APPENDIX

App. 1

No. _____

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

CAL CARTAGE TRANSPORTATION EXPRESS LLC; CCX2931, LLC; K&R TRANSPORTATION CALIFORNIA LLC, KRT2931, LLC; CMI TRANSPORTATION LLC; and CM2931, LLC,

Real Parties in Interest.

From order of the California Court of Appeal
Second Appellate District, Division 4,
Case No. B304240

California Superior Court, Los Angeles County
Case Nos. BC689320, BC689321, BC689322
Honorable William F. Highberger, Dept. 010, Presiding

PETITION FOR REVIEW OF REAL PARTIES IN INTEREST

(Filed Dec. 1, 2020)

[Counsel for Real Parties in Interest Listed on Following Page]

* * *

A. The Court Of Appeal's Decision Squarely Conflicts With Numerous Decisions Around The Country.

Under the FAAAA, any state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" is preempted. (49 U.S.C. § 14501(c)(1).) The Court of Appeal's holding that "the ABC test . . . is not preempted by the FAAAA" (Op. 3) directly conflicts with the decisions of at least six other courts.

The U.S. Court of Appeals for the First Circuit held that the FAAAA preempts "Prong 2" of Massachusetts's three-pronged law for classifying workers, which is materially identical to Prong B of California's ABC Test. (*Schwann v. FedEx Ground Package System, Inc*. (1st Cir. 2016) 813 F.3d 429.) In *Schwann*, the court was asked to consider independent contractors hired by FedEx to perform "first-and-last mile" pick-up and delivery services. (*Id.* at p. 432.) The First Circuit held that the Massachusetts law—although a "generally applicable" employment law—was "incompatible" with the FAAAA because it "related to" FedEx's services and routes. (*Id.* at pp. 437, 439.) As for services, the First Circuit explained that the "decision whether to provide a service directly, with one's own employee, or to procure the services of an independent contractor is a

significant decision . . . that implicates the way in which a company chooses to allocate its resources and incentivize those persons providing the service." (*Id.* at p. 438.) The Massachusetts law created "regulatory interference . . . [that] [wa]s not peripheral" because it made "it *quite difficult* for carriers like FedEx to treat individual drivers as independent contractors, rather than employees," and "*largely* foreclosed" FedEx's current way of doing business. (*Id.* at pp. 438-439, emphases added.) As for routes, the state law would "change the manner in which" FedEx delivered packages and alter "the [incentive-based] structure chosen by FedEx"—changes that "simply highlight[ed] the tangible manner in which" the law interfered with the options available in the "free market." (*Id.* at pp. 439-440.)

The Massachusetts Supreme Judicial Court likewise held that the FAAAA preempts Massachusetts' three-part test for classifying workers. (*Chambers v. RDI Logistics, Inc.* (2016) 476 Mass. 95.) In *Chambers*, retail companies hired independent contractors to drive and deliver furniture. The court found that the state law resulted in motor carriers "adopt[ing] a different manner of providing services from what they otherwise might choose," which "likely" would "have a significant, if indirect, impact on motor carriers' services" and "rais[e] the costs of providing those services." (*Id.* at pp. 102-103.) The state law's "de facto ban" on "motor carriers wishing to use independent contractors" created an "impermissible 'patchwork' of State laws." (*Id.* at p. 102.)

Four California federal district courts have also concluded that the FAAAA preempts the ABC Test. (*Cal. Trucking Assn v. Becerra* (S.D.Cal. 2020) 433 F.Supp.3d 1154, appeal pending; *B&O Logistics, Inc. v. Cho* (C.D.Cal. Apr. 15, 2019) 2019 WL 2879876; *Valadez v. CSX Intermodal Terminals, Inc.* (N.D.Cal. Mar. 15, 2019) 2019 WL 1975460; *Alvarez v. XPO Logistics Cartage LLC* (C.D.Cal. Nov. 15, 2018) 2018 WL 6271965.)[2] These courts concluded that the ABC Test "would require a court to look at a motor carrier's service, determine that the [truck driver's] service is outside the carrier's usual course of business, and then bar the carrier from using workers as independent contractors to perform that service," which "pose[s] a serious potential impediment to the FAAAA's objectives." (*Alvarez*, *supra*, 2018 WL 6271965, at *4.) By "requir[ing] carriers to classify all workers who performed trucking work as employees, rather than independent contractors," the ABC Test has an "impermissible" relation to motor carriers' services, prices, or routes. (*Valadez*, *supra*, 2019 WL 1975460, at *8; see also *B&O Logistics*, *supra*, 2019 WL 2879876 at *3 [similar].)

The U.S. Court of Appeals for the Third Circuit also has issued a decision conflicting with the Court of Appeal's decision. (*Bedoya v. Am. Eagle Express Inc.* (3d Cir. 2019) 914 F.3d 812.) Prong B of New Jersey's ABC

[2] Two judges in another district have disagreed. (See *Henry v. Central Freight Lines, Inc.* (E.D.Cal. June 13, 2019) 2019 WL 2465330, at *7; *W. States Trucking Assn. v. Schoorl* (E.D.Cal. 2019) 377 F.Supp.3d 1056, 1070, appeal voluntarily dismissed.) The Ninth Circuit is presently considering this issue. (See *Cal. Trucking Assn. v. Becerra* (9th Cir.) Nos. 20-55106, 20-55107.)

test provides that a worker is an employee unless she performs work "outside the [employer's] usual course of business . . . *or [performs such service] outside of all the places of business of [the employer].*" (*Id.* at p. 824, quoting N.J. Stat. Ann. § 43:21-19(i)(6)(B), emphasis added, alterations in original.) The Third Circuit concluded that the FAAAA does not preempt the New Jersey law, but expressly distinguished New Jersey's law from the Massachusetts statute addressed by the First Circuit in *Schwann* and by the Massachusetts Supreme Judicial Court in *Chambers.* (*Ibid.*) The New Jersey test's "or" clause is pivotal. As the Third Circuit explained, it provides motor carriers a viable "alternative method for reaching independent contractor status—that is, by demonstrating that the worker provides services outside of the putative employer's places of business." (*Ibid*.) Because truck drivers provide their services on highways, not the employer's place of business, New Jersey's law categorically exempts truck drivers from prong B of its ABC test. Absent that provision —a provision California's ABC Test lacks—the Third Circuit signaled that the FAAAA would have preempted the law. (*Ibid.*)

The Court of Appeal's holding that the FAAAA does not preempt the ABC Test, as well as its reasoning behind that decision, squarely contradicts the holdings of these courts.

* * *

CONCLUSION

Defendants respectfully request that this Court grant the Petition for Review.

DATED: December 21, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Joshua S. Lipshutz*
Joshua S. Lipshutz

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Attorneys for Defendant
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. K&R TRANSPORTATION CALIFORNIA LLC, KRT2931, LLC and DOES 1-50, inclusive, Defendants.	CASE NO. BC689322 [Related to Case Nos. BC689320 and BC689321] **DEFENDANT K&R TRANSPORTATION CALIFORNIA, LLC'S RESPONSE TO PLAINTIFF'S SECOND SET OF SPECIALLY PREPARED INTERROGATORIES** (Filed Oct. 1, 2019)

Assigned for all purposes to:
The Hon.
William F. Highberger
Dept: 10

Action Filed: January 8, 2018
Trial Date: None set

PROPOUNDING PARTY: THE PEOPLE OF THE STATE OF CALIFORNIA

RESPONDING PARTY: DEFENDANT K&R TRANSPORTATION CALIFORNIA, LLC

SET NO.: TWO (2)

* * *

SPECIAL INTERROGATORY NO. 45:

To the extent that you contend any DRIVER has performed work that falls outside the usual course of YOUR business for purposes of the test articulated in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903, state all factual bases for that contention.

RESPONSE TO SPECIAL INTERROGATORY NO. 45:

KRTC restates and incorporates the Preliminary Statement and General Objections as though fully set forth in this response. KRTC objects to this Interrogatory as overly broad and burdensome to the extent it is unlimited in time. KRTC objects to this Interrogatory to the extent that it calls for a legal conclusion. KRTC

objects to this Interrogatory to the extent that it seeks information that is neither relevant to the subject matter of the litigation nor reasonably calculated to lead to the discovery of admissible evidence, see Cal. Code Civ. Proc. § 2017.010, or information of such marginal relevance that its probative value is substantially outweighed by the burden imposed on KRTC in having to search for and provide such information. KRTC further objects to this Interrogatory that it calls for the disclosure of information protected by the attorney work product doctrine, the attorney-client privilege, and any other applicable privilege. KRTC objects to this Interrogatory as vague, ambiguous, overly broad and unduly burdensome. Further, the terms "DRIVER" and "YOUR" render this Interrogatory vague, ambiguous, overly broad, and unduly burdensome. KRTC also objects to the Interrogatory as unduly burdensome, harassing, and duplicative in light of KRTC's Motion in Limine. KRTC also objects to this Interrogatory to the extent that it seeks confidential or proprietary business information. KRTC further objects to the Interrogatory to the extent it seeks information not in the possession, custody, or control of KRTC. KRTC objects to this Interrogatory to the extent it calls for information not presently known to or in the possession of KRTC.

Subject to and without waiving said objections, and without conceding that *Dynamex* applies in this action, KRTC responds as follows: KRTC manages clients' various cargo needs, including transloading cargo

between different forms of transportation, warehousing, moving cargo from one location to another, and other operations. KRTC does not own any trucks, or other vehicles used for cargo transport. When a client chooses to have its cargo moved by truck, KRTC contracts with independent owner-operators to haul the client's cargo via truck. The owner-operators who contract with KRTC own and run independent trucking businesses. Discovery is ongoing, and KRTC reserves the right to supplement and amend this response as discovery progresses.

* * *

DATED: October 1, 2019

GIBSON, DUNN &
CRUTCHER LLP

By: /s/ Dhananjay S. Manthripragada
Dhananjay S. Manthripragada

Attorneys for Defendant
K&R TRANSPORTATION
CALIFORNIA, LLC

VERIFICATION

I, Jorge Fernandez, declare:

I make this verification on behalf of Defendant K&R Transportation California, LLC and am authorized to do so. I have read the foregoing Response to Plaintiff's Specially Prepared Interrogatories, Set No.

Two and know the contents thereof. To the extent I have personal knowledge of the matters set forth there in, the same are true and correct. insofar as said materials are composite of the information of several individuals, I do not have personal knowledge concerning all of the information contained in said responses, but I am informed and believe that the information set forth therein is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 1st day of October, 2019 at Long Beach, California.

/s/ Jorge Fernandez
Jorge Fernandez

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CAL CARTAGE TRANSPORTATION EXPRESS, LLC, CCX2931, LLC and DOES 1-50, inclusive, Defendants.	CASE NO. BC689320 Related Cases: BC689321, BC689322, 19STV19291, 19STCV0377 BC689321] **DEFENDANTS' MOTION IN LIMINE RE PRE-EMPTION AND NON-RETROACTIVITY OF ABC WORKER CLASSIFICATION TEST** (Filed Sep. 30, 2019)

Assigned for all purposes to:
Hon. William F Highberger
Dept: SSC-10

Action Filed: Jan. 8, 2018
Trial Date: May 27, 2019
(New Entity K&R Only)

HEARING
Date: November 6, 2019
Time: 10:00 A.M.
Dept.: SSC-10

* * *

Assuming the truth of these allegations,[3] the ABC Test as Plaintiff proposes to apply it is preempted by the FAAAA because it would categorically prohibit a motor carrier business from utilizing independent contractors to move cargo by truck, and would force them to enter into employer-employee relationships.

* * *

VII. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion in limine and hold that the worker classification test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989)

[3] Defendants reserve the right to challenge Plaintiff's characterization of the nature of their businesses, and assume these allegations as true solely for the purpose of this motion regarding the legal issue of which worker classification test applies to Plaintiff's claims as pled.

48 Cal.3d 341 applies to Plaintiff's misclassification-based claims. If the Court instead applies the ABC Test, it should do so prospectively only.

DATED: September 30, 2019

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Joshua S. Lipshutz
Joshua S. Lipshutz

Attorneys for Defendant
CAL CARTAGE TRANSPORTATION EXPRESS, LLP

DATED: September 30, 2019

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, LLP

By: /s/ Christopher C. McNatt, Jr.
Christopher C. McNatt, Jr.

Attorneys for Defendant
CCX2931, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 10
HON. WILLIAM E. HIGHBERGER, JUDGE

JUAN JOSE RODRIGUEZ, PLAINTIFF(S), VS. K&R TRANSPORTATION, LLC, DEFENDANT(S). AND ALL RELATED CASES.	CASE NO. 19STCV03772

REPORTER'S TRANSCRIPT
OF ORAL PROCEEDINGS

WEDNESDAY, JULY 31, 2019

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KEVIN A. ROLDAN, CSR 13463
OFFICIAL REPORTER PRO TEMPORE

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* * *

[89] MR. MUNSEY: YOUR HONOR, I HAVE THE LANGUAGE IN FRONT OF ME, AND I'M HAPPY TO READ IT. UNDER DYNAMEX PRONG C IS, QUOTE, "THE WORKER IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION OR BUSINESS OF THE SAME NATURE AS THE WORK PERFORMED." UNDER BORELLO, THERE'S A CORRESPONDING FACTOR, QUOTE, "WHETHER ONE PERFORMING SERVICES IS ENGAGED IN A DISTINCT OCCUPATION OR BUSINESS."

THE COURT: SO, FOR DISCOVERY PURPOSES, IT'S THE SAME QUESTION AS DEPOSITION. I DON'T KNOW WHY YOU'RE CALLING IN FROM A DEPOSITION TO TALK TO ME ABOUT THAT. BORELLO – EXCUSE ME, DYNAMEX PRONG B IS NEW, AND YOU DON'T FIND IT IN BORELLO. THAT'S WHY IT GIVES CALIFORNIA EMPLOYERS HIVES, BECAUSE IT'S A NEW AND UNIQUE TEST THAT'S IMPOSSIBLE TO MEET SO OFTEN.

MR. MANTHRIPRAGADA: AND I COMPLETELY AGREE, YOUR HONOR, AND I THINK WHEN I STARTED, I WAS –

THE COURT: UNLESS YOU COACH YOUR WITNESS TO BE A PHILOSOPHER AND SAY, "I'M REALLY NOT A TRUCK COMPANY. I'M A COMPUTER LOGISTICS FACILITATOR FOR PEOPLE TO MOVE TRADE AROUND THE PLANET, AND I DON'T KNOW ANYTHING ABOUT SHIPPING,"

AND SOME KIND OF WORD PICTURE THAT SAYS, "I'M [90] NOT WHAT I SEEM TO BE." YOU HARDLY NEED TO GET IT OUT OF THE MOUTH OF THE DEFENDANT. YOU JUST HAVE TO SORT OF STAND AT THE GATE OF THE COURT AND WATCH THE TRUCKS COMES AND GO AND FIGURE OUT WHAT THE BUSINESS IS, WHICH SEEMS TO BE MOVING CARGO.

MR. MUNSEY: YOUR HONOR, I WOULD ALSO NOTE THAT WE BELIEVE THAT THE DYNAMEX PRONG B IS PART OF THE BORELLO TEST. WHAT MAKES DYNAMEX NEW IS MAKING THE ISSUE DISPOSITIVE, BUT IF YOU LOOK AT BORELLO –

THE COURT: WELL, IT'S THE CONVERSE OF C, WHETHER YOU REALLY LOOK LIKE AN INDEPENDENT BUSINESS WITH MULTIPLE CUSTOMERS VERSUS BEING THE MEAT AND POTATOES OF WHICH YOU GO ABOUT EVERY DAY.

MR. MUNSEY: I THINK THAT'S CORRECT, YOUR HONOR, BUT BORELLO ALSO SEPARATELY STATES A FACTOR WHETHER THE WORK IS PART OF THE REGULAR BUSINESS OF THE PRINCIPAL. THAT SEEMS TO US TO BE THE SAME TEST.

MR. MANTHRIPRAGADA: I DISAGREE. OH, GO AHEAD.

MR. LIPSHUTZ: I WAS GOING TO SAY, THE DIFFERENCE IS REALLY HOW DISPOSITIVE PRONG B IS AND THE FACT THAT COURTS HAVE SAID IN ORDER TO EVALUATE PRONG B, YOU REALLY NEED TO DIVE INTO A DEFENDANT'S BUSINESS. YOU OFTEN LOOK AT THEIR FINANCIALS IN A WAY THAT YOU NEVER DID UNDER BORELLO. CERTAINLY A 30(B)6 WITNESS FROM THE ENTITIES, IF WE'RE TALKING ABOUT PRONG B OF DYNAMEX, MIGHT BE CALLED ON TO ANSWER QUESTIONS ABOUT THE COMPANY'S FINANCIALS, WHAT PERCENTAGE OF THE BUSINESS –

THE COURT: WELL, THIS IS WHERE THE DEFENSE PART [91] WILL HAVE TO GO TO TRY TO SURVIVE ON THE FACE OF WHAT APPEARS TO BE THE IMPOSSIBLE TEST CREATED BY DYNAMEX THAT LOOKS LIKE YOU SHOULD HAVE FAILED UNTIL CREATIVE LAWYERS FIND A WAY TO START PHILOSOPHIZING ABOUT IT, AS I INDICATED, BUT IT MAY BE AND SAY, "WELL, MOST OF MY BUSINESS IS REALLY MADE ON LICENSING MY TRADEMARK. IT'S NOT MOVING THE CARGO SOMEHOW. AND SO, REALLY, I'M A TRADEMARK BUSINESS, AND I MOVE CARGO INCIDENTALLY BECAUSE HISTORICALLY I MOVE CARGO. BUT THE HEART AND SOUL OF THE BUSINESS IS MY LICENSE FEES."

MR. LIPSHUTZ: THAT'S CORRECT, YOUR HONOR, AND THAT'S WHY IT MATTERS NOT ONLY TO DISCOVERY. IT MATTERS TO THE SCOPE OF A 30(B)6. THERE ARE CERTAIN TOPICS

THAT YOU WOULDN'T EVER DIVE INTO UNDER BORELLO THAT YOU NOW SUDDENLY BECOME QUITE RELEVANT UNDER DYNAMEX.

IT ALSO MATTERS GREATLY, FRANKLY, TO ADR AND SETTLEMENT DISCUSSIONS. I MEAN, WE'VE HEARD, NOT ONLY FROM THE PEOPLE BUT FROM OTHER OPPOSING COUNSEL IN CASES, THAT THEY'RE NOT WILLING TO SETTLE IF DYNAMEX IS ON THE TABLE BECAUSE THEY KNOW – YOU KNOW, THEY KNOW WHAT PRONG B MEANS FOR THEM, AND THEY KNOW HOW CREATIVE LAWYERS HAVE TO BE ON THE DEFENSE IN ORDER TO GET AROUND IT. SO I –

THE COURT: HAVE TO BE PRETTY CREATIVE. THAT'S WHY THEY'VE HIRED YOU, SO . . .

MR. LIPSHUTZ: AND, LOOK, I THINK THAT, YOU KNOW, GOES A LONG WAY TO EXPLAINING WHY WE THINK IT'S SO IMPORTANT TO EVALUATE THIS ISSUE EARLY. IT GOES NOT ONLY TO DISCOVERY, TO THE SCOPE OF EXPERT WITNESSES. DO WE [92] NEED AN EXPERT THAT'S GOING TO TALK ABOUT WHAT LINE OF BUSINESS WE ARE IN AND WHY LOGISTICS IS DIFFERENT FROM SHIPPING AND WHY IT'S BROADER? IT ACTUALLY AFFECTS QUITE A LOT OF THE TRIAL, IN OUR VIEW, AND –

THE COURT: WELL, THAT'S YOUR PHILOSOPHY EXERCISE. AND I DON'T MEAN TO BE PEJORATIVE. IT'S WHAT YOU HAVE TO DO IN THE FACE OF THAT LEGAL STANDARD,

BECAUSE NOTHING ELSE HAS ANY HOPE OF WORKING.

MR. LIPSHUTZ: COMPLETELY UNDERSTAND, YOUR HONOR, AND IT'S ALSO WHY, FRANKLY, THE FAAAA PREEMPTION – NOT TO KEEP COMING BACK TO THAT ISSUE – IS SO IMPORTANT IN THE TRUCKING INDUSTRY.

THE COURT: NOW, WE DIDN'T COME UP WITH A DATE TO HEAR THE IN LIMINE; RIGHT? WE'VE JUST TALKED ABOUT IT IN CONCEPT.

MR. MANTHRIPRAGADA: THAT'S RIGHT, YOUR HONOR. WE DON'T HAVE A DATE YET.

THE COURT: WELL, WHY DON'T YOU MEET AND CONFER WITH MR. MUNSEY AND SEE IF YOU CAN AGREE TO SOME SCHEDULE HE MIGHT LIVE WITH. WE'LL BE TOGETHER SOON ENOUGH ON THE 13TH AND LATER IN THE MONTH, AND JUST BRING IT UP AGAIN, IF YOU HAVEN'T COME UP WITH A SCHEDULE. BUT I DO THINK WE SHOULD JUST DEAL WITH THE FAAAA AND RETROACTIVITY AND STOP AND NOT LORD IT UP WITH MORE COMPLEXITY.

AND THE INTERESTING QUESTION AS TO WHO WILL TESTIFY TO WHAT IN ORDER TO HELP MR. LIPSHUTZ WITH HIS NEW DYNAMEX PRONG B DEFENSE, I THINK WE CAN WAIT UNTIL YOU ACTUALLY HAVE A WITNESS IN THE ROOM AND YOU'RE SQUABBLING ABOUT THAT. AND, FRANKLY, SINCE THE WITNESS WILL

WANT TO PHILOSOPHIZE ABOUT ALL THIS STUFF, I CAN'T IMAGINE WHY HE WOULDN'T BE ANSWERING QUESTIONS, BECAUSE THEY'RE GOING TO WANT TO GET THIS ALL OUT THERE. THAT'S PART OF THE EXPOSITION OF WHY I'M NOT THE BUSINESS YOU THINK I AM.

MR. LIPSHUTZ: WELL, NOT IF DYNAMEX IS NOT IN THE CASE.

* * *

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CAL CARTAGE TRANSPORTATION EXPRESS, LLC, CCX2931, LLC and DOES 1-50, inclusive, Defendants.	CASE NO. BC689320 [Related to Cases Nos. BC689321 and BC689322] **DEFENDANTS' NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** (Filed Jun. 1, 2018)

[Notice of Demurrer and Demurrer; Memorandum of Points & Authorities; Request for Judicial Notice and Declaration of Joshua S. Lipshutz Filed Concurrently Herewith]

Assigned for all purposes to: The Hon. John Shepard Wiley, Jr.
Dept: 9

Action Filed: Jan. 8, 2018
Trial Date: None set

HEARING
Date: August 16, 2018
Time: 10:00 A.M.
Dept.: 9

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

I. OVERVIEW

"[W]hen a substantive defect is clear from the face of a complaint . . . a defendant may attack that portion of the cause of action by filing a motion to strike." (*PH II v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.) Under the Code of Civil Procedure, "[t]he court may, upon a motion . . . or at any time in its discretion . . . [s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436.) As explained in the demurrer concurrently filed by

Defendants Cal Cartage Transportation Express, LLC and CCX2931, LLC, the first cause of action in the complaint filed by the People of the State of California should be dismissed in its entirety. However, to the extent the Court overrules the demurrer and does not dismiss the first cause of action in its entirety, Defendants file this motion to strike in the alternative, to address two specific issues:

First, the portion of Plaintiff's complaint alleging that Defendants failed to reimburse owner-operators for business expenses and losses, in violation of Labor Code section 2802, is preempted by federal Truth-in-Leasing ("TIL") regulations and should be stricken. (See *Valadez v. CSX Intermodal Terminals, Inc.* (N.D. Cal. Apr. 10, 2017) 2017 WL 1416883, at pp. *9-*10 [explaining that TIL regulations preempt Section 2802 reimbursement claims related to maintenance, fuel, and insurance costs].) Plaintiff contends that Defendants should be held liable for not covering expenses for owner-operators related to fuel, insurance, and maintenance. (See Compl., ¶¶ 32, 52(g).) But TIL regulations specifically authorize owner-operators to enter contracts under which they will cover such expenses. (See 49 C.F.R. § 376.12.) Thus, Plaintiffs Section 2802 theory is barred by "obstacle preemption," under which "state law prohibits something permitted (but not required) by federal law, thus standing as an obstacle to accomplishing the purposes of the federal law." (*Rodriguez v. RWA Trucking Co.* (2013) 238 Cal.App.4th 1375, 1391.)

Second, to the extent the Court decides not to dismiss Plaintiff's first cause of action but deems portions of that cause of action improper and barred under the arguments in Defendants' demurrer—including, for instance, a ruling that the res judicata argument is controlling only through January 8, 2018, with some viable claim remaining thereafter—the Court should strike those improper portions of the complaint and appropriately limit the complaint.

* * *

III. THE COURT SHOULD STRIKE PORTIONS OF THE COMPLAINT IT RULES IMPROPER UNDER THE ARGUMENTS IN DEFENDANTS' DEMURRER

For the reasons set forth in Defendants' concurrently filed demurrer, the first cause of action should be dismissed in its entirety. In the event, however, that the Court finds only portions of the first cause of action to be improper under the doctrine of res judicata – for example, if the Court finds that res judicata precludes the first cause of action only through January 8, 2018, with a viable claim remaining thereafter for one or both of Defendants – Defendants respectfully request that the Court strike those portions of the complaint and appropriately limit the scope of the complaint without leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to strike without leave to amend.

DATED: June 1, 2018

GIBSON, DUNN &
CRUTCHER LLP

By: /s/ Joshua S. Lipshutz
Joshua S. Lipshutz

Attorneys for Defendant
CAL CARTAGE
TRANSPORTATION
EXPRESS, LLP

DATED: September 30, 2019

SCOPELITIS, GARVIN, LIGHT,
HANSON & FEARY, LLP

By: /s/ Christopher C. McNatt, Jr.
Christopher C. McNatt, Jr.

Attorneys for Defendant
CCX2931, LLC

1994 WIS. STAT. § 102.07

102.07 Employe defined

"Employe" as used in this chapter means:

(1) (a) Every person, including all officials, in the service of the state, or of any municipality therein whether elected or under any appointment, or contract of hire, express or implied, and whether a resident or employed or injured within or without the state. The state and any municipality may require a bond from a contractor to protect the state or municipality against compensation to employes of such contractor or employes of a subcontractor under the contractor. This paragraph does not apply beginning on the first day of the calendar quarter beginning after the day that the secretary files the certificate under s. 102.80(3)(a).

(b) Every person, including all officials, in the service of the state, or of any municipality therein whether elected or under any appointment, or contract of hire, express or implied, and whether a resident or employed or injured within or without the state. This paragraph first applies on the first day of the calendar quarter beginning after the day that the secretary files the certificate under s. 102.80(3)(a).

(2) Any peace officer shall be considered an employe while engaged in the enforcement of peace or in the pursuit and capture of those charged with crime.

(3) Nothing herein contained shall prevent municipalities from paying teachers, police officers, fire fighters and other employes full salaries during disability,

nor interfere with any pension funds, nor prevent payment to teachers, police officers or fire fighters therefrom.

(4) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employes, whether paid by the employer or employe, if employed with the knowledge, actual or constructive, of the employer, including minors (who shall have the same power of contracting as adult employes), but not including (a) domestic servants, (b) any person whose employment is not in the course of a trade, business, profession or occupation of the employer, unless as to any of said classes, such employer has elected to include them. Item (b) shall not operate to exclude an employe whose employment is in the course of any trade, business, profession or occupation of the employer, however casual, unusual, desultory or isolated any such trade, business, profession or occupation may be.

(5) For the purpose of determining the number of employes to be counted under s. 102.04(1)(c), but for no other purpose, the following definitions shall apply:

(a) Farmers or their employes working on an exchange basis shall not be deemed employes of a farmer to whom their labor is furnished in exchange.

(b) The parents, spouse, child, brother, sister, son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of a farmer shall not be deemed the farmer's employes.

(c) A shareholder-employe of a family farm corporation shall be deemed a "farmer" for purposes of this chapter and shall not be deemed an employe of a farmer. A "family farm corporation" means a corporation engaged in farming all of whose shareholders are related as lineal ancestors or lineal descendants, or as spouses, brothers, sisters, uncles, aunts, cousins, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, brothers-in-law or sisters-in-law of such lineal ancestors or lineal descendants.

(6) Every person selling or distributing newspapers or magazines on the street or from house to house. Such a person shall be deemed an employe of each independent news agency which is subject to this chapter, or (in the absence of such agencies) of each publisher's (or other intermediate) selling agency which is subject to this chapter, or (in the absence of all such agencies) of each publisher, whose newspapers or magazines the person sells or distributes. Such a person shall not be counted in determining whether an intermediate agency or publisher is subject to this chapter.

(7) (a) Every member of any volunteer fire company or fire department organized under ch. 213 or any legally organized rescue squad shall be deemed an employe of such company, department or squad. Every such member, while serving as an auxiliary police officer at an emergency, shall also be deemed an employe of said company, department or squad. If such company, department or squad has not insured its liability for compensation to its employes, the municipality

or county within which such company, department or squad was organized shall be liable for such compensation.

(b) The department may issue an order under s. 102.31(1)(b) permitting the county within which a volunteer fire company or fire department organized under ch. 213, a legally organized rescue squad or an ambulance service provider, as defined in s. 146.50(1)(c), is organized to assume full liability for the compensation provided under this chapter of all volunteer members of that company, department, squad or provider.

(8) (a) Except as provided in par. (b), every independent contractor is, for the purpose of this chapter, an employe of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employe of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.

2. Holds or has applied for a federal employer identification number.

3. Operates under contracts to perform specific services or work for specific amounts of money and under

which the independent contractor controls the means of performing the services or work.

4. Incurs the main expenses related to the service or work that he or she performs under contract.

5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.

6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.

7. May realize a profit or suffer a loss under contracts to perform work or service.

8. Has continuing or recurring business liabilities or obligations.

9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

(c) The department may not admit in evidence state or federal laws, regulations, documents granting operating authority or licenses when determining whether an independent contractor meets the conditions specified in par. (b)1 or 3.

(8m) An employer who is subject to this chapter is not an employe of another employer for whom the first employer performs work or service in the course of the other employer's trade, business, profession or occupation.

(9) Members of the national guard and state defense force, when on state active duty under direction of appropriate authority, but only in case federal laws, rules or regulations provide no benefits substantially equivalent to those provided in this chapter.

(10) Further to effectuate the policy of the state that the benefits of this chapter shall extend and be granted to employes in the service of the state, or of any municipality therein on the same basis, in the same manner, under the same conditions, and with like right of recovery as in the case of employes of persons, firms or private corporations, any question whether any person is an employe under this chapter shall be governed by and determined under the same standards, considerations, and rules of decision in all cases under subs. (1) to (9). Any statutes, ordinances, or administrative regulations which may be otherwise applicable to the classes of employes enumerated in sub. (1) shall not be controlling in deciding whether any person is an employe for the purposes of this chapter.

(11) The department may by rule prescribe classes of volunteer workers who may, at the election of the person for whom the service is being performed, be deemed to be employes for the purposes of this chapter. Election shall be by endorsement upon the worker's compensation insurance policy with written notice to the department. In the case of an employer exempt from insuring liability, election shall be by written notice to the department. The department shall by rule prescribe the means and manner in which notice of

election by the employer is to be provided to the volunteer workers.

(12) A student in a technical college district while, as a part of a training program, he or she is engaged in performing services for which a school organized under ch. 38 collects a fee or is engaged in producing a product sold by such a school is an employe of that school.

(13) A child performing uncompensated community service work as a result of an informal disposition under s. 48.245, a consent decree under s. 48.32 or an order under s. 48.34(9) is an employe of the county in which the court ordering the community service work is located. No compensation may be paid to that employe for temporary disability during the healing period.

(14) An adult performing uncompensated community service work under s. 971.38, 973.03(3), 973.05(3) or 973.09 is an employe of the county in which the district attorney requiring or the court ordering the community service work is located. No compensation may be paid to that employe for temporary disability during the healing period.

(15) A sole proprietor or partner or member electing under s. 102.075 is an employe.

(16) An inmate participating in a work release program under s. 303.065(2) or in the transitional employment program is an employe of any employer under

this chapter for whom he or she is performing service at the time of the injury.