APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15124

DEV ANAND OMAN, et al.,
Plaintiffs-Appellants,
v.
DELTA AIR LINES, INC.,
Defendant-Appellee.

Filed: Feb. 2, 2021

Before: WATFORD and FRIEDLAND, *Circuit Judges*
and
RAKOFF,[*] District Judge.

MEMORANDUM[**]

Plaintiffs are four current or former flight attendants who seek to represent an uncertified class of Delta Air Lines flight attendants who have performed work in California. They allege that Delta

[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

[**] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

violated provisions of California law governing the payment of minimum wages, timing of wage payments, and the format of wage statements. Plaintiffs appeal from the district court's order granting summary judgment to Delta on the minimum-wage claims, and from the court's separate order granting summary judgment to Delta on the timing-of-pay and wage-statement claims. We affirm in part and reverse and remand in part.

1. We affirm the district court's entry of summary judgment in Delta's favor on the minimum-wage claims asserted by all plaintiffs. In response to our certification request, the California Supreme Court held that Delta complied with California's minimum-wage laws. *Oman v. Delta Air Lines, Inc.*, 466 P.3d 325, 341 (Cal. 2020). That ruling obviates any need for us to decide whether application of those laws would be impermissibly extraterritorial or would violate the dormant Commerce Clause.

2. We reverse and remand the district court's entry of summary judgment in Delta's favor on the timing-of-pay and wage-statement claims asserted by plaintiffs Todd Eichmann, Albert Flores, and Michael Lehr. In its decision in *Oman*, the California Supreme Court held that California Labor Code §§204 and 226 apply to flight attendants who either perform a majority of their work in California or who do not perform a majority of their work in any one State and are based for work purposes in California. 466 P.3d at 341. For the reasons stated in our concurrently filed opinion in *Ward v. United Airlines, Inc.*, No. 16-16415, 986 F.3d 1234 (9th Cir. 2021), application of this test to flight attendants who meet its requirements does

not violate the dormant Commerce Clause. Although it appears as though plaintiffs Eichmann, Flores, and Lehr may satisfy this test, we remand to the district court for a determination of that issue in the first instance. We also remand to the district court to determine in the first instance whether Delta complied with §§204 and 226, assuming these plaintiffs establish that they meet the requirements of the California Supreme Court's test.

The record establishes that plaintiff Dev Oman does not meet the requirements of the California Supreme Court's test, so we affirm the district court's entry of summary judgment in Delta's favor on the timing-of-pay and wage-statement claims asserted by Oman.

AFFIRMED in part; REVERSED and REMANDED in part.

The parties shall bear their own costs.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15124

DEV ANAND OMAN, et al.,
Plaintiffs-Appellants,
v.
DELTA AIR LINES, INC.,
Defendant-Appellee.

Filed: April 13, 2021

Before: WATFORD and FRIEDLAND, *Circuit Judges* and RAKOFF,* *District Judge*.

ORDER

The panel unanimously votes to deny the petition for panel rehearing. Judge Watford and Judge Friedland vote to deny the petition for rehearing en banc, and Judge Rakoff so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed March 18, 2021, is DENIED.

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* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Appendix C

SUPREME COURT OF CALIFORNIA

No. S248726

DEV ANAND OMAN, et al.,

Plaintiffs and Appellants,

v.

DELTA AIR LINES, INC.,

Defendant and Appellee.

Filed: June 29, 2020

OPINION

Opinion of the Court by KRUGER, J:

In this case, as in the companion cases *Ward v. United Airlines, Inc.*, and *Vidrio v. United Airlines, Inc.* (June 29, 2020, S248702) 9 Cal.5th 732, 264 Cal.Rptr.3d 1, 466 P.3d 309 (*Ward*), we confront a question about the application of various California wage and hour laws to flight attendants who work primarily outside California's territorial jurisdiction. Consistent with our holding in those cases, we conclude that California's wage statement laws apply only to flight attendants who have their base of work operations in California, and that the same is true of

California laws governing the timing of wage payments. Finally, we hold that, whether or not California's minimum wage laws apply to work performed on the ground during the flight attendants' brief and episodic stops in California, the pay scheme challenged here complies with the state requirement that employers pay their employees at least the minimum wage for all hours worked.

I.

Defendant Delta Air Lines, Inc., is a national and international air carrier incorporated in Delaware and based in Georgia. Delta offers service in and out of roughly one dozen California airports, connecting cities as small as Palm Springs and as large as Los Angeles to the rest of the country and the world.

Plaintiffs Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores are or were flight attendants for Delta. Oman lived in New York and had a New York airport as a home base. Lehr lives in Nevada but has a California airport as his home base. Eichmann and Flores both live in California and have California airports as their home bases. All four employees have served on flights in and out of California airports, as well as airports outside the state.

In 2015, the named plaintiffs (collectively Oman) filed a putative class action in federal court, alleging that Delta violates California labor law by failing to pay its flight attendants at least the minimum wage for all hours worked. According to the operative complaint, Delta's published work rules (hereafter Work Rules) pay flight attendants pursuant to formulas that compensate them on an hourly basis for

certain hours worked but fail to provide any compensation at all for other working hours, in contravention of an obligation under California statutory and regulatory law to pay no less than the minimum wage for every hour worked. (See Lab. Code, §§1182.12, 1194, 1194.2; Industrial Welfare Commission (IWC) wage order No. 9-2001, §4 (Wage Order No. 9).) Oman also alleged Delta fails to pay all wages in accordance with the semimonthly timeframe prescribed by Labor Code section 204 (section 204) and to provide comprehensive wage statements reporting hours worked and applicable hourly pay rates, as required by California's wage statement statute, Labor Code section 226 (section 226). Oman sought relief under these statutes, as well as civil penalties under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, §2698 et seq.) and restitution and injunctive relief under the unfair competition law (Bus. & Prof. Code, §17200 et seq.).

On cross-motions for summary judgment, the district court concluded Delta's pay scheme does not violate California's minimum wage requirements. (*Oman v. Delta Air Lines, Inc.* (N.D.Cal. 2015) 153 F.Supp.3d 1094, 1095.) Oman argued that Delta fails to pay any compensation at all for certain hours worked in California and, under *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal. App.4th 36, 155 Cal.Rptr.3d 18 (*Gonzalez*) and *Armenta v. Osmose, Inc.* (2005) 135 Cal. App.4th 314, 37 Cal.Rptr.3d 460 (*Armenta*), Delta is prohibited from borrowing compensation due for other hours worked to make up for any shortfall. The district court examined the pay formulas set out by Delta's Work Rules and concluded they adequately compensate flight attendants for all

hours worked, without any impermissible borrowing or reduction in agreed-to contractual rates. (*Oman*, *supra*, 153 F.Supp.3d at pp. 1102-1107.)

The parties then filed cross-motions for summary judgment on Oman's remaining wage statement and timing claims. The district court granted judgment in favor of Delta, concluding that the relevant California statutes, sections 204 and 226, do not apply to Oman. The court held that the jurisdictional reach of the statutes should be determined according to a multifactor analysis that examines "the particular Labor Code provision invoked, the nature of the work being performed, the amount of work being performed in California, and the residence of the plaintiff and the employer." (*Oman v. Delta Air Lines, Inc.* (N.D.Cal. 2017) 230 F.Supp.3d 986, 992-993.) Here, "[f]ocusing on the purpose of Section 226 (to give employees clarity as to how their wages are calculated, so they can verify that their wages are calculated appropriately *under* California law), because the undisputed facts show that the named plaintiffs only worked a *de minimis* amount of time in California (ranging from 2.6% to a high of 14%), and in light of the nature of their work (necessarily working in federal airspace as well as in multiple other jurisdictions but during each pay period *and day* at issue)," the court concluded that section 226 does not apply to Oman's claims. (*Oman*, *supra*, 230 F.Supp.3d at p. 993, fn. omitted.) Seeing no argument for a different result under section 204, and because plaintiffs' counsel had conceded the statute should have a similar scope, the district court likewise rejected Oman's section 204 claims. (*Oman*, at p. 994.)

On appeal, the Ninth Circuit asked that we resolve three unsettled questions of California law underlying Oman's claims. (*Oman v. Delta Air Lines, Inc.* (9th Cir. 2018) 889 F.3d 1075, 1076-1077.) We accepted the request and agreed to resolve the following issues:[1]

(1) Do sections 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?

(2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time? (See Lab. Code, §§1182.12, 1194; Cal. Code Regs., tit. 8, §11090, subd. (4).)

(3) Does the *Armenta/Gonzalez* bar on averaging wages (see *Armenta*, *supra*, 135 Cal. App.4th 314, 37 Cal.Rptr.3d 460; *Gonzalez*, *supra*, 215 Cal.App.4th 36, 155 Cal.Rptr.3d 18) apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty?

II.

A.

Our precedent makes clear that the application of California wage and hour protections to multistate workers like Oman may vary on a statute-by-statute

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[1] We have reframed these inquiries slightly. (Cal. Rules of Court, rule 8.548(f)(5).)

basis. (See *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1201, 127 Cal.Rptr.3d 185, 254 P.3d 237 (*Sullivan*).) We thus consider separately each of the wage and hour statutes on which Oman relies, beginning with section 226. That provision requires an employer to supply each employee "semimonthly or at the time of each payment" a written wage statement disclosing the pay period and itemizing the hours worked, applicable hourly rates, gross and net wages earned, any deductions taken, and other relevant information. (§226, subd. (a).)

As we explained in *Ward*, *supra*, 9 Cal.5th 732, 264 Cal.Rptr.3d 1, 466 P.3d 309, section 226 does not, in so many words, define its geographic reach. (*Ward*, at p. 752, 264 Cal.Rptr.3d 1, 13, 466 P.3d 309.) But we ordinarily presume the Legislature drafts laws with domestic conditions in mind (*id.* at pp. 748-749, 264 Cal.Rptr.3d 1, 10, 466 P.3d 309), and thus requires some degree of connection between the subject matter of the statutory claim and the State of California. In *Ward*, we addressed the nature of the connection required to trigger the wage statement requirements set forth in section 226 and held that section 226 applies when an employee's principal place of work is in California. Ordinarily, this test is met if an employee works primarily (i.e., the majority of the time) in California. In the case of interstate transportation workers and others who do not spend a majority of their working time in any one state, this test is satisfied when California serves as their base of work operations. (*Ward*, at pp. 755-757, 264 Cal. Rptr.3d 1, 15-17, 466 P.3d 309.) Under this rule, because plaintiffs here never worked more than half the time in California (or in any other state), whether

they are entitled to California-compliant wage statements hinges on whether they were based for work purposes in California.

The Ninth Circuit's question in this case appears to ask whether it is also relevant that Delta is a nonresident corporation. Delta now concedes that its foreign domicile does not foreclose the application of state law. We accept the concession. Section 226 contains no exemption based on the employer's location. This is in contrast to, for example, the worker's compensation scheme, which expressly exempts some out-of-state employers. (See Lab. Code, §3600.5, subd. (b); *Sullivan*, *supra*, 51 Cal.4th at pp. 1197-1198, 127 Cal.Rptr.3d 185, 254 P.3d 237.) The state's power to protect employees within its borders is not limited by whether the worker might be a nonresident or might be employed by a nonresident entity. (*North Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1, 5, 162 P. 93; see *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 105, 45 Cal.Rptr.3d 730, 137 P.3d 914 ["individual states may adopt distinct policies to protect their own residents and generally may apply those policies to businesses that choose to conduct business within that state"].) Instead, the onus ordinarily is on "a company that conducts business in numerous states … to make itself aware of and comply with the law of a state in which it chooses to do business." (*Kearney*, at p. 105, 45 Cal.Rptr.3d 730, 137 P.3d 914.) To hold otherwise would, as Delta suggests, create an incentive for businesses employing individuals who work in California to avoid application of California law by locating their business operations outside the state. If employees are based for work purposes in California,

that is sufficient to trigger the requirements of section 226, regardless of where their employer resides.

The proposed class in this case includes individuals who, like New York-based Dev Oman, neither perform their work predominantly in California nor are based for work purposes in the state. Oman urges us to apply a different rule than the one we have articulated in *Ward*. Although the operative complaint does not so specify, Oman clarifies in his briefing that unlike the *Ward* plaintiffs he does not seek comprehensive wage statements documenting all wages earned during a pay period. He argues instead that section 226 ought to be interpreted to require California- compliant documentation for those hours, however few they might be during any given pay period, when he worked on the ground in California. He contends this requirement should apply to any airline employee who ever works in California, even those who are based out of state.

This argument fails under the terms of section 226. Section 226 provides for the documentation of wages and other information over an entire pay period, not fractions thereof. A wage statement must specify not only "total hours worked" and "all applicable hourly rates," but also "gross wages," "net wages," and "all deductions" for the full period. (§266, subd. (a).) The statute contains no indication that the employer of an out-of-state worker must report fractions of wages earned during brief trips to the state, as well as attempt to calculate the fraction of wage deductions attributable to these sojourns. The statute requires "an accurate itemized statement"

reflecting "the inclusive dates of the period for which the employee is paid" and all relevant information concerning the employee's pay during that period—that is, a single comprehensive statement of pay. (*Ibid.*)

Oman argues that our recent decision in *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 235 Cal.Rptr.3d 820, 421 P.3d 1114 supports his proposed fractional approach, but *Troester* has nothing to do with the question before us. There, stressing that the IWC's wage orders ensure compensation for " 'all hours worked' " (*Troester*, at p. 840, 235 Cal.Rptr.3d 820, 421 P.3d 1114, quoting IWC wage order No. 5-2001, §§3(A), 4(A)), we rejected the contention that state wage law would not concern itself with unpaid work on the order of a few minutes a day. Instead, we held that an "employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine." (*Troester*, at p. 847, 235 Cal.Rptr.3d 820, 421 P.3d 1114.) That holding has no relevance here. The issue before us is not whether brief periods of work must be compensated—no one disputes the point—but whether a few minutes or hours of work in California necessarily trigger the detailed pay-period documentation requirements of California law. The answer to that question is no: Employees are entitled to California-compliant wage statements only if California is the principal place of their work.

Oman also argues that an approach based on the principal place of work will prove unworkable because

coverage can only be determined in retrospect. But there is nothing unworkable about it. Wage statements are, of necessity, prepared in retrospect; their function is to record hours already worked and wages already earned. And if the location of an employee's job duties shifts radically during the course of employment—if, for example, a flight attendant takes on a new job as a gate agent at Los Angeles International Airport—the employer will have ample opportunity to adjust. Likewise, if the employee's base of operations changes because the employee is assigned to a different home airport, it will be a small matter to determine whether section 226 now applies.

It is, in the end, Oman's approach that poses greater practical concerns. By insisting on California-compliant wage statements, but only for the fraction of hours worked on the ground in California, Oman would effectively require that employers either (1) accompany each California-specific wage statement with multiple similar separate statements under the laws of each and every additional state in which an employee worked during a pay period, or (2) issue a single wage statement, but allow California law effectively to dictate the form and contents for documenting work predominantly performed in foreign jurisdictions. The first option would undermine the very purpose of section 226, which is "to ensure an employer 'document[s] the basis of the employee compensation payments' to assist the employee in determining whether he or she has been compensated properly." (*Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 390, 208 Cal.Rptr.3d 618, quoting *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 574, 67 Cal.Rptr.3d 468, 169

P.3d 889.) This informational purpose would be ill-served by a rule that led to employees receiving a blizzard of wage statements every pay period, each documenting only a state-specific sliver of their work, and from this paper snowdrift trying to discern what they had actually been paid. As to the second option, allowing any work in California, no matter how fleeting, to effectively impose California law on documentation of all work in a pay period would raise the very sorts of conflict-of-laws problems we generally presume the Legislature seeks to avoid. (*Ward*, *supra*, 9 Cal.5th at pp. 749-750, 264 Cal.Rptr.3d 1, 10-11, 466 P.3d 309.) It is presumably for this reason that Oman has avoided arguing that California law requires this result. We decline to construe section 226 as putting employers to the choice of either issuing a single California-compliant wage statement for every interstate worker who works for any amount of time, however brief, within the state, or issuing a multiplicity of statements, when the statute envisions that employees will receive just one.

The principal place of work rule we have articulated in *Ward* means that some short periods of work in California will not be covered by section 226's documentation requirements. Conversely, some periods of work outside California *will* be covered, if they occur as part of an overall period in which most work occurs inside this state or are performed by an employee who primarily works in no state but is based here. Such consequences are inevitable and unavoidable in a nation of 50 states where some forms of employment stretch across the land. But an understanding of section 226 that focuses on the principal place of an employee's work both serves the

informational purposes the Legislature sought to achieve and minimizes the inevitable complications that would result from a rule that any work in one state, no matter how fleeting, is sufficient to trigger application of that state's wage reporting laws.

We thus conclude section 226 does not apply to work performed in California during pay periods in which the employee, based outside California, works primarily outside California. A non-California-based employee who works in California "only episodically and for less than a day at a time" (*Oman v. Delta Air Lines, Inc.*, *supra*, 889 F.3d at p. 1077) is not entitled to a wage statement prepared according to the requirements of California law.

B.

We turn now to Oman's section 204 claim. That statute guarantees employees full payment on a semimonthly basis, providing: "All wages," with certain exceptions not relevant here, "earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." (§204, subd. (a).) Section 204 goes on to establish specific deadlines by which wage payments must be made. (*Id.*, subd. (a).)[2] As is true of section 226,

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[2] With certain exceptions not relevant here, "[l]abor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month." (§204, subd. (a).)

nothing in the statute explicitly specifies its intended geographic scope.

As Oman conceded in the federal district court (see *Oman v. Delta Air Lines, Inc.*, *supra*, 230 F.Supp.3d at p. 994), there is no reason to interpret section 204's geographic coverage differently from that of section 226. That is because section 204 works hand in hand with section 226. Section 226 regulates the information an employer must provide in connection with wage payments, while section 204 regulates when an employer must pay an employee for hours worked. The Legislature has recognized that when an employee must be paid (the subject of §204), and what information must accompany each such required payment (the subject of §226) are necessarily linked. (See §204, subd. (b)(2) [coordinating the application of these provisions].)

As with section 226, Oman seeks to apply section 204 only to those hours he worked within California. And as with section 226, reading the statute as Oman argues would pose difficulties that prove fatal to the argument. Again, there are two options: Either the employer must calculate and split out some portion of the wages due as attributable to work performed in California and pay only those on section 204's schedule, while paying other wages due in accord with whatever timing statutes might apply under other states' laws, or the employer must pay all wages due according to the schedule required under California law by section 204. These interpretations present the same issues as the corresponding options for complying with section 226.

The first interpretation, aside from the administrative headaches it would generate, runs headlong into the text of section 204, which applies to "[*a*]*ll* wages … earned," with exceptions not significant here. (§204, subd. (a), italics added.) As with section 226, nothing in the text suggests the Legislature contemplated fragmenting wages earned according to the state in which labor was performed and requiring whatever sliver of wages might be attributable to California to be paid on section 204's timeline, with other slivers for work elsewhere paid according to whatever other state law might apply. Nor is it clear how such a reading would advance the policy underlying section 204. Section 204 serves the "public policy in favor of full and prompt payment of an employee's earned wages," which "is fundamental and well established: ' "Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public." ' " (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82, 45 Cal.Rptr.3d 394, 137 P.3d 218, quoting *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326, 19 Cal.Rptr. 492, 369 P.2d 20; see *Voris v. Lampert* (2019) 7 Cal.5th 1141, 1148, 250 Cal.Rptr.3d 779, 446 P.3d 284 ["prompt and complete wage payments are of critical importance to the well-being of workers, their families, and the public at large"].) Section 204, insofar as it applies to the entirety of an employee's wages, directly serves this policy. It is less apparent how the policy is meaningfully advanced by requiring payment of California-earned wages on a California-specified timeline when those wages represent just a

small fraction of the earnings an employee relies on for support.

The second interpretation accords section 204 a broad reach, allowing California law to dictate the timing of payment for wages earned predominantly outside California for work performed outside California. Granting section 204 such an expansive scope would generate significant complications. Given the nature of the flight attendants' work, treating any work performed on the ground in any given state as sufficient to trigger application of payment timing requirements could subject the payment for work in a given pay period to the often-conflicting laws of a dozen or more states. Reading section 204 in concert with section 226 as applying to pay periods in which an employee works predominantly in California avoids these problems.

In sum, we conclude section 204 is subject to the same limits as section 226 and applies only to pay periods during which an employee predominantly works inside California.

III.

We turn, finally, to the minimum wage claims. The Ninth Circuit asks two questions related to these claims: First, whether California minimum wage law applies to the hours (or fractions thereof) that Oman worked on the ground in California, and second, whether Delta's method of computing Oman's wages complies with the state law. As discussed, the application of labor protections must be analyzed on a provision by provision basis in light of the nature of the protection afforded, and so the rules we articulate for sections 204 and 226 do not resolve whether the

state's minimum wage laws might apply. (See *Ward*, *supra*, 9 Cal.5th at pp. 752-753, 756-757 & fn. 10, 264 Cal. Rptr.3d 1, 13, 16-17 & fn. 10, 466 P.3d 309; *Sullivan*, *supra*, 51 Cal.4th at p. 1201, 127 Cal.Rptr.3d 185, 254 P.3d 237; *ante*, at pp. 745-746, 264 Cal.Rptr.3d 1, 5, 466 P.3d 309.) But we need not settle the reach of the state's minimum wage laws if we can determine that, even were those laws to apply, Delta's pay scheme would not violate them. Because the record establishes Delta complies with state minimum wage law, we address only that question.

Like other industry wage orders, Wage Order No. 9 requires that "[e]very 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." (*Id.*, §4(B).) Here, pursuant to the Work Rules, the remuneration provided to Delta flight attendants is measured by the "rotation," a given sequence of flights over a day or a period of days that the attendant will serve on. Compensation for each rotation is calculated according to four different formulas; flight attendants are paid according to whichever formula yields the largest amount for the complete rotation. (See *post*, 264 Cal. Rptr.3d at pp. 33-34, 466 P.3d at pp. 336-337.) It is undisputed that under this compensation scheme, flight attendants are always paid, on an hourly average, above the minimum wage. Oman contends that the scheme nonetheless violates California's minimum wage law, principally because one of Delta's four formulas—the formula that most often determines how much flight attendants will be paid, because it generally yields the

greatest compensation—is based solely on flight time and does not factor in the hours flight attendants spend working on the ground before and after flights.

The dispute between the parties does not concern the substance of California's minimum wage guarantee. It is common ground that the law guarantees at least minimum wage for "all hours worked in the payroll period." (Wage Order No. 9, §4(B).) The parties' disagreement instead concerns how compliance is to be measured when the employer does not compensate its employees according to a fixed hourly rate applicable to all hours.

A.

To understand the nature of the dispute, some background is required. Beginning several decades ago, federal courts confronting questions about minimum wage compliance commonly interpreted federal law to require only that employers pay in each week an average wage at or above the federal minimum. (See 29 U.S.C. §206(a); *U.S. v. Klinghoffer Bros. Realty Corp.* (2d Cir. 1960) 285 F.2d 487, 490; see also, e.g., *Dove v. Coupe* (D.C. Cir. 1985) 759 F.2d 167, 171-172 (opn. of Ginsburg, J.).) At least without further refinement, the workweek-average approach means that if an employer agrees to pay a particular amount for say, 20 hours of work in a week, but then demands the employee work an additional 10 hours for free, the minimum wage law is satisfied so long as the total wages, divided by 30, equal or exceed the applicable minimum wage. Under this approach, Delta's compensation scheme could create no possible problems, since, as noted, it is undisputed that the

scheme yields an average hourly wage that well exceeds the minimum set by California law.

The Division of Labor Standards Enforcement (DLSE) and the unanimous Courts of Appeal, however, have embraced a more stringent understanding of state law that forbids taking compensation contractually due for one set of hours and spreading it over other, otherwise un- or undercompensated, hours to satisfy the minimum wage—a practice that has often, perhaps misleadingly, been referred to as "wage averaging." As we will explain, the practice these authorities prohibit might be more accurately characterized as "wage borrowing," and we employ that phraseology here.

The DLSE was first to consider the issue. (See Dept. of Industrial Relations, DLSE Opn. Letter No. 2002.01.29 (Jan. 29, 2002) (hereafter DLSE Opinion Letter No. 2002.01.29).) In response to a question by parties to a collective bargaining agreement, the DLSE determined that particular employee travel time for which no compensation was being paid, because the employer apparently viewed it as off-duty and noncompensable, was in fact on-duty hours worked and compensable. (*Id.* at pp. 1-7.) The DLSE then considered whether payments for other compensable hours, contractually promised under the collective bargaining agreement, could be borrowed to satisfy the employer's minimum wage obligations, as would have been true under the rule generally articulated in the federal courts.

The DLSE viewed the language of the wage order as ambiguous, so it turned to the statutory backdrop for answers. California law, the DLSE observed,

differs from federal law in that it not only guarantees a minimum wage but also expressly protects employees' right to receive the wages promised in a contract or collective bargaining agreement. Specifically, Labor Code section 221 prohibits an employer from paying wages and then recouping some portion of the wages as a kickback or secret deduction;[3] Labor Code section 222 prohibits underpayment of wages established by a collective bargaining agreement;[4] and Labor Code section 223 prohibits underpayment of wages otherwise established by contract.[5] Wage borrowing would violate these statutes by reducing compensation, for the hours from which wages were borrowed, below the contractually agreed-upon level. (DLSE Opn. Letter No. 2002.01.29, *supra*, at p. 11 ["These statutes prevent [an] employer that might be covered by a [collective bargaining agreement (CBA)] or other contract that expressly pays employees less than the minimum wage for certain activities that constitute

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[3] "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." (Lab. Code, §221; see *Kerr's Catering Service v. Department of Industrial Relations*, *supra*, 57 Cal.2d at p. 328, 19 Cal.Rptr. 492, 369 P.2d 20.)

[4] "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." (Lab. Code, §222.)

[5] "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract." (Lab. Code, §223.)

'hours worked' within the meaning of state law, from using any part of the wage payments that are required under that CBA or other contract for activities that are compensated in an amount that equals or exceeds the minimum wage, as a credit for satisfying minimum wage obligations for those activities that are compensated at less than the minimum wage under the CBA or contract" (fn. omitted)].) In practical terms, this means that an employer who contracts to pay $18 per hour for two hours of work, but who then demands a third hour of unpaid work, cannot argue that it has complied with a $12 hourly minimum wage (see, e.g., Lab. Code, §1182.12, subd. (b)(1)(C), (2)(C)) because it has paid $36 over three hours, or $12 per hour. Under the DLSE's interpretation of the Labor Code, the employer must pay the full $18 required by contract for the first two hours. Then, for the third uncontracted-for hour for which no compensation was promised, it must pay no less than the applicable minimum wage.

The Court of Appeal in *Armenta*, *supra*, 135 Cal.App.4th 314, 37 Cal.Rptr.3d 460, endorsed the DLSE's reasoning in a similar context. The employer in *Armenta*, which maintained utility poles, had promised in a collective bargaining agreement to pay set hourly rates for hours spent engaged in "productive" tasks directly related to pole maintenance. But employees were required to engage in other, "nonproductive" activities, such as travel time and paperwork, for which they received no compensation. (*Id.* at p. 317, 37 Cal.Rptr.3d 460.) The court held this unlawful, notwithstanding the fact that the average of the paid and unpaid hours exceeded the minimum wage. The court reasoned that

an employer who promises to compensate particular hours worked at a particular rate cannot borrow some of that compensation and apply it to other compensable hours for which no compensation is provided. To do so would effectively compel an employee to sacrifice contractually promised compensation and breach the employer's contractual commitments, in violation of either Labor Code section 222 (governing collective bargaining agreements) or Labor Code section 223 (governing ordinary contracts). (See *Armenta*, at p. 323, 37 Cal.Rptr.3d 460 [averaging pay across any uncompensated hours "contravenes these code sections and effectively reduces [the employee's] contractual hourly rate"].)

Since *Armenta*, other Courts of Appeal have uniformly followed its lead. These decisions have extended the no-borrowing rule to employees under a collective bargaining agreement (*Bluford v. Safeway Inc.* (2013) 216 Cal.App.4th 864, 872-873, 157 Cal. Rptr.3d 212 (*Bluford*)) and an ordinary contract (*Gonzalez*, *supra*, 215 Cal.App.4th at pp. 50-51, 155 Cal.Rptr.3d 18), and without regard to whether the basis for compensation is hourly (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 297-298, fn. 5, 120 Cal. Rptr.3d 442), by piece rate (*Bluford*, at p. 872, 157 Cal.Rptr.3d 212; *Gonzalez*, at pp. 51-52, 155 Cal.Rptr.3d 18), or by commission (*Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, 108-114, 214 Cal. Rptr.3d 661 (*Vaquero*)). Although we have not previously had occasion to address the issue, we agree with this consensus: State law prohibits borrowing compensation contractually owed for one set of hours or tasks to rectify compensation below the

minimum wage for a second set of hours or tasks, regardless of whether the average of paid and unpaid (or underpaid) time exceeds the minimum wage. Even if that practice nominally might be thought to satisfy the requirement to pay at least minimum wage for each hour worked, it does so only at the expense of reneging on the employer's contractual commitments, in violation of the contract protection provisions of the Labor Code.

Synthesizing the authorities, we summarize the principles this way. The compensation owed employees is a matter determined primarily by contract. Compensation may be calculated on a variety of bases: Although nonexempt employee pay is often by the hour, state law expressly authorizes employers to calculate compensation by the task or piece, by the sale, or by any other convenient standard. (See Lab. Code, §200, subd. (a) [compensation may be "fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation"]; Wage Order No. 9, §4(B) [compensation may be "measured by time, piece, commission, or otherwise"].) In many employment agreements, such as the one at issue in *Armenta*, the unit of time or activity by which an employer promises to pay an employee is easily ascertainable. (See *Armenta*, *supra*, 135 Cal.App.4th at p. 317, 37 Cal.Rptr.3d 460 ["Under the terms of the parties' collective bargaining agreement, respondents were paid hourly wages … .'].) In other cases, the employer may compensate employees based on a combination of methods. (See, e.g., *Vaquero*, *supra*, 9 Cal.App.5th at p. 103, 214 Cal.Rptr.3d 661 [compensation determined by the greater of sales commission or hourly minimum pay]; *Gonzalez*, *supra*,

215 Cal.App.4th at p. 41, 155 Cal.Rptr.3d 18 [compensation determined by greater of repair tasks completed or minimum hourly pay].) Consistent with general contract interpretation principles, the unit for which pay is promised should be determined based on the "mutual intention of the parties as it existed at the time of contracting." (Civ. Code, §1636.)

Whatever the task or period promised as a basis for compensation, however, an employer must pay no less than the minimum wage for all hours worked. (See Wage Order No. 9, §§2(H), 4.) The employer must satisfy this obligation while still keeping any promises it has made to provide particular amounts of compensation for particular tasks or periods of work. (Lab. Code, §§221-223.) For all hours worked, employees are entitled to the greater of the (1) amount guaranteed by contract for the specified task or period, or (2) the amount guaranteed by the minimum wage. Whether a particular compensation scheme complies with these obligations may be thought of as involving two separate inquiries. First, for each task or period covered by the contract, is the employee paid at or above the minimum wage? Second, are there other tasks or periods not covered by the contract, but within the definition of hours worked, for which at least the minimum wage should have been paid?

For purposes of evaluating whether an employee has received at least the hourly minimum wage for tasks or periods compensated under the contract, it is generally permissible to translate the contractual compensation—whether it be done by task, work period, or other reasonable basis—into an hourly rate by averaging pay across those tasks or periods. An

employer can, for example, pay by the day, with daily pay averaged across all hours worked to determine whether the resulting hourly wage exceeds the minimum. But an employer who instead promises to pay by the hour may not compensate any given hour at less than minimum wage. Nor may the employer make up for the shortfall by pointing to other hours for which contractual compensation exceeds the minimum wage. As the DLSE explained in its letter, if a contract or bargaining agreement expressly guarantees compensation for one set of tasks or one specific period, that compensation may not be reduced to supplement pay for other tasks or periods within the purview of the contract or bargaining agreement, but otherwise undercompensated by them. (DLSE Opn. Letter No. 2002.01.29, *supra*, at p. 11; Lab. Code, §§221-223.)

The same "no borrowing" principle applies when an employer requires work not covered by the contract at all, but which falls within the definition of hours worked under the minimum wage law. So, for example, in *Armenta*, *supra*, 135 Cal.App.4th 314, 37 Cal. Rptr.3d 460, the collective bargaining agreement ensured pay at or above the minimum wage for hours engaged in specified productive tasks, and under the agreement and Labor Code section 222, the employees were entitled to their promised wages without diminution. But for other periods not compensated under the contract, but during which employees were on duty and thus owed compensation under the wage order, the minimum wage was also due.

B.

So far, we have described common ground: Delta does not challenge the no-borrowing principle as it has been elaborated in the *Armenta* line of cases. The parties' disagreement concerns whether Delta's flight attendant compensation scheme violates this no-borrowing principle. Because the relevant provisions of the Labor Code prohibit borrowing only when it results in failure to maintain the wage scale designated by contract, the resolution necessarily turns on the nature of Delta's contractual commitments. (See Lab. Code, §223 [prohibiting an employer from "secretly pay[ing] a lower wage while purporting to pay the wage designated … by contract"].)

Delta's Work Rules, which are disclosed to all its flight attendants, promise to compensate attendants by the rotation rather than by particular hours worked. This is evident both from the structure of the compensation scheme outlined in the Work Rules and the procedures Delta employees follow to obtain work assignments.

Each rotation contains one or more duty periods, interspersed with layovers between duty periods. A duty period begins when a flight attendant reports to an airport before a flight. Thereafter, the flight attendant may have preboarding obligations, in-flight obligations, post touchdown obligations, transit or sit time—the period in another airport before the next flight is ready for boarding—and a similar set of obligations during the next or each subsequent flight until the end of the duty period. As Delta acknowledges, flight attendants are on duty

continuously during a duty period, from first reporting until release after the last flight of the period. For his part, Oman does not contend flight attendants are on duty or entitled to compensation for layovers between duty periods.

Under the Work Rules, compensation is first determined for each duty period within a rotation by comparing three calculations and choosing the highest pay from among these: "Each duty period of a rotation pays the greatest of: [¶] 1) flight time (includes deadhead flight time, minutes under, and flight pay for ground time), or [¶] 2) 4:45 minimum duty period credit (MDC), or [¶] 3) 1 for 2 duty period credit (DPC)." Second, the maximum pay for all duty periods within a rotation is summed and compared against a fourth formula based on the length of the rotation, and flight attendants are paid whichever of these two amounts is greater.[6] Thus, although hours worked, or credited, are elements in these successive computations and comparisons to determine an employee's pay, Delta does not promise to pay by the hour, nor does it promise to pay for certain hours and not others.

The promise to pay by rotation is also reflected in the procedures Delta uses for distributing work assignments. The nature of these procedures is undisputed: Each month, Delta circulates a bid packet to its flight attendants listing rotations each employee can request. The bid packet presents the number of

[6] Under this alternative rotation formula, "[t]he sum of the duty period credits listed above is then compared to 1 for 3.5 trip credit (TRP), which guarantees at least 1 hour pay for every 3.5 hours away from base. You will be paid the greater of the two values."

duty periods and length of each duty period within each rotation; report times and total scheduled flight times for the flights within each rotation; and the amount of time the flight attendant can expect to be away from base. The bid packet also shows which formula will apply and the minimum amount flight attendants would be paid for the rotation at their particular contractually established "flight pay" rate. (See *Oman v. Delta Air Lines, Inc.*, *supra*, 153 F.Supp.3d at pp. 1096-1098.) Flight attendants then submit their rotation preferences, with the understanding that their pay for each rotation will be no less than the amount derivable from the bid packet. That Delta pays flight attendants by the rotation, and what it will pay for any particular rotation, are fully disclosed. Delta then gives flight attendants access to electronic databases that track credits and pay earned for each assigned rotation.

Delta's four-formula method for calculating compensation guarantees that flight attendants are always paid above the minimum wage for the hours worked during each rotation without borrowing from compensation promised for other rotations. Under one of the four formulas—the one-for-two duty period credit formula—pay is calculated by multiplying the attendant's established flight pay rate by the total hours in the duty period, divided by two. To borrow the simple example contained in Delta's 2014 Work Rules, a flight attendant working a duty period that lasts 12.5 hours would receive 6.25 hours of credit at the flight pay rate—a rate that in 2014 ranged from $23.28 to $53.52 depending on the employee's years of service. So long as the flight pay rate equals or exceeds twice the applicable minimum wage, this formula

ensures a flight attendant is paid for all hours worked in every duty period at no less than the minimum wage. And because pay for a rotation is never less than the sum of the pay for each duty period, rotation pay also will always meet or exceed the hourly minimum wage.

Oman does not contend that any flight attendant's flight pay rate was ever less than twice the applicable minimum wage. But he nevertheless contends that the duty period credit formula fails to compensate flight attendants for all hours worked and instead compensates them for only half the hours worked—leaving the other half entirely uncompensated, contrary to state minimum wage law. Specifically, as Oman reads the Work Rules, the flight attendant working a 12.5-hour duty period is being paid for only half of that time, 6.25 hours, with the remaining 6.25 hours unpaid.

Oman's reading is unsound. The Work Rules do not, as he suggests, purport to compensate flight attendants only for every other hour—which is to say, they do not require a flight attendant to work an hour for free in order to earn full flight pay credit for working a second hour. Instead, flight pay credit accumulates continuously as the duration of the duty period lengthens: Every additional minute on duty earns an employee an additional 30 seconds of flight pay credit. As an example, a flight attendant subject to a $40 flight pay rate who works an eight-hour duty period would receive $160; for an 8.5-hour duty period, $170; for a nine-hour duty period, $180; and so on.[7]

[7] The same is true no matter what causes the duty period to extend. If the same flight attendant with a $40 flight pay rate

Each and every increment of on-duty time is compensated under the formula, and at a rate equal to or greater than the hourly minimum wage. There is no impermissible borrowing from hours for which full flight pay was promised to cover hours for which no compensation is provided, both because every hour is compensated at the same rate (half flight pay) and because Delta never promised full flight pay for any particular hour under this formula.

The duty period credit formula is, however, only one of four formulas that may determine flight attendant compensation; if any one of the other formulas yields a greater amount of compensation, it will instead control. Oman argues that when pay is based on one of these other formulas, Delta violates the state minimum wage law.

Oman focuses in particular on a second formula, the flight time formula, which supplies the measure of pay for most duty periods. (*Oman v. Delta Air Lines, Inc.*, *supra*, 153 F.Supp.3d at pp. 1100-1101.) Under this formula, an attendant is paid at the contractually established flight pay rate for each period between flight "block out" and "block in"—the period between when each flight departs the block, or gate, and arrives at the destination gate. The established flight pay rate is multiplied by the longer of the scheduled flight time or the actual flight time. Time between reporting for duty and the first flight block out, during

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works a duty period consisting of flights in and out of San Francisco, and the second flight is delayed by fog, requiring additional sit time in San Francisco, the amount owed under the duty period credit formula will still rise, at the rate of $20 per hour, for every extra minute of delay.

any between-flights sit time, and after the last flight block in until release, is not directly factored into the calculation. For duty periods where the flight time comprises less than 50 percent of the total on-duty time, a flight attendant can still be compensated according to the duty period credit formula described above; the flight time formula operates only to supply additional compensation, above and beyond the compensation that would be owed under the duty period credit formula, for periods where flight time exceeds this 50 percent threshold.

As Oman observes, there are on-duty periods to which the flight time formula does not directly attribute compensation, such as preflight briefings. Oman contends that Delta's failure to specify a particular pay rate specific to these periods of time violates the obligation to pay at least minimum wage for all hours worked. And, according to Oman, any attempt to satisfy the minimum wage law by averaging the flight attendant's pay over the entire span of the duty period would violate the no-borrowing rule of *Armenta* and its progeny.

Oman's argument depends on a particular view of the role of the flight time formula under the parties' contract: That, by offering flight attendants a fixed amount of compensation for a particular rotation, but also disclosing the formula on which it has arrived at that amount, Delta has in effect promised to compensate flight attendants at their full flight pay rate for hours in flight, and not to compensate them at all for their other hours worked. But even if this were a plausible view of the flight time formula in isolation, it is not a plausible view of the formula as it operates

in the broader context of the Work Rules. Under those rules, the flight time formula is just one of four components of a single compensation scheme that constitutes Delta's contractual promise to its flight attendants. Flight attendants are presented with information about the entire scheme and bid on their work assignments according to the entire scheme. And the scheme, taken as a whole, does not promise any particular compensation for any particular hour of work; instead, as discussed above, it offers a guaranteed level of compensation for each *duty period* and each *rotation*. Because there are no on-duty hours for which Delta contractually guarantees certain pay—but from which compensation must be borrowed to cover other un- or undercompensated on-duty hours—the concerns presented by the compensation scheme in *Armenta*, *supra*, 135 Cal.App.4th 314, 37 Cal.Rptr.3d 460 and like cases are absent here.

The same logic applies when either of Delta's remaining two formulas is used to calculate flight attendant compensation. In all cases, flight attendants are guaranteed at least the amount of compensation owed under the duty period credit formula, which, as already discussed, always exceeds the minimum wage. To forbid Delta from offering greater pay than the amount owed under that formula based on the flight time formula or one of the other two formulas would do nothing to ensure workers are paid fair or adequate wages for all hours worked. (See *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 [minimum wage laws serve to ensure " ' "[a] fair day's pay for a fair day's work" ' "]; *Brooklyn Savings Bank v. O'Neil* (1945) 324 U.S. 697, 706, 65 S.Ct. 895, 89

L.Ed. 1296 [minimum wage protections serve "to protect certain groups of the population from sub-standard wages … due to … unequal bargaining power"].) There is no evident inadequacy or unfairness in permitting Delta to compensate flight crew members on a per-rotation basis, at a level no less than contractually promised and in excess of the hourly minimum wage—nor is there any unfairness in permitting Delta to increase that compensation when, for example, duty periods include a greater percentage of flight time or rotations include more drawn-out off-duty layovers between duty periods.

Resisting this commonsense conclusion, Oman leans heavily on *Gonzalez*, *supra*, 215 Cal.App.4th 36, 155 Cal.Rptr.3d 18, but *Gonzalez* will not support the weight. There, the employer auto dealership and service center compensated auto technicians on a piece-rate basis. Each repair task was assigned a set number of "flag hours" roughly corresponding to the length of time it ought to take to complete. The service center promised its technicians a flat rate tied to their experience level multiplied by the number of flag hours completed. Technicians also had significant wait time, during which no repair orders were pending and so no flag hours could be accrued, but during which the employer required them to remain on premises in case new customers arrived. The employer also calculated a " 'minimum wage floor,' " which equaled the total hours a technician remained on the premises multiplied by the applicable minimum wage. (*Id*. at p. 41, 155 Cal.Rptr.3d 18.) If a technician's "flag hour" compensation fell below the minimum wage floor, the employer supplemented the technician's pay to make up for the difference. (*Id*. at pp. 41-42, 155

Cal.Rptr.3d 18.) Employees sued for minimum wage violations based on the failure to pay for wait time.

The Court of Appeal concluded that the employer's compensation scheme violated California minimum wage law. It explained that the *Armenta* no-borrowing rule "applies whenever an employer and employee have agreed that certain work will be compensated at a rate that exceeds the minimum wage and other worktime will be compensated at a lower rate." (*Gonzalez*, *supra*, 215 Cal. App.4th at p. 51, 155 Cal.Rptr.3d 18.) In such circumstances, pay at an agreed higher rate cannot be borrowed to make up for subminimum wage pay during other worktime. As the *Gonzalez* court read the parties' contract, the case before it involved such a situation: The employer's contractual commitment to its workers was a guaranteed piece-rate for completing various repair tasks. Having promised a particular amount of compensation for each flag hour, the employer could not borrow from that promised compensation to supply at least a minimum hourly wage for unpaid wait time hours without violating Labor Code section 223 and the *Armenta* no-borrowing rule. The court illustrated with the hypothetical case of a worker promised $20 per flag hour who completed repair tasks assigned four flag hours but was then obligated to spend an additional four hours on site, during which no new orders came in. In the *Gonzalez* court's view, paying the employee only $80 for this shift would either (1) violate the minimum wage, because the four hours of wait time were uncompensated, or (2) require the employee to forfeit half of his or her promised $20 per flag hour to cover the unpaid wait time, in violation of section 223. (*Gonzalez*, at p. 50, 155

Cal.Rptr.3d 18.) In other words, the additional wait time constituted periods not covered by the employer's commitment to piece-rate pay, but within the definition of hours worked, for which at least the minimum wage should have been paid.

This case is different from *Gonzalez* in critical respects. In *Gonzalez*, the court understood the contract at issue to promise pay at a certain rate for certain tasks completed. The minimum wage floor, which "supplement[ed]" employee pay only when "necessary," did not alter the nature of that promise. (*Gonzalez*, *supra*, 215 Cal.App.4th at p. 40, 155 Cal.Rptr.3d 18.) We do not address here, and express no opinion concerning, a scenario in which a minimum wage floor was written into a contract that otherwise promised pay by the piece.[8] Because the employer in *Gonzalez* required technicians to remain at work while waiting for customers—time not accounted for by the piece-rate system—the Court of Appeal concluded the employer violated the no-borrowing rule by attempting to use piece-rate pay as a credit against its obligations to pay for wait time. By contrast, as we

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[8] Since *Gonzalez*, this particular scenario has been addressed by the Legislature, which endorsed *Gonzalez*'s overarching principles and codified for piece-rate workers a statutory right to separate pay, at no less than the minimum wage, for otherwise uncompensated nonproductive and rest time. (Lab. Code, §226.2, subd. (a), added by Stats. 2015, ch. 754, §4; see Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1513 (2015–2016 Reg. Sess.) as amended Sept. 9, 2015, pp. 2 [bill "[c]odifies the *Gonzalez* and *Bluford* decisions that nonproductive time, rest breaks, and recovery breaks are separately compensated"], 3 [bill "[c]odifies that, for nonproductive time, the rate of compensation is not less than the minimum wage"].)

have explained, Delta's Work Rules reflect a promise to pay by the rotation, and for each rotation, the compensation Delta promises will, no matter which of the four formulas applies, always exceed the state minimum wage per hour worked. Thus, Delta satisfies state minimum wage law without ever needing to compromise its contractual commitments.

The minimum wage laws exist to ensure that workers receive adequate and fair pay, not to dictate to employers and employees what pay formulas they may, or may not, agree to adopt as a means to that end. (See *Madison Ave. Corp. v. Asselta* (1947) 331 U.S. 199, 203-204, 67 S.Ct. 1178, 91 L.Ed. 1432.) Delta's arrangement may be relatively unusual, but it is not unlawful.

IV.

We answer the Ninth Circuit's questions as follows:

(1) Labor Code sections 204 and 226 do not apply to pay periods in which an employee works only episodically and for less than a day at a time in California unless the employee works primarily in this state during the pay period, or does not work primarily in any state but has his or her base of operations in California.

(2) State law limits on wage borrowing permit compensation schemes that promise to compensate all hours worked at a level at or above the minimum wage, even if particular components of those schemes fail to attribute to each and every compensable hour a specific amount equal to or greater than the minimum wage.

(3) In light of the answer to the question about the substantive application of the state's minimum wage laws, we do not address the separate question concerning the geographic scope of that law's application.

We Concur:

CANTIL-SAKAUYE, C. J.

CHIN, J.

CORRIGAN, J.

LIU, J.

CUÉLLAR, J.

GROBAN, J.

Concurring Opinion by Justice Liu

Today's opinion endorses the rule against wage borrowing established in *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 37 Cal.Rptr.3d 460 (*Armenta*) and reaffirmed in subsequent decisions. (Maj. opn., *ante*, 264 Cal.Rptr.3d at p. 32, 466 P.3d at p. 335.) The court holds that an employer may not satisfy its obligation to pay at least the minimum wage for all hours worked by "borrowing compensation contractually owed for one set of hours or tasks to rectify compensation below the minimum wage for a second set of hours or tasks." (*Ibid.*) Delta Air Lines, Inc.'s (Delta) flight attendant compensation scheme does not violate this "no-borrowing" rule. (*Id.* at pp. 33-38, 466 P.3d at pp. 336-340.)

While agreeing with today's opinion, I write to highlight the first step in applying the no-borrowing rule: identifying the nature of the employer's contractual commitment to its employees. Because the

rule requires employers to keep their contractual commitments in the course of fulfilling their minimum wage obligations, whether the rule is violated turns on what an employer's contractual commitments are. Courts should be careful not to allow employers to characterize their contractual commitments in ways that would effectively circumvent the no-borrowing rule.

Although *Armenta* established the no-borrowing rule in the context of a "minimum wage" claim, it is important to clarify that the rule's purpose is not to ensure that employees are paid, on average, hourly wages at or above a minimum threshold. In no-borrowing cases, there is no dispute that the employees are paid at least the minimum wage when total compensation is averaged over all hours worked. The question is whether the employer is using contractually promised pay for certain tasks or hours worked to make up for failing to pay the minimum wage for other tasks or hours worked. As today's opinion explains, the purpose of the no-borrowing rule is to prevent employers from using clever accounting to effectively "reneg[e] on the employer's contractual commitments, in violation of the contract protection provisions of the Labor Code." (Maj. opn., *ante*, 264 Cal. Rptr.3d at p. 33, 466 P.3d at p. 336.) Plaintiff flight attendants do not claim that their average pay ever fell below the minimum wage. Rather, they claim that the pay structure Delta promised did not compensate them for all the hours they worked.

Whether Delta or any other employer violates the no-borrowing rule thus turns on the nature of the pay structure the employer has promised. "The

compensation owed employees is a matter determined primarily by contract." (Maj. opn., *ante*, 264 Cal.Rptr.3d at p. 33, 466 P.3d at p. 336.) Employers may legally compensate their employees on any number of bases, including "by the standard of time, task, piece, commission basis, or other method of calculation." (Lab. Code, §200, subd. (a); see Industrial Welfare Commission, wage order No. 9-2001, §4(B) [compensation may be "measured by time, piece, commission, or otherwise"].) The unit of pay is often straightforward. In *Armenta*, the plaintiff employees "were paid hourly wages ranging between $9.08 to $20, depending on whether they were crew members or foremen." (*Armenta*, *supra*, 135 Cal.App.4th at p. 317, 37 Cal.Rptr.3d 460.) In other cases, the compensation scheme may be more complex. Employers may use a combination of methods (e.g., *Bluford v. Safeway Inc.* (2013) 216 Cal. App.4th 864, 867, 157 Cal.Rptr.3d 212 [truck drivers' compensation based on a combination of miles driven and hours worked]) or alternative pay formulas that are triggered when certain conditions are met (e.g., *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, 103, 214 Cal.Rptr.3d 661 (*Vaquero*) [compensation determined by the greater of sales commission or hourly minimum pay]; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 41, 155 Cal.Rptr.3d 18 (*Gonzalez*) [compensation determined by the greater of repair tasks completed or hourly minimum pay]).

Consistent with general contract interpretation principles, the employer's contractual commitment, including the unit of promised pay, is based on the objectively reasonable expectations of the parties at

the time of contract. (See Civ. Code, §1636 ["A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."].) Such principles include interpreting the employment agreement as a whole (*id*., §1641) and, if the contract language is ambiguous, looking to the context surrounding its formation (*id*., §1647) as well as the subsequent conduct of the parties (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, §772).

Correctly identifying an employer's contractual commitment is critical to ensuring that employers do not circumvent the no-borrowing rule simply by inserting into employment agreements a minimum wage floor — i.e., an agreement to make up the difference if an employee's promised pay, averaged over all hours worked, falls below the applicable minimum wage. A minimum wage floor, by incorporating the concept of borrowing into the contract, would seem to be an easy way for an employer to inoculate itself against a no-borrowing claim.

Courts applying *Armenta* have rejected such compensation schemes. In *Vaquero*, a furniture store paid its salespeople on a commission basis and did not separately compensate them for legally mandated rest breaks. (*Vaquero*, *supra*, 9 Cal.App.5th at p. 103, 214 Cal.Rptr.3d 661.) The employer also calculated employee pay based on the total number of hours an employee worked, including rest breaks. If a salesperson failed to earn more than an average of $12.01 per hour on commission, the employer made up

the difference and subtracted that amount from the salesperson's earnings in the next pay period. (*Ibid.*) Construing the compensation scheme to promise payment by commission, the Court of Appeal concluded that the scheme failed to separately pay employees for rest breaks and therefore failed to pay for all hours worked. (*Ibid.*) The no-borrowing rule barred the employer from using pay promised for an employee's commission to fulfill its obligation to pay for rest breaks. (*Id.* at pp. 114-117, 214 Cal.Rptr.3d 661.) The fact that the employer supplemented an employee's commission if it fell below a specified hourly floor did not cure the violation. (*Ibid.*)

Likewise, in *Gonzalez*, an automobile servicing company paid its mechanics for each repair they completed but did not compensate them for wait time between repairs. (*Gonzalez*, *supra*, 215 Cal.App.4th at p. 41, 155 Cal.Rptr.3d 18.) The employer also calculated what it called a " 'minimum wage floor' " (*ibid.*): If a mechanic's compensation for repairs fell below what the mechanic would have made if paid the minimum wage for all hours worked, including wait time, the employer made up the difference. (*Id.* at pp. 41-42, 155 Cal.Rptr.3d 18.) Despite such a minimum wage floor, the Court of Appeal affirmed the trial court's finding that the employer failed to pay for all hours worked. (*Id.* at p. 55, 155 Cal.Rptr.3d 18.) The court found that the compensation system was a "piece-rate system" because the "technicians [were] paid primarily on the basis of repair tasks completed." (*Id.* at p. 41, 155 Cal. Rptr.3d 18.) It concluded that the no-borrowing rule developed in *Armenta* also applied to piece-rate compensation schemes. (*Id.* at p. 49, 155 Cal.Rptr.3d 18.) Because the employer's piece-

rate scheme did not separately compensate mechanics for wait time between repairs, the employer did not pay employees for all hours worked. Under the no-borrowing rule, the employer could not use pay promised for repair tasks to cover its obligations to pay for wait time. (*Id.* at p. 50, 155 Cal.Rptr.3d 18; see also *Balasanyan v. Nordstrom, Inc.* (S.D.Cal. 2012) 913 F.Supp.2d 1001 [finding a violation of California wage law under *Armenta* where a department store paid salespeople on a commission basis and supplemented commissions if it fell below an average hourly minimum].)

Although *Vaquero* and *Gonzalez* did not extensively discuss the nature of each employer's respective contractual commitments, the reasoning of those decisions recognizes that employers cannot circumvent their obligation to pay employees for all hours worked or to pay the full amount of commissions, piece rates, or other compensation promised to employees simply by inserting a minimum wage floor into an employment agreement. A contrary conclusion would make it all too easy to evade the rule; a minimum wage floor would become a standard term in many employment contracts, and the rule would be emptied of real substance. The rule developed in *Armenta* is grounded in the protections of the Labor Code that prohibit an employer from diluting an employee's contractually promised wages. (*Armenta*, *supra*, 135 Cal.App.4th at p. 323, 37 Cal.Rptr.3d 460 [discussing Lab. Code, §§221, 222, 223].) *Vaquero* and *Gonzalez* held that the employers in those cases made contractual commitments to commission and piece-rate pay, respectively, and the addition of a minimum wage floor did not change those commitments. (Cf.

Cardenas v. McLane FoodServices, Inc. (C.D.Cal. 2011) 796 F.Supp.2d 1246, 1252 [finding a violation of California wage law under *Armenta* even though the employer did not violate an "explicit agreement"].) Today's opinion leaves those decisions, and the protective force of the no-borrowing rule, intact.

I Concur:

CUÉLLAR, J.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15124

DEV ANAND OMAN, et al.,

Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC.,

Defendant-Appellee.

Filed: May 9, 2018

Before: PAUL J. WATFORD and MICHELLE T. FRIEDLAND, *Circuit Judges*, and JED S. RAKOFF,* *Senior District Judge.*

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT OF CALIFORNIA

We respectfully ask the Supreme Court of California to exercise its discretion to decide the certified questions set forth in section II of this order.

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* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

I. Administrative Information

We provide the following information in accordance with California Rule of Court 8.548(b)(1). The caption of this case is:

No. 17-15124

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT FLORES, individually, on behalf of others similarly situated, and on behalf of the general public, Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC., Defendant-Appellee.

The names and addresses of counsel for the parties are:

For Plaintiffs-Appellants Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores: Daniel S. Brome and Matthew C. Helland, Nichols Kaster, LLP, 235 Montgomery Street, Suite 810, San Francisco, CA 94104.

For Defendant-Appellee Delta Air Lines, Inc.: Andrew P. Frederick, Robert Jon Hendricks, and Thomas M. Peterson, Morgan Lewis & Bockius LLP, One Market Street, Spear Street Tower, San Francisco, CA 94105.

We designate Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores as the petitioners if our request for certification is granted. They are the appellants before our court.

II. Certified Questions

We certify to the Supreme Court of California the following three questions of state law:

> (1) Do California Labor Code §§204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?
>
> (2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time? *See* Cal. Labor Code §§§1182.12, 1194; 8 C.C.R. §11090(4).
>
> (3) Does the *Armenta*/*Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty? *See Gonzalez v. Downtown LA Motors, LP*, 155 Cal. Rptr. 3d 18, 20 (Ct. App. 2013); *Armenta v. Osmose, Inc.*, 37 Cal. Rptr. 3d 460, 468 (Ct. App. 2005).

We certify these questions pursuant to California Rule of Court 8.548. The answers to these questions will determine the outcome of the appeal currently pending in our court. We will accept and follow the decision of the California Supreme Court on these questions. Our phrasing of the questions should not restrict the California Supreme Court's consideration of the issues involved.

III. Statement of Facts

In this case, flight attendants have sued their employer, Delta Air Lines, Inc. (Delta), for alleged violations of California labor law. Delta is a major passenger and cargo airline that operates throughout the United States and the world. It is a Delaware corporation, headquartered in Atlanta, Georgia. From 2012 to 2015, approximately 7% of its almost 22,000 United States-based flight attendants were based out of California airports.

The plaintiffs are four Delta flight attendants, only two of whom reside in California. Dev Anand Oman was a flight attendant for Delta from 2011 to 2014, during which time he lived in New York and was based out of New York's John F. Kennedy Airport. Todd Eichmann and Michael Lehr began working for Delta in 2009, when Delta acquired their previous employer. Eichmann has lived in California and been based out of California's Los Angeles International Airport (LAX) since 2014. Lehr has lived in Nevada and been based out of California's San Francisco International Airport throughout his time with Delta. Albert Flores has been a flight attendant for Delta since around 2008. He has lived in California and been based out of LAX since 2010. The plaintiffs proposed a class of Delta flight attendants "who have performed work" in California, but they never sought to certify it.

During a sample of the time period in question, the plaintiffs spent at most 14% of their "flight-related working hours" in California. From January 2014 to June 2016, Oman worked 3% of his time in California; Eichmann, 9%; Lehr, 14%; and Flores, 11%. These percentages are not in dispute.

The plaintiffs were paid according to a complicated credit-based pay formula that is explained in the Delta Work Rules. (Because Delta flight attendants are not unionized, the Work Rules, rather than a collective bargaining agreement, govern their pay.) The pay formula calculates a flight attendant's pay by "rotation," which is a set of flights that can include layovers. The pay formula incorporates four different credit calculations. The credit calculations award credits based on different criteria. For example, the Flight Pay calculation awards one credit per hour flown or scheduled to be flown, while the Duty Period Credit calculation awards one credit per two hours on duty. The pay formula compares the result of the four credit calculations to determine which yields the most credits per rotation. Delta then multiplies the highest number of credits by the flight attendant's hourly wage rate (plus additions not relevant here) to determine the flight attendant's pay.

The pay formula at times fails to award credit for all hours on duty, but it never results in an hourly rate that is below California's minimum wage. The pay formula can fail to award credit for all hours on duty because the Flight Pay calculation provides credit only for hours flown or scheduled to be flown, not for hours preparing the airplane for passengers, for example. Still, a flight attendant is always paid an above-minimum-wage hourly rate because the Duty Period Credit calculation, in effect, guarantees a flight attendant half her hourly wage rate per hour on duty, and even the lowest flight attendant wage rate is more than double California's minimum wage. The plaintiffs cannot identify a rotation in which they were

paid an average hourly wage below California's minimum wage.

The plaintiffs sued Delta in federal court, alleging that the Flight Pay calculation violates California minimum wage law by failing to pay the minimum wage "per hour for all hours worked." 8 C.C.R. §§11090(4)(A); *see Armenta*, 37 Cal. Rptr. 3d at 468. They argue that the Flight Pay formula impermissibly averages a flight attendant's wages for paid, productive time and unpaid, unproductive time. *See Gonzalez*, 155 Cal. Rptr. 3d at 20. They also contend that Delta failed to pay their wages on time, in violation of California Labor Code §204, and failed to issue them wage statements that complied with California Labor Code §226. The plaintiffs demand damages and unpaid wages under California Labor Code §§1194 and 1194.2; damages and statutory penalties under California Labor Code §§203 and 226; civil penalties under the Private Attorneys General Act (PAGA), Cal. Labor Code §2699; and restitution and attorney's fees under California Business & Professions Code §17200.

The plaintiffs seek to apply California law to their claims based solely on the location of their work. They seek to apply California law to work that lasted only for hours and minutes, not days, in California. They argue that California Labor Code §§204 and 226 apply to any pay period in which they performed work in California and that California minimum wage law applies to any work performed in California, however short the duration.

The district court granted summary judgment to Delta and denied it to the plaintiffs in two orders.

First, the district court held that Delta complied with California minimum wage law. *Oman v. Delta Air Lines, Inc.*, 153 F. Supp. 3d 1094, 1095 (N.D. Cal. 2015). Second, the district court granted summary judgment on the §204, §226, and other remaining claims. *Oman v. Delta Air Lines, Inc.*, 230 F. Supp. 3d 986, 994 (N.D. Cal. 2017). It held that California labor law does not apply to the four plaintiffs because they worked only a *de minimis* amount of time in California. *Id.* at 993-94. The plaintiffs appealed both orders.

We heard oral argument on March 16, 2018. The Air Transport Association of America, Inc., filed an amicus brief in support of Delta. The California Employment Lawyers Association filed an amicus brief in support of the plaintiffs.

On the same day that we heard oral argument in this case, we also heard oral argument in two related cases, *Ward v. United Airlines, Inc.*, No. 16-16415, and *Vidrio v. United Airlines, Inc.*, No. 17-55471. Those cases raise questions about the extraterritoriality of California Labor Code §226 that are similar to the questions raised here. We are also certifying the state-law questions in *Ward* and *Vidrio* to the California Supreme Court, in a separate certification order.

IV. Explanation of Certification Request

No controlling California precedent answers the certified questions on the proper territorial reach of the California Labor Code provisions at issue, or on the application of California minimum wage law to a credit-based pay formula. Because the first two certified questions both concern the extraterritorial application of the Labor Code, we explain our

certification of those two questions together in section IV.A. We explain our certification of the third question, which arises out of *Armenta* and *Gonzalez*, in section IV.B. The answers to these certified questions matter greatly to the many out-of-state employers whose employees work in California for only brief periods of time.

A.

There is no controlling California precedent on the question whether California labor law applies to an employee who works for an out-of-state employer and does not work principally, or even for days at a time, in California. The three principles that generally guide our evaluation of the propriety of a potentially extraterritorial application of California law, and the California Supreme Court's application of those principles, do not provide sufficient guidance here.

The first principle is that "[o]rdinarily the statutes of a state have no force beyond its boundaries." *N. Alaska Salmon Co. v. Pillsbury*, 162 P. 93, 94 (Cal. 1916). To evaluate whether a claim seeks to apply the force of a state statute beyond the state's boundaries, courts consider where the conduct that "creates liability" under the statute occurs. *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011); *see also RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016) (where the "conduct relevant to the statute's focus occur[s]"). If the conduct that "creates liability" occurs in California, California law properly governs that conduct. *Sullivan*, 254 P.3d at 248; *see also Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 554 (Cal. 1999). By contrast, if the liability-creating conduct occurs outside of California,

California law generally should not govern that conduct (unless the Legislature explicitly indicates otherwise, which it did not in the Labor Code). *See Sullivan*, 254 P.3d at 248.

The second principle is that the proper reach of Labor Code provisions can differ because the provisions regulate different conduct and implicate different state interests. *See id.* at 243-44. For example, because "California's interest in the content of an out-of-state business's pay stubs" may be weaker than its interest in the payment of overtime wages, wage statement provisions may apply more narrowly than overtime provisions do. *See id.* at 243.

The third principle is that courts must balance California's interest in applying its law with considerations of "interstate comity," in order to avoid unnecessary conflicts of state law. *See id.* at 242-43. For example, courts should consider whether the proposed use of California law would displace another state's law or would protect an employee who is otherwise not protected by any state law. *See id.* at 243 (citing *Bostain v. Food Express, Inc.*, 153 P.3d 846 (Wash. 2007)).

The California Supreme Court has applied these principles twice to the Labor Code. *Tidewater* held that wage orders apply to an employee who "resides in California, receives pay in California, and works exclusively, or principally, in California." *Tidewater Marine W., Inc. v. Bradshaw*, 927 P.2d 296, 309 (Cal. 1996). *Sullivan* held that overtime provisions apply to day-long or week-long work performed in California for a California employer by an out-of-state resident. 254 P.3d at 243, 247.

But with regard to the required strength of the California connection, *Tidewater* did not address whether California law applies to California residents "who work primarily outside California[]," as the California-resident plaintiffs in this case do. 927 P.2d at 309. *Sullivan* did not resolve whether California law applies to nonresident employees who work less than a full day in California, as the nonresident plaintiffs do. *See* 254 P.3d at 242-43. Neither case discussed how to balance California's interest in applying its law to its residents with California's interest in avoiding interstate conflict by not applying its law to an out-of-state employer, such as Delta.

With regard to the different Labor Code provisions, *Sullivan* confined its holding to overtime provisions, leaving uncertain whether it applies to similar minimum wage claims. Neither *Tidewater* nor *Sullivan* considered a statute that focused on an employee's receipt of pay and information about her pay, as §204 and §226 do. *See* Cal. Labor Code §§204(a), 226(e)(2); *see also Lopez v. Friant & Assocs., LLC*, 224 Cal. Rptr. 3d 1, 6 (Ct. App. 2017); *Morgan v. United Retail, Inc.*, 113 Cal. Rptr. 3d 10, 19 (Ct. App. 2010). If that focus makes the relevant location for a §§204 or §226 claim the place where the employee receives her pay, does an employee's California residence and receipt of pay in California strengthen California's interest in the content of an out-of-state employer's wage statement? *Cf. Sullivan*, 254 P.3d at 243. Does an employee's out-of-state residence preclude application of California wage-timing or wage-statement law to her?

In short, *Tidewater* and *Sullivan*, even informed by the principles of extraterritoriality, do not allow us to confidently resolve the plaintiffs' California law claims. The claims implicate the proper reach of California labor law, which in turn implicates the wage-and-hour protections given to traveling workers. For this reason, we certify these important questions.

B.

There is also no directly controlling California precedent that determines whether Delta's credit-based pay formula implicates California's bar on averaging wages. The California Court of Appeal has held that the "FLSA model of averaging all hours worked in any work week to compute an employer's minimum wage obligation under California law is inappropriate." *Armenta*, 37 Cal. Rptr. 3d at 468 (internal quotation marks omitted). Instead, the "minimum wage standard applies to each hour worked." *Id.*; *see Gonzalez*, 155 Cal. Rptr. 3d at 28. The plaintiffs argue that the Flight Pay calculation violates this rule because, as they correctly note, the calculation does not award credits for "each hour worked." But the plaintiffs' proposed application raises two unresolved issues regarding the proper interpretation of when the bar applies (assuming that it applies at all).

First, *Gonzalez* stated that the bar applies "whenever *an employer and employee have agreed* that certain work will be compensated at a rate that exceeds the minimum wage and other work time will be compensated at a lower rate." *Gonzalez*, 155 Cal. Rptr. 3d at 29 (emphasis added). Both *Armenta* and *Gonzalez* premised their holdings in part on California

Labor Code §§221, 222, and 223, which articulate the principle that "all hours must be paid *at the statutory or agreed rate* and no part of this rate may be used as a credit against a minimum wage obligation." *Armenta*, 37 Cal. Rptr. 3d at 467-68 (emphasis added); *see Gonzalez*, 155 Cal. Rptr. 3d at 28. The references to a pay agreement leave unresolved how directly that agreement must link certain work to certain pay to implicate the *Armenta*/*Gonzalez* bar. Does it matter that the Delta Work Rules state that Delta awards credits, rather than hourly pay, for certain work? Does it matter that the Work Rules award credits not only for the exact hours flown, but also for the hours scheduled to be flown, thus somewhat severing the link between certain work and certain pay?

Second, the *Armenta*/*Gonzalez* bar applies when averaging wages "effectively reduces [an employee's] contractual hourly rate" and "results in underpayment of employee wages." *Armenta*, 37 Cal. Rptr. 3d at 467-68; *Gonzalez*, 155 Cal. Rptr. 3d at 28. In this case, the challenged Flight Pay calculation operates only to increase a flight attendant's hourly wage above the guaranteed minimum rate promised under the Duty Period Credit calculation. Does the bar apply to a pay system that effectively increases an employee's hourly rate?

Because existing California precedent does not establish whether the *Armenta*/*Gonzalez* bar properly applies here, we certify the question. Although the question is somewhat fact-intensive, it implicates California's strong interest in enforcing its minimum wage law.

V. Accompanying Materials

The clerk of this court is hereby directed to file in the Supreme Court of California, under official seal of the United States Court of Appeals for the Ninth Circuit, copies of all relevant briefs and excerpts of the record, and an original and ten copies of this order and request for certification, along with a certification of service on the parties, pursuant to California Rule of Court 8.548(c), (d).

This case is withdrawn from submission. Further proceedings before us are stayed pending final action by the Supreme Court of California. The Clerk is directed to administratively close this docket, pending further order. The parties shall notify the clerk of this court within seven days after the Supreme Court of California accepts or rejects certification, and again within seven days if that court accepts certification and subsequently renders an opinion. The panel retains jurisdiction over further proceedings.

IT IS SO ORDERED.

Appendix E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. 15-cv-00131-WHO

DEV ANAND OMAN, et al.,
Plaintiffs,
v.
DELTA AIR LINES, INC.,
Defendant.

Filed: January 6, 2017

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

The parties cross-move for summary judgment on plaintiffs' claims that Delta violates California Labor Code section 226 by failing to provide Flight Attendants who work for any amount of time on the ground in California individualized wage statements disclosing the total hours worked at specific hourly rates.[1] Plaintiffs also separately move for summary

[1] Delta moves for summary judgment on plaintiffs' third claim for wage statement penalties under California Labor Code section 226, fourth claim for civil penalties under the Private

judgment on their PAGA claim under Labor Code section 204, arguing that Delta fails to make timely wage payments for pay periods encompassing any work by Flight Attendants in California.[2]

The facts regarding how and when Flight Attendants are paid and what information they are given regarding their wages are not in dispute. Instead, the dispute is whether the protections of the California Labor Code provisions at issue apply to the four named plaintiffs when they only worked a *de minimis* amount of time in California during any of the relevant pay periods. I conclude that given the undisputed facts in this case, California law does not apply. Delta's motion for summary judgment is GRANTED and plaintiffs' motion is DENIED.

BACKGROUND

I. DELTA'S PAY FORMULAS

Delta pays its flight attendants on a bid packet and rotation system where each month Flight Attendants "bid" on Rotations that are scheduled to depart from the Flight Attendant's base the following month.[3] For each Rotation, the Bid Packets describe

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Attorneys' General Act, (PAGA) and fifth claim for violation of California's unfair competition law.

[2] Delta argues that plaintiffs cannot move for summary judgment on their PAGA claim under Labor Code section 204, because the parties' stipulation allowing for summary judgment prior to class certification (Dkt. No. 57) did not encompass that claim.

[3] The facts regarding Delta's four pay formulas and how they operate are not disputed and taken from my prior Order granting Delta's motion for summary judgment on plaintiffs' minimum wage claims. Dkt. No. 45, December 29, 2015 Order.

the number and length of the Duty Periods encompassed within the Rotation, the Report Times for each Duty Period, the scheduled total flight time for each Segment within the Rotation (which is measured from Block Out to Block In), and the amount of time that the Flight Attendant can expect to be away from base. The Bid Packets show which of Delta's four pay formulas will apply to the Rotation, what the credit value of the Rotation is, and calculates the minimum compensation for each Rotation. The credit valuation included in the Bid Packets for each Rotation serves as a minimum guarantee for Flight Attendants with respect to credits. The actual compensation may increase as a result of delays, changes, or other contingencies; it cannot decrease.

Delta's bidding and compensation policies are laid out in Delta's Work Rules. Delta uses four formulas to determine a Flight Attendant's actual pay. The "Flight Pay" formula is based on the actual flight time and/or scheduled flight time of the Segments, whichever is greater. Under the "Duty Period Credit," Delta "credits" flight attendants with "1 hour of flight pay for every 2 hours on duty for any given period." The "Minimum Duty Period Credit" (MDC) multiplies 4:45 hours by the Flight Pay Rate for each Duty Period within a Rotation that has at least one flight Segment. And under the "Trip Credit" formula, Flight Attendants receive credit for 1 hour of flight time for each 3.5 hours they are away from base.

Delta runs calculations for each Flight Attendant's Rotation and pays the Flight Attendant using the formula that results in the highest amount of pay. In no event is a Flight Attendant's pay less per

hour worked in the Duty Period (all hours worked), than the California minimum wage rate. Each formula uses a "base" which Delta defines as "Flight Pay Rate." But the Flight Pay Rate is not an agreed to "hourly rate of pay;" it is instead part of the mathematical equation Delta runs to determine actual pay.

II. DELTA'S WAGE TRACKING AND PAYMENTS

Delta provides Flight Attendants information about their hours worked and income paid through its Monthly Time Display System (MOTS), which is available to all Flight Attendants. Declaration of Brian Moreau (Dkt. No. 59-2) ¶8. MOTS allows Flight Attendants "real-time" access to their compensation for each Rotation and non-flight activity as they progress through their monthly schedules. *Id*.

Delta provides wage statements to Flight Attendants at the time of each payment of wages. Moreau Decl., ¶10. Those wage statements show each "category" of payments made to Flight Attendants as a separate line-items, but do not show the hours worked or hourly rates paid for those categories. *Id*.; *see also*, Frederick Decl., Ex. J (Eichmann wage statements). Flight Attendants also receive a Monthly Activity Pay Statement ("MAPS") for each bid period, which contains detailed pay information about their flying and non-flying activities for each bid period. Moreau Decl., ¶¶11-13; Frederick Decl. Ex. K (Eichmann 2014 MAPS). For each flight within a Rotation, the MAPS shows: (1) the flight number; (2) the departure day; (3) the departure and arrival airports; (4) the report time for the first flight of the Duty Period; (5) the Block Out and Block In times; and

(6) the actual flight time. Moreau Decl. ¶12. It also shows the total hours credited and provides a pay summary breaking down the current monthly pay based on flight credits and amounts paid for holding pay, flight leader pay, and TAFB. Frederick Decl., Ex. K.

Delta pays Flight Attendants on the 15th and last day of each month (*i.e.*, semi-monthly). Moreau Decl., ¶9. As Delta does not know Flight Attendants' final schedules for a bid period until they are complete, it provides them with a base allotment of 45 credits at their Flight Pay Rate per bid period, where Attendants receive 22.5 credits in each paycheck. *Id.* Following the close of the bid period, Delta calculates the total credits for that bid period, determines what premium pay rates should be applied[4] and what additional payments should be made,[5] and calculates the TAFB pay. *Id.*[6] The resulting amount is then split evenly between the two pay periods for the following bid period. *Id.* For example, on October 15th, Flight Attendants receive 22.5 credits for October 1st through 15th, plus fifty percent of their credits, premiums, and TAFB pay for September. *Id.* Then, on

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[4] For example, for being a Flight Leader or for international flights. Moreau Decl. ¶12.

[5] For example, for holding pay or training pay. Moreau Decl. ¶¶7, 12.

[6] Time Away from Base Pay (TAFB) is a meal expense reimbursement payment, paid at an hourly rate for every hour spent away from base for any Rotation, including non-compensable time (*e.g.*, layovers after release from duty). Moreau Decl. ¶7. TAFB pay is paid at a different rate for domestic and international travel.

October 31st, the Flight Attendants receive the remaining 22.5 credits for October plus the remaining credits, premiums, and TAFB pay for September. *Id.*

III. PLAINTIFFS' WORK HISTORY

During the relevant time period, plaintiff Oman was based out of New York/JFK airport. Plaintiff Eichmann was based out of Los Angeles/LAX and a California resident since February 2014, and before that was based out of Detroit (DTW) or Seattle (SEA). Plaintiff Lehr has been based out of San Francisco/SFO, but has been a resident of Las Vegas, Nevada throughout his employment with Delta. Plaintiff Flores is a resident of California based out of Los Angeles/LAX.

Plaintiffs do not dispute that the named plaintiffs spent between 86 percent and 97.1 percent of their "flight-related working hours" outside of California, and that they continuously worked in multiple jurisdictions on a pay period, weekly, and daily basis.[7]

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[7] Specifically, Delta contends that the percentage of time each named plaintiffs worked outside of California in the relevant time periods is as follows: Eichmann 91.4%; Flores 89.1%; Lehr 86%; and Oman 97.1%. Declaration of Valentin Estevez (Dkt. No. 59-3) at 5-6. Delta calculated those figures by using two measures to determine time spent on the ground in California; MAPS reports showing reporting time and Block In and Block Out, and on-time performance reports showing taxi times. Estevez Decl. at 2-5. Delta's expert used those measures for flights flown by the named plaintiffs into and out of California and compared report times and departure times, turn time at California airports, deplaning times at California airports, and taxi-times. Estevez Decl. at 4. In their declarations, the named plaintiffs assert only that they "regularly" fly into and out of California airports, but provide no estimate as to how much time they worked in

IV. PRIOR ORDER

In my prior Order granting Delta's motion for summary judgment on plaintiffs' minimum wage claims, I concluded that Delta's payment practice did not violate California's minimum wage requirements because Delta's Work Rules compensated Flight Attendants for all of their hours worked, in a fully disclosed manner based upon the floor guaranteed by the Bid Packet process. I recognized that under Delta's system, workers were not provided a guaranteed minimum rate for each hour on Duty, but that the Flight Pay Rate was used as part of the mathematical equation Delta runs to determine actual pay. December 2015 Order at 5.

The parties now cross-move for summary judgment on plaintiffs' remaining claims under California Labor Code sections 226 and 204.

LEGAL STANDARD

I. SUMMARY JUDGMENT

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear

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California in any given pay period or during the class period. *See* Dkt. No. 58-19, Flores Decl. ¶2 ("regularly fly into and out of California airports"); Dkt. No. 58-20, Lehr Decl. ¶2 (same); Dkt. No. 58-21, Eichmann Decl. ¶2 (same).

the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id*. The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

On summary judgment, the Court draws all reasonable factual inferences in favor of the non-movant. *Id*. at 255. In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id*. However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp*., 594 F.2d 730, 738 (9th Cir.1979).

II. CALIFORNIA LABOR CODE

Section 226 requires employers to "semimonthly or at the time of each payment of wages" provide employees "either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee … , (4) all deductions … , (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other

than a 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 … . For purposes of this subdivision, 'copy' includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision." Cal. Lab. Code §226.

Section 204 requires that all wages "are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month." Cal. Lab. Code §204.

DISCUSSION

Delta's main argument is that the four named plaintiffs cannot be covered by Sections 226 and 204 of the California Labor Code—which provide procedural protections for wages earned under California law—when the vast majority of their work occurred in federal airspace governed by federal regulations and any work on the ground in California was *de minimis* and incidental to their work as Flight Attendants in the air. Plaintiffs contend that whenever a Flight Attendant flies into or out of California, their work in that pay period becomes covered by the Labor Code

sections (and therefore California-compliant wage statements and payments are required), regardless of where the Flight Attendant resides or is based out of, and regardless of how much time that Flight Attendant works on the ground in California during that pay period.

I. SECTION 226

A. Delta's Wage Statements and Wage Information

Delta does not dispute that it does not provide Flight Attendants an itemized wage statement showing all of the information required under Section 226 for each bi-monthly pay period, particularly the exact hours worked by each Flight Attendant and the rate or rates the Flight Attendant was paid for those hours. Delta argues that it cannot provide that information because, as discussed extensively on the prior motion for summary judgment, Delta uses an atypical method of payment which is not based on a set hourly wage rate for each of the tasks it requires of Flight Attendants.

Delta contends, however, that the essential information required by Section 226 is provided through the monthly MAPS and the accessible-anytime MOTS. The MAPS statements are apparently generated on a monthly basis, not bi-monthly as required under Section 226. Moreover, MAPS does not disclose an hourly wage rate for each hour worked, but instead show the *formula* of how the final payments for each Rotation were determined. MOTS is not a "statement" provided to the Flight Attendants at the time they are paid, but instead a system that they can access. As with the MAPS, it does not disclose an

hourly rate for each category of work performed by plaintiffs.

Delta cannot rely on the MAPS and MOTS to argue that Delta satisfies the requirements of Section 226. However, as discussed below, I reject plaintiffs' theory of liability under Section 226. Because the undisputed facts show that the named plaintiffs only worked a *de minimis* amount of time on the ground in California, the "situs" of their work is not California. For the reasons that follow, California Labor Code provisions do not apply to their wage statements.

B. Applicability of Section 226

Plaintiffs argue that under the California Supreme Court's decision in *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011) (*Sullivan I*), when any work is performed within California, the employee should receive a Section 226-compliant wage statement regardless of where the bulk of her or his work in the relevant pay period is performed. However, neither *Sullivan I* nor the subsequent decision from the Ninth Circuit in Sullivan v. Oracle Corp., 662 F.3d 1265, 1267 (9th Cir. 2011 (Sullivan II) addressed the question presented here. In the Sullivan cases, the non-resident plaintiffs sought overtime pay for full days and weeks worked "entirely in California." Sullivan I, 51 Cal. 4th at 1196; *id.* at 1199-00 ("plaintiffs here claim overtime only for entire days and weeks worked in California, in accordance with the statutory definition of overtime." (emphasis in original)).[8] The California Supreme Court focused

[8] The statute at issue provided that "[a]ny work in excess of eight hours in one workday and … 40 hours in any one workweek … shall be compensated at the rate of no less than one

narrowly on the nature, scope, and purpose of the Labor Code provision at issue there—requiring overtime for any entire day or week worked in California-and concluded that in light of the purpose and language of Section 510, it could be applied against the California-based employer for the full days and entire weeks worked by the non-resident employees in California. The court was careful to limit its holding to overtime under Section 510, and repeatedly noted that its conclusion under Section 510 did not automatically apply to other provisions of the Labor Code, for example, those regulating "pay stubs." *Sullivan v. Oracle Corp.*, 51 Cal. 4th at 1201.

Here, plaintiffs ignore the purpose and scope of Section 226. They argue, regardless even of whether the Flight Attendant's or the employer's residence is in California or whether they worked a full pay period in California, that the trigger for liability is simply performing *any* work in California during a pay period. Given the nature of the claim under Section 226 and the nature of the plaintiffs' jobs as Flight Attendants, it is wrong to ignore whether California can be considered the situs of the Flight Attendants' work sufficient to invoke Section 226's wage statement requirements.

The analysis Judge Alsup recently undertook in a factually analogous case, *Ward v. United Airlines, Inc.*, No. C 15-02309 WHA, 2016 WL 3906077 (N.D. Cal. July 19, 2016), is instructive. There, Judge Alsup determined that Section 226 did not apply to wage

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and one-half times the regular rate of pay … ." Cal. Lab. Code, §510(a).

statements issued to pilots who were California residents but who worked "principally out of state." *Id.* at *3-5; *see also Aguilar v. Zep Inc.*, No. 13-CV-00563-WHO, 2014 WL 4245988, at *12 (N.D. Cal. Aug. 27, 2014) ("'the critical factor is where the work at issue is performed' by the plaintiff.").

Plaintiffs argue that the "situs" analysis in *Ward* ignored the *Sullivan* precedent and should not be followed. However, plaintiffs read *Sullivan* far too broadly. To determine whether a particular California Labor Code provision should apply in a situation where work was performed in California *and* in other jurisdictions, the appropriate analysis must focus on the particular Labor Code provision invoked, the nature of the work being performed, the amount of work being performed in California, and the residence of the plaintiff and the employer.

This multi-factor approach is consistent with the recent ruling in *Bernstein v. Virgin Am., Inc.*, No. 15-CV-02277-JST (N.D. Cal. Jan. 5, 2017), where Judge Tigar concluded that California wage and hour protections, including Section 226, applied to a class of California flight attendants. Judge Tigar reached that conclusion because: (i) the attendants were California residents; (ii) attendants sometimes worked entire days on consecutive flights between California airports; (iii) the defendant was headquartered in California; (iv) the wrongful conduct (issuance and application of compensation policies) emanated from California; and (v) the defendant had other "deep ties" to California, including that almost 90% of its daily flights departed from a California airport and it received millions of dollars in state subsidies to train

all of its flight attendants in California. That plaintiffs only spent around 25% of their total work time in California *was* a factor, but not a determinative one in light of the others. *Bernstein* January 5, 2017 Order at 6-14.

The facts in *Bernstein* are starkly different than the undisputed facts here. Here, the question is whether Section 226 should apply based *solely* on a Flight Attendant's performance of a *de minim*is amount of work in California during any pay period, *not* on the Flight Attendants' residence, an employer's California residence or other "deep ties" to California, or the performance of a significant amount of work in a particular pay period in California. Plaintiffs assert that the amount of time worked in California-either during the class period or during a particular pay period-is irrelevant to the applicability of Section 226, but that ignores important California and federal precedent to the contrary. *See, e.g., Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 578 (1996) ("[I]f an employee resides in California, receives pay in California, and works exclusively, or principally, in California, then that employee is a 'wage earner of California' and presumptively enjoys the protection of IWC regulations."); *see also Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 420 (1976) (concluding that the "predominant job situs is the controlling factor" in determining whether the National Labor Relations Act "right to work" savings clause applies).

Focusing on the purpose of Section 226 (to give employees clarity as to how their wages are calculated, so they can verify that their wages are calculated

appropriately *under* California law)[9], because the undisputed facts show that the named plaintiffs only worked a *de minimis* amount of time in California (ranging from 2.6% to a high of 14%), and in light of the nature of their work (necessarily working in federal airspace as well as in multiple other jurisdictions but during each pay period *and day* at issue), I conclude that Section 226 does not apply to the claims of the four named plaintiffs. That Delta is not a California-based employer and that plaintiffs explicitly disclaim any reliance on the residence of the Flight Attendants further strengthen this conclusion.

Plaintiffs also make a totally unfounded legislative history argument that recent amendments to Section 226 evince the legislature's intent to apply Section 226 to all other workers who sometimes work outside of the state. Plaintiffs' MSJ at 12-13; Plaintiffs' Reply at 16-17.[10] They rely on the legislature's clarification that the total hours worked for certain categories of employees who had *already* been determined to be exempt from overtime by an existing statute or Industrial Welfare Commission order need

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[9] *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385, 392 (Ct. App. 2016) ("section 226(a)'s statutory purpose … is to *document* the *paid wages* to ensure the employee is fully informed regarding the calculation of *those wages*." (emphasis in original)).

[10] Plaintiffs' reliance on the legislative history of *other* provisions of the Labor Code, *e.g.,* Cal. Lab. Code §245.5(a)(4) is similarly misplaced. Plaintiffs' MSJ at 13. As the *Sullivan I* court recognized, the determination of whether a Labor Code provision extends to work performed in part in California depends on an analysis of the particular Labor Code provision at issue. *Sullivan v. Oracle Corp.*, 51 Cal. 4th at 1201.

not be reported on their wage statements.[11] That has nothing to do with whether employees who work a *de minimis* amount in California are covered by Section 226. There is no logic or support to plaintiffs' argument.

In sum, there is no basis to apply Section 226's procedural protections to the named plaintiffs.[12]

II. APPLICABILITY OF SECTION 204

Like Section 226, Section 204 provides California workers a procedural protection; requiring wages earned in California to be paid to them on a specific timeframe.[13] Delta does not dispute that it does not comply with Section 204. However, plaintiffs at oral argument admitted that if I conclude Section 226 does not apply to the four named plaintiffs, then the result for their Section 204 claim is the same. There are no additional arguments—based on the nature, scope, and purpose of Section 204—for reaching a different conclusion under that section.

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[11]http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2535.

[12] Having concluded that Section 226 (and as discussed below, Section 204) cannot apply to the claims of the named plaintiffs, I need not reach whether application of those provisions to Delta would violate the dormant commerce clause.

[13] *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889, 904–05 (2012) ("As observed by the California Supreme Court more than 70 years ago, 'the sole purpose of [section 204] is to require an employer of labor who comes within its terms to maintain two regular pay days each month, within the dates required in that section.'" (*quoting In re Moffett*, 19 Cal.App.2d 7, 14 (1937)).

CONCLUSION

For the foregoing reasons, defendant's motion for partial summary judgment is GRANTED and plaintiffs' motion is DENIED. Because no issues remain in this case, judgment will be entered in Delta's favor in full.

IT IS SO ORDERED.

Dated: January 6, 2017

[handwritten: signature]
William H. Orrick
United States District Judge

Appendix F

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA**

No. 15-cv-00131-WHO

DEV ANAND OMAN, et al.,

Plaintiffs,

v.

DELTA AIR LINES, INC.,

Defendant.

Filed: January 6, 2017

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On the parties' cross-motions for summary judgment, the core question is whether Delta's Work Rules violate California's minimum wage requirements. Given the complexities of scheduling and paying Flight Attendants, Delta has developed formulas for determining Flight Attendant pay. Those formulas ("Work Rules") are fully disclosed to Flight Attendants and form the basis for the minimum promised pay included in each Bid Packet for each Rotation that a Flight Attendant might want to work.

Even where flights are delayed or rescheduled, a Flight Attendant will receive the minimum pay promised in the Bid Packet and the highest pay produced by applying each of the four Work Rules to the Rotation actually worked by the Flight Attendant. As explained in more depth below, I find that Delta's Flight Attendants are compensated for all hours worked in California at an amount exceeding the minimum wage.

There is no dispute—even when considering all hours a Flight Attendant was on Duty within each Rotation—that the Flight Attendants always received at least the California minimum wage rate for each hour within that Duty period. That Delta does not use a set hourly wage for each different type of task Flight Attendants perform (*e.g.,* time in flight, time spent in crew meetings or other pre-boarding duties, time spent on the ground in-between flight Segments, and time away from base) does not violate California law because Delta's formulas ensure that Flight Attendants are compensated for *all* time spent on Duty. Accordingly, I GRANT defendant's motion for partial summary judgment on plaintiffs' First, Second, and Third claims for relief and DENY plaintiffs' cross-motion for summary judgment.[1]

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[1] In their First Amended Complaint, plaintiffs allege violations of San Francisco and San Jose's Minimum Wage Ordinances. *See* First Amended Complaint (Dkt. No 24). Delta moves for summary judgment on those claims. Delta MSJ at 26-27. Plaintiffs attempt to "withdraw" those claims in their Motion. Plaintiffs' MSJ at 15 fn. 11. Because plaintiffs do not *oppose* Delta's MSJ as to those claims for the three named plaintiffs, I GRANT Delta's Motion for Summary Judgment on plaintiffs' Second and Third claims for relief.

BACKGROUND

I. DELTA'S FLIGHT ATTENDANT SCHEDULES AND PAY RULES

Delta provides air transportation for passengers and cargo throughout the United States and World through its network of hubs and international gateways. Declaration of Andrew P. Frederick (Dkt. No. 33), Ex. G at 2.[2] As of August 2015, Delta employed approximately 80,000 employees worldwide and 21,689 Flight Attendants in the United States. *Id.* at 10; Declaration of Brian Moreau (Dkt. No. 32-1), ¶2. The domestic flight attendants are primarily based at one of Delta's eight domestic hubs, Hartsfield-Jackson Atlanta International Airport ("ATL"), Los Angeles International Airport ("LAX"), Detroit Metropolitan Wayne County Airport ("DTW"), Minneapolis-St. Paul International Airport ("MSP"), New York-LaGuardia Airport ("LGA"), New York-John F. Kennedy International Airport ("JFK"), Salt Lake City International Airport ("SLC") and Seattle-Tacoma International Airport ("SEA"). Moreau Decl. ¶¶2. From May 1, 2012 to the present, between 5.3% and 6.2% of Delta Flight Attendants were based out of LAX, and between 1.2% and 1.5% based out of SFO. Moreau Decl. ¶¶3-4. Most Flight Attendants were and are based out of Atlanta and New York. *Id.* ¶5.

Every month, Flight Attendants "bid" on Rotations that are scheduled to depart from the Flight Attendant's base the following month. Frederick Decl.,

[2] The following facts are undisputed, unless otherwise noted.

Exs. L-N.[3] Flight Attendants' schedules, therefore, fluctuate and depend upon the seniority-based bid process. Moreau Decl. ¶6.

A Rotation begins when a Flight Attendant reports to an airport at a designated Report Time for "Sign in," to let the Delta know he or she is present and available to work the assigned Rotation. Moreau Dep. 51:5-19, 52:17-21, 53:8-54:4. Report Time is typically one hour before the departure time for domestic flights, one and a half hours for international flights, and is the start of the Flight Attendant's Duty Period. Moreau Dep. 51:5-19. After reporting, the Flight Attendant is required to check his/her e-mail and/or mailbox and attend a pre-flight briefing with the other Flight Attendants working the flight (the "Crew") in the Flight Attendant lounge, reporting location, or other designated area. Moreau Dep. 67:15-16, 70:8-71:25.

The Flight Attendant must then report to the departure gate prior to boarding. Moreau Dep. 77:2-4. At the gate, the Flight Attendant's pre-flight responsibilities will vary depending upon whether

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[3] A Rotation is a sequence of flights that may consist of one or more flight segments (i.e., a single flight) or one or more Duty Periods. Deposition of Brian Moreau, Ex. D to Frederick Decl. (Dkt. No. 34-3) 39:9-25, 41:6-8. A Duty Period begins at the scheduled Report Time and ends upon the Flight Attendant's release from duty for that particular day or Rotation. Moreau Dep. 40:5-15. Report Time is the time a Flight Attendant must be present at the airport either for Sign-in or to return from a layover. Frederick Decl. Exs. E, F at G13 (Work Rules Glossary). Attendants do not have any duties or responsibilities prior to their Report Time. Moreau Dep. 74:23-75:3.

they are serving as the Purser or Flight Leader,[4] regular crew member, or language destination Flight Attendant. Moreau Dep. 68:2-70:2. For example, the Purser/Flight Leader will typically obtain a copy of the flight's manifest and "brief" with the Captain while the rest of the Crew performs a number of duties to ensure the aircraft cabin is ready to receive passengers before assisting with the boarding process. Moreau Dep. 69:8-12.

Once the plane pushes back from the gate (referred to as "Block Out"), the Flight Attendant performs the necessary safety demonstrations and other in-flight duties. Moreau Dep. 41:24-42:3. At arrival, when the flight pulls into the gate (referred to as "Block In"), the Flight Attendant assists with the deplaning process after the boarding door has opened. Moreau Dep. 42:4-9.

For Duty Periods with multiple flight Segments, there is a period of time between the arrival on the first Segment and the departure of the next Segment referred to as Turn Time. Moreau Dep. 42:25-44:4-7. During the Turn Time, Flight Attendants do not have any responsibilities, but they are still on "duty." Moreau Dep. 108:2-12, 139:18-140:3. Flight Attendants must remain at the airport for possible contact from Crew Tracking. Work Rules at 11 ("Flight

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[4] The Flight Leader is the lead Flight Attendant on a domestic flight and the Purser is the lead Flight Attendant on a transoceanic flight. Moreau Dep. 20:5-20:16. Lead Flight Attendants and Pursers were paid premiums of $3.20 or $5.40 per hour flown during the relevant time period, in addition to the compensation earned for the Duty Period. Frederick Decl., Exs. E, F (Work Rules §2.P).

Attendants must be contactable at all times in the event of changes in flight times or routing."). Delta considers the Turn Time to be Duty Time for purposes of compensation. Moreau Dep. 108:11-12.

If the Flight Attendant's Duty Period ends in a destination city other than the Flight Attendant's base, he or she is released from work into Layover (usually overnight) until the next leg of the Rotation begins. Moreau Dep. 42:13-17. A Layover is a period of rest between Duty Periods of the Flight Attendant's Rotation. *Id*.

Regardless of whether the Duty Period is the only, first, middle or last Duty Period within a Rotation, the Duty Period ends 15 minutes after the block in of the last flight Segment. Moreau Dep. 101:11-18. However, in the event that deplaning takes longer than 15 minutes, Flight Attendants can notify the Scheduling Department to extend the Duty Time. Deposition of Dev Anand Oman, Ex. A to Frederick Decl. (Dkt. No. 34) 202:6-23; Deposition of Todd Eichmann, Ex. C to Frederick Decl. (Dkt. No. 34-2) 135:4-24. The Duty Period encompasses all time that the Flight Attendants are on Duty, including during the pre-flight meeting, preparation of the aircraft cabin, boarding, Flight Time, Turn Time, and deplaning of passengers, even when a Flight Attendant's release is delayed due to extenuating circumstances. Moreau Dep. 44:25-45:2.

The Bid Packets provided to Flight Attendants include a listing of all available Rotations that are scheduled to depart from the Flight Attendant's base the following month. Declaration of Michael Lehr, Ex. B. to Frederick Decl. (Dkt. No. 34-1) 187:17-188:4. For

each Rotation, the Bid Packets describe the number and length of the Duty Periods encompassed within the Rotation, the Report Times for each Duty Period, the scheduled total flight time for each Segment within the Rotation (which is measured from Block Out to Block In), and the amount of time that the Flight Attendant can expect to be away from base. Moreau Dep. 195:4-204:18; Frederick Decl. Exs. L-N. The Bid Packets show which of Delta's four pay formulas will apply to the Rotations, what the credit value of the Rotation is, and calculates the minimum compensation for each Rotation. Eichmann Dep. 175:8-176:14; Lehr Dep. 191:9-21, 202:13-19. The credit valuation included in the Bid Packets for each Rotation serves as a minimum guarantee for Flight Attendants with respect to credits. The actual compensation may increase as a result of delays, changes, or other contingencies; it cannot decrease. Eichmann Dep. 175:8-14.

Delta's bidding and compensation policies are laid out in Delta's Work Rules. Moreau Dep. 36:13-17. Delta uses four formulas to determine a Flight Attendant's actual pay. Delta runs each calculation for each Flight Attendant's Rotation and pays the Flight Attending using the formula that results in the highest amount of pay. Frederick Decl. Exs. E, F at 32-38 (Work Rules); Moreau Dep. 171:14-25. Delta asserts—and plaintiffs do not contest—that in no event is a Flight Attendant's pay less per hour worked in the Duty Period (all hours worked), than the California minimum wage rate.

Plaintiffs' challenge to the Delta's Work Rules stems from a misinterpretation of how the four

formulas work in determining compensation. Each uses a "base" which Delta defines as "Flight Pay Rate."[5] The Flight Pay Rate is not an agreed to "hourly rate of pay;" it is instead part of the mathematical equation Delta runs to determine actual pay. Plaintiffs point to no evidence that Delta or its Flight Attendants understand that the Flight Pay Rate is an hourly rate of pay that promises or guarantees payment at that rate for each hour on Duty. Below is a brief description of each formula.

A. Flight Pay

The Flight Pay formula is based on the actual flight time and/or scheduled flight time of the Segments, whichever is greater. Work Rules at 35. Flight time for Flight Pay begins at Block Out and ends at Block In (generally 15 minutes after landing). *Id*. Under this formula, the flight time is multiplied by the Flight Pay Rate to produce the value.

B. Duty Period Credit

Delta refers to this formula in its Work Rules as "Duty Period Credit (1 for 2)." Frederick Decl., Ex. F ("Work Rules") at 36.[6] A Duty Period is the period of time from scheduled or actual Report Time to the release at a base or on Layover. Moreau Dep. 40:5-15. Under this formula, Delta "credits" flight attendants

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[5] A Flight Attendant's Flight Pay Rate is based on an individual's length of service. Plaintiffs' Flight Pay Rates from May 1, 2012 through April 2015 were from $45.75 per hour up to $53.52 per hour. Moreau Decl. ¶8; Frederick Decl. Exs. E, F.

[6] Unless otherwise noted, I will refer to the 2015 Work Rules attached as Exhibit F to the Frederick Decl. As far as the record shows, all Flight Attendants have been subject to the same set of compensation Work Rules since May 1, 2012.

with "1 hour of flight pay for every 2 hours on duty for any given period." Work Rules at 36. As an example, Delta's Work Rules explain:

> You are scheduled for a turnaround worth 6:00 block time with a scheduled duty period length of 10:00. Due to an operational delay, your duty period is lengthened to 14:00. You will be paid 7:00 for the turnaround, comprised of 6:00 block time and 1:00 of 1 for 2 duty credit (14:00 divided by 2).

Id. Delta characterizes this formula as providing one-half of the Flight Pay Rate for every hour worked in a Duty Period. Delta's MSJ at 12. Plaintiffs point out that in Delta's own examples, DPC appears to be applied as a credit that supplements the Flight Pay value (otherwise known as block time). Work Rules at 36.

Delta's corporate designee (Brian Moreau) confirmed that DPC is a formula that for "every two hours on duty, one hour will be credited and paid at the flight pay rate." Moreau Dep. 170:12-17. Moreau also testified that the description of DPC in the Work Rules—"You will be credited with one hour of flight pay for every two hours on duty for any given duty period"—accurately reflected Delta's actual practices. *Id*. at 175:23-176:17. Moreau explained that under the DPC, Flight Attendants are "compensated at a minimum of one-half of their flight hourly rate for every hour on duty" and referred to the Flight Pay Rate as an "effective rate" that was half of the Flight Pay Rate. Moreau Dep. 185:1-9, 190:24-191:14, 192:6-19.

C. Minimum Duty Period Credit

The Minimum Duty Period Credit (MDC) multiplies 4:45 hours by the Flight Pay Rate for each Duty Period within a Rotation that has at least one flight Segment. Work Rules at 37.[7] For example:

> A 3-day trip has daily block time scheduled of 3:00, 5:00, and 5:00 respectively for the three days for a total of 13:00 block time. Because the 4:45 minimum guarantee applies for all 3 days, the total credit for the trip would be 14:45, and the pairing will generate 1:45 in MDC and you will be paid 14:45 for the trip (13:00 block time plus 1:45 MDC).

Id. The time paid will be at the Flight Pay Rate. *Id*. at 32.

Delta explains that the MDC was intended to provide Flight Attendants whose Rotations consisted of relatively short flight segments within multiple Duty Periods with higher compensation than they would have received under the other formulas. Moreau Decl. ¶7.

D. Trip Credit

Under this formula, Flight Attendants receive credit for 1 hour of flight time for each 3.5 hours they are away from base. Work Rules at 38. As an example:

> Your 3-day trip is away from base a total of 60 hours. The 1 for 3.5 hours trip credit is 17:07 hours.

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[7] Prior to April 1, 2014, the MDC was called the Duty Period Average, but functioned similarly. *See, e.g*., Frederick Decl., Ex. E at 37.

Id. This formula expressly includes non-Duty Period Time, such as travelling to airports during Layovers and time when Flight Attendants have been released from Duty.

Delta's Work Rules explain how these formulas are applied in slightly different ways. The 2015 Work Rules explain: "Flight Attendant compensation is paid as an hourly rate for all hours flown or credited." Work Rules at 32. "Each duty period of a rotation pays the greatest of: 1) flight time (includes deadhead flight time, minutes under, and flight pay for ground time), or 2) 4:45 minimum duty period credit (MDC), or 3) 1 for 2 duty period credit (DPC); The sum of the duty period credits listed above is then compared to 1 for 3.5 trip credit (TRP), which guarantees at least 1 hour pay for every 3.5 hours away from base. You will be paid the greater of the two values." *Id*. The 2014 Work Rules describe compensation as "for every trip, a comparison is made between block time (which includes Flight Pay, any 1 for 2 duty credit, and deadhead time[8]), the duty period average [now MDC], and the 1 for 3.5 Trip Credit (TRP). After taking these into consideration, you will be paid the greatest total trip value." 2014 Work Rules (Ex. E to Frederick Decl.) at 36).[9]

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[8] Deadhead time is when a flight attendant is transported by plane as a passenger, for an assignment that will be begin at another airport. Moreau Dep. 196:18-21.

[9] Flight Attendants also receive various forms of premium pay, including for working at as Lead Flight Attendant or Purser, report pay, time away from base pay, and holding pay. Work Rules, Section 2.

Plaintiffs characterize Delta's Work Rules as having one standard compensation formula—the Flight Pay formula—and allege that despite Delta's use of the other "credit formulas" there are three different time periods where plaintiffs are not appropriately paid under California law: (i) pre-boarding time-the time from Report Time to Block In; (ii) post-landing-the time from Block Out until all passengers have deplaned and all other onboard duties have been completed; and (iii) Turn Time (in middle of duty period). Plaintiffs' MSJ at 1.

II. PLAINTIFFS

A. Oman

For the relevant period, Oman has been based out of JFK. Oman Dep. 40:15-18. From May 1, 2012 through his termination in September 2014, Oman worked a total of 106 Rotations consisting of 369 flights. Oman Dep., Exs. 5 & 18. With respect to those Rotations and flights: 11 Rotations included flight Segments arriving at or departing from a California airport; in those 11 Rotations there were 26 flight Segments (13 arrivals and 13 departures); ten of the 13 flights arriving in California were the last flight Segments of the Duty Period, meaning Oman was immediately off-duty thereafter; for the remaining three arrivals, Oman had a total Turn Time between Block-In and Block-Out of 5 hours and 12 minutes; and none of the flight Segments were intra-California flights-*i.e.*, a flight that both departed from and arrived at California-based airports. *Id*.

Plaintiffs contend that Oman worked at least 27 flights into or out of California between over a longer time period, November 24, 2011 and August 8, 2014.

Frederick Decl. Ex. H, Ex. A. Oman received small amounts of Duty and Trip Credit on two flights, and the remaining 25 flights (93%) was paid Flight Pay only. *Id.*

B. Eichmann

Eichmann has been based out of LAX since February 2014. Eichmann Dep. 35:16-22. Prior to that, he was based out of DTW and SEA. *Id.* 95:8-13. From May 1, 2012 through his relocation to LAX in 2014, Eichmann worked a total of 83 Rotations consisting of 312 flights. Eichmann Depo. Exs. 36, 48, 49. Of those Rotations and flights: five Rotations included flight Segments arriving at or departing from a California based airport; the five Rotations consisted of 10 such flight Segments (five arrivals and five departures); three of the five flight Segments arriving in California were the last flight of the Duty Period, meaning Eichmann was immediately off-duty thereafter; for the remaining arrivals, Eichmann had a total turn time of 4 hours, 32 minutes; and none of the flight Segments were intra-California flights. *Id.*

From February 2014 through June 21, 2015—when based at LAX—Eichmann worked 88 Rotations consisting of 414 flights, of which 196 flight Segments arrived at or departed from a California-based airport. *Id.*, Exs. 36, 49. Only one of those flight Segments was an intra-California flight—a June 19, 2014 segment from SJC to LAX. *Id.*

Plaintiffs contend that Eichmann worked 178 flights into or out of California over a longer time period, January 1, 2011 and May 1, 2015. Frederick Decl. Ex. I, Ex. A. Eichmann received Duty Credit or

Trip Credit on 29 flights, and the remaining 149 flights (84%) was paid Flight Pay only. *Id.*

C. Lehr

Lehr has been based out of San Francisco and living in Las Vegas throughout his employment with Delta. Lehr Dep. 92:10-17. From May 1, 2012 through June 16, 2015, Lehr flew 230 Rotations consisting of 839 flights, of which 236 flights departed from SFO, 5 flights were intra-California flights. *Id.* Exs. 25, 29, 30. During that time, the initial flight of all but one of Lehr's Rotations departed from SFO and he never had more than five departures from SFO in any given seven day period. *Id.* Moreover, of the 236 flights departing from SFO, 229 were the initial leg of the Rotation (*i.e.*, Lehr's Duty Period began an hour before those departures), while the remaining seven consisted of five secondary attempts at taking off (*i.e.*, the initial leg blocked out but had to return to gate) and two intra-Rotational flights (*i.e.,* subsequent flights within a Rotation). *Id.* For the two intra-Rotational flights, Lehr's Turn Times prior to departure were 35 minutes and 51 minutes, respectively. *Id.*

Plaintiffs contend that Lehr worked 681 flights into or out of California over a longer time period, January 1, 2011 and May 1, 2015. Frederick Decl., Ex. J, Ex. A. Of those 681 flights, Lehr received some sort of Duty Credit on 52 flights and Trip Credit on 50 flights. *Id.* The remaining 579 flights, or 85% of Lehr's California flights, paid Flight Pay only. *Id.*

Delta asserts—and plaintiffs do not dispute—that for every hour of Duty worked by plaintiffs, they were paid an amount per hour that far exceeded California's

minimum wage floor. Plaintiffs nonetheless contend that under California law, the Flight Pay Rate is essentially a guaranteed hourly rate, and that it should be applied to all Duty hours worked, not just to certain hours that Delta credits under the Work Rules.

LEGAL STANDARD

I. MOTION FOR SUMMARY JUDGMENT

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby,* 477 U.S. 242, 257 (1986).

On summary judgment, the Court draws all reasonable factual inferences in favor of the non-movant. *Id.* at 255. In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is

insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730, 738 (9th Cir.1979).

II. CALIFORNIA WAGE ORDER

The Industrial Welfare Commission (IWC) wage order that applies to the transportation industry, is Wage Order 9-2001, and that Wage Order provides:

> 4. Minimum Wages
>
> (A) Every employer shall pay to each employee wages not less than [minimum wage amount] per hour for all hours worked, … .
>
> (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.

Cal. Code Regs. tit. 8, §11090.[10]

"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." *Id*., §2(G). (O) "Wages" includes "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of

[10] As of July 1, 2014, "the minimum wage for all industries shall be not less than nine dollars ($9) per hour." Cal. Lab. Code §1182.12.

time, task, piece, commission basis, or other method of calculation." *Id*., §2(O).

DISCUSSION

Delta argues that, assuming that California law applies to the work plaintiffs performed on the ground in California, Delta's compensation scheme is compliant with California law because plaintiffs were paid at least the California minimum wage rate for all of their Duty hours in California. Delta relies heavily on a recent case from the District Court in Massachusetts. In *DeSaint v. Delta Air lines, Inc.*, No. CIV.A. 13-11856-GAO, 2015 WL 1888242 (D. Mass. Apr. 15, 2015), the court faced exactly the same question on the same facts as here: whether Delta's use of its four pay formulas violated Massachusetts law by failing to pay plaintiff flight attendants for every hour worked. The court granted Delta's motion for summary judgment.

The court in *DeSaint* phrased critical issue in that case as follows:

> whether Delta's Flight Attendant compensation scheme runs afoul of the Wage Act because it fails to pay those employees all of their earned wages. The plaintiffs contend that under Delta's policies, Flight Attendants are paid an hourly rate, known as a "flight pay rate," for flying time or other working hours for which they receive a credit, but never receive compensation for each and every hour of work that they perform for the defendant. Delta contends that its compensation scheme accounts for every minute of work that is performed by its Flight

> Attendants, and guarantees that those employees are paid well above minimum wage for all hours spent on duty.

Id. at *1. It concluded that because Delta's rules accounted for each hour worked—by paying Flight Attendants the highest value under each of the four formulas—the compensation was compliance with Massachusetts law. *Id.* at *4. In particular, it relied on the DPC, which guarantees that "Flight Attendants will be paid, at a minimum, at the rate of one half of their flight pay for each hour that they spend working on duty for defendant." *Id.* *5. It also found that plaintiffs' argument was based on a mischaracterization of the Flight Pay Rate as a guaranteed minimum hourly wage. Instead, it concluded that it was "in reality" "simply a number used as a starting point to calculate compensation for each rotation." *Id.* *5, 8-10. And under Delta's compensation formulas, "it is not the rate that each Flight Attendant will be paid for each hour worked." *Id.* With respect to the Flight Pay formula, the court explained that while that formula arguably did not account for all hours actually worked, because it could "only be used to increase their pay above the Duty Period Credit formula, which applies a specified hourly rate to all hours worked," there was no violation. *Id.* at *6.

In reaching its conclusion, the *DeSaint* court concluded that under Massachusetts law, employers did not have to use a fixed per hour rate to compensate workers and "were not prohibited from calculating the hourly rate by dividing earnings by the number of hours worked during the relevant pay period." *Id.* at

*11. It is on that ground that plaintiffs' argue *DeSaint* is inapposite. They rely on a series of California cases that have rejected as impermissible under California law the approach that is permissible under the federal Fair Labor Standards Act. Under FLSA, in determining whether FLSA's minimum wage requirement was violated, courts can average all of the hours worked in a pay period by the amount paid in order to determine whether the employer has cleared the minimum wage floor; in other words paid their employees at least the minimum hourly wage for each hour worked. This, however, is not what Delta does, and the cases relied on by plaintiffs rejecting FLSA averaging, discussed below, are inapposite.

In *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005), employees who worked for a company that maintained utility poles were covered by a collective bargaining agreement guaranteeing their pay at specific rates. The employees' work tasks were classified as "productive" or "nonproductive" hours. Employees were not paid for nonproductive time spent travelling, loading equipment, completing paperwork, and maintaining vehicles, despite written policies to the contrary. *Id.* at 318. When sued for failure to pay a minimum wage for all hours worked, the employer argued that because the employees were compensated weekly at an amount exceeding the total hours worked multiplied by the applicable minimum wage rate, their average hourly rate in any given pay period was higher than California's minimum wage floor and not in violation of the law. *Id.* at 319.

The California Court of Appeal recognized that California's wage laws, while patterned on federal

FLSA statutes, were more protective of workers' rights. As such, while FLSA required payment or minimum wage to employees for their work in "any work week," California law required payment of a minimum wage for "every hour" worked. Therefore, the court concluded that the "averaging method" allowed under FLSA—which permits a court to average hours worked by the amount paid in a pay period "to assess" whether there was a violation of the federal minimum wage floor—is not allowed under California law. *Id*. at 323. The court also noted that provisions of the California Labor Code supported the principal that "all hours worked must be compensated at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation." *Id*. (relying on Cal. Labor Code §§221 [precluding employers from taking back wages already paid], 222 [precluding employers from withholding any part of an agreed upon wage] and 223 [precluding employers from secretly paying a wage lower than designated wage scale]). "California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked." *Id*. at 324.

Delta's Work Rules do not implicate the wrongs identified in *Armenta*. Delta is not arguing, as the *Armenta* defendant did, that it can avoid paying Flight Attendants for certain hours on Duty because when considering all hours on Duty the average amount earned exceeds California's minimum wage floor. Delta is instead applying formulas that expressly consider all hours worked in the first instance. It is not engaging in a post-hoc attempt to rationalize a failure to pay for all hours worked by pointing out that pay exceeds the minimum wage floor as in Armenta. Nor

is this a case where Delta's Work Rules run afoul of Labor Code sections 221, 222, and 223. Delta is not attempting to avoid payment of all hourly work at the "agreed to" hourly wage scale. As noted above, there is no evidence that Delta has promised or the Flight Attendants expect to be compensated for each hour worked at the Flight Pay Rate. Indeed, Flight Attendants receive Bid Packets that state the minimum guaranteed pay for each Rotation, so they can easily calculate their rate of pay for the mix of responsibilities they would have during the Rotation. This is also no attempt by Delta to take back wages by "building in" pay for uncompensated tasks to the pay earned for compensated tasks.

Plaintiffs also rely on *Ontiveros v. Zamora*, No. CIV S-08-567LKK/DAD, 2009 WL 425962 (E.D. Cal. Feb. 20, 2009), where the Eastern District of California followed *Armenta*. In that case, automobile mechanics were paid on a piece-rate basis. Each type of repair was given a "flag rate" and compensated at a fixed amount based on the estimated time that repair should take. *Id*. at *2. The employees alleged the compensation system violated California law because they were not compensated for non-piece work, including attending meetings and setting up work stations. Defendants asserted their compensation scheme was legal as long as the amount of compensation paid for a particular pay period did not fall below the minimum wage considering all hours worked. *Id*. The court found the rationale of *Armenta* applicable—even though the employees were paid on a piece-rate basis—because under the scheme at issue "employees are not necessarily compensated for every hour worked and an employee is compensated for non-

piece rate hours with wages accrued during piece hours," in violation of California law. *Id.* *3. As discussed above, this is not a case where the amount earned at an agreed-to rate for "paid hours" is used to compensate other unpaid work.

The Central District of California followed *Armenta* in *Cardenas v. McLane FoodServices, Inc.*, 796 F. Supp. 2d 1246 (C.D. Cal. 2011). There employee drivers of a motor carrier were paid a piece-rate formula based on the number of deliveries, number of miles driven, and number of delivery stops. That formula, the drivers alleged, failed to pay them for pre and post-shift duties such as safety checks and vehicle inspections. The employer contended that compensation for the pre and post shift duties were "built into" the compensation provided in the piece-rate formula and that it need not compensate employees for time not included in the piece-rate formula if, at the end of the pay period, the average wage exceeded the minimum wage. *Id.* at 1250-51. The court concluded that the employer's argument about building in compensation was akin to the rejected "averaging" of productive and unproductive time in *Armenta*. Because the employer's formula did not actually directly compensate employees for pre and post shift duties, it was impermissible under California law. *Id.* at 1253. Delta's Work Rules do not suffer from the defect identified by the *Cardenas* court, where the applicable pay formula did not "calculate" for the pre and post shift duties required by the employer. *Id.* Instead, the Work Rules expressly consider all hours worked, and a Flight Attendant will always be paid the highest value for each Rotation worked under the applicable formulas.

In *Balasanyan v. Nordstrom, Inc.*, 913 F. Supp. 2d 1001 (S.D. Cal. 2012), the Southern District likewise rejected an argument that paid commissions and hourly pay for non-sell time could adequately compensate employees for un-paid non-commission producing activities employees were required to undertake (*e.g.*, marketing activities and contacting customers). While the employer argued its commission rates adequately compensated employees for non-sell time and that plaintiffs received an "effective" minimum hourly wage that exceeded the minimum wage, those arguments were foreclosed by *Armenta* and the cases following it. Employees "must be directly compensated at least minimum wage for all time spent on activities that do not allow them to directly warn [*sic*] wages," in that case extra commissions. *Id.* at 1007. And an employer cannot justify preventing employees from engaging in commission-generating activities (by requiring them to engage in unpaid tasks), even where post-hoc averaging hours and pay demonstrates a minimum wage rate was always paid. *Id.* Here the Delta Work Rules do not require Flight Attendants to perform uncompensated tasks at the expense of their ability to perform compensated tasks, and there is no post-hoc "averaging" rationalization in an attempt to justify treating specific tasks as uncompensated.

Two Northern District cases likewise rejected schemes which attempted to "build in" compensation for unpaid tasks into the compensation for paid tasks. In *Quezada v. Con-Way Freight, Inc.*, No. C 09-03670 JW, 2012 WL 2847609 (N.D. Cal. July 11, 2012), the court considered a compensation scheme where line haul drivers were paid under a pre-set mileage rate

multiplied by the number of miles in a trip. Drivers were not compensated for pre and post-trip vehicle inspections and wait time. Defendant's argument that it "built into" the per-mile rate compensation for those pre and post-trip tasks was rejected as impermissible under IWC Wage Order 9-2001, because under California law "all work time must be directly paid for." *Id.* at *4, 6. The Quezada court also concluded that the pay formula at issue violated California law, as expressed in a Division of Labor Standards Enforcement (DLSE) manual provision which explained that when employees are paid under a "piece-rate" formula, employees must be separately compensated for performing required tasks when—by virtue of performing those tasks—they are unable to earn additional piece-rate compensation during that time. *Id.* at *4-5.

The deficiencies found in *Quezada* are not found here. This is not a case where Delta "builds in" payment for pre and post flight duties into Flight Time, nor is it a situation where Delta is preventing Flight Attendants from performing compensable tasks by requiring them to perform expressly non-compensable tasks. Instead, Delta's Work Rules ensure that Flight Attendants are paid for all hours worked, based on the minimum guarantee in the Bid Packet and considering all hours worked during a Rotation.

In *Ridgeway v. Wal-Mart Stores, Inc.*, No. 08-CV-05221-SI, 2015 WL 3451966 (N.D. Cal. May 28, 2015) motion to certify appeal denied, No. 08-CV-05221-SI, 2015 WL 4463923 (N.D. Cal. July 21, 2015), the court granted partial summary judgment to plaintiff drivers

on their claim that defendant's piece-rate compensation system—where drivers were paid based on mileage, as well as hourly rates for certain required activities—did not compensate them for other pre, post and during-trip duties. The court followed *Armenta* and its progeny and concluded that under Wage Order 9-2001, the employer could not "subsume" non-paid activities into the wages paid for other activities because "California minimum wage standards apply to each hour worked by an employee." *Id*. at *6. Again, this is not a "built into" pay scheme; Flight Attendants are paid for all hours worked at an effective rate that is fully disclosed and bid upon by the attendants.

Finally, in *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013), a more decision from the California Court of Appeal, the court considered a scheme where car repair technicians were paid on a "piece-rate" basis at a flat rate for different repairs they were required to perform during their eight hour shifts. During their shifts, the technicians were required to stay on the premises even when there were no cars for them to repair, and they were expected to perform other tasks during that time, including obtaining parts, cleaning up, and reviewing service bulletins. They were not paid by the hour for those tasks and they were not paid for other time spent waiting for the next vehicle to repair. *Id.* at 42. At the end of each 80 hour pay period, the employer would multiply the "flag hours" the technicians spent repairing vehicles at the technician's "flat rate," in order to determine how much the technician earned. At the same time, the employer also calculated how much the technician would earn if paid an amount

equal to his total recorded hours (hours spent on shift) by the applicable minimum wage. *Id.* at 41. If a technician's flag hours pay fell short of the "minimum wage floor" the employer would supplement the pay in the amount of the shortfall. *Id.* at 41-42. The California Court of Appeal concluded that pay scheme violated California law because the employees were not being paid when they were required to be on duty, but did not have a car to repair. The court also rejected, as in Armenta, the employer's reliance on its post-hoc calculation to ensure it paid its workers at least the minimum wage per hour worked during each pay period, because that undermined the otherwise agreed-to piece rate wage promised to the employees.

The facts of *Gonzalez*, like each of the other cases relied upon by plaintiffs, are significantly different from the facts before me. Delta is not attempting to avoid paying an agreed-to hourly rate for specific tasks and is not using a post-hoc averaging to ensure the state's minimum wage floor is met (as allowed by FLSA). Delta's Work Rules function in a different, fully-disclosed way to ensure that Flight Attendants are paid for each hour worked on their Rotations. Delta's Work Rules do not violate California's minimum wage requirements and, therefore, summary judgment must be granted to defendant.[11]

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[11] Because I agree with Delta that its Work Rules do not violate California law, I need not reach the question of whether California's wage and hour laws can apply to the Flight Attendants' work in California consistent with Due Process and Commerce Clause principles. Nor do I need to address whether Delta is liable to plaintiffs under the materially similar Northwest compensation.

CONCLUSION

Delta's motion for summary judgment on plaintiffs' First, Second, and Third claims is GRANTED. Plaintiffs' cross-motion for summary judgment is DENIED. I have set a Case Management Conference on January 26, 2016. The parties shall file a Joint Case Management Conference Statement by January 19, 2016 that describes the remaining issues in this case and proposes a schedule to adjudicate them.

IT IS SO ORDERED.

Dated: December 29, 2015

[handwritten: signature]
William H. Orrick
United States District Judge

Appendix G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, §8, cl. 3

The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

Cal. Labor Code §204

(a) All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. However, salaries of executive, administrative, and professional employees of employers covered by the Fair Labor Standards Act, as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act, as amended through March 1, 1969, in Part 541 of Title 29 of the Code of Federal Regulations, as that part now reads or may be amended to read at any time hereafter, may be paid once a month on or before the 26th day of the month during which the labor was performed if the entire month's salaries, including the unearned portion between the date of payment and the last day of the month, are paid at that time.

(b)

(1) Notwithstanding any other provision of this section, 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.

(2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

(c) However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall apply to the covered employees.

(d) The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

(e) Notwithstanding subdivision (a) of Section 220, all wages earned by employees directly employed by the Regents of the University of California shall be paid on a regular payday. For the employees on a monthly payment schedule, payment is due no later than five days after the close of the monthly payroll period. For employees on a more frequent payment

schedule, payment is due according to the pay schedule announced by the University of California in advance. Nothing in this section shall be construed to prohibit the Regents of the University of California from allowing its employees to choose to distribute their pay so that they will receive paychecks throughout the year, rather than during pay periods worked only.

Cal. Labor Code §226

(a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (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 only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of 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 and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment. The deductions made from payment 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 and the 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. For purposes of this subdivision, "copy" includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.

(b) An employer that is required by this code or any regulation adopted pursuant to this code to keep the information required by subdivision (a) shall afford current and former employees the right to inspect or receive a copy of records pertaining to their employment, upon reasonable request to the employer. The employer may take reasonable steps to ensure the identity of a current or former employee. If the employer provides copies of the records, the actual cost of reproduction may be charged to the current or former employee.

(c) An employer who receives a written or oral request to inspect or receive a copy of records pursuant to subdivision (b) pertaining to a current or former employee shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request. A violation of this subdivision

is an infraction. Impossibility of performance, not caused by or a result of a violation of law, shall be an affirmative defense for an employer in any action alleging a violation of this subdivision. An employer may designate the person to whom a request under this subdivision will be made.

(d) This section does not apply to any employer of a person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(e)

(1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.

(2)

(A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and

complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

(C) For purposes of this paragraph, "promptly and easily determine" means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

(3) For purposes of this subdivision, a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In reviewing for compliance with this section, the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section.

(f) A failure by an employer to permit a current or former employee to inspect or receive a copy of records within the time set forth in subdivision (c) entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar ($750) penalty from the employer.

(g) The listing by an employer of the name and address of the legal entity that secured the services of the employer in the itemized statement required by subdivision (a) shall not create any liability on the part of that legal entity.

(h) An employee may also bring an action for injunctive relief to ensure compliance with this section, and is entitled to an award of costs and reasonable attorney's fees.

(i) This section does not apply to the state, to any city, county, city and county, district, or to any other governmental entity, except that if the state or a city,

county, city and county, district, or other governmental entity furnishes its employees with a check, draft, or voucher paying the employee's wages, the state or a city, county, city and county, district, or other governmental entity shall use no more than the last four digits of the employee's social security number or shall use an employee identification number other than the social security number on the itemized statement provided with the check, draft, or voucher.

(j) An itemized wage statement furnished by an employer pursuant to subdivision (a) shall not be required to show total hours worked by the employee if any of the following apply:

(1) The employee's compensation is solely based on salary and the employee is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission.

(2) The employee is exempt from the payment of minimum wage and overtime under any of the following:

(A) The exemption for persons employed in an executive, administrative, or professional capacity provided in any applicable order of the Industrial Welfare Commission.

(B) The exemption for outside salespersons provided in any applicable order of the Industrial Welfare Commission.

(C) The overtime exemption for computer software professionals paid on a salaried basis provided in Section 515.5.

(D) The exemption for individuals who are the parent, spouse, child, or legally adopted child of the employer provided in any applicable order of the Industrial Welfare Commission.

(E) The exemption for participants, director, and staff of a live-in alternative to incarceration rehabilitation program with special focus on substance abusers provided in Section 8002 of the Penal Code.

(F) The exemption for any crew member employed on a commercial passenger fishing boat licensed pursuant to Article 5 (commencing with Section 7920) of Chapter 1 of Part 3 of Division 6 of the Fish and Game Code provided in any applicable order of the Industrial Welfare Commission.

(G) The exemption for any individual participating in a national service program provided in any applicable order of the Industrial Welfare Commission.