paid for all work over 40 hours in any workweek except minors 16 or 17 years old who are not required by law to attend school and may therefore by employed for the same hours as an adult are subject to subsection (A) or (B) and (C) above.

(**VIOLATIONS OF CHILD LABOR LAWS** are subject to civil penalties of from $500 to $10,000 as well as to criminal penalties. Refer to California Labor Code Sections 1285 to 1312 and 1390 to 1399 for additional restrictions on the employment of minors and for descriptions of criminal and civil penalties for violation of the child labor laws. Employers should ask school districts about any required work permits.)

(E) An employee may be employed on seven (7) workdays in one workweek when the total hours of employment during such workweek do not exceed 30 and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

(H) Except as provided in subsections (E) and (G), this section shall not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay

for those employees of not less than 30 percent more than the state minimum wage.

(I) Notwithstanding subsection (H) above, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement pertaining to the hours of work of the employees, the requirement regarding the equivalent of one (1) day's rest in seven (7) (see subsection (G) above) shall apply, unless the agreement expressly provides otherwise.

(J) If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that makeup work time, if performed in the same workweek in which the work time was lost, may not be counted toward computing the total number of hours worked in a day for purposes of the overtime requirements, except for hours in excess of 11 hours of work in one (1) day or 40 hours of work in one (1) workweek. If an employee knows in advance that he/she will be requesting makeup time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make up work time for up to four (4) weeks in advance; provided, however, that the makeup work must be performed in the same week that the work time was lost. An employee shall provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to this subsection. While an employer may inform an employee of this makeup time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make up the work hours within the same workweek pursuant to this subsection.

(K) The daily overtime provision of subsection (A) above shall not apply to ambulance drivers and attendants scheduled for 24-hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one (1) hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule.

(L) 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.

(M) The provisions of this section shall not apply to taxicab drivers.

(N) The provisions of this section shall not apply where any employee of an airline certified by the federal or state government works over 40 hours but not more than 60 hours in a workweek due to a temporary modification in the employee's normal work schedule not required by the employer but arranged at the request of the employee, including but not limited to situations where the employee requests a change in days off or trades days off with another employee.

**4. MINIMUM WAGES**

(A) Every employer shall pay to each employee wages not less than nine dollars ($9.00) per hour for all hours worked, effective July 1, 2014, and not less than

ten dollars ($10.00) per hour for all hours worked, effective January 1, 2016, except:

LEARNERS: Employees during their first 160 hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than 85 percent of the minimum wage rounded to the nearest nickel.

(B) 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.

(C) When an employee works a split shift, one (1) hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

**5. REPORTING TIME PAY**

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the

employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authoties; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

**6. LICENSES FOR DISABLED WORKERS**

(A) A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

(B) A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

(C) All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California Labor Code, Sections 1191 and 1191.5)

**7. RECORDS**

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birth date, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

**8. CASH SHORTAGE AND BREAKAGE**

No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

**9. UNIFORMS AND EQUIPMENT**

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

**NOTE:** This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and

maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

**NOTE:** This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

**10. MEALS AND LODGING**

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

(B) "Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(C) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the

employer's minimum wage obligation, the amounts so credited may not be more than the following:

| **LODGING** | **Effective July 1, 2014** | **Effective January 1, 2016** |
|---|---|---|
| Room occupied alone | $42.33 per week | $47.03 per week |
| Room shared | $34.94 per week | $38.82 per week |
| Apartment – two thirds (2/3) of the ordinary rental value, and in no event more than: | $508.38 per month | $564.81 per month |
| Where a couple are both employed by the employer, two thirds (2/3) of the ordinary rental value, and in no event more than: | $752.02 per month | $835.49 per month |
| **MEALS** | | |
| Breakfast | $3.26 | $3.62 |
| Lunch | $4.47 | $4.97 |
| Dinner | $6.01 | $6.68 |

(D) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received or lodging not used.

(E) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer,

then the employer may not charge rent in excess of the values listed herein.

**11. MEAL PERIODS**

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

(E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

(F) The section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the agreement expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

**12. REST PERIODS**

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

(C) This section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the agreement expressly provides for rest periods for those employees, final and binding

arbitration of disputes concerning application of its rest period provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

**13. CHANGE ROOMS AND RESTING FACILITIES**

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

**NOTE:** This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

**14. SEATS**

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use

such seats when it does not interfere with the performance of their duties.

**15. TEMPERATURE**

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

**16. ELEVATORS**

Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

**17. EXEMPTIONS**

If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature;

or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

**18. FILING REPORTS**

(See California Labor Code, Section 1174(a))

**19. INSPECTION**

(See California Labor Code, Section 1174)

**20. PENALTIES**

(See California Labor Code, Section 1199)

(A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:

(1) Initial Violation — $50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

(2) Subsequent Violations — $100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

(3) The affected employee shall receive payment of all wages recovered.

(B) The labor commissioner may also issue citations pursuant to California Labor Code Section 1197.1 for non-payment of wages for overtime work in violation of this order.

**21. SEPARABILITY**

If the application of any provision of this order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

**22. POSTING OF ORDER**

Every employer shall keep a copy of this order posted in an area frequented by employees where it may be easily read during the workday. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this order and make it available to every employee upon request.

**QUESTIONS ABOUT ENFORCEMENT** of the Industrial Welfare Commission orders and reports of violations should be directed to the Division of Labor Standards Enforcement. A listing of the DLSE offices is on the back of this wage order. Look in the white pages of your telephone directory under CALIFORNIA, State of, Industrial Relations for the address and telephone number of the office nearest you. The

Division has offices in the following cities: Bakersfield, El Centro, Fresno, Long Beach, Los Angeles, Oakland, Redding, Sacramento, Salinas, San Bernardino, San Diego, San Francisco, San Jose, Santa Ana, Santa Barbara, Santa Rosa, Stockton, Van Nuys.

**SUMMARIES IN OTHER LANGUAGES**

**The Department of Industrial Relations will make summaries of wage and hour requirements in this Order available in Spanish, Chinese and certain other languages when it is feasible to do so. Mail your request for such summaries to the Department at: P.O. box 420603, San Francisco, CA 94142-0603.**

**RESUMEN EN OTROS IDIOMAS**

**El Departamento de Relaciones Industriales confeccionara un resumen sobre los requisitos de salario y horario de esta Disposicion en español, chino y algunos otros idiomas cuando sea posible hacerlo. Envie por correo su pedido por dichos resumenes al Departamento a: P.O. box 420603, San Francisco, CA 94142-0603.**

其它文字的摘錄

工業關係處將摘錄本規則中有關工資和工時的規定，用西班牙文、中文印出。其它文字如有需要，也將同樣辦理。如果您有需要，可以來信索閱，請寄到：

**Department of Industrial Relations**
**P.O. box 420603**
**San Francisco, CA 94142-0603**

All complaints are handled confidentially. For further information or to file your complaints, contact the State of California at the following department offices:

**Division of Labor Standards Enforcement (DLSE)**

| **BAKERSFIELD** | **REDDING** | **SAN JOSE** |
|---|---|---|
| Division of Labor Standards Enforcement<br>7718 Meany Ave.<br>Bakersfield, CA 93308<br>661-587-3060 | Division of Labor Standards Enforcement<br>2115 Civic Center Drive, Room 17<br>Redding, CA 96001<br>530-225-2655 | Division of Labor Standards Enforcement<br>100 Paseo De San Antonio, Room 120<br>San Jose, CA 95113<br>408-277-1266 |
| **EL CENTRO** | **SACRAMENTO** | **SANTA ANA** |
| Division of Labor Standards Enforcement<br>1550 W. Main St. | Division of Labor Standards Enforcement<br>2031 Howe Ave, | Division of Labor Standards Enforcement |

El Centro, CA
92643
760-353-0607

Suite 100
Sacramento, CA
95825
916-263-1811

605 West Santa
Ana Blvd., Bldg.
28, Room 625
Santa Ana, CA
92701
714-558-4910

**FRESNO**
Division of Labor
Standards
Enforcement
770 E. Shaw
Ave., Suite 222
Fresno, CA 93710
559-244-5340

**SALINAS**
Division of Labor
Standards
Enforcement
1870 N. Main
Street, Suite 150
Salinas, CA
93906
831-443-3041

**SANTA BARBARA**
Division of
Labor
Standards
Enforcement
411 E. Canon
Perdido, Room 3
Santa Barbara,
CA 93101
805-568-1222

**LONG BEACH**
Division of Labor
Standards
Enforcement
300 Oceangate,
3rd Floor
Long Beach, CA
90802
562-590-5048

**SAN BERNARDINO**
Division of Labor
Standards
Enforcement
464 West 4th
Street, Room 348
San Bernardino,
CA 92401
909-383-4334

**SANTA ROSA**
Division of
Labor
Standards
Enforcement
50 "D" Street,
Suite 360
Santa Rosa, CA
95404
707-576-2362

**LOS ANGELES**
Division of Labor
Standards
Enforcement

**SAN DIEGO**
Division of Labor
Standards
Enforcement

**STOCKTON**
Division of
Labor
Standards

320 W. Fourth St., Suite 450
Los Angeles, CA 90013
213-620-6330

7575 Metropolitan, Room 210
San Diego, CA 92108
619-220-5451

Enforcement
31 E. Channel Street, Room 317
Stockton, CA 95202
209-948-7771

**OAKLAND**
Division of Labor Standards Enforcement
1515 Clay Street, Room 801
Oakland, CA 94612
510-622-3273

**SAN FRANCISCO**
Division of Labor Standards Enforcement
455 Golden Gate Ave. 10th Floor
San Francisco, CA 94102
415-703-5300

**VAN NUYS**
Division of Labor Standards Enforcement
6150 Van Nuys Boulevard, Room 206
Van Nuys, CA 91401
818-901-5315

**SAN FRANCISCO – HEADQUARTERS**
Division of Labor Standards Enforcement 455 Golden Gate Ave. 9th Floor
San Francisco, CA 94102
415-703-4810

EMPLOYERS:

Do not send copies of your alternative workweek election ballots or election procedures.

Only the results of the alternative workweek election shall be mailed to:

Department of Industrial Relations
Office of Policy, Research and Legislation
P.O. Box 420603
San Francisco, CA
94142-0603
(415) 703-4780

Prevailing Wage Hotline (415) 703-4774

## APPENDIX H

R. Rex Parris (SBN 96567)
Alexander R. Wheeler (SBN 239541)
Jason P. Fowler (SBN 239426)
Douglas Han (SBN 232858)
Kitty Szeto (SBN 258136)
**R. REX PARRIS LAW FIRM**
42220 10th Street West, Suite 109
Lancaster, California 93534
Telephone: (661) 874-4238
Facsimile: (661) 949-7524

*Attorneys for* Plaintiffs and the Proposed Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES**

**Case No.: BC437399**

**[Filed May 7, 2010]**

BRANDON CAMPBELL and RALPH MALDONADO; individually, and on behalf of members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA")

Plaintiffs,

vs.

| | |
|---|---|
| VITRAN EXPRESS, INC., a Pennsylvania corporation formerly known as VITRAN EXPRESS WEST, INC., a Nevada corporation; and DOES 1 through 100, inclusive | ) |
| Defendants. | ) |

**CLASS ACTION & ENFORCEMENT UNDER THE PRIVATE ATTORNEYS GENERAL ACT, CALIFORNIA LABOR CODE §§ 2698 ET SEQ.**

(1) Violation of California Labor Code §§ 226.7 and 512(a)
(2) Violation of California Labor Code § 226.7
(3) Violation of California Labor Code § 204
(4) Violation of California Labor Code §§ 201 and 202
(5) Violation of California Labor Code § 226(a)
(6) Violation of California Labor Code § 1174(d)
(7) Violation of California Business & Professions Code § 17200

**DEMAND FOR JURY TRIAL**

1. This class action is brought pursuant to California Code of Civil Procedure section 382. The monetary damages and restitution sought by Plaintiffs exceed the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. The amount in controversy for each class representative, including claims for compensatory damages, interest, and pro rata share of attorneys' fees, is less than $75,000. The maximum potential recovery as a result of this action is less than $5,000,000.

2. This Court has jurisdiction over this action pursuant to the California Constitution, Article VI, section 10, which grants the Superior Court "original jurisdiction in all causes except those given by statute to other courts." The statutes under which this action is brought do not specify any other basis for jurisdiction.

3. This Court has jurisdiction over all Defendants because, upon information and belief, each party is either a citizen of California, has sufficient minimum contacts in California, or otherwise intentionally avails itself of the California market so as to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

4. Venue is proper in this Court because, upon information and belief, the named Defendants reside, transact business, or have offices in this county and the acts and omissions alleged herein took place in this county. In addition, Plaintiff Ralph Maldonado resides in the County of Los Angeles and has worked at a Vitran Express, Inc., while residing in the County of Los Angeles for the duration of his employment.

**PARTIES**

5. Plaintiff Brandon Campbell ("Campbell") is an individual residing in the State of California.

6. Plaintiff Ralph Maldonado ("Maldonado") is an individual residing in the State of California.

7. Defendant Vitran Express, Inc. was a corporation organized and existing under the laws of the State of Nevada, and transacts business

throughout the State of California, including the County of Los Angeles. On December 31, 2009, Vitran Express, Inc. reorganized into the corporate entity Vitran Express, Inc., a corporation organized and existing under the law of the State of Pennsylvania, and transacts business throughout the State of California, including the County of Los Angeles. (hereinafter "Vitran Express"). Plaintiffs are informed and believe and thereon allege that Vitran Express, Inc. assumed all liabilities of Vitran Express West, Inc. and is therefore liable for Vitran Express West, Inc.'s Labor Code violations alleged herein.

8. Defendant Vitran Express, Inc. owns and operates approximately five (5) Vitran Express service centers within California, including in the County of San Bernardino.

9. At all relevant times, Vitran Express, Inc. was the "employer" of Plaintiff and the other class members within the meaning of all applicable state laws and statutes.

10. At all times herein relevant, Vitran Express, Inc. and Does 1 through 100, and each of them, were the agents, partners, joint venturers, representatives, servants, employees, successors-in-interest, co-conspirators and assigns, each of the other, and at all times relevant hereto were acting within the course and scope of their authority as such agents, partners, joint venturers, representatives, servants, employees, successors, co-conspirators and assigns, and that all acts or omissions alleged herein were duly committed with the ratification, knowledge, permission, encouragement, authorization and consent of each defendant designated herein.

11. The true names and capacities, whether corporate, associate, individual or otherwise, of defendants Does 1 through 100, inclusive, are unknown to Plaintiff who sues said defendants by such fictitious names. Plaintiff is informed and believes, and based on that information and belief alleges, that each of the defendants designated as a Doe is legally responsible for the events and happenings referred to in this complaint, and unlawfully caused the injuries and damages to Plaintiff and the other class members alleged in this complaint. Plaintiff will seek leave of court to amend this Complaint to show the true names and capacities when the same have been ascertained.

12. Vitran Express, Inc. and Does 1 through 100 will hereinafter collectively be referred to as Defendants.

13. California Labor Code sections 2699 et seq., the "Labor Code Private Attorneys Generals Act" ("PAGA"), authorizes aggrieved employees to sue directly for various civil penalties under the California Labor Code.

14. Plaintiffs have timely provided notice to the California Labor and Workforce Development Agency ("LWDA") and to Defendants, pursuant to California Labor Code section 2699.3(a).

## FACTUAL ALLEGATIONS

15. Defendants employed Campbell as a "city driver" from approximately February 2009 to approximately January 2010 in the State of California

16. Defendants employed Maldonado as a "city driver" from approximately October 2008 to

approximately December 2009 in the State of California.

17. Defendants had the authority to hire and, terminate Plaintiffs and the other class members; to set work rules and conditions governing Plaintiffs' and the other class members' employment; and, to supervise their daily employment activities.

18. Defendants directly hired and paid wages and benefits to Plaintiffs and the other class members.

19. Plaintiffs are informed and believe, and based thereon allege, that Defendants failed to provide the Plaintiffs and the other class members the required rest and meal periods during the relevant time period as required under the Industrial Welfare Commission Wage Orders and thus they are entitled to any and all applicable penalties.

20. Plaintiffs are informed and believe, and based thereon allege, that Defendants knew or should have known that Plaintiffs and the other class members were entitled to receive all meal periods or payment of one additional hour of pay at Plaintiffs' and the other class members' regular rate of pay when a meal period was missed.

21. Plaintiffs are informed and believe, and based thereon allege, that Defendants knew or should have known that Plaintiffs and the other class members were entitled to receive all rest periods or payment of one additional hour of pay at Plaintiffs' and the other class members' regular rate of pay when a rest period was missed.

22. Plaintiffs are informed and believe, and based thereon allege, that Defendants knew or should have known that Plaintiffs and the other class members were entitled to receive all wages owed to them upon discharge or resignation.

23. Plaintiffs are informed and believe, and based thereon allege, that Defendants knew or should have known that Plaintiffs and the other class members were entitled to receive complete and accurate wage statements in accordance with California law.

24. Plaintiffs are informed and believe, and based thereon allege, that Defendants knew or should have known that they had a duty to compensate Plaintiffs and the other class members pursuant to California law, and that Defendants had the financial ability to pay such compensation, but willfully, knowingly, and intentionally failed to do so, and falsely represented to Plaintiffs and the other class members that they were properly denied wages, all in order to increase Defendants' profits.

25. At all material times set forth herein, Defendants regularly and consistently failed to provide uninterrupted meal and rest periods to Plaintiffs and the other class members.

26. At all material times set forth herein, Defendants regularly and consistently failed to provide complete and accurate wage statements to Plaintiffs and the other class members.

27. At all material times set forth herein, Defendants regularly and consistently failed to pay Plaintiffs and the other class members all wages owed to them upon discharge or resignation.

## CLASS ACTION ALLEGATIONS

28. Plaintiffs bring this action on their own behalf and on behalf of all other members of the general public similarly situated, and thus, seeks class certification under Code of Civil Procedure § 382.

29. The proposed class is defined as follows:

> All current and former "City Drivers" or "Local Drivers" and employees in similar job titles, who worked for Vitran Express, Inc. within the State of California that were not paid premium wages for working through rest and meal breaks at any time during the period of four years before the filing of this Complaint to final judgment.

30. Plaintiffs reserve the right to establish subclasses as appropriate.

31. The class is ascertainable and there is a well-defined community of interest in the litigation:

a. The class members are so numerous that joinder of all class members is impracticable. The membership of the entire class is unknown to Plaintiffs at this time; however, the class is estimated to be greater than one-hundred (100) individuals and the identity of such membership is readily ascertainable by inspection of Vitran Express, Inc. employment records.

b. Plaintiffs' claims are typical of all other class members' as demonstrated herein. Plaintiffs will fairly and adequately protect the interests of the other class members with

whom they have a well defined community of interest.

c. Plaintiffs will fairly and adequately protect the interests of each class member, with whom they have a well-defined community of interest and typicality of claims, as demonstrated herein. Plaintiffs have no interest that is antagonistic to the other class members. Plaintiffs' attorneys, the proposed class counsel, are versed in the rules governing class action discovery, certification, and settlement. Plaintiffs have incurred, and during the pendency of this action will continue to incur, costs and attorneys' fees, that have been, are, and will be necessarily expended for the prosecution of this action for the substantial benefit of each class member.

d. A class action is superior to other available methods for the fair and efficient adjudication of this litigation because individual joinder of all class members is impractical.

e. Certification of this lawsuit as a class action will advance public policy objectives. Employers of this great state violate employment and labor laws every day. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. However, class actions provide the class members who are not named in the complaint anonymity that allows for the vindication of their rights.

32. There are common questions of law and fact as to the class members that predominate over questions affecting only individual members. The following common questions of law or fact, among others, exists as to the members of the class:

a. Whether Defendants deprived Plaintiffs and class members of meal periods or required Plaintiffs and class members to work during meal periods without compensation

b. Whether Defendant deprived Plaintiffs and class members a second meal period or required Plaintiffs and class members to work during their second meal periods every time they were required to work more than 10 hours per day;

c. Whether Defendants deprived Plaintiffs and class members of rest periods or required Plaintiffs and class members to work during rest periods without compensation;

d. Whether Defendants failed to pay all wages due to Plaintiffs and the other class members within the required time upon their discharge or resignation;

e. Whether Defendants complied with wage reporting as required by the California Labor Code; including, but not limited to, Section 226;

f. Whether Defendants' conduct was willful or reckless;

g. Whether Defendants engaged in unfair business practices in violation of California Business & Professions Code sections 17200 et seq.;

h. The appropriate amount of damages, restitution, and/or monetary penalties resulting from Defendants' violation of California law; and

i. Whether Plaintiffs and the class are entitled to compensatory damages pursuant to the California Labor Code.

**PAGA ALLEGATIONS**

33. At all times herein set forth, PAGA was applicable to Plaintiffs' employment by Defendants.

34. At all times herein set forth, PAGA provides that any provision of law under the California Labor Code that provides for a civil penalty to be assessed and collected by the LWDA for violations of the California Labor Code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself and other current or former employees pursuant to procedures outlined in California Labor Code section 2699.3.

35. Pursuant to PAGA, a civil action under PAGA may be brought by an "aggrieved employee," who is any person that was employed by the alleged violator and against whom one or more of the alleged violations was committed.

36. Plaintiffs were employed by Defendants and the alleged violations were committed against them

during their time of employment and they are, therefore, aggrieved employees. Plaintiffs and other employees are "aggrieved employees" as defined by California Labor Code section 2699(c) in that they are all current or former employees of Defendants, and one or more of the alleged violations were committed against them.

37. Pursuant to California Labor Code sections 2699.3 and 2699.5, an aggrieved employee, including Plaintiffs, may pursue a civil action arising under PAGA after the following requirements have been met:

a. The aggrieved employee shall give written notice by certified mail (hereinafter "Employee's Notice") to the LWDA and the employer of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

b. The LWDA shall provide notice (hereinafter "LWDA Notice") to the employer and the aggrieved employee by certified mail that it does not intend to investigate the alleged violation within thirty (30) calendar days of the postmark date of the Employee's Notice. Upon receipt of the LWDA Notice, or if the LWDA Notice is not provided within thirty-three (33) calendar days of the postmark date of the Employee's Notice, the aggrieved employee may commence a civil action pursuant to California Labor Code section 2699 to recover civil penalties in addition to any other penalties to which the employee may be entitled.

38. On April 22, 2009, Plaintiff Campbell provided written notice by certified mail to the LWDA and to Defendant Vitran Express West, Inc. of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

39. On May 4, 2010, Plaintiff Campbell provided written notice by certified mail to the LWDA and to Defendant Vitran Express, Inc. of the specific provision of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

40. On May 4, 2010, Plaintiff Maldonado provided written notice by certified mail to the LWDA and to Defendant Vitran Express, Inc. of the specific provision of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

**FIRST CAUSE OF ACTION**

**(Violation of California Labor Code §§ 226.7 and 512(a))**

**(Against VITRAN EXPRESS, INC. and DOES 1 through 100)**

41. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 40, and each and every part thereof with the same force and effect as though fully set forth herein.

42. At all times herein mentioned, the Industrial Welfare Commission Order and California Labor Code sections 226.7 and 512(a) were applicable to Plaintiffs' and the other class members' employment by Defendants.

43. Pursuant to California Labor Code section 226.7, no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

44. Pursuant to California Labor Code section 512(a), an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

45. Pursuant to California Labor Code section 512(a), an employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

46. As alleged herein, Defendants routinely interrupted and/or failed to permit, authorize and/or provide Plaintiffs' and class members' meal breaks. By these actions, Defendants violated California Labor Code sections 226.7(a) and 512(a), and is liable to Plaintiffs and the Class.

47. During the relevant time period, Plaintiffs and the other class members who were scheduled to work for a period of time in excess of six (6) hours were required to work for a period of time in excess of six (6) hours, and were required to work for periods longer than five (5) hours without an uninterrupted meal period of not less than thirty (30) minutes.

48. During the relevant time period, Plaintiffs and the other class members who were scheduled to work in excess of ten (10) hours but not longer than twelve (12) hours, and who did not waive their legally-mandated meal periods by mutual consent were required to work in excess of ten (10) hours without receiving a second uninterrupted meal period of not less than thirty (30) minutes.

49. During the relevant time period, Plaintiffs and the other class members were scheduled to work for a period of time in excess of twelve (12) hours was required to work for periods longer than ten (10) hours without a second uninterrupted meal period of not less than thirty (30) minutes.

50. During the relevant time period, Defendants intentionally and willfully required Plaintiffs and the other class members to work during meal periods and failed to pay Plaintiffs and the other class members the full meal period premium for work performed during meal periods.

51. Defendants' conduct violates applicable Industrial Welfare Commission Wage Orders, and California Labor Code sections 226.7 and 512(a).

52. Pursuant to California Labor Code section 226.7 (b), Plaintiffs and the other class members are

entitled to recover from Defendants one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

**SECOND CAUSE OF ACTION**

**(Violation of California Labor Code §§ 226.7)**

**(Against VITRAN EXPRESS, INC. and DOES 1 through 100)**

53. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 52, and each and every part thereof with the same force and effect as though fully set forth herein.

54. At all times herein set forth, the California Industrial Welfare Commission Order and California Labor Code section 226.7 was applicable to Plaintiffs' and the other class members' employment by Defendants.

55. Pursuant to California Labor Code section 226.7, no employer shall require an employee to work during any rest period mandated by an applicable order of the California Industrial Welfare Commission.

56. As alleged herein, Defendants routinely interrupted and/or failed to permit, authorize and/or provide Plaintiffs' and class members' rest breaks. By these actions, Defendants violated California Labor Code section 226.7(a) and is liable to Plaintiffs and the Class.

57. During the relevant time period, Defendants required Plaintiffs and the other class members of the

class to work in excess of four (4) hours without providing them a second ten (10) minute rest period.

58. During the relevant time period, Defendants required Plaintiffs and the other class members to work an additional four (4) hours without providing a second ten (10) minute rest period.

59. During the relevant time period, Defendants willfully required Plaintiffs and the other class members to work during rest periods and failed to pay Plaintiffs and the other class members the full rest period premium for work performed during rest periods.

60. Defendants' conduct violates applicable Industrial Welfare Commission Wage Orders, and California Labor Code section 226.7.

61. Pursuant to California Labor Code section 226.7(b), Plaintiffs and the other class members of the class are entitled to recover from Defendants one additional hour of pay at the employees' regular hourly rate of compensation for each work day that the rest period was not provided.

**THIRD CAUSE OF ACTION**

**(Violation of California Labor Code § 204)**

**(Against VITRAN EXPRESS, INC. and DOES 1 through 100)**

62. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 61, and each and every part thereof with the same force and effect as though fully set forth herein.

63. Pursuant to California Labor Code section 204(b)(1), all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

64. During the relevant time period, Defendants intentionally and willfully failed to pay Plaintiffs and the other class members the overtime and/or regular wages due to them, within any time period permissible under California Labor Code section 204. Therefore, Plaintiffs seek civil penalties pursuant to PAGA.

**FOURTH CAUSE OF ACTION**

**(Violation of California Labor Code §§ 201 and 202)**

**(Against VITRAN EXPRESS, INC. and DOES 1 through 100)**

65. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 64, and each and every part thereof with the same force and effect as though fully set forth herein.

66. Pursuant to California Labor Code sections 201 and 202, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and if an employee quits his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

67. During the relevant time period, Defendants intentionally and willfully failed to pay Plaintiffs and the other class members their wages, earned and unpaid, within seventy-two (72) hours of Plaintiffs and the other class members leaving Defendants' employ.

68. Defendants' failure to pay Plaintiffs and the other class members their wages, earned and unpaid, within seventy-two (72) hours of her leaving Defendants' employ, is in violation of California Labor Code sections 201 and 202.

69. Pursuant to California Labor Code section 203, if an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201 and 202, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action is commenced; but the wages shall not continue for more than thirty (30) days.

70. Plaintiffs and the other class members are entitled to recover the statutory penalty for each day they were not paid, at her regular hourly rate of pay, up to thirty (30) days maximum pursuant to California Labor Code section 203.

**FIFTH CAUSE OF ACTION**

**(Violation of California Labor Code § 226(a))**

**(Against VITRAN EXPRESS, INC. and DOES 1 through 100)**

71. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 70, and

each and every part thereof with the same force and effect as though fully set forth herein.

72. Pursuant to California Labor Code section 226(a), every employer shall furnish each of his or her employees an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. The deductions made from payments of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement or a record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

73. Defendants intentionally and willfully failed to provide Plaintiffs and the other class members with complete and accurate wage statements. The deficiencies included one or more of the following: the failure to include the total number of hours worked by Plaintiff and the other class members, the failure to include the hourly rate, the failure to provide their social security numbers.

74. As a result of Defendants' violation of California Labor Code section 226(a), Plaintiffs and the other class members have suffered injury and damage to their statutorily-protected rights.

75. More specifically, Plaintiffs and the other class members have been injured by Defendants' intentional and willful violation of California Labor Code section 226(a) because they were denied both their legal right to receive, and their protected interest in receiving; accurate and itemized wage statements pursuant to California Labor Code section 226(a).

76. Plaintiffs and the other class members are entitled to recover from Defendants the greater of their actual damages caused by Defendants' failure to comply with California Labor Code section 226(a), or an aggregate penalty not exceeding four thousand dollars per employee.

**SIXTH CAUSE OF ACTION**

**(Violation of California Labor Code § 1174(d))**

**(Against VITRAN EXPRESS, INC. and DOES 1 through 100)**

77. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 76 , and each and every part thereof with the same force and effect as though fully set forth herein.

78. Pursuant to California Labor Code section 1174(d), an employer shall keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the

number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years.

79. Defendants have intentionally and willfully failed to keep accurate and complete payroll records showing the hours worked daily and the wages paid, to Plaintiffs and the other class members.

80. As a result of Defendants' violation of California Labor Code section 1174(d), Plaintiffs and the other class members have suffered injury and damage to their statutorily-protected rights.

81. More specifically, Plaintiffs and the other class members have been injured by Defendants' intentional and willful violation of California Labor Code section 1174(d) because they were denied both their legal right and protected interest, in having available, accurate and complete payroll records pursuant to California Labor Code section 1174(d). Therefore, Plaintiffs seek civil penalties for violation of this section pursuant to PAGA.

**SEVENTH CAUSE OF ACTION**

**(Violation of California Business & Professions Code § 17200 et seq.)**

**(Against VITRAN EXPRESS, INC. and DOES 1 through 100)**

82. Plaintiffs incorporates by reference the allegations contained in paragraphs 1 through 81, and

each and every part thereof with the same force and effect as though fully set forth herein.

83. Defendants' conduct, as alleged in this complaint, has been, and continues to be, unfair, unlawful and harmful to Plaintiffs and the other class members, and Defendants' competitors. Accordingly, Plaintiffs and the other class members seek to enforce important rights affecting the public interest within the meaning of Code of Civil Procedure section 1021.5.

84. Defendants' activities as alleged herein are violations of California law, and constitute unlawful business acts and practices in violation of California Business & Professions Code section 17200 et seq.

85. A violation of California Business & Professions Code section 17200 et seq. may be predicated on the violation of any state or federal law. As described herein, Defendants violated California Labor Code sections 201, 204, 212, 213, 226(a), 226.7, 512(a), and 1174(d).

86. As a result the herein described violations of California law, Defendants unlawfully gained an unfair advantage over other businesses.

87. Plaintiffs and the other class members have suffered pecuniary loss by Defendants' unlawful business acts and practices alleged herein.

88. Pursuant to California Business & Professions Code sections 17200 et seq., Plaintiffs and the other class members are entitled to restitution of the wages and other monies wrongfully withheld and retained by Defendants pursuant to California Labor Code § 512(a).

89. Pursuant to California Business & Professions Code section 17200 et seq., injunctive relief is necessary to prevent Defendants from continuing to engage in the unfair business practices as alleged herein. Plaintiffs are informed and believe that Defendants have committed and will continue to commit the above-described unlawful acts unless restrained or enjoined by this Court. Unless the relief prayed for below is granted, a multiplicity of actions will result. Plaintiffs and the other class members have no plain, speedy, or adequate remedy at law, in that pecuniary compensation alone would not afford adequate and complete relief. The above-described acts will cause great and irreparable damage to Plaintiffs and the other class members unless Defendant is restrained from committing further illegal acts.

90. Plaintiffs and the other class members are entitled to an award of attorneys' fees and costs pursuant to California Code of Civil Procedure section 1021.5 and other applicable laws.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of all other members of the public similarly situated, prays for relief and judgment against Defendants, jointly and severally, as follows:

Class Certification

1. That this action be certified as a class action;

2. That Plaintiffs be appointed as the representative of the class;

3. That counsel for Plaintiffs be appointed as class counsel;

4. That Defendants provide to class counsel, immediately upon its appointment, the names and most current contact information (address and telephone numbers) of all class members.

As to the First Cause of Action

5. For all actual, consequential, and incidental losses and damages, according to proof;

6. For premium wages pursuant to California Labor Code section 226.7(b);

7. For pre-judgment interest on any unpaid wages from the date such amounts were due;

8. For civil penalties pursuant to California Labor Code sections 2699(f) and (g) in the amount of $100 dollars for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code sections 226.7 and 512;

9. For reasonable attorneys' fees and costs of suit incurred herein; and

10. For such other and further relief as the court may deem just and proper.

As to the Second Cause of Action

11. For all actual, consequential, and incidental losses and damages, according to proof;

12. For premium wages pursuant to California Labor Code section 226.7(b);

13. For pre-judgment interest on any unpaid wages from the date such amounts were due;

14. For civil penalties pursuant to California Labor Code sections 2699(f) and (g) in the amount of $100 dollars for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code section 226.7

15. For such other and further relief as the court may deem just and proper.

As to the Third Cause of Action

16. For actual, consequential and incidental losses and damages, according to proof;

17. For pre-judgment interest on any untimely paid compensation, from the date such amounts were due;

18. For reasonable attorneys' fees and costs of suit incurred herein;

19. For civil penalties pursuant to California Labor Code sections 2699(f) and (g) in the amount of $100 dollars for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code section 204; and

20. For such other and further relief as the court may deem just and proper.

As to the Fourth Cause of Action

21. For actual, consequential and incidental losses and damages, according to proof;

22. For statutory penalties pursuant to California Labor Code section 203 for Plaintiff and all other class members who have left Defendants' employ;

23. For reasonable attorneys' fees and costs of suit incurred herein;

24. For civil penalties pursuant to California Labor Code sections 2699(f) and (g) in the amount of $100 dollars for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code sections 201, 202, and 203; and

25. For such other and further relief as the court may deem just and proper.

As to the Fifth Cause of Action

26. For actual, consequential and incidental losses and damages, according to proof;

27. For statutory penalties pursuant to California Labor Code section 226(e);

28. For injunctive relief to ensure compliance with this section, pursuant to California Labor Code section 226(g);

29. For reasonable attorneys' fees and costs of suit incurred herein pursuant to California Labor Code section 226(e);

30. For civil penalties pursuant to California Labor Code sections 2699(f) and (g) in the amount of $100 dollars for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code section 226(a); and

31. For such other and further relief as the court may deem just and proper.

As to the Sixth Cause of Action

32. For actual, consequential and incidental losses and damages, according to proof;

33. For statutory penalties pursuant to California Labor Code section 1174.5;

34. For reasonable attorneys' fees and costs of suit incurred herein;

35. For civil penalties pursuant to California Labor Code sections 2699(f) and (g) in the amount of $100 dollars for each violation per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation, plus costs and attorneys' fees for violation of California Labor Code section 1174(d); and

36. For such other and further relief as the court may deem just and proper.

As to the Seventh Cause of Action

37. For restitution of unpaid wages and other monies wrongfully withheld and retained by Defendants to Plaintiff and the other class members and prejudgment interest from the day such amount were due and payable;

38. For reasonable attorneys' fees and costs of suit incurred herein that Plaintiff and the other class members are entitled to recover under California Code of Civil Procedure section 1021.5.

39. For injunctive relief to ensure compliance with this section, pursuant to California Business & Professions Code section 17200 et seq.; and

40. For such other and further relief as the court may deem just and proper.

Dated: May 4, 2010 **R. REX PARRIS LAW FIRM**

By: /s/Douglas Han
Douglas Han
*Attorneys for Plaintiffs* and the Proposed Class

**DEMAND FOR JURY TRIAL**

Plaintiffs, individually and on behalf of the members of the public similarly situated, hereby demand a trial by a jury.

Dated: May 4, 2010 **R. REX PARRIS LAW FIRM**

By: /s/Douglas Han
Douglas Han
*Attorneys for* Plaintiffs and the Proposed Class

## APPENDIX I

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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**Case No. 2:11-cv-05029-RGK-SH**

**[Filed April 26, 2012]**

BRANDON CAMPBELL and RALPH MALDONADO; individually, and on behalf of members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA")

Plaintiffs,

v.

| | |
|---|---|
| VITRAN EXPRESS, INC., a Pennsylvania corporation formerly known as VITRAN EXPRESS WEST, INC., a Nevada corporation; and DOES 1 through 100, inclusive | ) |
| Defendant. | ) |

**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS, OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT**

| | |
|---|---|
| Complaint Filed: | May 7, 2010 |
| Trial Date: | None set |
| Judge: | Hon. Judge R. Gary Klausner |

| | |
|---|---|
| DATE: | May 29, 2012 |
| TIME: | 9:00 a.m. |
| DEPT: | 850 |

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## I. INTRODUCTION

Plaintiffs assert several claims in their putative class action, all of which are based on alleged violations of California's unique laws governing meal and rest breaks. However, recent decisions by the U.S. Supreme Court, the Ninth Circuit, and the Southern and Central Districts of California provide this Court with ample authority to find that, as a matter of law, all of Plaintiffs' claims are preempted by the Federal Aviation Administration Authorization Act (the "FAAAA").[1]

## II. BACKGROUND

### A. Plaintiffs Allege that Vitran's Purported Violations Are a Result of Plaintiffs' Scheduled Routes.

This putative class action arises out of an alleged failure to provide timely meal and rest breaks. *UF 1*. Plaintiffs Brandon Campbell and Ralph Maldonado (the "Plaintiffs") allege that they were employed as city truck drivers with Vitran from approximately February 2009 to January 2010, and from approximately October 2008 to December 2009, respectively. *UF 2*. Plaintiffs also claim that, throughout their employment, Vitran intentionally and willfully required Plaintiffs to work during their meal and rest periods. *UF 3*. Plaintiffs' *Complaint* alleges seven separate causes of action, all of which stem from Vitran's alleged violation of California's meal and rest break laws, and thus all are preempted by the FAAAA. *UF 1*.

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[1] On April 2, 2012, the Parties met and conferred about the instant motion, as required by Local Rule 7-3. *UF 49*.

While this case was pending in California Superior Court, Plaintiffs asserted the following allegations:

> As to the meal and rest breaks, pre-lawsuit investigations revealed that Vitran's practice of pressuring its drivers to make faster pick-ups/deliveries and overloading its drivers' workload effectively failed to permit the drivers from taking proper meal or rest breaks. Due to the tight delivery schedules, drivers were only able to take a rest break when waiting for their cargo to load and unload. Any meal breaks were either foregone or were taken while driving. *UF 5*.

Plaintiffs also made the following assertions in Superior Court in support of their motion to compel further responses:

> Here, Plaintiffs are not concerned with *when or how* the meal and rest breaks were provided, but challenges Vitran's failure to make either rest breaks or meal breaks available by its practice of pressuring Plaintiffs and the class members to be more efficient in delivering goods which discouraged and prevented Day Drivers from taking both rest and meal breaks. Accordingly, the facts of this case and Vitran's employment practices are analogous to the *Cicairos* case. …
>
> Similarly, Vitran's supervisors pressured Plaintiffs and the class members into being more efficient with their pick-up and delivery schedule and were constantly pressured by their supervisors to work faster. As a result, Plaintiffs and the class members frequently missed meal breaks and hardly ever

> received rest breaks. In practice, Vitran failed to permit a proper meal and rest breaks . . . . *UF 5*.

As such, Plaintiffs' allegations clearly assert that Vitran's purported violations are a result of Plaintiffs' scheduled routes that allegedly prevented them from taking meal and rest breaks at the rigid times required by California law. *Id*.

**B. Plaintiffs' Testimony Provides Further, Undisputed Material Facts that Their Claims Are Based on a Theory that Vitran Allegedly Scheduled Their Delivery Routes such that They Were Unable to Take Meal and Rest Breaks as Required By California Law.**

Although this Court does not need to consider additional facts to dismiss all of Plaintiffs' claims, Vitran submits additional, undisputed material facts that the Plaintiffs' claims are preempted. Indeed, Plaintiffs' deposition testimony further demonstrates that the thrust of their claims are that Vitran's purported violations were a result of their scheduled routes.[2]

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[2] In the *Brinker* decision, the California Supreme Court recently clarified that, according to California's unique meal break laws, while an employer must provide an employee with the opportunity to take a 30 minute, duty-free meal break, the employer need not ensure that such a break is taken. *Brinker v. Sup. Ct.*, 2012 WL 1216356, No. S166350 at *18 (Cal. Apr. 12, 2012)

**1. Plaintiff Campbell Testified that His Scheduled Routes Precluded Him from Taking Meal and Rest Breaks.**

Plaintiff Campbell testified at his deposition that due to time pressures from Vitran management, his scheduled routes did not allow him to take rest breaks:

Q. Yeah. Did anybody say, The reason we don't get our [rest] breaks is --
A. Because you're always -- always moving, always on the go. Shawn don't give you time to -- don't give you time to breathe.
Q. Okay.
A. He -- he wants the freight in and out so he can go home. That's all he was worried about, going home. *UF 6, Exh. B, 43:12-20.*

Q. What was the reason you couldn't get your [rest] breaks?
A. Always moving, always on the go. You got one stop, he's calling you, What -- what are you doing? What's taking so long? Hurry up. *UF 6, Exh. B at 44:5-9.*

Q. Yeah. Did he push you so that you didn't have time to take [rest] breaks, Steve?
A. Well, you don't -- you don't have time for breaks. You're going from pickup to pickup to pickup.
Q. All right.
A. And then once you're done with your pickups, you got to get back in and re- -- bring -- the freight's got to be there by a certain time.

Q. Did you ever -- did you ever say, when they said you need to go someplace, I need to take a break?
A. Yeah.
Q. Did -- and what -- who did you say that to?
A. To Shawn.
Q. And did you ever say that to Steve?
A. Yes.
Q. And what did Steve say?
A. He says, Try to work it in, but I need you to get here; I need you to get here before they close.
Q. So he told you to try to work in the break?
A. Yeah. *Id. at 45:3-25.*

Campbell also testified that due to time pressures from Vitran management, his scheduled routes did not allow him to take meal breaks:

Q. So did you notify dispatch every day, I can't take a lunch?
A. I would ask somebody to take a lunch. They – You got – you got to move, get hot; you're killing me. *Id. at 55:14-18.*

Q. Now, do you remember Mr. Stalnaker being present when there was a discussion of lunch breaks at any meeting other than the one that was on 3/27?
A. I -- I -- yes, I think -- yes, I do.
Q. All right. When was that?
A. Well, I'm pretty sure it would be these -- these -- these meetings on the fourth or sixth hour. Because drivers would complain, you can't take your lunch between your fourth and sixth hour

because that's when you're doing your deliveries, and dispatch won't let you. *Id. at 59:10-20.*

Q. So why didn't you take lunch?
MR. HAN: Objection; assumes facts not in evidence –
BY MR. JONES:
Q. You can answer.
MR. HAN: -- lacks foundation. Go ahead.
THE WITNESS: Because you have to go do the pickups. Because you pick up -- as soon as you're ready, he's got pickups ready to go. *Id. at 148:22-149:7.*

Q. Did you ever try to take a lunch break after you signed this document?
A. I asked him, yes.
Q. Okay. How soon after you received this did you ask to take a lunch break?
A. The next day.
Q. And what did he say?
A. He says -- he said, You got to get hot, got to get moving. He says -- you know, he told me before, You go without you taking lunches. *Id. at 197:12-21.*

**2. Plaintiff Maldonado Also Testified that His Scheduled Routes Precluded Him from Taking Meal and Rest Breaks.**

Plaintiff Maldonado also testified that due to time pressures from Vitran management, his scheduled routes did not allow him to take rest breaks:

Q. Okay. Did Shawn tell you you couldn't take rest breaks?

A. Yes. It's -- it was all tied together. Make your deliveries first; call me the minute you finish.
Q. Okay. Did he ever tell you you couldn't take a rest break between deliveries?
A. Yes.

Q. He tell you that specifically?
A. He told me, Get the job done. Get the job done before anything, anything. And -- when someone goes, "Get the job done," as an adult, I understand what that means. *UF 6, Exh. C at 132:3-15.*

Plaintiff Maldonado further testified that due to time pressures from Vitran management, his scheduled routes did not allow him to take meal breaks:

Q. Did you ever ask the dispatcher -- say to the dispatcher, I need -- I'm going to take my lunch?
A. Yes.
Q. Okay. And when did you do that?
A. As soon as I finished my deliveries.
Q. So as soon as you finished your deliveries, you would tell the dispatcher, I need to take lunch; is that correct?
A. Yes.
Q. And the dispatcher never allowed you to take a lunch; correct?
A. No. You need to get hot. That was his word.
Q. Pardon?
A. His word was, You need to get hot and start making pickups.
Q. So you knew this was going to happen every day; correct?
A. Yes. *Id. at 75:9-76:3.*

Q. Okay. And who did you complain to [about not being able to take lunches]?
A. To the terminal manager. The terminal manager.
Q. Mr. Stalnaker?
A. Yes.
Q. And what did you say to Mr. Stalnaker?
A. I told him when I can take my breaks – my lunch.
Q. And what did he say?
A. No.
Q. What did he say specifically? He didn't just say no.
A. He just said, We need to make the pickups first. And then after everything was done, then we could take a lunch. *Id. at 79:20-80:9.*

Q. Okay. This was something -- who conducted this meeting every week?
A. Shawn.
Q. Shawn. And were lunches discussed at that meeting?
A. Yes.
Q. And what did he say?
A. You need to get hot. That's too bad.
Q. What do you mean, "When we get hot"?
A. You need to get hot. You got to work faster, faster, faster. Don't worry about breaks. I'm not hearing none of that.
Q. And he said that every week?
A. Every day. That was his motto; that's why it's ingrained in me already. *Id. at 98:11-25.*

### C. The Undisputed Material Facts Demonstrate that the Rigid Requirements of California's Meal And Rest Break Laws Would Significantly Impact Vitran's Routes and Services.

#### 1. Vitran Would Need To Specifically Schedule Separate Stops In Each Driver's Scheduled Route To Comply With California's Rigid Meal and Rest Break Laws.

Vitran's local and city drivers operating in California have schedules and routes that can vary on almost a daily basis. *UF 7.* Accordingly, there is no guarantee that any driver's work day will have scheduled stops at precisely the rigid times when California law requires meal periods (i.e. a net 30 minute, duty free period, to commence within the first five hours of work), and a specific number of duty-free, net 10 minute rest periods to be taken at or as near as practicable to the midpoint of each work period. (The statutorily required number of these rest periods is calculated on the basis of one break for every four hours of the total workday or major fraction thereof). *UF 8.* For Vitran to track and ensure that meal and rest breaks are taken at the precise time periods required by California law, Vitran would need to specifically schedule additional stops in driver schedules for meal and rest breaks. *UF 9*. Thus, Vitran would have to specifically schedule several, additional, daily stops in driver schedules to verify that the drivers take meal and rest breaks at the rigid times, and in the required numbers, as dictated by California law. *UF 10*.

Moreover, even if Vitran specifically scheduled these additional stops for breaks, there would be no guarantee that drivers can still take them. *UF 11.* For example, a Vitran driver may have a 120 mile route, and Vitran and the driver estimate that the average speed traveled along the route is 30 miles per hour. *UF 12*. Thus, a rest break is scheduled for the driver at 60 miles into the route, or around the midpoint of the first 4 hours of the shift. *Id.* But then unpredictable traffic, accidents, or weather hinder the route speed to 18 miles per hour. *Id.* As a result, the driver will not be able to reach the break stop until over 3 hours into the route, allegedly in violation of California law. *Id.* This example is not unusual, and thus in reality, it is not even possible to schedule breaks for truck drivers according to the rigid requirements of California's meal and rest break laws. *Id.*

**2. Mandating Additional, Scheduled Stops for Drivers to Take Meal and Rest Breaks Would Significantly Impact Vitran's Routes and Services.**

**(a) Vitran's Drivers Must Comply with Several Legal Restrictions to Safely and Legally Park a 70-Foot Tractor-Trailer to Take a Break.**

The standard Vitran tractor-trailer is approximately 70 feet long. *UF 13*. The truck is also often loaded with several tons of freight. *UF 14*. There are limited places to park a 70 foot tractor-trailer, and rest and truck stops are often full. *UF 15*. The driver must pull off the route and find a safe and legal space to park the tractor-trailer and secure the unit. *UF 16*. Before resuming the route, the driver must inspect the

equipment, start the truck back up, pull out of the parking space, drive through surface streets to reenter the route, and accelerate back to roadway speeds. *Id*.

Finding a safe and legal parking space for a 70 foot tractor-trailer has become increasingly difficult, especially in California. *UF 17*. For example, a driver cannot park the tractor-trailer on municipal streets, or on the shoulder of a highway, or on the side of the road. *Id.* California has also enacted laws that prohibit drivers from idling their trucks for more than 5 minutes, with fines for violations ranging from $300 to $1,000 per day. *UF 18*. Many rest stops in California are closed for maintenance, repairs, or seasonal periods. *UF 19*. California prohibits truck drivers from pulling over to the side of the highway/freeway (or on an exit or entrance ramp) to take a break. *UF 20*. California is also first in the nation in the shortage of overall private and public commercial vehicle parking space, and has been closing rest areas due to a lack of funding. *UF 21*. For these reasons, applying California's rigid meal and rest break rules will inevitably force drivers to alter their routes so that they can find adequate parking spaces to take breaks at the specific times required by law. *UF 22*.

Additional, unplanned variables can significantly impact a driver's ability to make a stop for a break. *UF 23*. It may be unsafe for a driver to make a stop in a heavy snow storm, as exits may not be sufficiently plowed and rest break amenities may not be sufficiently available. *Id*. Traffic congestion may also prohibit a driver from safely changing lanes and exiting the route. *Id*.

**(b) It Takes Several Minutes for a Driver To Exit a Route, Park a Tractor-Trailer, Inspect the Truck, Pull Out of the Parking Space, and Re-Enter the Route at Route Speed.**

It can take a Vitran driver of a 70-foot tractor-trailer from 5 minutes to about an hour to exit a freeway, park a tractor-trailer, shut it down, inspect the truck, pull out of the parking spot, and resume a route. *UF 24*. Thus, 30 minutes would be a conservative estimate of the time it takes for such stops. *UF 25*. If a driver must make 3 additional stops to take two 10-minute rest breaks and one 30-minute meal break in an 8 hour shift, the driver will need to spend 40 minutes taking the first rest break (30 minutes for additional driving, parking, and inspecting activities, along with the additional 10 minute rest break), another 60 minutes to take a meal break (30 minutes for driving, parking, and inspecting activities, along with the additional 30 minute, duty free meal break), and another 40 minutes to take the second rest break (30 minutes for driving, parking, and inspecting activities, along with the additional 10 minute rest break). *UF 26*. That is a total of 140 minutes, or 2 hours and 20 minutes spent on breaks in an 8 hour day, which amounts to over 29% of the shift on these additional breaks. *UF 27*.

If the driver must make a second meal break stop in a shift of more than 10 hours, then the driver will need to take 200 minutes (3 hours and 20 minutes) taking breaks, which is approximately one third of the shift taking breaks. *UF 28*. If the driver must take a third

rest break in a 14 hour shift, then the driver must take 240 minutes, or 4 hours of the day on breaks, which is over 28% of the shift taking breaks. *UF 29*.

By imposing several additional stop requirements on drivers to take meal and rest breaks while in California, drivers are forced to spend almost a third of their day repeating the many tasks involved in driving, parking, inspecting the load and load controlling devices, and maneuvering a tractor-trailer into and out of a parking space and through surface streets in order to take meal and rest breaks. *UF 30*. Thus, forcing drivers to make 3 to 5 additional stops each day to take breaks actually **requires drivers to spend more time on the burdensome tasks** of off-route driving, parking, inspecting, and maneuvering time just to take meal and rest breaks that can often be several minutes less than the additional work required to take them. *UF 31*.

**(c) Forcing Drivers To Make Several, Additional, Daily Stops for Meal and Rest Breaks Will Have a Significant, Prohibitive Impact on Vitran's Routes.**

Forcing a driver to spend about a third of one's shift taking breaks will require drivers to take shorter routes, and provide less customer service deliveries. *UF 32*. A critical nature of Vitran's transportation business is that its drivers provide on-time pick-up and delivery services for its customers. *UF 33*. Vitran's business suffers significantly when its deliveries are late. *UF 34*. The key to providing interstate transportation services is to ensure uniformity and integration throughout the entire delivery chain. *UF 35*. A break-down in

deliveries has a ripple effect throughout Vitran's operations, and can result in re-routing other drivers in order to maintain customer service. *UF 36.*

Vitran trains its drivers to plan their own routes. *UF 37*. Drivers are instructed to plan their routes to avoid commuter traffic when highways are congested, and to take into account other contingent factors like weather. *UF 38*. Requiring drivers to make several additional detours from their daily routes to make stops for meal and rest breaks at locations where such is possible, will significantly impact Vitran's routes. *UF 39*. Drivers will need to zigzag their way to their next stop to take 3 to 5 additional meal and rest break stops. *UF 40*. Vitran will also need to re-design routes to ensure that drivers are near locations, like truck and rest stops, that provide safe and legal parking space for a 70 foot tractor-trailer, and the amenities that enable a driver to take a restful break. *UF 41*. As a result, drivers would be deprived of the flexibility to take routes that may not offer adequate parking locations. *UF 42*. Drivers would have no choice but to take fewer and shorter routes, and make fewer deliveries. *UF 43*.

**(d) Forcing Drivers To Make Several, Additional, Daily Stops for Meal and Rest Breaks Will Have a Significant Impact on Vitran's Services.**

Forcing Vitran to schedule several, additional, daily stops for drivers to take meal and rest breaks at the rigid times required by California law will also have a significant, prohibitive impact on Vitran's services. *UF 44*. As explained above, requiring drivers to make several more daily stops for meal and rest breaks will

reduce their capacity by about 30% each day. *UF 45*. By virtue of simple mathematics, reducing that amount of on-duty driving time for each driver will significantly reduce each driver's ability to provide the same level of customer service. *UF 46*.

In addition, many contingencies like unpredictable traffic, weather, accidents and breakdowns impact driver schedules and routes, and thus Vitran and its drivers need the flexibility to revise routes and schedules to handle these unpredictable events and still meet customer delivery needs. *UF 47*. If drivers are confined to specific routes and schedules because of California's rigid meal and rest break requirements, Vitran's drivers will need to reduce the number of deliveries each day, which will directly and significantly reduce Vitran's level of customer service. *UF 48*.

## III. LEGAL ANALYSIS

### A. Preemption Under the FAAAA

#### 1. Recent Decisions from the U.S. Supreme Court and the Ninth Circuit Have Applied Federal Preemption to State Regulations of Motor Carriers.

In 1994, Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501 *et seq*. *Esquivel,* 2012 WL 516094, at *3. The FAAAA prohibits states from enacting or enforcing a law related to a price, route, **or** service of any motor carrier with respect to the transportation of property. *Id*.

In the most recent U.S. Supreme Court decision on FAAAA preemption, *Rowe, et al. v. New Hampshire Motor Transp. Ass'n,* 552 U.S. 364 (2008) (*"Rowe"*), the Court held that the FAAAA broadly preempts state trucking regulations by prohibiting a state from enacting or enforcing a law, regulation, or other provision that is *related to* a price, route, or service of any motor carrier with respect to the transportation of property. 552 U.S. at 368. The FAAAA also reflects Congress' overarching goal to help assure transportation rates, routes, and services that reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality. *Rowe,* 552 U.S. at 371. *Rowe* also confirmed that FAAAA preemption may occur even if a state law's impact on rates, routes or services is *only indirect*. *Esquivel,* 2012 WL 516094 at *4 (emp. Added)(quoting *Rowe*, 552 U.S. at 370–71).

After *Rowe*, the Ninth Circuit found "no doubt" that when Congress adopted the FAAAA, it intended to *broadly* preempt state laws relating to the pricing, routes, **or** services of transportation companies. *American Trucking Ass'ns, Inc. v. City of L.A*, 559 F.3d 1046, 1053 (9th Cir. 2009) (*"ATA I"*). In *ATA I*, the Ninth Circuit addressed whether the City of Los Angeles' "Clean Truck Program" was preempted by the FAAAA. *Id*. In holding that FAAAA preemption applied, the Ninth Circuit panel stated that there can be no doubt that when Congress adopted the FAAAA, it intended to "broadly preempt" state laws that were related to a price, route or service of a motor carrier. *ATA I*, 559 F.3d at 1053. The Ninth Circuit further explained that 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.*

The Ninth Circuit later applied preemption in *American Trucking Ass'ns, Inc. v. City of L.A.*, 660 F.3d 384, 397 (9th Cir. 2011)("*ATA II*"). The *ATA II* court explained that in a "borderline" case (i.e., when a state law does not directly regulate but indirectly impacts rates, routes or services), the proper inquiry is to determine "whether the provision, directly or ***indirectly, 'binds the … carrier to a particular price, route or service*** and thereby interferes with competitive market forces within the industry." *ATA II,* 660 F.3d at 397 (emph. added).

**2. The Southern District of California Has Also Found FAAAA Preemption of California's Meal and Rest Break Laws Regulating Motor Carriers.**

Following *ATA II*, the Southern District of California issued *Dilts v. Penske*, 2011 WL 4975520 (Oct. 19, 2011, S.D. Cal.) (*"Dilts"*). *Esquivel*, 2012 WL 516094 at *3, 4 . *Dilts* emphasized that the FAAAA *broadly* preempts "purely **intrastate** operations," and found that the FAAAA preempted California's meal and rest break laws as applied to truck drivers. *Id*. at *4, *7 (emph. added). *Dilts* also found that California's rigid requirements had a significant impact on Penske's rates, routes and services, which required federal preemption. *Id.* at * 8. *Dilts* also concluded that the fairly "rigid" meal and break requirements impact the types and lengths of routes that are feasible. *Id.* Thus, while the laws do not strictly bind the defendant's drivers to one particular route, they have

the same effect by depriving them of the ability to take any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes. *Id.*

The *Dilts* court further explained that the meal and rest break laws have a significant impact on trucking "services" by affecting the number of routes each driver may go on each day, the types of roads the defendant's drivers may take, and the amount of time it takes them to reach their destination. *Id*. These restrictions, the court concluded, bind the motor carrier to a schedule and frequency of routes that would interfere with competitive market forces within the industry. *Id*. The *Dilts* court noted further that **"no factual analysis is required to decide this question of preemption,"** as it is "more importantly the imposition of substantive standards upon a motor carrier's routes and services [] that implicates preemption." *Id*. (emphasis added)(quoting *Dilts,* 2011 WL 4975520 at 9); *see also Blackwell v. SkyWest Airlines, Inc.,* 2008 WL 5103195, No. 06-CV-0307-DMS-AJB at *18 (S.D. Cal. 2008)(*"Blackwell"*). The *Dilts* court further concluded that:

> [T]o allow California to insist exactly when and for exactly how long carriers provide breaks for their employees would allow other States to do the same, and to do so differently. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations." [citing *Rowe*, 552 U.S. at 373]. Thus, the Court finds state regulation of details significantly impacting the routes or

services of the carrier's transportation itself preempted by the FAAAA. *Dilts*, 2011 WL 4975520 at *9.

**3. This Central District's Decision in the *Esquivel* Case Provides Further Authority to Dismiss Plaintiffs' Claims because of Federal Preemption.**

Most recently, in *Esquivel*, this Central District held that, as a matter of law, the FAAAA preempts claims brought by former drivers of a motor carrier based on the employer's alleged failure to provide the drivers with meal and rest breaks. *Id*. at *6. The court granted Vistar's Rule 12(b)(6) motion, noting that "no factual analysis is required to decide this question of preemption," as it is more importantly the imposition of substantive standards upon a motor carrier's routes and services that implicates preemption. *Id*. at *4.

The *Esquivel* plaintiffs were employed by Vistar as route delivery drivers, and they alleged (just like Plaintiffs Campbell and Maldonado) that throughout their employment, Vistar scheduled their delivery routes such that the drivers were unable to take duty-free meal breaks. *Id.* According to the drivers, Vistar prevented them from taking meal breaks because of the time pressure they were under to make deliveries by a certain time of day. *Id*. The court granted the Rule 12(b)(6) motion, finding that, as a matter of law, the FAAAA preempted California's meal and rest break claims. *Id*. at *5. According to the *Esquivel* court:

The Court finds the reasoning in *Dilts* applicable and persuasive. As in *Dilts,* all of Plaintiffs' claims are directly or indirectly based on alleged violations

> of California meal break laws. [] Plaintiffs specifically allege that Defendant's purported violations are "a result of their scheduled routes," which provide no time for scheduled meal breaks as required by California law. [] Here, as in *Dilts,* "the length and timing of meal and rest breaks seems directly and significantly related to such things as the frequency and scheduling of transportation," such that requiring off-duty breaks "at specific times throughout the workday ... would interfere with competitive market forces within the ... industry." *Dilts,* 2011 WL 4975520 at *9 (quotation marks omitted). *Esquivel*, 2012 WL 516094 at *5.

As such, pursuant to Rule 12(c), this Court has ample authority to dismiss Plaintiffs' claims based on the allegations in the Complaint alone.

### B. Plaintiffs' Allegations and Admissions Fully Warrant the Dismissal of All of Their Claims Based on Federal Preemption.

#### 1. The Rule 12(c) Standard.

Rule 12(c) of the Federal Rules of Civil Procedure provides that after the pleadings are closed, but early enough not to delay trial, a party may move for judgment on the pleadings. The standard applied on a Rule 12(c) motion is essentially the same as the standard that applies on a Rule 12(b)(6) motion. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). When considering a motion for judgment on the pleadings, the Court may consider facts that "are contained in materials of which the court may take judicial notice." *Heliotrope General, Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999). The Court may

take judicial notice of documents that are "a matter of general public record." *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988).

**2. This Court May Consider Plaintiffs' Judicial Admissions to Warrant a Judgment on the Pleadings.**

Any facts asserted by the Plaintiffs in their prior briefs in this action amount to "judicial admissions." *See, United States v. Davis,* 332 F.3d 1163, 1168 (9th Cir. 2003)(facts in trial brief may be "judicial admissions"); *Gospel Missions of America v. City of L.A.,* 328 F.3d 548, 557 (9th Cir. 2003)(statement made in trial briefs may be "judicial admission"). As such, this Court may consider Plaintiffs' prior judicial admissions in this Rule 12(c) motion. *See, Steinbrecher v. Oswego Police Officer Dickey,* 138 F. Supp. 2d 1103, 1108 n. 3 (N.D. Ill. 2001) ("Use of a judicial admission does not convert a motion to dismiss to one for summary judgment. A judicial admission is not an evidentiary admission that can be controverted with other evidence; rather it has the effect of withdrawing a fact from contention later in the proceedings.").

Moreover, the doctrine of judicial estoppel prohibits the Plaintiffs from making assertions that contradict their prior judicial admissions in this action. *Dilts*, 2011 WL 4975520 * 13. Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by taking a clearly inconsistent position. *Id*. Courts consider three factors to determine whether to invoke judicial estoppel: (1) whether a party's later position is "clearly inconsistent" with its original position; (2) whether the party has successfully persuaded the court of the earlier position, and

(3) whether allowing the inconsistent position would allow the party to derive an unfair advantage or impose an unfair detriment on the opposing party. *Id*.

The Ninth Circuit has recognized that "the integrity of the judicial process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal." *Id*. Thus, judicial estoppel "is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts.' " *Id*. (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

Accordingly, in the instant case, Plaintiffs' assertions in their briefs to the Superior Court constitute judicial admissions that fully support dismissal of Plaintiffs' case on the pleadings.

**3. The FAAAA Preempts All of Plaintiffs' Claims as a Matter of Law Because the Result of Plaintiffs' Allegations and Judicial Admissions Would Be a Significant, Prohibitive Impact on Vitran's Routes and Services.**

Here, as in *Esquivel*, judgment on the pleadings based on FAAAA preemption is clearly warranted. Plaintiffs allege that Vitran intentionally and willfully required Plaintiffs to work during their meal and rest periods. *UF 3*. Plaintiffs have also alleged that Vitran's purported violations of California's meal and rest break laws were a result of Vitran's "tight delivery schedules" and its alleged "practice of pressuring its drivers to make faster pick-ups/deliveries and overloading its drivers' workload …" *UF 5*.

Similarly, the *Esquivel* court concluded that the FAAAA preempted the plaintiffs' claims precisely because of their allegations that the defendant's purported violations were "a result of their scheduled routes." *Esquivel*, 2012 WL 516094 at *5. The court explained that when allegations involve the length and timing of meal and rest breaks for truck drivers, such allegations are "directly and significantly related to such things as the frequency and scheduling of transportation." *Id*. Thus, since California's meal and rest break laws would require Vitran to schedule breaks "at specific times throughout the workday", such requirements would interfere with competitive market forces within the industry, and thus preemption applies as a matter of law. *Id*.

Similarly, Plaintiffs' compliance demands for meal and rest breaks will have a forbidden, significant effect on Vitran's services. "Services" under the FAAAA can include "such things as the frequency and scheduling of transportation." *Esquivel*, 2012 WL 516094 at *4, n. 2 (quoting *Charas v. Trans World Airlines, Inc.,* 160 F.3d 1259, 1265–66 (9th Cir.1998)). As set forth above, Plaintiffs allege that Vitran's tight schedules precluded them from taking meal and rest breaks. Precisely because Plaintiffs' allegations place the "length and timing of meal and rest breaks" at issue in this case, their allegations, as a matter of law, significantly impact Vitran's "services" by being "directly and significantly related to such things as the frequency and scheduling of transportation." *Esquivel*, 2012 WL 516094 at *5. Thus, FAAAA preemption applies. *Id*. Indeed, "by virtue of simple mathematics," requiring drivers to make additional stops for 3 to 5 meal and rest breaks each day will significantly reduce driver

capacity to complete deliveries to customers, resulting in a significant, prohibited impact on Vitran's services. *Dilts,* 2011 WL 4975520 at *8.

### C. Alternatively, Summary Judgment is Warranted.

#### 1. The Standard for Summary Judgment

Rule 12(d) of the Federal Rules of Civil Procedure provides that if the Court considers matters outside the pleadings in a Rule 12(c) motion, the motion must be treated as one for summary judgment under Rule 56. Federal Rule of Civil Procedure 56 permits a court to grant summary judgment where (1) the moving party demonstrates the absence of a genuine issue of material fact and (2) entitlement to judgment as a matter of law. *Dilts,* 2011 WL 4975520 at *3. Summary judgment applies when, as here, there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Blackwell,* 2008 WL 5103195 at *3. In the instant case, federal preemption, pleaded by Vitran as an affirmative defense, provides a complete defense to all of Plaintiffs' claims, leaving no triable issues for the Court to adjudicate.

#### 2. The FAAAA Preempts All of Plaintiffs' Claims as a Matter of Law Because the Undisputed Material Facts Show That Plaintiffs' Compliance Demands Would Have a Significant, Prohibitive Impact on Vitran's Routes and Services.

Vitran submits that, as set forth above, this Court can dismiss all of Plaintiffs' claims as a matter of law because of their significant, prohibitive impact on

Vitran's routes and services. In the alternative, Vitran has presented undisputed material facts that forcing Vitran's drivers to make several additional detours from their daily routes in order to make stops for meal and rest breaks will significantly impact Vitran's routes and services, which requires FAAAA preemption. *UF 7-51*.

The uncontroverted facts show that Plaintiffs' compliance demands for meal and rest breaks will significantly and prohibitively impact the routes of Vitran's drivers. Forcing drivers to make additional stops to take breaks will require them to zigzag their way along their routes to make the 3 to 5 additional meal and rest break stops at the rigid times each day. *UF 39-41*. Vitran will also need to re-design routes to ensure that drivers are near locations, like truck and rest stops, that provide safe and legal parking space for a 70 foot tractor-trailer, and the essential amenities that enable a driver to take a restful break. *Id.* As a result, drivers would be confined only to such routes, and will be deprived of the flexibility to take other preferred or more efficient routes. *See, Dilts*, 2011 WL 4975520 * 8 (meal and rest break laws preempted because they deprive drivers of the ability to take any route that does not offer adequate locations for stopping, or by forcing them to take shorter or fewer routes). Drivers would also need to take fewer and shorter routes, and will have to make fewer deliveries. Thus, preemption is warranted. See *Dilts*, 2011 WL 4975520 * 12 (preemption warranted to prevent state laws that restrict the company's routes and services in a way that is binding); *Esquivel*, 2012 WL 516094 at *5.

Moreover, forcing Vitran to schedule several, additional, daily stops for drivers to take meal and rest breaks at the rigid times required by California law will also have a significant, prohibitive impact on Vitran's services. By forcing Vitran's drivers to make several, additional, daily stops, Vitran will lose about 30% of its current driver capacity to serve its customers in California. *UF 24-34*. "By virtue of simple mathematics," this significant reduction in driver capacity will cause Vitran to drop delivery stops from its routes in California, which will have a significant, prohibitive impact on customer service. *Dilts*, 2011 WL 4975520 at *8. Accordingly, preemption is warranted. *Id. at *8, *12.*

In addition, many contingencies like unpredictable traffic, weather, accidents and breakdowns impact driver schedules and routes, and thus Vitran and its drivers need the flexibility to revise routes and schedules to handle these unpredictable events and still meet customer delivery needs. *UF 47*. If drivers are confined to specific routes and schedules because of California's rigid meal and rest break requirements, Vitran's drivers will be deprived of the ability to revise routes to maintain current levels of customer service in the event of disruptive contingencies. As a result, the number of deliveries, and thus the current level of customer service, will be directly and significantly reduced, warranting preemption. *Dilts*, 2011 WL 4975520 *8, *12.

### D. With a Patchwork of State-Specific Laws on Meal and Rest Breaks in Vitran's Operating Area, Plaintiffs' Compliance Arguments Will Exacerbate the Significant Impact on Vitran's Routes and Services.

In *Dilts*, the court recognized that "to allow California to insist exactly when and for exactly how long carriers provide breaks for their employees would allow other states to do the same, and to do so differently." *Dilts*, 2011 WL 4975520 * 9. Such a situation would "easily lead to a patchwork of state service-determining laws, rules, and regulations," that warrant preemption. *Id.*

Vitran operates in the 48 Contiguous United States. *UF 50*. At least 7 states, in addition to California, have specific laws requiring paid rest periods, and at least 17 states, in addition to California, have specific laws requiring meal periods for employees.[3] These laws *vary significantly*. Examples of various rest break requirements include a 10-minute paid break in California, a 15-minute paid break in Illinois, "adequate" rest breaks in Minnesota, and "reasonable

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[3] *Please see,* Conn. Gen. Stat. Ann. § 31-51ii (West); Del. Code Ann. tit. 19, § 707 (West); IL ST CH 820 § 140/3; Ky. Rev. Stat. Ann. § 337.365 (West); Ky. Rev. Stat. Ann. § 337.355 (West); Mass. Gen. Laws Ann. ch. 149, § 100 (West); Me. Rev. Stat. Ann. tit. 26, § 601; Minn. Stat. Ann. § 177.254 (West); Minn. Stat. Ann. § 177.253 (West); Neb. Rev. Stat. § 48-212; Nev. Rev. Stat. Ann. § 608.019 (West); N.H. Rev. Stat. Ann. § 275:30-a; N.Y. Lab. Law § 162 (McKinney); Or. Admin. R. 839-020-0050; R.I. Gen. Laws § 28-3-14 (West); Tenn. Code Ann. § 50-2-103 (West); Wash. Admin. Code 296-126-092; Vt. Stat. Ann. tit. 21 § 304 (West); W. Va. Code Ann. § 21-3-10a (West); MD LABOR & EMPLY § 3-710.

opportunities" for rest breaks in Vermont. *Id.* Examples of various meal break requirements include California's 30 minute meal period to commence within the first 5 hours of work, Illinois' requirement of a 20 minute meal break, Minnesota's requirement of "sufficient" time for meals, New York's various requirements, Rhode Island's requirement of a 20 minute mealtime, Vermont's requirement of "reasonable opportunities" for a meal, and West Virginia's requirement of a 20 minute meal period. *Id.* The states also vary in their requirements for *when* the meal period must be provided. *Id.*

Moreover, the significant impact on Vitran's routes and services shown above would be significantly multiplied if Vitran had to comply with a patchwork of state-specific mandates of various meal and rest break requirements. *UF 51.* As such, FAAAA preemption applies. *See, Dilts*, 2011 WL 4975520 * 9 (preemption warranted to prevent a patchwork of state laws requiring breaks).

### E. The Field Preemption Doctrine Provides Further Authority for FAAAA Preemption of Plaintiffs' Claims

The Supremacy Clause of the U.S. Constitution provides that the Constitution and federal law "shall be the supreme Law of the Land ...." *ATA I,* 559 F.3d at 1053 (quoting U.S. Const. art. VI, cl. 2). Thus, state laws that interfere with, or are contrary to, federal law are invalid. *Id*. *ATA,* 559 F.3d at 1053. The Field Preemption Doctrine is also based on the Supremacy Clause, and applies if federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the states to

supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

In the instant case, the federal HOS regulations underscore the need for the preemption of Plaintiffs' meal and rest break claims. *UF 52*. On December 27, 2011, the FMCSA adopted a rule that requires a driver to take a 30-minute rest break after 8 consecutive hours of on-duty time, which may include consecutive driving time. *Request for Judicial Notice, Exhibit A at 81187.* In adopting this rule, the FMCSA emphasized: "Drivers will have great flexibility in deciding when to take the break." *Id. at 81146.* The compliance date for this new rule is July 1, 2013. *Id. at 81187.* Along with the current, comprehensive set of HOS regulations of a trucker's on-duty driving and working time, this rule amply demonstrates that the FMCSA thoroughly regulates the maximum driving time and breaks of Vitran's drivers, leaving no room for California's unique and varied regulations, or for a patchwork of various, state-specific regulations. *UF 52*.

### F. Since All of Plaintiffs' Claims Derive From Their Meal and Rest Break Claims, the FAAAA Preempts All of Their Claims.

All of Plaintiffs' claims derive from their meal and rest break claims, and thus are all preempted. *Blackwell*, 2008 WL 5103195 at *20; *Esquivel*, 2012 WL 516094 at *5.

## IV. CONCLUSION

For the reasons set forth herein, Vitran requests this Court to dismiss all of Plaintiffs' claims based on FAAAA preemption.

DATED: April 26, 2012

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Michael J. Nader
Robert A. Jones
Michael J. Nader

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## APPENDIX J

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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**Case No. 2:11-cv-05029-RGK-SH**

**[Filed April 26, 2012]**

BRANDON CAMPBELL and RALPH MALDONADO; individually, and on behalf of members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA")

Plaintiffs,

v.

| | |
|---|---|
| VITRAN EXPRESS, INC., a Pennsylvania corporation formerly known as VITRAN EXPRESS WEST, INC., a Nevada corporation; and DOES 1 through 100, inclusive | ) |
| Defendant. | ) |

**DECLARATION OF DEAN E. KUSKA IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT**

| | |
|---|---|
| Complaint Filed: | May 7, 2010 |
| Trial Date: | None set |
| Judge: | Hon. Judge R. Gary Klausner |

DATE: May 29, 2012
TIME: 9:00 a.m.
DEPT: 850

I, Dean E. Kuska, declare as follows:

1. I am currently employed with Defendant, Vitran Express, Inc. ("Vitran") as its Vice President of Human Resources and Safety. I have direct and personal knowledge of the matters set forth herein and, if called and sworn as a witness, I could and would competently testify to them.

2. Vitran's parent corporation is a North American provider of freight services and distribution solutions to a wide variety of companies and industries. Vitran's truck drivers haul freight for Vitran's customers in most of the 48 contiguous United States. Vitran also provides logistics solutions that range from inventory consolidation to responsibility for the complete distribution function as well as highway and rail brokerage.

3. Vitran operates four terminals in California, which are located in San Leandro, Fresno, Fontana and Sacramento.

4. I have been Vitran's Vice President of Human Resources and Safety for about three and a half years. My primary duties include the promotion of safe operations at Vitran. Thus, I ensure that Vitran's drivers comply with the federal hours of service ("HOS") Regulations. All of Vitran's City and Local drivers in California are subject to the HOS regulations established by the Federal Motor Carrier Safety Administration ("FMCSA") and the Department of Transportation ("DOT").

5. Generally, the HOS rules place specific limits on when and how long commercial truck drivers may drive and work, including a limit on driving more than 11

hours in each shift, a limit of 14 total hours of driving and non-driving work (which can be 11 hours of driving and 3 hours of non-driving work), and a requirement that the driver stop for 10-consecutive hours of off-duty time.

6. The HOS regulations provide professional drivers with the flexibility to take meal and rest breaks as each driver wants and needs them. This flexibility enables Vitran and its drivers to efficiently and predictably deliver freight across the nation.

7. It can take a truck driver from 5 minutes to more than 1 hour of additional driving, parking, and inspection time to make a stop for a meal or rest break. Unlike a typical automobile, Vitran's drivers operate a tractor connected to a 48 or 53-foot trailer, which is about 70 feet combined. The truck is also often loaded with several tons of freight. There are limited places to park a 70 foot tractor-trailer, and rest and truck stops are often full. The driver must pull off the route and find a safe and legal space to park the tractor-trailer and secure the unit. Before resuming the route, the driver must inspect the equipment, start the truck back up, pull out of the parking space, drive through surface streets to reenter the route, and accelerate back to roadway speeds.

8. Finding a safe and legal parking space for a 70 foot tractor-trailer has become increasingly difficult, especially in California. For example, a driver cannot park the tractor-trailer on municipal streets, or on the shoulder of a highway, or on the side of the road.

9. California has also enacted laws that prohibit drivers from idling their trucks for more than 5

minutes, with fines for violations ranging from $300 to $1,000 per day. Attached as **Exhibit 1** is a fact sheet printed from the California Environmental Protection Agency Air Resources Board website (www.arb.ca.gov/msprog/truck-idling/factsheet.pdf) identifying this California regulation.

10. Moreover, in California, many rest stops are closed for maintenance, repairs, or seasonal periods. California does not permit truck drivers to pull their trucks over to the side of the highway/freeway (or on an exit or entrance ramp) to take a break. In a 2010 report on commercial vehicle parking in California, a copy of selected pages are attached at **Exhibit 2**, researchers identified California as first in the nation in the shortage of overall private and public commercial vehicle parking space. *Exhibit 2 at iii.* The report also shows that demand for truck parking space in the State exceeded capacity at all public rest areas and at 88% of private truck stops on the 34 corridors in California bearing the highest volumes of truck travel. *Id.* Also, due to the current economic downturn, several States including California are closing rest areas due to a lack of funding. For these reasons, applying California's rigid meal and rest break rules will inevitably force drivers to alter their routes so that they can find adequate parking to take breaks at the times required.

11. Additional, unplanned variables can significantly impact a driver's ability to make a stop for a break. It may be unsafe for a driver to make a stop in a heavy snow storm, as exits may not be sufficiently plowed and rest break amenities may not be sufficiently available. Traffic congestion may also

prohibit a driver from safely changing lanes and exiting the route. Routes in California may also lack available truck stops or rest areas where drivers must stop and take a meal or rest break, but this will vary immensely by the types and locations of routes.

12. While the time a driver needs to safely and legally park a tractor-trailer, and resume the route, can vary from about 5 minutes to about an hour, I will use a fairly conservative estimate of 30 minutes as the length of time a driver will need to make and resume each of these stops. If a driver must make 3 additional stops to take two10-minute rest breaks and one 30-minute meal break in an 8 hour shift, the driver will need to spend 40 minutes taking the first rest break (30 minutes for additional driving, parking, and inspecting activities, along with the additional 10 minute rest break), another 60 minutes to take a meal break (30 minutes for driving, parking, and inspecting activities, along with the additional 30 minute, duty free meal break), and another 40 minutes to take the second rest break (30 minutes for driving, parking, and inspecting activities, along with the additional 10 minute rest break). That is a total of 140 minutes, or 2 hours and 20 minutes spent on breaks in an 8 hour day, which amounts to over 29% of the shift on these additional breaks. If the driver must make a second meal break stop in a shift of more than 10 hours, then the driver will need to take 200 minutes (3 hours and 20 minutes) taking breaks, which is approximately one third of the shift taking breaks. If the driver must take a third rest break in a 14 hour shift, then the driver must take 240 minutes, or 4 hours of the day on breaks, which is over 28% of the shift taking breaks. As a result, Vitran will need to either reduce its services

by about a third, or incur dramatically increased costs to maintain current customer service levels.

13. By imposing several additional stop requirements on drivers to take meal and rest breaks while in California, drivers are forced to spend almost a third of their day repeating the many tasks involved in driving, parking, inspecting the load and load controlling devices, and maneuvering a tractor-trailer into and out of a parking space and through surface streets in order to take meal and rest breaks. Thus, forcing drivers to make 3 to 5 additional stops each day to take breaks actually requires drivers to spend more time on the burdensome tasks of off-route driving, parking, inspecting, and maneuvering time just to take meal and rest breaks that can often be several minutes less than the additional work required to take them.

14. Forcing a driver to spend about a third of one's shift taking breaks will require drivers to take shorter routes provide less customer service deliveries.

15. A critical nature of Vitran's transportation business is that its drivers provide on-time pick-up and delivery services for its customers.

16. Vitran's business suffers significantly when its deliveries are late. The key to providing interstate transportation services is to ensure uniformity and integration throughout the entire delivery chain. A break-down in deliveries has a ripple effect throughout Vitran's operations, and can result in re-routing other drivers in order to maintain customer service.

17. Vitran trains its drivers to plan their own routes. Drivers are instructed to plan their routes to avoid commuter traffic when highways are congested,

and to take into account other contingent factors like weather.

18. Vitran's City and Local drivers in California have schedules and routes that can vary on almost a daily basis. Accordingly, there is no guarantee that any driver's workday will have scheduled stops at precisely the rigid times when California law requires meal periods, and a specific number of duty-free, 10 minute rest periods to be taken at or as near as practicable to the midpoint of each work period. Thus, Vitran would have to specifically schedule several, additional, daily stops in driver schedules to verify that the drivers take meal and rest breaks at the rigid times, and in the required numbers, as dictated by California law.

19. Requiring drivers to make several additional detours from their daily routes to make stops for meal and rest breaks at locations where such is possible, will significantly impact Vitran's routes. Drivers will need to zigzag their way to their next stop to take 3 to 5 additional meal and rest break stops. Vitran will also need to re-design routes to ensure that drivers are near locations, like truck and rest stops, that provide safe and legal parking space for an approximately 70 foot tractor-trailer, and the amenities that enable a driver to take a restful break. As a result, drivers would be deprived of the flexibility to take routes that may not offer adequate parking locations. Drivers would have no choice but to take fewer and shorter routes, and make fewer deliveries.

20. Even if Vitran specifically scheduled these additional stops for breaks, there is no guarantee that any driver's work day will have scheduled stops at precisely the rigid times when California law requires

meal periods, and a specific number of duty-free, 10 minute rest periods to be taken at or as near as practicable to the midpoint of each work period.

21. Unpredictable traffic, weather, breakdowns, and accidents may inhibit driving such that the driver is well into the third hour of the shift before reaching the scheduled location for a rest break stop. The driver will also be significantly restricted from being able to vary the route and take detours unless such revised routes have sufficient parking available to take mandatory break stops. For example, a Vitran driver may have a 120 mile route, and Vitran and the driver estimate that the average speed traveled along the route is 30 miles per hour. Thus, a rest break is scheduled for the driver at 60 miles into the route, or around the midpoint of the first 4 hours of the shift. But then unpredictable traffic, accidents, or weather hinder the speed to 18 miles per hour. As a result, the driver will not be able to reach the break stop until over 3 hours into the route, allegedly in violation of California law. This example is not unusual, and thus in reality, it is not even possible to schedule breaks for truck drivers according to the rigid requirements of California meal and rest break law.

22. Forcing Vitran to schedule several, additional, daily stops for drivers to take meal and rest breaks at the rigid times required by California law will also have a significant impact on Vitran's services. As explained above, requiring drivers to make several more daily stops for meal and rest breaks will reduce their capacity by about 30% each day. By virtue of simple mathematics, reducing the amount of on-duty driving time for each driver will significantly reduce

each driver's ability to provide the same level of customer service.

23. In addition, many contingencies like unpredictable traffic, weather, accidents and breakdowns impact driver schedules and routes, and thus Vitran and its drivers need the flexibility to revise routes and schedules to handle these unpredictable events and still meet customer delivery needs. If drivers are confined to specific routes and schedules because of California's rigid meal and rest break requirements, Vitran's drivers will need to reduce the number of deliveries each day, which will directly and significantly reduce Vitran's level of customer service.

24. Vitran operates in most of the contiguous United States. The significant impact of California's meal and rest break laws on Vitran's routes and services would be multiplied if other States sought to enforce State-specific meal or rest break laws against Vitran. Since States impose different meal and rest break requirements from California, merely determining which State's law would apply to any particular interstate driver at any particular time while simultaneously juggling customer scheduling demands and compliance with the HOS regulations would be so fraught with uncertainty and logistical complications that it would result in a further, adverse impact on Vitran's routes and services.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on April 26, 2012 at Gibsonia, Pennsylvania.

/s/Dean E. Kuska VP HR & Safety
Dean E. Kuska

**Exhibit 1**

BRANDON CAMPBELL et al. v.
VITRAN EXPRESS, INC
Case No. 2:11-CV-05029-RGK-SH

**DECLARATION OF DEAN E. KUSKA IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**IMPORTANT INFORMATION FOR TRUCK AND BUS DRIVERS!**

**Regarding California's Anti-Idling Regulations**

DOES YOUR DIESEL TRUCK HAVE A GROSS VEHICLE WEIGHT RATING GREATER THAN 10,000 POUNDS? If yes, then the following applies to you.

**IDLING FOR MORE THAN 5 MINUTES IS PROHIBITED WITHIN CALIFORNIA'S BORDERS. AS OF JANUARY 1, 2008, THIS PROHIBITION ALSO APPLIES TO SLEEPER BERTH TRUCKS DURING PERIODS OF SLEEP AND REST.**

**WHY IS THERE AN IDLING LIMIT?**

Unnecessary idling:

- Produces emissions that contribute to cancer, premature death, and other serious health problems.
- Wastes fuel and contributes to global warming.

**WHAT ARE THE VIOLATION PENALTIES?**

Fines start at $300 and can be as much as $1000 per day. Violators may also face criminal charges.

**IF I CAN'T IDLE, WHAT CAN I DO ABOUT CAB COMFORT?**

Here is a list of some available idle reduction technologies:

- Battery-Powered Auxiliary Power Systems
- Fuel-Fired Heaters (restrictions apply - visit www.arb.ca.gov/noidle for details)

- Diesel-Fueled Auxiliary Power Systems (restrictions apply - visit www.arb.ca.gov/noidle for details)
- Truck stop infrastructures that provide heating, cooling, electricity, and/or other services at various locations throughout California
- Visit www.arb.ca.gov/cabcomfort for information on these and other idle reduction technologies.

**ARE THERE SITUATIONS WHEN IDLING IS ALLOWED?**

Yes, idling under the following situations is acceptable:

- You are stuck in traffic.
- When idling is necessary for inspecting or servicing your vehicle.
- You are operating a power take-off device.
- You cannot move because of adverse weather conditions or mechanical failure.
- You are queuing (must be beyond 100 feet from any residential area).
- Your truck's engine meets the optional NOx idling emission standard and your truck is located beyond 100 feet from any residential area.
- Please visit www.arb.ca.gov/noidle for a complete list of exemptions.

**ARE THERE RESTRICTIONS THAT APPLY TO IDLE REDUCTION TECHNOLOGIES?**

Yes, here are some restrictions that apply:

- You cannot operate a diesel-fueled auxiliary power system for more than 5 minutes if you are located within 100 ft of a residential area.
- If your truck has a 2007 or newer model year engine, your diesel-fueled auxiliary power system or fuel-fired heater must meet additional equipment requirements.

- Please visit www.arb.ca.gov/noidle for more information.

**DOES MY TRUCK NEED A NEW LABEL?**

A special hood label is required if:

- Your truck has a 2007 or newer model year engine and you operate an engine-based auxiliary power system within California, or
- Your truck's engine meets the optional NOx idling emission standard and you idle for more than 5 minutes within California.

**WHERE CAN I GET MORE INFORMATION?**

- Contact the California Air Resources Board at 1-800-END-SMOG (1-800-363-7664)
- Visit Our Program Webpage at: www.arb.ca.gov/noidle.

Other laws, regulations, and restrictions may apply. Nothing in this fact sheet or in the referenced regulation sections allows idling in excess of other applicable laws, regulations, and restrictions.

**Exhibit 2**

BRANDON CAMPBELL et al. v.
VITRAN EXPRESS, INC
Case No. 2:11-CV-05029-RGK-SH

**DECLARATION OF DEAN E. KUSKA IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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**Publication Detail**

**Commercial Vehicle Parking in California: Exploratory Evaluation of the Problem and Solutions**


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- Susan A. Shaheen
- Denise Allen
- Brenda Dix



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**Abstract:**
California is home to major international ports in Long Beach, Los Angeles, and Oakland, as well as the second

largest border crossing between Mexico and the U.S. California's highways are critical commercial links from these ports of entry to the nation and carry more commercial vehicle truck traffic than any other state in the U.S. Given the high volume of truck travel in California, it is not surprising that there is a serious shortage of truck parking in the state. This shortage negatively impacts economic productivity, roadway safety, air quality, and public health. This report begins with a summary of the relevant legislation history on truck parking in the U.S. Next, the shortage of truck parking in California and its impact on congestion, safety, air quality, public health, and the trucking industry's productivity is presented. A summary of lessons learned, from stakeholder interviews, recent surveys of truck drivers, and parking guidance information for autos, are presented next. This is followed by an evaluation of alternatives to address the truck parking problem in California, including expanded capacity, improved information, and installation of anti-idling technology. Finally, the federally funded Truck Parking Initiative in California is described. The study concludes with a summary of key findings.

**Keywords:** commercial vehicle travel, truck parking, ITS

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CALIFORNIA PATH PROGRAM
INSTITUTE OF TRANSPORTATION STUDIES
UNIVERSITY OF CALIFORNIA, BERKELEY

**Commercial Vehicle Parking in California: Exploratory Evaluation of the Problem and Solutions**

**Caroline J. Rodier, Susan A. Shaheen,
Denise M. Allen, Brenda Dix**

**California PATH Research Report
UCB-ITS-PRR-2010-4**

This work was performed as part of the California PATH Program of the University of California, in cooperation with the State of California Business, Transportation, and Housing Agency, Department of Transportation, and the United States Department of Transportation, Federal Highway Administration.



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**PARTNERS FOR ADVANCED TRANSIT AND HIGHWAYS**
**INSTITUTE OF TRANSPORTATION STUEDIES**
**UNIVERSITY OF CALIFORNIA, BERKELEY**

# Commercial Vehicle Parking in California: Exploratory Evaluation of the Problem and Solutions

**T.O. 6120**

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## ABSTRACT

California is home to major international ports in Long Beach, Los Angeles, and Oakland, as well as the second largest border crossing between Mexico and the U.S. California's highways are critical commercial links from these ports of entry to the nation and carry more commercial vehicle truck traffic than any other state in the U.S. Given the high volume of truck travel in California, it is not surprising that there is a serious shortage of truck parking in the state. This shortage negatively impacts economic productivity, roadway safety, air quality, and public health. This report begins with a summary of the relevant legislation history on truck parking in the U.S. Next, the shortage of truck parking in California and its impact on congestion, safety, air quality, public health, and the trucking industry's productivity is presented. A summary of lessons learned, from stakeholder interviews, recent surveys of truck drivers, and parking guidance information for autos, are presented next. This is followed by an evaluation of alternatives to address the truck parking problem in California, including expanded capacity, improved information, and installation of anti-idling technology. Finally, the federally funded Truck Parking Initiative in California

is described. The study concludes with a summary of key findings.

**KEY WORDS: commercial vehicle travel, truck parking, ITS**

## EXECUTIVE SUMMARY

California is home to major international ports in Long Beach, Los Angeles, and Oakland as well as the second largest border crossing between Mexico and the U.S. California's highways are critical commercial links from these ports of entry to the world and carry more commercial vehicle truck traffic than any other state in the U.S. Given the high volume of truck travel in California, it is not surprising that there is a serious shortage of truck parking in the state. This shortage negatively impacts economic productivity, roadway safety, air quality, and public health.

### Legislation History

A study by the National Transportation Safety Board (NTSB) in 1990 indicated that a significant number of fatal truck collisions and crashes were fatigue-related and that a major contributor to fatigue was the lack of rest areas along the Interstate Highway System. Drivers are now limited to driving 11 hours during a 14 hour shift after ten consecutive hours off-duty. Prior to 2003, truckers could drive a maximum of 10 hours during a 15 hour shift after eight hours off-duty and could extend the 15 hour shift with off-duty time such as meal and fuel stops (U.S. DOT, 2003). The federal transportation bills passed during the first decade of the 21st Century set aside funding to investigate the adequacy of truck parking and rest areas and for programs to address parking shortages and reduce

diesel exhaust emissions from idling at rest areas (FHWA, 2005)

Recent environmental and health legislation in California has placed emphasis on the need to reduce diesel exhaust emissions from idling. The Scoping Plan for the 2006 Global Warming Solutions Act (Assembly Bill [AB] 32) identifies electrification of accessories to reduce diesel exhaust from truck idling as one of the measures necessary to reduce two million metric tons of CO2 annually by the year 2020 (26). California, as well as a growing number of other states and localities, now limit truck idling. California's Assembly Bill 233 (The Healthy Heart and Lung Act) improves the enforcement of diesel emission regulations, raises the penalty for idling longer than five minutes at any location, and requires operators to clear citations before having their registrations renewed.

**Truck Parking Shortage and Consequences**

California ranks first in the nation in overall (private and public) commercial vehicle parking shortage (Fleger et al., 2006). It is estimated that demand exceeds capacity at all public rest areas and at 88 percent of private truck stops on the 34 corridors in California with the highest volumes of truck travel (Caltrans, 2001). Moreover, it is estimated that by the year 2020 the demand for public rest area parking will increase by 53 percent, and for private parking will increase by 100 percent (Caltrans, 2001).

California is home to some of the most congested regions in the nation. The estimated cost of delay to California drivers and passengers in 2007 was almost $23 million per day in lost time and excess fuel

consumption (Caltrans, 2008). Trucks compose approximately 10 percent on average of all highway traffic (Caltrans, 2007). Navigational waste due to truck drivers searching for truck parking can contribute unnecessarily to congestion; studies of parking guidance information suggest that parking search traffic can be reduced by as much as 25 percent by giving drivers information on the location of an available parking space (Rodier et al., 2005). Accidents are also a significant factor contributing to congestion. In 2007, truck drivers were found to be at fault in 72 fatal accidents and 3,095 injury accidents in California (CHP, 2007). Lack of parking and information about the location and availability of parking means that many truck drivers face the difficult and dangerous choice between illegal parking or noncompliance with HOS laws.

California's air quality is also among the worst in the nation. Diesel exhaust contributes significantly to air pollution and has serious effects on human health. The California Air Resources Board estimates that current statewide levels of diesel exhaust contribute to $19.5 billion in annual health care related costs. Many trucks idle their engines while stopped in order to generate electricity needed to run in-cab appliances. A heavy duty diesel engine burns about one gallon of fuel every hour while idling and nonessential idling accounts for about nine percent of on-road diesel exhaust emissions (The Union of Concerned Scientists, 2005). Truck parking shortages can result in drivers seeking out alternative spaces near their routes, which are often located on residential streets and next to parks near ports (The Modesta Avila Coalition, 2005; West Oakland Environmental Indicators Project, 2003)

directly exposing residents to high levels of diesel exhaust.

**Lessons Learned**

As part of this study stakeholder interviews were conducted with members of the California Truck Parking Sub-Committee and Goods Movements Task Force as well as the California Trucking Association's Policy Unit from June 2007 through July 2008. In addition, the literature was reviewed to identify relevant findings from recent surveys of truck drivers (Chen et al., 2002; Lutsey et al., 2000; Rodier and Shaheen, 2007) and parking guidance systems for autos. The following is a synthesis of the key lessons learned:

- Parking at public rest areas is most difficult for truck drivers in California. Public and private parking is also difficult to find in areas near ports and between key origin and destination locations. Bigger pull-though spaces are also needed.
- Private truck stops are preferred for long-term rests, and more parking is needed during overnight hours, near metropolitan areas.
- Many drivers regularly park in unauthorized areas because of lack of legal spaces and knowledge of locations of available parking where it is needed.
- Drivers may idle more frequently to cool and heat cabs in California. Few have experienced any enforcement of anti-idling laws. Most had not purchased any technology that would reduce idling emissions from their truck.
- Truckers may be a promising market for pre-trip and en-route parking information. Truck drivers (and not their carrier) most frequently decide where

they will park and some do so to prior to starting their trip but most do so en-route. Many drivers use online mapping programs to plan their route that currently do include truck specific information.

**Alternatives**

A range of alternatives to address the truck parking problem in California, including expanding capacity, improving information, and anti-idling technology, were evaluated and the following are key findings:

- Developing new parking facilities is challenging because of (1) community opposition due to health, safety, and quality of life concerns, (2) high land values and construction costs in metropolitan areas where the parking is most needed, and (3) overlapping jurisdictional authority in areas adjacent to Interstate Highways.
- Converting park-and-ride lots, weigh stations, and large store parking lots for truck parking does not appear to be feasible because (1) trucks are too large to enter park-and-ride lots and (2) entities responsible for weigh stations and retail parking lots are unable to assume increased liability and maintenance costs associated truck parking use. More research needs to be conducted to evaluate the feasibility of converting closed army bases in California for truck parking use.
- The physical space of existing parking could be bettered used to accommodate more parking through improved enforcement, adjusting time limits, and restriping parking spaces at public rest areas.
- Public private partnerships should be explored to develop comprehensive, free paper and electronic

truck parking guides as well as real-time, en-route parking and route guidance information with reservation capabilities. Barriers to implementing these services include demand, willingness-to-pay, and the development of a self-sustaining business model.

- Idling at truck stops may be addressed in the short term by implementing Advanced Truck Stop Electrification units (TSEs) to reduce idling by truckers unable to equip vehicles with Auxiliary Power Units (APUs) or onboard TSEs because of added weight and/or high installation and maintenance cost.

**Truck Parking Initiative in California**

The California Department of Transportation funded exploratory research programs to better understand the parking problems and possible solutions in California. The result of these efforts was a successful application to the Federal Highway Administration to fund a Truck Parking Initiative in California along Interstate 5 to provide pre-trip and en-route (real-time) truck parking availability, route-guidance information, and parking reservation capabilities. Caltrans has partnered with NAVTEQ, ParkingCarma™, and the TSRC at the University of California, Berkeley to implement and evaluate the pilot. The project will update NAVTEQ's map systems to include a database of public and private truck parking with features of importance to truckers (e.g., restrooms, hot food, showers, fuel, etc.). Truck drivers will be able to access this information as well as directions to parking facilities by phone (511 or 800 number), websites (both Internet and WiFi), and possibly satellite radio. Real-

time truck parking availability and reservation capabilities will be integrated into the truck parking mapping and routing services by ParkingCarma™. Linking this project to the provision of TSEs may be a promising opportunity to reduce idling and meet California's air quality and public health goals. Researchers will conduct an analysis of alternative business cases, including advertising, transaction, and subscriptions models, to determine how a public-private partnership could continue to operate in a steady state, self-financing mode after the prototype project is completed.

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## INTRODUCTION

The over 700,000 heavy-duty trucks in California are a vital part of our nation's economy and freight system. California is home to major international ports in Long Beach, Los Angeles, and Oakland as well as the second largest border crossing between Mexico and the U.S. California's highways are critical commercial links between these ports of entry and the rest of the nation and the world and they carry more commercial vehicle truck traffic than any other state in the U.S. (Office of Freight Management and Operations, 2002). The major California ports contribute almost 40 percent of all U.S. containerized cargo trade—triple California's share of the U.S. population— and container traffic is expected to grow by at least 2.5 times it current volume by 2024 (WCC, 2004). Eighty percent of freight shipments in California are made on state highways (Office of Freight Management and Operations, 2002).

Given the high volume of truck travel in California, it is not surprising that there is a serious shortage of truck parking. The state ranks first in the nation in overall (private and public) commercial vehicle parking shortage (Fleger et al., 2006). Recent estimates indicate that demand for truck parking exceeds capacity at all public rest areas; this is also the case at 88 percent of private truck stops on the 34 corridors in California with the highest truck travel volumes (Caltrans, 2001). The truck parking shortage in California and the U.S. has a number of serious consequences that threaten our roadway safety, public health, and economic productivity.

This report begins with a summary of the relevant legislative history on truck parking in the U.S. Next,

the shortage of truck parking in California as well as its consequences for congestion, safety, air quality, public health, and the trucking industry's productivity is presented. A summary of lessons learned, from stakeholder interviews, recent surveys of truck drivers, and parking guidance information for autos, are presented. This is followed by an evaluation of a range of alternatives to address the truck parking problem in California, including expanded capacity, improved information, and provision of anti-idling technology. Finally, the federally funded Truck Parking Initiative in California is described. The study concludes with a summary of key findings.

## BACKGROUND

Public rest areas were built along the Interstate Highways System as part of the federal-aid highway program and are maintained by state departments of transportation (DOTs). These spaces were built to accommodate the physically smaller trucks on the highways in the mid-20$^{th}$ century. As the trucking industry has evolved and truck sizes have dramatically increased, space availability has decreased because trucks require multiple spaces to park. In addition, most rest areas do not provide pull-through parking, which modern trucks prefer because of difficulties backing-up larger trucks.

Private truck stops gained momentum during the building of the Interstate Highway System and the National Association of Truck Stop Operators (NATSO) was formed in 1960 (NATSO, 2005). Private truck stops offer more parking spaces and amenities than public rest areas. Public rest areas are generally located along

major highways, and private truck stops are typically located nearby, but not adjacent, to highway facilities.

The Federal Hours-of-Service (HOS) regulations, originally instituted in 1939, have contributed to the demand for both private and public truck parking. These regulations mandate the number of hours a truck driver can operate a commercial vehicle before taking a rest. Drivers are now limited to driving 11 hours during a 14 hour shift after ten consecutive hours off-duty. Prior to 2003, truckers could drive a maximum of 10 hours during a 15 hour shift after eight hours off-duty and could extend the 15 hour shift with off-duty time such as meal and fuel stops (U.S. DOT, 2003).

Congressional mandates related to truck parking studies began with the National Transportation Safety Board (NTSB) (1990) estimate that 31 percent of fatal truck collisions and crashes were fatigue-related and that a major contributor to fatigue was the lack of rest areas along Interstate Highways. In 2000, with help from the NTSB, Congress recommended that the Federal Motor Carrier Safety Administration (FMCSA) create a guide to inform truck drivers of the locations of parking and parking availability in advance and during trips.

Congress continued to place importance on truck parking through the Transportation Equity Act for the 21st Century (TEA-21), setting aside funding to investigate the adequacy of truck parking and rest areas. Section 4027 of TEA-21 mandated a study to determine the location and quantity of parking facilities at both commercial truck stops and public rest

areas. This study inventoried the current facilities and examined shortages.

The subsequent Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) further emphasized the importance of investigating truck parking availability. SAFETEA-LU authorized $6.25 million for four years starting in 2006 to establish the Truck Parking Facilities Pilot Program. This program provided funding to address the shortage of long-term parking for commercial vehicles on the National Highway System.

SAFETEA-LU also addressed the problem of idling emissions and the truck parking shortage. The Interstate Oasis Program and Idling Reduction Facilities on Interstate Rights-of-Way Program were designed to establish standards for rest facilities along the Interstate that included the provision of products and services to the public, provide 24-hour access to restrooms, cleanly appearance, supply parking for heavy trucks, and alternative power to support truck driver comfort and reduce idling while parked in a public rest area.

Recent environmental and health legislation in California has placed emphasis on the need to reduce diesel exhaust emissions from idling. The 2006 Global Warming Solutions Act (Assembly Bill [AB] 32) mandates reduction of green house gasses in California to 1990 levels by 2020 which is approximately a 25 percent reduction from current levels. The 2008 Climate Change Scoping Plan to implement AB 32, outlined electrification of accessories to reduce diesel exhaust from truck idling as one of the measures necessary to reduce two million metric tons of $CO_2$

annually by the year 2020 from the good movement sector (CARB, 2008).

California, as well as a growing number of other states and localities, now limit truck idling. In California, strict restrictions have been placed on the idling of all diesel-fueled commercial motor vehicles greater than 10,000 pounds traveling in the state including (1) a five minute operating limit at any location, (2) certification of diesel fueled auxiliary power systems; and (3) automatic shutdown systems on all 2008 and subsequent heavy-duty diesel engines (U.S. DOT, 2005; California Code of Regulations, Section 2485).

In September of 2007, California also passed Assembly Bill 233 – The Healthy Heart and Lung Act— to improve the enforcement of diesel emission regulations. It specifically raised the penalty for heavy duty truck idling (longer than five minutes) from $100 to $300 and requires operators to clear all citations before renewing their registrations.

**TRUCK PARKING SHORTAGES**

Throughout the U.S., shortages of public truck spaces are considered to be more severe than shortages of private spaces. In 2002, 71 percent of states reported public shortages, but only 16 percent reported private shortages (Chen et al., 2002). This trend is expected to continue: the annual demand for public rest area spaces is projected to be 1.7 percent greater than the growth in supply, while the annual increase in private spaces is expected to exceed demand (Fleger et al., 2002).

California ranks first in the nation in overall (private and public) commercial vehicle parking shortage

(Fleger et al., 2002). Recent truck parking demand estimates in California indicate that demand exceeds capacity at all public rest areas and at 88 percent of private truck stops on the 34 corridors in California with the highest volumes of truck travel (Caltrans, 2001). Table 1 provides an overview of supply and demand for truck parking based on the results of surveys and demand estimates conducted by Caltrans and the U.S. DOT. The California Highway Patrol (CHP) has identified 198 illegal truck parking locations, most of which are around existing public rest areas and private truck stops (Caltrans, 2001). Moreover, it is estimated that by the year 2020 average daily truck travel will increase by approximately 50 percent; the demand for public rest area parking will increase by 53 percent, and demand for private parking will increase by 100 percent (Caltrans, 2001). States that are contiguous to California also have a shortage in public rest areas but a surplus of private truck stops (see Table 2).

**Table 1 Overview of the Supply and Demand for Truck Parking in California.**[1]

| Attribute | Public Rest Area | Private Truck Stop | Other Private Location | Illegal Parking Locations |
|---|---|---|---|---|
| **Ownership** | Public | Private | Private | Public |
| **Legal parking time** | Typically, a few hours | Unlimited | Unlimited | Zero (illegal to park) |

[1] Smith et al., 2004; California Department of Transportation, 2001.

| | | | | |
|---|---|---|---|---|
| **Number of Facilities** | 88 | 33 | Unknown | 198[2] |
| **Spaces per Location** | Maximum: 205 Minimum: 0 Average: 85 | Maximum: 420 Minimum: 0 Average: 53 | Unknown | Undefined |
| **Number of Spaces Overall** | 7,496 | 1,106 | Unknown | Undefined |
| **Space Shortage as of 2000** | 8,057 | 6,106 | Unknown | Undefined |
| **Location Convenience** | High | Moderate | Varies | High |
| **Parking Convenience** | Varies | Varies | Varies | High |
| **Safety from Crime** | Varies | Varies | Perceived as Moderate to Low[3] | Varies |
| **Safety from Crashes** | Safe | Safe | Safe | Not as safe |

[2] Based on California Highway Patrol's observations of unauthorized parking locations.

[3] Smith et al., 2002.

**Table 2 Demand/Supply Ratio of States Contiguous to California.**[1]

| State Public | | Private | Overall |
|---|---|---|---|
| Nevada | 2.62 | 0.46 | 0.57 |
| Oregon | 1.89 | 0.67 | 0.79 |
| Arizona | 1.88 | 0.43 | 0.53 |
| Utah | 1.64 | 0.54 | 0.62 |

## THE IMPACTS OF TRUCK PARKING SHORTAGES

### Congestion and Safety

Congestion is a real and growing problem on the major highways of California: California is home to some of the most congested regions in the nation and delays increased by seven percent in just one year from 2006 to 2007 (Caltrans, 2008). Forty-six percent of the urban freeway miles were congested during peak hours in 2007 (Caltrans, 2008). The estimated cost of delay to California drivers and passengers in this year is almost $23 million per day in lost time and excess fuel consumption (Caltrans, 2008). Over the next ten years, congestion is expected to grow by 35 percent in California (Caltrans, 2007).

Navigational waste due to truck drivers searching for truck parking can contribute unnecessarily to congestion. Studies of parking guidance information suggest that parking search traffic can be reduced by

[1] Fleger et al., 2002

as much as 25 percent by giving drivers information on the location of available parking (Rodier et al., 2005).

Accidents are also a significant factor contributing to congestion on California highways. Trucks compose approximately 10 percent on average of all highway traffic (Caltrans, 2007). In 2007, trucks drivers were found to be at fault in 72 fatal accidents and 3,095 injury accidents in California (CHP, 2007).

Fatigue is a major contributing factor to truck collisions: eight percent of all fatal collisions and 16 percent of all truck collisions (Quan, 2006). HOS regulations limit truck drivers to 11 hours of driving during a 14 hour period followed by eight hours of sleep (U.S. DOT, 2003). Lack of information about the location and availability of parking means that some drivers face the difficult and dangerous choice between parking illegally or risking noncompliance with HOS law. Illegal parking is also dangerous: "(1) it limits the ability of parked vehicles to accelerate safely into the traffic stream from their parked position; (2) the presence of parked vehicles creates a conflict between existing and parked vehicles; and (3) errant vehicles may stray into the shoulder area and strike parked vehicles" (Trombly, 2003, p. 3).

**Air Quality and Public Health**

California's air quality is among the worst in the nation. Over the past decade, major metropolitan areas in California have consistently exceeded state and national air quality standards. Diesel exhaust contributes significantly to air pollution and has serious effects on human health; it is classified by California as a carcinogen and contains forty hazardous

air pollutants listed by the Environmental Protection Agency. Out of the top metropolitan areas in the U.S. with the greatest health impacts due to diesel, four are in California: Los Angeles, San Francisco-Oakland-Fremont, San Diego-Carlsbad-San Marcos, and Riverside-San Bernardino-Ontario, ranking second, seventh, 21st, and 25th respectively (U.S. GAO, 2004; American Lung Association, 2000). The California Air Resources Board (ARB) estimates that current statewide levels of diesel exhaust contribute to $19.5 billion in costs related to premature deaths (3,500 per year); lung cancer (250 per year); decreased lung function in children; chronic bronchitis; increased respiratory and cardiovascular hospitalizations; aggravated asthma; increased respiratory symptoms; and lost workdays.

Many trucks idle their engines while stopped in order to generate electricity needed to run in-cab appliances. A heavy duty diesel engine burns about one gallon of fuel every hour while idling (The Union of Concerned Scientists, 2005). Nonessential idling contributes to about nine percent of all on-road diesel emissions (The Union of Concerned Scientists, 2005). Over half of these emissions are from diesel trucks equipped with sleeper cabs. Truck parking shortages cause truck drivers to seek out alternative spaces near their routes. Because of the concentration of truck traffic near ports and other intermodal facilities, illegal parking is a common occurrence in these areas. Often the alternative spaces drivers find are located on residential streets and next to parks (The Modesta Avila Coalition, 2005; West Oakland Environmental Indicators Project, 2003). When idling occurs in residential neighborhoods, which are often already

located near huge sources of ambient air pollution like ports, people are more directly exposed to high levels of diesel exhaust both inside and outside of their homes.

### Trucking Industry

The shortage of truck parking also negatively impacts the productivity of the trucking industry though (1) increased liability due to crashes resulting from illegal parking and fatigue, (2) lower driver productivity due to excessive parking search travel, and (3) driver dissatisfaction and higher turnover due to the inability to obtain a rest (Smith et al., 2004).

* * *

## SUMMARY AND CONCLUSIONS

California is home to major international ports in Long Beach, Los Angeles, and Oakland as well as the second largest border crossing between Mexico and the U.S. California's highways are critical commercial links from these ports of entry to the world and carry more commercial vehicle truck traffic than any other state in the U.S. Given the high volume of truck travel in California, it is not surprising that there is a serious shortage of truck parking in the state. This shortage negatively impacts economic productivity, roadway safety, air quality, and public health.

### Legislation History

A study by the National Transportation Safety Board (NTSB) in 1990 indicated that a significant number of fatal truck collisions and crashes were fatigue-related and that a major contributor to fatigue was the lack of rest areas along the Interstate Highway System.

Drivers are now limited to driving 11 hours during a 14 hour shift after ten consecutive hours off-duty. Prior to 2003, truckers could drive a maximum of 10 hours during a 15 hour shift after eight hours off-duty and could extend the 15 hour shift with off-duty time such as meal and fuel stops (U.S. DOT, 2003). The federal transportation bills passed during the first decade of the 21st Century set aside funding to investigate the adequacy of truck parking and rest areas and for programs to address parking shortages and reduce diesel exhaust emissions from idling at rest areas (FHWA, 2005)

Recent environmental and health legislation in California has placed emphasis on the need to reduce diesel exhaust emissions from idling. The Scoping Plan for the 2006 Global Warming Solutions Act (Assembly Bill [AB] 32) identifies electrification of accessories to reduce diesel exhaust from truck idling as one of the measures necessary to reduce two million metric tons of $CO_2$ annually by the year 2020 (26). California, as well as a growing number of other states and localities, now limit truck idling. California's Assembly Bill 233 (The Healthy Heart and Lung Act) improves the enforcement of diesel emission regulations, raises the penalty for idling longer than five minutes at any location, and requires operators to clear citations before having their registrations renewed.

**Truck Parking Shortage and Consequences**

California ranks first in the nation in overall (private and public) commercial vehicle parking shortage (Fleger et al., 2006). It is estimated that demand exceeds capacity at all public rest areas and at 88 percent of private truck stops on the 34 corridors in

California with the highest volumes of truck travel (Caltrans, 2001). Moreover, it is estimated that by the year 2020 the demand for public rest area parking will increase by 53 percent, and for private parking will increase by 100 percent (Caltrans, 2001).

California is home to some of the most congested regions in the nation. The estimated cost of delay to California drivers and passengers in 2007 was almost $23 million per day in lost time and excess fuel consumption (Caltrans, 2008). Trucks compose approximately 10 percent on average of all highway traffic (Caltrans, 2007). Navigational waste due to truck drivers searching for truck parking can contribute unnecessarily to congestion; studies of parking guidance information suggest that parking search traffic can be reduced by as much as 25 percent by giving drivers information on the location of an available parking space (Rodier et al., 2005). Accidents are also a significant factor contributing to congestion. In 2007, truck drivers were found to be at fault in 72 fatal accidents and 3,095 injury accidents in California (CHP, 2007). Lack of parking and information about the location and availability of parking means that many truck drivers face the difficult and dangerous choice between illegal parking or noncompliance with HOS laws.

California's air quality is also among the worst in the nation. Diesel exhaust contributes significantly to air pollution and has serious effects on human health. The California Air Resources Board estimates that current statewide levels of diesel exhaust contribute to $19.5 billion in annual health care related costs. Many trucks idle their engines while stopped in order to generate

electricity needed to run in-cab appliances. A heavy duty diesel engine burns about one gallon of fuel every hour while idling and nonessential idling accounts for about nine percent of on-road diesel exhaust emissions (The Union of Concerned Scientists, 2005). Truck parking shortages can result in drivers seeking out alternative spaces near their routes, which are often located on residential streets and next to parks near ports (The Modesta Avila Coalition, 2005; West Oakland Environmental Indicators Project, 2003) directly exposing residents to high levels of diesel exhaust.

**Lessons Learned**

As part of this study stakeholder interviews were conducted with members of the California Truck Parking Sub-Committee and Goods Movements Task Force as well as the California Trucking Association's Policy Unit from June 2007 through July 2008. In addition, the literature was reviewed to identify relevant findings from recent surveys of truck drivers (Chen et al., 2002; Lutsey et al., 2000; Rodier and Shaheen, 2007) and parking guidance systems for autos. The following is a synthesis of the key lessons learned:

- Parking at public rest areas is most difficult for truck drivers in California. Public and private parking is also difficult to find in areas near ports and between key origin and destination locations. Bigger pull-though spaces are also needed.
- Private truck stops are preferred for long-term rests, and more parking is needed during overnight hours, near metropolitan areas.

- Many drivers regularly park in unauthorized areas because of lack of legal spaces and knowledge of locations of available parking where it is needed.
- Drivers may idle more frequently to cool and heat cabs in California. Few have experienced any enforcement of anti-idling laws. Most had not purchased any technology that would reduce idling emissions from their truck.
- Truckers may be a promising market for pre-trip and en-route parking information. Truck drivers (and not their carrier) most frequently decide where they will park and some do so to prior to starting their trip but most do so en-route. Many drivers use online mapping programs to plan their route that currently do include truck specific information.

**Alternatives**

A range of alternatives to address the truck parking problem in California, including expanding capacity, improving information, and anti-idling technology, were evaluated and the following are key findings:

- Developing new parking facilities is challenging because of (1) community opposition due to health, safety, and quality of life concerns, (2) high land values and construction costs in metropolitan areas where the parking is most needed, and (3) overlapping jurisdictional authority in areas adjacent to Interstate Highways.
- Converting park-and-ride lots, weigh stations, and large store parking lots for truck parking does not appear to be feasible because (1) trucks are too large to enter park-and-ride lots and (2) entities responsible for weigh stations and retail parking lots are unable to assume increased liability and

maintenance costs associated truck parking use. More research needs to be conducted to evaluate the feasibility of converting closed army bases in California for truck parking use.

- The physical space of existing parking could be bettered used to accommodate more parking through improved enforcement, adjusting time limits, and restriping parking spaces at public rest areas.
- Public private partnerships should be explored to develop comprehensive, free paper and electronic truck parking guides as well as real-time, en-route parking and route guidance information with reservation capabilities. Barriers to implementing these services include demand, willingness-to-pay, and the development of a self-sustaining business model.
- Idling at truck stops may be addressed in the short term by implementing Advanced Truck Stop Electrification units (TSEs) to reduce idling by truckers unable to equip vehicles with Auxiliary Power Units (APUs) or onboard TSEs because of added weight and/or high installation and maintenance cost.

**Truck Parking Initiative in California**

The California Department of Transportation funded exploratory research programs to better understand the parking problems and possible solutions in California. The result of these efforts was a successful application to the Federal Highway Administration to fund a Truck Parking Initiative in California along Interstate 5 to provide pre-trip and en-route (real-time) truck parking availability, route-guidance information,

and parking reservation capabilities. Caltrans has partnered with NAVTEQ, ParkingCarma™, and the TSRC at the University of California, Berkeley to implement and evaluate the pilot. The project will update NAVTEQ's map systems to include a database of public and private truck parking with features of importance to truckers (e.g., restrooms, hot food, showers, fuel, etc.). Truck drivers will be able to access this information as well as directions to parking facilities by phone (511 or 800 number), websites (both Internet and WiFi), and possibly satellite radio. Real-time truck parking availability and reservation capabilities will be integrated into the truck parking mapping and routing services by ParkingCarma™. Linking this project to the provision of TSEs may be a promising opportunity to reduce idling and meet California's air quality and public health goals. Researchers will conduct an analysis of alternative business cases, including advertising, transaction, and subscriptions models, to determine how a public-private partnership could continue to operate in a steady state, self-financing mode after the prototype project is completed.

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