APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 19-15382, 20-15186

Argued and Submitted January 14, 2021
San Francisco, California

Filed February 23, 2021

Amended March 8, 2021

Amended July 20, 2021

JULIA BERNSTEIN; Esther Garcia; Lisa Marie Smith, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees

v.

VIRGIN AMERICA, INC.; Alaska Airlines, Inc.,
Defendants-Appellants

Before: J. CLIFFORD WALLACE and MILAN D. SMITH, JR., Circuit Judges, and ROBERT S. LASNIK,* District Judge.

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* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

ORDER AND AMENDED OPINION

ORDER

The opinion filed on February 23, 2021, and previously amended on March 8, 2021, is amended with the amended opinion filed concurrently with this order.

The panel unanimously voted to deny the petitions for panel rehearing. Judge M. Smith voted to deny the petitions for rehearing en banc, and Judges Wallace and Lasnik so recommended. The full court was notified of the petitions for rehearing en banc, and no judge requested a vote. Fed. R. App. P. 35. The petitions for rehearing en banc (No. 19-15382 Dkts. 115, 116; No. 20-15186 Dkts. 47, 48) are **DENIED**. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

M. SMITH, Circuit Judge:

This case requires us to determine whether certain provisions of the California Labor Code apply to an interstate transportation company's relationship with its employees. Plaintiffs Julia Bernstein, Esther Garcia, and Lisa Smith sued their employer, Virgin America, Inc., alleging that Virgin violated a host of California labor laws. The district court certified a class of similarly-situated plaintiffs and granted summary judgment to Plaintiffs on virtually all of their claims, and Virgin appealed. We affirm in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are California-based flight attendants who were employees of Virgin. During the Class Peri-

od, approximately 25% of Virgin's flights were between California airports. Approximately 75% of Virgin's flights took off or landed at a non-California airport, but the vast majority of those flights retained some connection to California: "From 2011 through 2016, the daily percentage of Virgin's flights that arrived in or departed from California airports was never less than 88%, and during some years reached 99%." Class members spent approximately 31.5% of their time working within California's borders. There is no evidence in the record to suggest that class members spent more than 50% of their time working in any one state, or that they worked in any other state more than they worked in California. Virgin's fleet of aircraft were registered with the Federal Aviation Administration at Virgin's headquarters in Burlingame, California, and the record does not reflect any other business headquarters.

In their complaint, Plaintiffs alleged that Virgin failed to pay minimum wage (Cal. Lab. Code §§ 1182.12, 1194, 1194.2), overtime (Cal. Lab. Code §§ 510, 1194), and for every hour worked (Cal. Lab. Code § 204); failed to provide required meal periods (Cal. Lab. Code §§ 226.7, 512), rest breaks (Cal. Lab. Code § 226.7), and accurate wage statements (Cal. Lab. Code § 226); failed to pay waiting time penalties[1] (Cal. Lab. Code §§ 201, 202, 203); and violated the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200). Plaintiffs also sought compensation under

[1] Waiting time penalties refer to the California requirement that employers expeditiously pay all wages due to employees who separate from employment. If an employer fails to comply, it is liable for "waiting time penalties" pursuant to the Labor Code.

the California Labor Code's Private Attorneys General Act (Cal. Lab. Code § 2698) (PAGA).

Virgin disputes that it is subject to California law, but does not contend that any other state's labor laws ought to apply to it.

In November 2016, the district court held that Plaintiffs satisfied the requirements for a class action pursuant to Federal Rule of Civil Procedure 23(b)(3), and certified the following classes:

> **Class**: All individuals who have worked as California-based flight attendants of Virgin America, Inc. at any time during the period from March 18, 2011 (four years from the filing of the original Complaint) through the date established by the Court for notice of certification of the Class (the "Class Period").
>
> **California Resident Subclass**: All individuals who have worked as California-based flight attendants of Virgin America, Inc. while residing in California at any time during the Class Period.
>
> **Waiting Time Penalties Subclass**: All individuals who have worked as California-based flight attendants of Virgin America, Inc. and have separated from their employment at any time since March 18, 2012.

On July 9, 2018, the district court granted Plaintiffs' Motion for Summary Judgment in large part. The district court held that the California Labor Code applied to all work performed in California, and that "the presumption against extraterritorial application does not apply for the failure to pay for all hours worked, to pay overtime, to pay waiting time penalties, and to provide accurate wage statements" be-

cause the conduct underlying those claims took place in California. The district court also rejected the "job situs" test Virgin proposed, holding that, under California law, an employee need not work "exclusively or principally" in California to benefit from California law.

With respect to the dormant Commerce Clause arguments, the district court held that application of the California Labor Code does not violate the dormant Commerce Clause because the California Labor Code does not impose a substantial burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The district court further held that the California meal and rest break requirements were not preempted by field, conflict, or express preemption pursuant to the Federal Aviation Act (FAA) or the Airline Deregulation Act (ADA). The district court awarded PAGA penalties for initial and subsequent violations of the Labor Code.

The district court then awarded attorney's fees and costs to Plaintiffs' counsel, excluding 148.1 hours that were not properly documented, reducing the award for "complaint and client communications" time by 10%, and imposing a 5% reduction to the remaining hours. The district court then applied a 2.0 multiplier based on the factors set forth in *Ketchum v. Moses*, 17 P.3d 735, 741–42 (Cal. 2001). The district court awarded the full amount of costs that Plaintiffs' counsel claimed based on its conclusion that the amounts claimed were reasonable. Virgin appealed from the district court's summary judgment and grant of attorney's fees, and the cases were consolidated for oral argument.

STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo. *United States v. Phattey*, 943 F.3d 1277, 1280 (9th Cir. 2019). Our task is to "view the evidence in the light most favorable" to Virgin "and determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (cleaned up).

We review a district court's decision on a motion for attorney's fees for abuse of discretion. *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1235 (9th Cir. 2000).

ANALYSIS

A.

As a threshold matter, we must consider whether the dormant Commerce Clause permits application of California labor law in the context of this case. We hold that the dormant Commerce Clause does not bar applying California law.

"Modern dormant Commerce Clause jurisprudence primarily 'is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)). "[A] state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce. A critical requirement for proving a violation of the dormant Commerce Clause is

that there must be a *substantial burden* on *interstate commerce*." *Id.* (citation omitted). "These other significant burdens on interstate commerce generally result from inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Id.*

Indeed, only a "small number" of Supreme Court cases "have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory . . . where such laws undermined a compelling need for national uniformity in regulation." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997). Among these are *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945). Virgin relies on these cases, but they do not help its legal position.

In *Bibb*, the Arkansas Commerce Commission required straight mudflaps on trailers operating on state highways; an Illinois statute required curved mudflaps. 359 U.S. at 527. "Thus[,] if a trailer [were] to be operated in both States, mud-guards would have to be interchanged, causing a significant delay in an operation where prompt movement may be of the essence." *Id.* Moreover, the inter-change was laborious and could be "exceedingly dangerous." *Id.* The Supreme Court struck down the Illinois statute under the dormant Commerce Clause based on "the rather massive showing of burden on interstate commerce which [the motor carriers] made at the hearing." *Id.* at 528, 530.

In *Southern Pacific*, Arizona limited freight trains to seventy cars and passenger trains to fourteen cars, differing substantially from nearby states' length limitations. 325 U.S. at 771, 774. Railroad operations

passing through Arizona were substantially burdened by the obligation to break up and remake trains at the Arizona state border. *Id.* at 772. The Supreme Court held that the facts in the record showed "[t]he serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority." *Id.* at 775. These cases stand for the principle that state regulations can violate the dormant Commerce Clause in the rare case where an interstate carrier must comply with different and incompatible state requirements, and where that compliance is substantially burdensome.

We are not persuaded that California's labor laws are similar in character and effect to Illinois's mudflaps decree and Arizona's train-length limitation. Virgin has not identified any other state labor laws with which it might be required to comply. Indeed, because California labor law's application is based upon the parties' various contacts with the state—as explained further below—a claim that a proliferation of similar state laws would substantially burden Virgin is dubious. Virgin does not have anything like the number of contacts with any other state that it has with California, and it fails to proffer evidence of any burden it allegedly suffers from doing business in other states with different regulations. *Cf. Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1192 (9th Cir. 1990) (distinguishing between the facts presented in *Bibb* and a case where the defendant merely "speculate[d] that other states will pass similar but inconsistent legislation," because "inconsistent state laws . . . can coexist without conflict as long as each state regulates only its own [entities]"). We hold that

the dormant Commerce Clause is not implicated in this case.

B.

Virgin challenges application of California law to both the Class and the California Resident Subclass. But Virgin's proposed "job situs" test is a misinterpretation of California law. According to the California Supreme Court:

> The better question is what kinds of California connections will suffice to trigger the relevant provisions of California law. And second, the connections that suffice for purposes of one statute may not necessarily suffice for another. There is no single, all-purpose answer to the question of when state law will apply to an interstate employment relationship or set of transactions. As is true of statutory interpretation generally, each law must be considered on its own terms.

Ward v. United Airlines, Inc., 466 P.3d 309, 319 (2020). In accordance with *Ward*, each of Plaintiffs' claims requires separate analysis to determine whether the California Supreme Court would apply California law to the Class and Subclass under the circumstances of this case. *Cf. Pacheco v. United States*, 220 F.3d 1126, 1131 (9th Cir. 2000) ("[W]e must predict as best we can what the California Supreme Court would do in these circumstances."). Where there is no genuine issue of material fact whether Virgin complied with California law, we decline to determine whether and how the California Supreme Court would apply that particular law to Virgin.

a. Minimum wage and compensation for all hours worked

California Labor Code § 1182.12(a) prescribes "the minimum wage for all industries." Section 204(a) requires that "[a]ll wages . . . earned by any person in any employment are due and payable twice during each calendar month." Cal. Lab. Code § 204(a). After the district court's ruling in this case, the California Supreme Court considered whether a virtually identical compensation scheme violated California law for payment of minimum wage and payment for all hours worked. The court held that a payment scheme based on block time does not violate California law where

> the scheme, taken as a whole, does not promise any particular compensation for any particular hour of work; instead, . . . 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 v. Osmose, Inc.*, 37 Cal. Rptr. 3d 460 (Ct. App. 2005)] and like cases are absent here.

Oman v. Delta Air Lines, Inc., 466 P.3d 325, 339 (Cal. 2020) (emphases omitted).

Plaintiffs attempt to distinguish their case by noting that, while Delta promised the *Oman* plaintiffs payment "by the rotation rather than by particular hours worked," Virgin promised them an hourly wage. However, Plaintiffs' prior briefing contradicts this assertion. Instead, Plaintiffs' answering brief stated

that Virgin paid flight attendants based on "(1) block time worked each day of the pairing; (2) block time spent deadheading (traveling between airports to reach an assigned flight . . .); and (3) up to 3.5 hours of minimum duty if a flight attendant's block time and deadheading time in one day did not exceed 3.5 hours in total." This does not reflect a promise to pay a particular hourly wage.

Second, Plaintiffs contend that, unlike Delta's scheme in *Oman*, Virgin's did not guarantee "that flight attendants are always paid above the minimum wage for the hours worked during each rotation." *See Oman*, 466 P.3d at 338. Plaintiffs posit that a Virgin flight attendant could be ordered to report for duty five hours prior to their scheduled flight, but not be paid for any of that time. However, Plaintiffs have not alleged that this ever happened, nor that it would plausibly happen. Thus, the rule from *Oman* controls. The fact that pay is not specifically attached to each hour of work does not mean that Virgin violated California law. We therefore reverse the district court's summary judgment to Plaintiffs on their claims for minimum wage and payment for all hours worked.

b. Overtime

Under California law,

> Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one work-week and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the

> regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a work-week shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

Cal. Lab. Code § 510(a).

In *Sullivan v. Oracle Corp.*, 254 P.3d 237 (Cal. 2011), the California Supreme Court held that the overtime provision applied to non-residents performing work in California for a California-based employer. *Id.* at 240–41. This holding compels the conclusion that California's overtime provision applies to the Plaintiff Class. *Sullivan* did not answer whether the overtime provision would apply to residents performing work outside California for a California-based employer, *i.e.*, the Plaintiff California Resident Subclass. However, the principles set forth in *Sullivan* require us to apply California overtime law to California residents' out-of-state work. In *Sullivan*, the court wrote, "To permit nonresidents to work in California without the protection of our over-time law would completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork." *Id.* at 247. The same public policy goals would be thwarted by permitting residents to work outside of California for a California employer without the protection of its overtime law. Thus, we hold that under the circumstances of this case, Virgin was subject to the strictures of California Labor Code § 510 as to both the Class and Subclass.

Virgin's opening brief did not dispute that it failed to comply with § 510. Accordingly, we affirm the

district court's grant of summary judgment to Plaintiffs on this claim.

c. Rest and meal breaks

i. Preemption

California Labor Code § 512(a) states:

> An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes . . . . An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes[.]

IWC Wage Order 9-2001 § 12(A) requires an "authorized rest period time" that is "based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." "[I]nsofar as practicable," the rest period "shall be in the middle of each work period." *Id.* Virgin contends that federal law preempts California's meal and rest break requirements in the aviation context because federal law occupies the field. We disagree.

Under the field preemption doctrine,

> States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal

> system will be assumed to preclude enforcement of state laws on the same subject.

Arizona v. United States, 567 U.S. 387, 399 (2012) (cleaned up). Pursuant to the FAA, federal regulations entitled "Flight attendant duty period limitations and rest requirements" were promulgated that prohibit duty periods of more than 14 hours, subject to certain exceptions, and require a 9-hour rest period after release from a duty period of 14 hours or less. 14 C.F.R. § 121.467(b)(1)–(2).

Although our circuit has not yet addressed the precise question of FAA preemption of state meal and rest break requirements, our case law makes clear that field preemption generally applies to state regulations specifically in the field of *aviation safety*. In *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007), we held that Congress intended to occupy the field of "aviation safety." This was based on the dominance of federal interests in regulation of the country's airspace, the passage of the FAA "in response to a series of fatal air crashes between civil and military aircraft operating under separate flight rules," and delegation of "full responsibility and authority for the . . . promulgation and enforcement of safety regulations" to the agency. *Id.* at 471–72 (alteration in original). We noted that the FAA also directed the Administrator "to regulate any 'other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.'" *Id.* at 472 (quoting 49 U.S.C. § 44701(a)(5)).

In *Ventress v. Japan Airlines*, 747 F.3d 716 (9th Cir. 2014), we held that standards for pilots were also pervasively regulated because the FAA authorized the agency "to issue airman certificates to individuals who

are qualified and physically able to perform the duties related to the certified position." *Id.* at 721. The plaintiff's retaliation and constructive discharge claims arising out of California's whistleblowing statute (after the plaintiff raised concerns about a colleague's fitness to fly) were therefore preempted. *Id.* at 722. *Ventress* made clear that a congressional interest in national aviation safety standards served as a basis for our holding that federal law preempted the state law claim at issue. *Ventress* relied on "two reasons: the pervasiveness of federal safety regulations for pilots and the congressional goal of a uniform system of aviation safety." *Id.* We again emphasized the congressional interest in national aviation safety standards when we wrote, "In reaching this conclusion, we need not, and do not, suggest that the FAA preempts all retaliation and constructive termination claims brought under California law . . . . Instead, we hold that federal law preempts state law claims that encroach upon, supplement, or alter the *federally occupied field of aviation safety*[.]" *Id.* at 722–23 (emphasis added).

Virgin contends that meal and rest breaks touch on aviation safety in that the California requirements prohibit employers from assigning duties to an employee who is on a meal or rest break. But this connection is far too tenuous to support field preemption for California's requirements. Unlike the state laws at issue in *Montalvo* and *Ventress*, California's meal and rest break requirements have no *direct* bearing on the field of aviation safety.

We recognize that field preemption under the FAA is not necessarily limited to state laws that regulate aviation safety. In general, where a federal regulatory scheme is so pervasive that it evinces an intent to

occupy the field, state regulations in the same field are preempted. *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009). However, 14 C.F.R. § 121.467, the federal regulation governing maximum duty periods for flight attendants, does not resemble the type of comprehensive regulation or contain the pervasive language that we consider necessary to discern congressional intent to occupy the field. *See Ventress*, 747 F.3d at 721–22 (discussing at least five different sections under two titles of regulations relating to the requirement for an airman certificate, the requirement of a medical certificate, the delegation of the authority to issue a certificate to the Federal Air Surgeon, and the promulgation of standards for mental, neurological, and general medical conditions for the medical certificate). When a single regulation has triggered field preemption, our court has highlighted the regulation's "exhaustive" level of detail. *See Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 734–35 (9th Cir. 2016) (holding that 14 C.F.R. § 382.57 occupies the field of airport kiosk accessibility for the blind in part because it is "unmistakably pervasive in the pertinent sense, in that it exhaustively regulates the relevant attributes of accessible kiosks," including numerous "technical and design requirements"). While § 121.467 is lengthy, it only discusses allowed duty period lengths. The regulation does not compel us to conclude that Congress left no room for states to prescribe meal periods and ten-minute rest breaks within the maximum total duty period allowed under federal law.

Conflict preemption also does not bar application of California's meal and rest break requirements. "A conflict giving rise to preemption exists 'where it is impossible for a private party to comply with both state

and federal law, … and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016), *quoting Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). We sometimes refer to these two forms of conflict preemption as impossibility preemption and obstacle preemption. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013). Virgin argues that both impossibility preemption and obstacle preemption bar application of California's meal and rest break requirements. With respect to Virgin's impossibility preemption argument, it is physically possible to comply with federal regulations prohibiting a duty period of longer than fourteen hours and California's statutes requiring ten-minute rest breaks and thirty-minute meal periods at specific intervals.

Virgin's obstacle preemption argument mischaracterizes the relevant federal regulation and improperly dismisses the possibility of increasing flight attendant staffing on longer flights. Virgin argues that "applying California's break rules to flight attendants would frustrate the operation and natural effect of the federal safety scheme" and asserts that "FAA rules require flight attendants to be constantly on call and uniformly distributed throughout the cabin to help passengers in an emergency." Quoting 14 C.F.R. §§ 121.391(d) and 121.394(c), Virgin asserts that "'during takeoff and landing,' flight attendants must remain 'uniformly distributed throughout the airplane,' to help passengers with 'effective egress in the event of an emergency evacuation," and that the same is true "during passenger boarding or

deplaning." Virgin's phrasing to describe the duties misleadingly suggests that *all* attendants on a flight must be ready to perform the identified tasks. However, § 121.391 expressly imposes the duties only on "the flight attendants required by this section," which is defined in § 121.391(a). Section 121.391(a) sets the minimum number of attendants according to an airplane's payload and passenger capacity:

> [E]ach certificate holder must provide *at least the following flight attendants* on board each passenger-carrying airplane when passengers are on board:
>
> (1) For airplanes having a maximum payload capacity of more than 7,500 pounds and having a seating capacity of more than 9 but less than 51 passengers - one flight attendant.

Section 121.391(a)(1) (emphasis added); *see also id.* (a)(2–4). Section 121.394 also defines the base number of required flight attendants in reference to § 121.391 and allows for reductions depending on certain conditions. Therefore, contrary to Virgin's characterization, the relevant federal regulations define safety duties for a *minimum* number of flight attendants.

We agree with the district court, which held that airlines could comply with both the FAA safety rules and California's meal and break requirement by "staff[ing] longer flights with additional flight attendants in order to allow for duty-free breaks." Virgin dismisses this option and argues that space constraints make it impracticable and that it would "override" FAA rules in § 121.391. With respect to the former argument, the record does not bear Virgin out and indicates that Virgin operates flights with empty jump seats. With respect to the latter, § 121.391 sets

a minimum requirement for attendants per flight, so Virgin's argument that the application of California meal and rest break requirements would override FAA safety regulations does not make sense. California meal and rest break requirements do not stand as an obstacle to the accomplishment and execution of FAA safety regulations pertaining to flight attendants. Thus, barred by neither impossibility preemption nor obstacle preemption, California's meal and rest break requirements also survive under a conflict preemption analysis.

Finally, California's meal and rest break requirements are also not preempted under the ADA. The ADA provides: "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier[.]" 49 U.S.C. § 41713(b)(1). In discussing an identical provision in the trucking context, the Supreme Court "identified four principles" of the law's preemption:

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

Dilts v. Penske Logistics, LLC, 769 F.3d 637, 645 (9th Cir. 2014) (quoting *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370–71 (2008)) (cleaned up). But

"background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide." *Id.* at 646. Where a law bears a reference to rates, routes, or services, the Supreme Court has held that the law "relates to" those items and is therefore preempted. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388–89 (1992) (prohibition on deceptive advertising of airfare was preempted). Where a law bears no such reference, "the proper inquiry is whether the provision, directly or indirectly, *binds* the carrier to a particular price, route, or service and thereby interferes with the competitive market forces within the industry." *Dilts*, 769 F.3d at 646 (quoting *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 660 F.3d 384, 397 (9th Cir. 2011)).

In *Dilts*, we interpreted the preemption clause in the Federal Aviation Administration Authorization Act of 1994 (FAAA), which provided, "States may not enact or enforce a law related to a price, route, or service of any motor carrier with respect to the transportation of property." 769 F.3d at 643 (quoting 49 U.S.C. § 14501(c)(1) (internal quotation marks and alterations omitted)). We held that the FAAA did not preempt California's meal and rest break requirements as applied to the interstate trucking industry. In our opinion, we wrote that "Congress did not intend to preempt generally applicable state transportation, safety, welfare, or business rules that do not otherwise regulate prices, routes, or services." *Id.* at 644. Moreover, an increase in cost associated with compliance

was not sufficient to show a relation to prices, routes, or services. *Id.* at 646.

The language of the ADA's preemption clause is virtually identical to the language of the FAAA's. The reasoning of *Dilts* thus applies with equal force here. Just as the FAAA did not preempt California's meal and rest break requirements as applied to the trucking industry, the ADA does not preempt those requirements as applied to the airline industry.

ii. Application

After establishing that California's meal and rest break requirements are not preempted, we next address whether these requirements apply to the work performed by the Class and Subclass under California law. Extrapolating the principles of *Sullivan*, we hold that they do.

In *Sullivan*, the California Supreme Court emphasized the California Legislature's public policy goals in the context of California's overtime statute. Among these goals was "protecting employees in a relatively weak bargaining position from the evils associated with overwork[.]" 254 P.3d at 241. Based on this state policy, and others, the California Supreme Court held that "[t]o exclude non-residents from the overtime laws' protection would tend to defeat their purpose by encouraging employers to import unprotected workers from other states," and that "[n]othing in the language or history of the relevant statutes suggests the Legislature ever contemplated such a result." *Id.* at 242. The California Supreme Court concluded that application of the overtime statute to non-residents, as well as residents, was the only feasible way "to reconcile with the Legislature's express declaration that 'all protections, rights, and

remedies available under state law are available to all individuals who are or who have been employed, in this state.'" *Id.* (quoting Cal. Lab. Code § 1171.5(a) (alterations omitted)).

We hold that policy similarly dictates application of California's meal and rest break requirements to both the Class and Subclass. Like overtime pay, meal and rest break requirements are designed to prevent "the evils associated with overwork," mandating that employers treat employees humanely even when employees have been unable to bargain for that contractual right. Thus, like overtime pay, meal and rest break requirements applied to Virgin's relationship with both the Class and Subclass. Virgin's opening brief does not contend that it complied with California's meal and rest break requirements. We thus affirm the district court's summary judgment to Plaintiffs on these claims.

d. Wage statements

California Labor Code § 226(a) states:

> An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee . . . an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee . . . , (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, . . . (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 . . . , (8) the name and address of the

> legal entity that is the employer . . . , and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee[.]

The California Supreme Court has determined that § 226 applies to workers who "perform the majority of their work in California; but if they do not perform the majority of their work in any one state, they will be covered if they are based for work purposes in California." *Ward*, 466 P.3d at 321.

Ward controls here. According to Virgin's expert, "class members collectively worked only 31.5% of their time in California." There is, however, no evidence that the class members performed "the majority of their work in any one state," and, indeed, the record compels the inference that if Plaintiffs did not work in California for a majority of their time, they did not do so in any state.

Furthermore, Virgin itself classified all Plaintiffs in this action as being California-based. Virgin somewhat speciously contends that when it classified Plaintiffs as California-based, it meant that term in a different sense than the *Ward* court used it. This argument is unavailing. The court in *Ward* wrote, "the Legislature intended for section 226 to apply to workers whose work is not performed predominantly in any one state, provided that California is the state that has the most significant relationship to the work." *Id.* Thus, the California Supreme Court "conclude[d] this principle will be satisfied if the worker performs some work here and is based in California, meaning that California serves as the physical location where the worker presents himself or herself to begin work." *Id.*

Virgin's argument hinges on the final sentence—it asserts that many plaintiffs did not "present" themselves to "begin work" in California because Plaintiffs' pairings began and ended outside the state.

Virgin's argument fails for two reasons. First, *Ward* makes clear that presentation in California to begin work is *one* way in which a plaintiff might be based in California; it is not the *only* way. *Id.* (holding that the principle behind § 226 "will be satisfied if" it applies to the class of workers who present themselves to begin work in California, not that it cannot apply under other circumstances). Second, Virgin's argument misses the point of the *Ward* test, which serves to approximate whether California's "relationship to the work is more significant than any other state's." *Ward*, 466 P.3d at 323. The fact that Virgin's only employee base was in California and all of its flight crew were "based" there means that, so long as plaintiffs performed at least some work there, California had the strongest ties to the employment relationship of any state. Thus, under *Ward*, § 226 applies to Virgin. Virgin's opening brief does not contend that it complied with § 226. We therefore affirm the district court's summary judgment to Plaintiffs on their wage statement claim.

e. Waiting time penalties

California Labor Code § 201(a) states, "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Section 202(a) further provides, "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours

previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting." Section 203 sets forth penalties for failure to comply with §§ 201 and 202.

Although there is no California Supreme Court case specifically interpreting the reach of the waiting time penalties statute for interstate employers, we find an analogy to § 226 compelling. Both the waiting time penalties and the wage statement requirements pertain to a tangible object that the employer must give to the employee. Both requirements are technical in nature: section 226 specifies the information a wage statement must contain, and the waiting time penalties specify the time in which an employer must remit an employee's wages after separation from employment. Thus, using *Ward*'s language, the "kinds of California connections" that "will suffice to trigger the" two provisions are the same. *See Ward*, 466 P.3d at 319. Because the California Supreme Court held § 226 to apply under these circumstances, we hold that §§ 201 and 202 apply as well. Virgin's opening brief does not dispute that it failed to comply with §§ 201 and 202. Consequently, we affirm the district court's summary judgment to Plaintiffs on their waiting time penalties claim.

C.

Pursuant to Federal Rule of Civil Procedure 23, a class may be certified if "the class is so numerous that joinder of all members is impracticable"; "there are questions of law or fact common to the class"; "the claims or defenses" of the named plaintiffs are typical of those of the class; and the named plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(1)–(4). Additionally,

Plaintiffs must show that "questions of law or fact common to class members predominate" over individual questions, "and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Of these requirements, Virgin challenges only the last: that class adjudication is the superior method. Virgin claims that class adjudication is inappropriate because choice-of-law analyses will be required for each plaintiff. Pursuant to our analysis, the applicability of California law has been adjudicated on a class-wide or subclass-wide basis, and thus no individual choice-of-law analysis is necessary. We affirm the district court's decision on class certification.

D.

Finally, we consider whether the district court correctly held that Virgin was subject to heightened penalties for subsequent violations under PAGA. PAGA permits individuals to sue their employers to recover penalties to which they are entitled under the Labor Code. Cal. Lab. Code § 2699(a). Where the section violated does not indicate the amount of the penalty for its violation, PAGA fixes the penalty at $100 "for each aggrieved employee per pay period for the initial violation," and $200 "for each aggrieved employee per pay period for each subsequent violation." *Id.* § 2699(f)(2).

Under California law, "[a] good faith dispute" that an employer is required to comply with a particular law "will preclude imposition" of heightened penalties. *Amaral v. Cintas Corp. No. 2*, 78 Cal. Rptr. 3d 572, 607 (Ct. App. 2008). "A 'good faith dispute' . . . occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any

recover[y] on the part of the employee." *Id.* "Until the employer has been notified that it is violating a Labor Code provision (whether or not the [Labor] Commissioner or court chooses to impose penalties), the employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties." *Id.* at 614.

Virgin was not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted Plaintiffs' motion for summary judgment. On this basis, we reverse the district court's holding that Virgin is subject to heightened penalties for any labor code violation that occurred prior to that point.

E.

Since we reverse in part the district court's judgment on the merits, California law requires that we vacate the attorney's fees and costs award "because we cannot say with certainty that the [district] court would exercise its discretion the same way" had Plaintiffs not prevailed on virtually all of their claims. *Ventas Finance I, LLC v. Franchise Tax Bd.*, 81 Cal. Rptr. 3d 823, 844 (Ct. App. 2008). We therefore vacate the district court's order awarding fees and costs to Plaintiffs' counsel, and we remand the issue of attorney's fees and costs to the district court.

CONCLUSION

In sum, we affirm the district court's summary judgment to Plaintiffs on their claims for overtime (§ 510); for violation of meal and rest break requirements (§§ 226.7, 512); for wage statement deficiencies (§ 226); and for waiting time penalties (§§ 201 and 202). We also affirm the district court's decision on

class certification. We reverse the district court's summary judgment to Plaintiffs on their claims for minimum wage (§ 1182.12); for payment for each hour worked (§ 204); and for heightened penalties for subsequent violations under PAGA. We vacate the district court's order granting attorney's fees and costs to Plaintiffs, and we remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 15-cv-02277-JST

JULIA BERNSTEIN, et al.,
Plaintiffs

v.

VIRGIN AMERICA, INC.,
Defendant

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Virgin America's motion for summary judgment. ECF No. 97. The Court will deny the motion in part and grant the motion in part.

I. BACKGROUND

The Plaintiffs are flight attendants who currently work or have previously worked for Defendant Virgin America, Inc. ("Virgin"). In this class action against Virgin, the Plaintiffs allege that Virgin did not pay them for hours worked before, after, and between flights; time spent in training; time on reserve; time spent taking mandatory drug tests; and time spent completing incident reports. See First Amended Class Action Complaint, ECF No. 32 ¶¶ 28-41. The Plaintiffs

further allege that Virgin did not allow flight attendants to take meal or rest breaks, failed to pay overtime and minimum wages, and failed to provide accurate wage statements. Id.

A. Factual Summary

1. The Parties

Virgin is an airline company that is headquartered in Burlingame, California. Depo. of Valerie Jenkins, ECF No. 44-1 at 71:4.[1] Virgin trains its flight attendants in California, and it has received millions of dollars from the State of California to do so. ECF No. 101, Exs. 1-11. Many of Virgin's flights either arrive to or depart from a California airport. ECF No. 101-13. In fact, Virgin estimates that, since 2011, the average daily number of its flights that depart from a California airport has never been less than 88.6 percent. ECF No. 101-26 at 9.

Plaintiffs Julia Bernstein, Esther Garcia, and Lisa Marie all previously worked for or currently work for Virgin as flight attendants. ECF No. 50-17, Exs. 23-25. Each of the Plaintiffs provided Virgin with a California address and each of the Plaintiffs were based out of either San Francisco International Airport or Los Angeles International Airport during the course of their employment with Virgin. Id. The Plaintiffs' flight schedules show that they sometimes worked entire days on consecutive flights between California airports. See ECF No. 101-17.

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[1] Throughout this Order, the Court refers to the pagination created by the Court's electronic filing system, not the document's internal pagination.

2. Flight Attendant Scheduling Terminology and Responsibilities

Virgin schedules its flight attendants to fly "pairings," a series of flights over a series of continuous days that depart and return to the airport out of which flight attendants are based. ECF No. 44-1, Ex. 1 at 4:10-16; ECF No. 44-1, Ex. 2 at 59:6-13. Each pairing consists of one or more "duty periods." ECF No. 44-1, Ex. 1 at 5:18-25. Virgin's Work Rules require that each flight attendant report for duty one hour before the departure of her first scheduled flight of the day. ECF No. 45-2, Ex. 8 at 31. After they check in for duty, flight attendants must travel to the departure gate of their first flight and be onboard the flight no less than forty-five minutes before the scheduled departure. ECF No. 46-2 at 18. They must also attend two preflight briefings, greet and assist passengers in boarding, and generally prepare the cabin for departure. ECF No. 47-2 at 131-134; ECF No. 47-2 at 143-146. "Block time" is the amount of time within a duty period from when an aircraft pushes back from the gate ("block out") at its departure city to when the aircraft arrives at the gate ("block in") at its destination. ECF No. 50-2 at 6:11-21, 8:13-21. Once the flight arrives at its destination, flight attendants help passengers deplane and check the cabin for items left onboard. ECF No. 47-2 at 177. Flight attendants are not released from duty until fifteen minutes after their last scheduled flight of the day. ECF No. 45-3 at 2. Sometimes a flight attendant will need to travel as a passenger on a flight to arrive at an airport for an assigned flight. This time spent traveling is referred to as "deadheading."

When a flight attendant works a subsequent flight in a duty period, the time between the block in of the

first flight and block out of the second flight is referred to as "turn time." As with the first flight of the day, flight attendants must report for duty at the second flight's departure gate and be onboard that flight forty-five minutes before the scheduled departure. ECF 47-2 at 129. Flight attendants remain on duty during turn time. ECF No. 44-1 at 93:13-20.

3. Virgin's Policies Regarding Compensation and Breaks

Virgin's InFlight Work Rules outline its detailed compensation policies for flight attendants. ECF Nos. 45-46, Exs. 8, 9, 10. And Virgin's Crew Pay Manual is used by Virgin's payroll department to process flight attendant compensation. ECF No. 47-3, Ex. 12.

Pursuant to those policies, Virgin uses a credit-based system to compensate its flight attendants. ECF No. 45-4 at 12-13. That system does not directly compensate flight attendants for all hours on duty. ECF No. 47-3 at 8 ("Even for flying activity, crewmembers are not paid for time 'on the clock' (duty time); instead, they are typically paid only when the aircraft is moving (block time)."). Flight attendants receive an hour of credit for each hour of block time, fifty percent of block time for time spent deadheading, and a minimum of 3.5 hours of "minimum duty period credit" for duty periods in which the flight attendant does not earn at least 3.5 hours of credit from block time and/or deadheading. ECF No. 45-4 at 12-13. Virgin's system does not directly compensate duty hours that do not fall into one of these three categories (e.g. pre- and post-block duty time and turn time between flights). See id.

Virgin does, however, pay flat rates for some non-flight activities. For example, it pays flight attendants

thirty minutes of pay for drug testing, regardless of the duration of the drug test. ECF No. 47-5 at 7. Virgin also pays a flat monthly rate for initial flight attendant training, irrespective of the actual hours worked by flight attendants during this training. ECF No. 45-4 at 24. Virgin pays flight attendants 3.5 hours of pay for annual training even though those trainings last at least eight hours. ECF No. 45-4 at 16; ECF No. 101-20 at 2; see also, e.g., ECF No. 50-17 ¶ 22. Virgin pays flight attendants four hours of pay for airport reserve shifts in which they are not assigned to a flight, even though those shifts can last up to six hours. ECF No. 47-5 at 9. If a flight attendant is assigned a flight during their reserve shift, they are paid for half of the total time spent on reserve plus that flight's block time. Id. Virgin's compensation policy does not provide credit for time spent completing incident reports, which Plaintiffs testify they were unable to complete during time for which they are compensated due to their job duties (e.g. block time). ECF No. 50-17 ¶ 16.

Per Virgin's policies, crew leaders provide rest and meal periods for flight attendants. ECF No. 50-13 at 22. However, Virgin admits that, although its flight attendants have the opportunity to take breaks, they are still on duty throughout the entirety of a flight. ECF No. 71 at 15; ECF No. 44-1 at 96:1-6. Many flight attendants claim that they are unable to take breaks on flights. See, e.g., ECF No. 50-17, Ex. 23, ¶ 18. Approximately one-third of Virgin's daily flights since 2011 have been longer than five hours in duration. ECF No. 101-26 at 6-8.

Virgin's wage statements do not indicate the duty period hours worked or the block hours worked. ECF No. 50-2, Ex. 1 at 34:19-21, 36:17-24; ECF No. 101-23, 101-24, 101-25.

B. Procedural History

The Plaintiffs commenced this action in state court, and Virgin removed it to federal court pursuant to the diversity jurisdiction provision of the Class Action Fairness Act ("CAFA"). ECF No. 1.

Plaintiffs bring claims under the California Labor Code and California Industrial Welfare Commission Wage Order 9-2001 ("Wage Order") for failure to pay minimum wage, failure to pay overtime wages, failure to pay wages for all hours worked, failure to provide required meal periods, failure to provide required rest periods, failure to provide accurate wage statements, failure to pay waiting time penalties to discharged employees, failure to indemnify all necessary business expenditures, and derivative claims under California's Unfair Competition Law ("UCL") and the Private Attorney General Act ("PAGA"). ECF No. 32.

On November 7, 2016, this Court certified the following Class and Subclasses under Rule 23(b)(3):

> **Class**: All individuals who have worked as California-based flight attendants of Virgin America, Inc. at any time during the period from March 18, 2011 (four years from the filing of the original Complaint) through the date established by the Court for notice of certification of the Class (the "Class Period").
>
> **California Resident Subclass**: All individuals who have worked as California-based flight attendants of Virgin America, Inc. while residing in California at any time during the Class Period.
>
> **Waiting Time Penalties Subclass**: All individuals who have worked as California-based

> flight attendants of Virgin America, Inc. and have separated from their employment at any time since March 18, 2012.

See ECF No. 104. The Class claims are limited to time worked within California. ECF No. 70 at 10. However, both the California Resident Subclass and the Waiting Time Penalties Subclass seek to recover wages for time spent working within and outside California. Id.

Virgin now moves for summary judgment. ECF No. 97.

II. JURISDICTION

Pursuant to the Class Action Fairness Act ("CAFA"), the Court has jurisdiction over this case, as a class action in which a member of the class of plaintiffs is a citizen of a state different from any defendant, there are more than 100 class members nationwide, and the matter in controversy exceeds the sum of $5 million, exclusive of interests and costs. 28 U.S.C. § 1332(d).

III. LEGAL STANDARD

Summary judgment is proper when a "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). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by" citing to depositions, documents, affidavits, or other materials. Fed. R. Civ. P. 56(c)(1)(a). A party also may show that such materials "do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). An issue is "genuine" only if there is sufficient evidence for a reasonable fact-finder to find for

the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248¬49 (1986). A fact is "material" if the fact may affect the outcome of the case. Id. at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party. Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).

Where the party moving for summary judgment would bear the burden of proof at trial, that party bears the initial burden of producing evidence that would entitle it to a directed verdict if uncontroverted at trial. See C.A.R. Transp. Brokerage Co. v. Darden Rests, Inc., 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of proof at trial, that party bears the initial burden of either producing evidence that negates an essential element of the non-moving party's claim, or showing that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. If the moving party satisfies its initial burden of production, then the non-moving party must produce admissible evidence to show that a genuine issue of material fact exists. See Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996). Indeed, it is not the duty of the district court "to scour the record in search of a genuine issue of triable fact." Id. "A mere scintilla of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the non-moving party must

introduce some significant probative evidence tending to support the complaint." Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997) (citation and internal quotations omitted). If the non-moving party fails to make this showing, the moving party is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

IV. ANALYSIS

Virgin argues that applying California labor law to the Plaintiffs' employment would violate both the presumption against extraterritorial application and the Dormant Commerce Clause. Virgin further argues that the Plaintiffs' meal and rest break claims are preempted by the Federal Aviation Act and the Airline Deregulation Act. Finally, Virgin argues that, even if California law applies, Virgin's policies and practices comply with California law and the Plaintiffs have failed to present sufficient evidence to prevail on their claims.

A. Application of California's Labor Laws

1. Job Situs is Not Dispositive

As it did when opposing class certification, Virgin again argues that California labor law does not protect the Plaintiffs because they do not work "exclusively or principally" in California, but rather across "multiple jurisdictions" and "in the federally regulated airspace." ECF No. 97 at 19-22. Virgin claims that this "job situs" test is "determinative." Id.

The Court again rejects Virgin's singular emphasis on job situs as the dispositive factor to determine whether California's wage and hour laws apply to Plaintiffs. See ECF No. 104 at 14–17. As explained at

length in the class certification order, Virgin's position lacks relevant support in the case law. See id.

Virgin relies primarily on Tidewater Marine W., Inc. v. Bradshaw, 14 Cal. 4th 557, 577 (1996) for the proposition that an employee must work "exclusively or principally" in California to benefit from California law. See id. But that is not what Tidewater says. The Tidewater court simply explained that an employee who "resides in California, receives pay in California, and works exclusively, or principally, in California," presumptively enjoys the protections of California's wage orders. Tidewater, 14 Cal. 4th at 578. That court did not hold that an employee must necessarily satisfy all three of those conditions to be protected by California law. See id. In fact, because the Tidewater court ultimately found that the plaintiffs worked within California's territorial boundaries, it "express[ed] no opinion as to whether the trial court can enjoin the application of IWC wage orders to crew members who work primarily outside California's state law boundaries." Tidewater, 14 Cal. 4th at 578-79. The Court also left room for the possibility that California's labor laws may apply extraterritorially "in limited circumstances, such as when California residents working for a California employer travel temporarily outside the state during the course of the normal workday but return to California at the end of the day." Id. at 577-78. Despite the Tidewater court's explicit refusal to decide the precise issue presented here, Virgin relies on that case to argue that Plaintiffs' can only enjoy the protections of the California Labor Code if they worked exclusively or principally in California. Tidewater simply cannot bear the weight Virgin asks of it.

Lacking sufficient support from the California Supreme Court, Virgin again turns to three federal

district court cases to find support for its dispositive "job situs" test. Because the Court has already explained at length why those cases are factually distinguishable and legally erroneous, it does not address them again here. See ECF No. 104 at 14–17.

Instead of considering principal "job situs" in a vacuum, the California Supreme Court has endorsed a multi-faceted approach. The California Supreme Court's later decision in Sullivan confirms that the three factors listed in Tidewater – i.e. California residency, receipt of pay in California, and exclusive or principal "job situs" in California – are sufficient, but not necessary, conditions for an individual to benefit from the protections of California law. After all, the Sullivan court's central holding was that *non-residents* (who do not presumptively enjoy the protections of California's labor laws) are nonetheless protected by those laws in certain circumstances. Sullivan, 51 Cal. 4th at 1194. The court also suggested that other factors were relevant to this inquiry, such as the employer's residency and whether the employee's absence from the state was temporary in nature. See id. at 1199–1200 ("California law . . . might follow California resident employees of California employers who leave the state 'temporarily . . . during the course of the normal workday' . . . [n]othing in Tidewater suggests a nonresident employee, *especially a nonresident employee of a California employer such as Oracle*, can enter the state for entire days or weeks without the protection of California law.") (emphasis added). Sullivan therefore flatly rejects the simplistic test proposed by Virgin.

This multi-faceted approach is consistent with California's strong public policy of protecting its workers. The Sullivan court stressed that the wage and

hour laws "serve important public policy goals" and therefore they should be applied in a way that would not encourage employers to evade the law. Sullivan, 51 Cal. 4th at 1198. On another occasion, the California Supreme Court explained that "in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." Indus. Welfare Com. v. Superior Court, 27 Cal. 3d 690, 702 (1980).

As applied to this case, the Court finds that Plaintiffs' and Virgin's significant connections to California are also relevant considerations when determining whether to apply California's wage and hour laws. The Plaintiffs were California residents[2] who received their pay in California and, therefore, they satisfy two of the three elements to presumptively enjoy the protections of California law under Tidewater. In addition, Virgin is a California-based airline with its headquarters in California. See Sullivan, 51 Cal. 4th at 1200 (suggesting that the employer's residency is relevant to the application of California law). The Plaintiffs have presented evidence that Virgin has received millions of dollars in state subsidies to train all of its flight attendants in California. See ECF No. 101, Exs. 3–7. And the Plaintiffs' expert calculates that, since 2011, between 88 and 99 percent of Virgin's

[2] Although Virgin disputes whether Bernstein was actually living in California, see ECF No. 97 at 21, n. 23, the fact that she provided a California address for payroll and tax purposes in 2011 is sufficient to create a triable factual issue regarding her residency

flights each day either departed from or arrived in a California airport. ECF No. 101–38, ¶¶ 3–4. The parties' deep ties to California can hardly be described as "minor considerations" for a court determining whether to apply California law. ECF No. 97 at 19-22. And, although the Plaintiffs spent just around a quarter of their total work time in California, that consideration is relatively less important where, as here, temporary out-of-state travel is an inherent part of their job. Tidewater, 14 Cal. 4th at 577–78 (distinguishing temporary out-of-state travel).

Given Virgin's thin precedential support for its position that "job situs" is determinative, the other compelling considerations present in this case, and California's strong public policy of protecting its workers, the Court concludes that the Plaintiffs are not barred from asserting claims under California's wage and hour laws simply because they did not work exclusively or principally in California.

2. The California Labor Code Applies to Work Performed in California and Wrongful Conduct that Occurred in California

Virgin also argues that the Plaintiffs cannot seek protection of the California Labor Code for work that they performed outside of the state due to the presumption against the extraterritorial application of California law. See ECF No. 97 at 19.

At the outset, it is important to stress that many of the Plaintiffs' claims relate to work performed within California's borders to which California law clearly applies. For example, one of the Plaintiffs' primary allegations is that they were not paid for time spent working before takeoff and after landing in

California airports.[3] ECF No. 32 ¶¶ 31, 46. The Plaintiffs further allege that they were not paid for time spent in training and on reserve shifts that occurred in California. Id. ¶¶ 23-26, 35, 46. Virgin does not seriously dispute that such "non-flight activities exclusively preformed [sic] in California might be subject to California law." ECF No. 107 at 9, n. 8.[4] Nor could it.

Both the plain terms of the California Labor Code and California Supreme Court precedent confirm that the California Labor Code applies to work performed in California. The preamble to California's Labor Code provides that its protections "are available to all individuals . . . who have applied for employment, or who are or who have been employed, in this state." Cal. Lab. Code § 1171.5(a).[5] The specific Labor Code provisions at issue in this case similarly apply to all work performed in California. See, e.g., Cal. Lab. Code

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[3] The Plaintiffs' expert report shows that at least 88 percent of Virgin's flights each day either arrived at or departed from California airports. ECF No. 101–38, ¶¶ 3–4. In some years, this percentage reached 99 percent. Id.

[4] Although Virgin appears to concede this point as a matter of legal "theory," it nonetheless argues that the Plaintiffs have not provided sufficient evidence to prevail on such a theory in this particular case (i.e. because they have not shown that they worked enough hours in California to trigger overtime protections). See id. The Court addresses these alleged factual shortcomings later in its order.

[5] Although the original impetus for § 1171.5 was to extend protections to non-resident, undocumented workers in California, the provision has a broader reach because it was "codified as a general preamble to the wage law" and it "broadly refers to 'all individuals' employed in the state." Sullivan, 51 Cal. 4th at 1197-98, n. 3.

§ 1174 ("Every person employing labor *in this state* shall . . . ") (emphasis added).

Based on this clear statutory text, the California Supreme Court has concluded that California's overtime laws "speak broadly" to "regulate all nonexempt overtime work *within its borders*." Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1197-98 (2011) (emphasis added) ("California's overtime laws apply by their terms to all employment in the state."); Sullivan v. Oracle Corp. ("Sullivan II"), 662 F.3d 1265, 1271 (9th Cir. 2011) ("California applies its Labor Code equally to *work performed in California*, whether that work is performed by California residents or by out-of-state residents.") (emphasis added). This is true even if the individual seeking the protection of California law "worked mainly" in other states. See Sullivan, 51 Cal. 4th at 1197, 1194-95 (holding that California overtime laws applied to plaintiff's work performed in California even though he spent just twenty days working in California during a three-year period); Wright v. Adventures Rolling Cross Country, Inc., No. C-12-0982-EMC at *5-6 (N.D. Cal., May 3, 2012) (holding at the motion to dismiss stage that "Plaintiffs do have viable state law claims based on their work done in California," such as training, even though they did most of their work abroad as international trip leaders). The Court therefore concludes that California's labor laws apply to the work performed by the Plaintiffs in California.

Still, the Plaintiffs must overcome the presumption against extraterritorial application to the extent they seek to recover based on work performed *outside* of California. California law presumptively does not apply to conduct that occurs outside of California. See N. Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 4 (1916)

(internal quotation marks omitted) ("Ordinarily, the statutes of a state have no force beyond its boundaries."). To overcome that presumption, the Plaintiffs must show that a contrary intent "is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject-matter, or history." Id.

Instead of trying to overcome the presumption by pointing to the relevant statutory language or legislative history, Plaintiffs seek to avoid the presumption against extraterritorial application altogether by arguing that the alleged wrongful conduct giving rise to liability occurred within California. See ECF No. 102 at 18. The Plaintiffs argue that, "even if a presumption against extraterritorial application applies generally to the Labor Code," the Court must still "consider whether plaintiffs' proposed application of the [law] would cause it to operate, impermissibly, with respect to occurrences outside the state." Id. (quoting Sullivan, 51 Cal. 4th at 1207). The Plaintiffs claim that the wrongful conduct alleged here occurred in California because Virgin is headquartered in California, Virgin oversees its flight attendants and issues payroll from California, the Plaintiffs are California residents who were based out of California airports, and the Plaintiffs performed at least some of their work in California on most workdays. ECF No. 102 at 19.

Even if the presumption against extraterritorial application applies to a particular statute, the court must still consider "whether plaintiffs' proposed application of the [law] would cause it to operate, impermissibly, with respect to occurrences outside the state." Sullivan, 51 Cal. 4th at 1207; see also, e.g., Leibman v. Prupes, No. 2:14-CV-09003-CAS (VBKx), 2015 U.S. Dist. LEXIS 80101, at *15-18 (C.D. Cal.

June 18, 2015) ("assuming *arguendo* that the presumption [against extraterritorial application] applies to common law claims," but holding that the plaintiff's "claims do not constitute improper extraterritorial application of California law" because "the actions which gave rise to liability" occurred in California). This inquiry is necessary because the presumption against extraterritorial application does not bar the application of California law to wrongful conduct that occurs within California. Diamond Multimedia Sys., Inc. v. Superior Court, 19 Cal. 4th 1036, 1059 (1999) ("The presumption [against extraterritorial application] has never been applied to an injured person's right to recover damages suffered as a result of an unlawful act or omission committed in California."); *Aguilar v. Zep Inc.*, No. 13-CV-00563-WHO, 2014 WL 4245988, at *11 (N.D. Cal. Aug. 27, 2014) ("[E]xtraterritorial application of California law is not barred where the alleged wrongful conduct occurred in California.").

To determine whether a state law is being applied extraterritorially, courts consider "whether 'the conduct *which gives rise to liability* . . . occurs in California.'" Leibman v. Prupes, No. 2:14-CV-09003-CAS, 2015 U.S. Dist. LEXIS 80101, at *15–17 (C.D. Cal. June 18, 2015) (emphasis in original) (quoting Diamond Multimedia, 19 Cal. 4th at 1059). For example, the presumption against extraterritoriality did not bar the plaintiff's breach of contract claim where "the actions which gave rise to liability - that is, the alleged breach - occurred in California" when the business manager made the "'core decision' to wrongfully terminate [the plaintiff]" and terminated the plaintiff via email from his business in California. No. 2:14-CV-09003-CAS, 2015 U.S. Dist. LEXIS 80101, at *17–18

(C.D. Cal. June 18, 2015). Similarly, the presumption against extraterritorial application did not bar the out-of-state plaintiffs' consumer protection and false advertising claims under California law where the plaintiffs "alleged that [defendant's] purportedly misleading marketing, promotional activities and literature were coordinated at, emanate from and are developed at its California headquarters, and that all 'critical decisions' regarding marketing and advertising were made within the state." In re iPhone 4S Consumer Litig., No. C 12-1127 CW, 2013 U.S. Dist. LEXIS 103058, at *23-24 (N.D. Cal. July 23, 2013). Likewise, there was no extraterritorial application of California's consumer protection statutes where the plaintiffs alleged "that the misrepresentations were developed in California, contained on websites and an application that are maintained in California, and that billing and payment of services went through servers located in California." Ehret v. Uber Techs., Inc., 68 F. Supp. 3d 1121, 1132 (N.D. Cal. 2014). Therefore, the key question is whether the alleged wrongful conduct that gave rise to liability occurred within California. If so, the presumption against extraterritorial application does not apply.

The Court concludes that the wrongful conduct giving rise to liability occurred in California such that the Plaintiffs' claims do not constitute an attempt to apply the law to occurrences outside of the state. Plaintiffs challenge Virgin's centrally devised compensation policies, such as its policies of not compensating flight attendants for non-block duty time and paying flat rates for drug testing and training activities. See generally ECF No. 32; ECF Nos. 45, 46, 47–3 (outlining Virgin's detailed compensation policies for flight attendants). As in the above cases,

Virgin made these critical decisions regarding how it would pay its flight attendants, and proceeded to pay its flight attendants in accordance with those decisions, from its headquarters in Burlingame, California. Therefore, the very actions giving rise to potential liability – that is, the failure to pay for all hours worked, the failure to pay overtime, the failure to provide accurate wage statements, and the failure to pay waiting time penalties to discharged employees – occurred in California. Because the Plaintiffs' proposed application of the law would not impermissibly operate to reach conduct occurring outside of the state, the presumption against extraterritorial application does not apply and the Plaintiffs do not have to overcome it.

The only wrongful conduct that could have potentially occurred outside of California, at least in some instances, is Virgin's alleged failure to provide meal periods and rest breaks. Virgin does not have a centralized policy regarding the provision of such breaks; instead, Virgin's policies simply provide that team leaders are responsible for scheduling breaks for flight attendants. ECF No. 50–13 at 22. Therefore, any failure to provide meal and rest breaks did not originate at Virgin's headquarters in California, but rather occurred wherever the flight attendant was deprived of that break. In some instances, the Plaintiffs might have been deprived of such breaks outside of California, for example while they were working on flights between California and the East coast. See id. ¶ 23. To the extent the Plaintiffs seek to recover for such break violations that occurred outside of California, they must overcome the presumption against extraterritorial application. Because the Plaintiffs have not

attempted to do so, they cannot recover for that extra-territorial conduct under California law.

However, the Court nonetheless declines to grant summary judgment to Virgin on the meal and rest break claims because there is sufficient evidence that the Plaintiffs were deprived of at least some of those breaks while working in California. See ECF No. 101–17 at 2 (showing days on which Plaintiffs Esther Garcia and Lisa Smith flew back and forth between Los Angeles, San Francisco, and San Diego); ECF No. 98–2 at 6–7 (concluding that the Plaintiffs were sometimes eligible for meal periods or rest breaks based on the length of their pairings); ECF No. 50–17, ¶¶ 18–19 (Plaintiff Bernstein declaring that she "cannot remember ever being encouraged or directed to take a break or meal period" and that she does not remember taking a meal period during turn time between flights). Therefore, the Court cannot conclude as a matter of law that the break claims solely involve extraterritorial conduct such that California law may not apply to those claims. Aguilar, 2014 WL 4245988, at *12 ("Summary judgment is not proper to the extent [plaintiff] can prove that [defendant] violated California laws relating to work that he performed within California.").

B. Dormant Commerce Clause

Second, Virgin argues that requiring it to comply with California's labor laws would violate the Dormant Commerce Clause. ECF No. 97 at 22–25.

The United States Constitution's Commerce Clause grants Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. CONST. art. I, § 8, cl. 3. Because the framers gave the

federal government the exclusive power to regulate interstate commerce, and because federal law preempts state law, the United States Supreme Court has inferred the existence of a "dormant" Commerce Clause that limits states' abilities to restrict interstate commerce. See New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988) (explaining that the Commerce Clause "not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce[]").

At the same time, the Dormant Commerce Clause "respects federalism by protecting local autonomy." Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1148–49 (9th Cir. 2012). "Thus, the Supreme Court has recognized that 'under our constitutional scheme the States retain broad power to legislate protection for their citizens in matters of local concern such as public health' and has held that 'not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.'" Id. (quoting Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (internal quotations and citations omitted).

There are two ways in which a state regulation may violate the Dormant Commerce Clause. First, a state regulation is virtually *per se* invalid under the Dormant Commerce Clause if it discriminates against out-of-state entities. Dep't of Revenue v. Davis, 553 U.S. 328, 337 (2008); Int'l Franchise Ass'n, Inc. v. City of Seattle, 803 F.3d 389, 399 (9th Cir. 2015), cert. denied sub nom. Int'l Franchise Ass'n, Inc. v. City of Seattle, Wash., 136 S. Ct. 1838 (2016). Indeed, "[m]odern dormant Commerce Clause jurisprudence primarily 'is driven by concern about economic

protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" Harris, 682 F.3d at 1148 (quoting Davis, 553 U.S. at 337). Accordingly, "[m]ost regulations that run afoul of the dormant Commerce Clause do so because of discrimination. . . . " Harris, 682 F.3d at 1148. Virgin does not argue that the California wage and hour laws at issue here discriminate against out-of-state entities in this way. See ECF No. 97 at 22–25.

Second, a state regulation that "regulates even-handedly to effectuate a legitimate local public interest" and whose "effects on interstate commerce are only incidental" may nonetheless violate the Dormant Commerce Clause if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Sullivan v. Oracle Corp., 662 F.3d 1265, 1271 (9th Cir. 2011) (internal quotation marks omitted) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Importantly, "a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce." Harris, 682 F.3d at 1148. "A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden on interstate commerce*." Id. (emphasis in original).

Courts have only struck down non-discriminatory state regulations "in a small number of dormant Commerce Clause cases," Harris, 682 F.3d at 1148, and "[s]tate laws frequently survive this *Pike* scrutiny," Davis, 553 U.S. at 339 (citing cases). Virgin bears the burden of showing that the application of California's Labor Code would violate the Dormant Commerce Clause. Int'l Franchise Ass'n, Inc. v. City of Seattle,

803 F.3d 389, 400 (9th Cir. 2015), cert. denied sub nom. Int'l Franchise Ass'n, Inc. v. City of Seattle, Wash., 136 S. Ct. 1838 (2016) (internal quotation marks and citations omitted).

Virgin argues that, if it is forced to comply with the California Labor Code, it will necessarily have to comply with other states' wage and hour laws, too. ECF No. 97 at 22. As a result, it argues, "[a]pplication of the state regulations at issue would subject Virgin to an ever changing national patchwork of wage and hour law, and therefore places an undue burden on interstate commerce" that outweighs California's interest in protecting its employees. ECF No. 107 at 14. Virgin further argues that the need for uniform regulation is especially important in the airline industry, which is inherently national. ECF No. 97 at 23. Finally, Virgin argues that it will incur substantial costs if required to comply with the California Labor Code. ECF No. 120 at 4.

As a preliminary matter, the Court rejects Virgin's premise that it will necessarily be required to comply with each state's wage and hour laws. As explained above, Virgin is subject to California law because both Virgin and the Plaintiffs have deep ties to California and the wrongful conduct at issue in this case occurred in California. Regardless of where their employees' pairings take them, the challenged compensation policies at issue in this case emanated from Virgin's headquarters in California and Virgin paid its flight attendants pursuant to those policies in California. Nothing in the record suggests that Virgin has similar ties to other states, and Virgin has presented no evidence to support its contention that it will be required to comply with other states' laws. See S.D. Myers, Inc. v. City & Cty. of San Francisco, 253 F.3d

461, 471 (9th Cir. 2001) (rejecting a Dormant Commerce Clause challenge where the party challenging the state regulation "relied solely on conclusory statements about the burden the [state regulation] has on interstate commerce," and explaining that the court "require[s] specific details as to how the costs of the [state regulation] burdened interstate commerce"). Absent such evidence, this Court cannot conclude that Virgin will automatically be forced to comply with the state laws in whatever jurisdiction their flight attendants happen to pass through on a given day. Rather, Virgin is simply being required comply with the law of the state where it chose to headquarter its business, where its California-resident employees performed work based out of California airports, and where it made critical decisions regarding how it would compensate its employees that are now being challenged in this lawsuit. Virgin's suggestion that the Court's ruling will "have far-reaching implications," like subjecting an employer to California law because their employee "simply work[ed] for three hours in the SFO terminal while waiting for a connecting flight between New York and Japan," completely ignores all of the compelling considerations that weigh in favor of applying California law in this case. ECF No. 97 at 25, n. 28.

Absent this flawed premise, Virgin's argument regarding its administrative burden falls apart. Virgin relies heavily on Ward, but that court's conclusion that the application of California's Labor Code would impose an undue administrative burden on the airline was entirely dependent on its erroneous conclusion that California law only applies to individuals who work principally or exclusively in California. Based on that incorrect interpretation of California law, the

Ward court concluded that the airline would have to "monitor the pilot's precise hours spent working in each state and determine which state's laws applied in that bid period." Ward, 2016 WL 3906077 at *5. Then, the airline would have to "give an individual pilot a different form of wage statement in each bid period, depending on whether that pilot worked principally in California or some other state." Id.[6] In contrast, this Court has already determined that principal job situs is *not* dispositive of whether California law applies to the Plaintiffs, therefore eliminating any need to monitor each flight attendant's work schedule each month to determine where they principally worked. As explained above, both the Plaintiffs and Virgin have significant connections to California, the California Labor Code clearly applies to the Plaintiffs' work performed in California, and the wrongful conduct at issue in this case occurred in California. Because Plaintiffs do not seek to apply the California Labor Code extraterritorially, the administrative burden that was present in Ward is not present in this case.

Perhaps most importantly, the Ninth Circuit has already rejected a similar Dormant Commerce Clause

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[6] The Ward court also failed to analyze whether state laws regarding wage statements actually conflicted such that the airline would need to provide different wage statements for different states. In doing so, the court neglected to hold the airline to its burden of showing that compliance would impose a substantial burden. See Int'l Franchise Ass'n, Inc., 803 F.3d 389. Plaintiffs here have presented a thorough analysis of state-by-state wage statement requirements which suggests that a wage statement that complies with California law would comply with almost all state laws, thus mitigating any burden. ECF No. 101–15.

to California's Labor Code. See Sullivan v. Oracle Corp., 662 F.3d 1265, 1271 (9th Cir. 2011). Oracle, the California employer in Sullivan, argued that "[i]f California decides to impose its Labor Code on business travelers, other states may follow suit" and "[t]he resulting patchwork of conflicting state laws would have severe adverse impact on interstate commerce, resulting in an administrative burden as employers attempted to comply with varying state laws." Brief for Appellee Oracle Corporation, Sullivan v. Oracle Corp., 2007 WL 2317029 (C.A.9). The Ninth Circuit squarely rejected this argument, explaining that "California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents." Sullivan, 662 F.3d at 1271. As result, the Court explained, "[t]here is no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own." Id. Sullivan therefore confirms that California's Labor Code "regulates even-handedly to effectuate a legitimate local public interest" such that it will be upheld unless Virgin shows that the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits.'" Id.

The only potential difference between this case and Sullivan is that this case involves the airline industry. It is true that a state regulation "that imposes significant burdens on interstate transportation" represents the kind of "inconsistent regulation of activities that are inherently national or require a uniform system of regulation." Harris, 682 F.3d at 1148. The question then becomes what uniform system of regulation Virgin is currently subject to and

whether the application of the California Labor Code is inconsistent with that system.

Virgin suggests that the Fair Labor Standards Act (FLSA) already provides a uniform, albeit "baseline," system of regulation for employment in the airline industry. See ECF No. 107 at 15–16. But Virgin completely fails to explain how the application of California's Labor Code would conflict with FLSA and thereby disrupt the uniform system of regulation.[7] The only potential conflict that Virgin identifies between the FLSA and California law is that the FLSA allows averaging to satisfy minimum wage requirements, whereas California law does not. ECF No. 97 at 24–25. However, the FLSA specifically contemplates continued state regulation of employees' working conditions. See 29 U.S.C.A. § 218(a) ("No provision of this chapter or of any order thereunder shall excuse noncompliance with any … State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter …"). Through FLSA's savings clause, Congress "made clear its intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards." Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1421 (9th Cir. 1990) (explaining that California's overtime provisions supplemented FLSA's

[7] Again, the primary disruption to national uniformity that Virgin identifies is the supposed conflict between California law and the laws of other states, such as New York and Florida. See ECF No. 97 at 24. For the reasons provided above, the Court rejects Virgin's assumption that it will be subject to every state's wage and hour laws simply because it is subject to California law.

protections and holding that California's overtime laws applied to maritime workers working on the high seas). In other words, "the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." Id. at 1425 (emphasis in original). Because the FLSA and the California Labor Code were intended to coexist, the application of California law is not inconsistent with the national system of regulation under FLSA.[8]

The lack of a conflict between the FLSA and the California Labor Code distinguish this case from the small number of cases in which the Supreme Court has held that a state regulation is unconstitutional because it imposes an undue burden on interstate transportation. Virgin argues that California's prohibition against averaging to satisfy minimum wage requirements is akin to the state regulation at issue in Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). ECF No. 107 at 14–15. In Bibb, the Supreme Court held that an Illinois statute that required trucks to use curved mudguards placed an unconstitutional burden on interstate commerce because it

[8] Contrary to Plaintiffs' assertion, FLSA's savings clause does not constitute a delegation of Congressional authority to the states to regulate an area of interstate commerce. See ECF No. 102 at 26. As the Ninth Circuit explained in Pacific Merchant, "Congress did not 'delegate' authority to the states through section 218, but simply made clear its intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards." Pacific Merchant, 918 F.2d at 1421. Therefore, California's wage and hour laws are not completely "invulnerable" to a Dormant Commerce Clause challenge. Cf. W. & S. Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 652–55 (1981).

directly conflicted with an Arkansas statute that required truck drivers to use straight mudguards. Bibb, 359 U.S. at 527. The conflict between the two statutes required truck drivers to change their mudguards when crossing state lines, a process that caused significant delay and posed safety risks because the mudguards were welded on. See id. The Supreme Court similarly struck down an Arizona law that restricted the number of cars on trains that traveled interstate because it required railroads to break up and remake long trains upon entering and leaving the Arizona. S. Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761 (1945). Unlike the state regulations at issue in Bibb and Southern Pacific, California's Labor Code does not conflict with the FLSA. Rather, as explained by the Ninth Circuit in Pacific Merchant Shipping, California law supplements the FLSA's baseline wage and hour requirements. And requiring Virgin to pay its California employees in accordance with California law simply does not impede the flow of interstate transportation like the regulations at issue in Bibb and Pacific Merchant. As the Plaintiffs persuasively argue, "Virgin's aircrafts take off and land on schedule regardless of its pay policies." ECF No. 102 at 28.

Virgin also relies on United Air Lines, Inc. v. Indus. Welfare Com., a 1963 California Court of Appeals decision that was later overruled on other grounds. United Air Lines, Inc. v. Indus. Welfare Comm'n, 211 Cal. App. 2d 729, 747 (Ct. App. 1963) disapproved of by Indus. Welfare Com. v. Superior Court, 27 Cal. 3d 690, 728, n.15 (1980). In that case, the court held that a California wage regulation that required the defendant airline to pay for their flight attendant's uniforms would pose an undue burden on interstate commerce.

See id. at 747–49. The only burden that the court could identify was the "personnel troubles" that would result if some flight attendants had to pay for their uniforms and others did not. Id. Tellingly, the court admitted that "that burden may not be very great." Id. Nonetheless, the court held that the regulation violated the Dormant Commerce Clause because "the subject is one which necessarily requires uniformity of treatment." Id. The Court does not find this case persuasive because (1) controlling United States Supreme Court and Ninth Circuit precedent require a "substantial burden," and (2) the application of the California Labor Code would not disrupt national uniformity in this case because Congress intended for state law to supplement the FLSA. See Harris, 682 F.3d at 1148 (citing S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984)).[9]

Finally, Virgin argues that it will incur additional staffing costs if required to comply with California's meal break requirements. ECF No. 120 at 4-5. But the "administrative costs of compliance, alone, are generally insufficient to be deemed an unconstitutional burden." Barclays Bank Internat. Ltd. v. Franchise Tax Bd., 10 Cal.App.4th 1742, 1755 (1992) (citing Bibb, 359 U.S. at 526), *aff'd sub nom.* Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 310 (1994); see also, e.g., Burlington Northern R. Co. v. Department of Public Service Regulation, 763 F.2d 1106, 1114 (9th Cir. 1985) (rejecting a Dormant Commerce Clause challenge to a Montana statute that

[9] Virgin also relies on an unpublished, uncitable decision. See ECF No. 97 at 23 (relying on Guy v. IASCO, 2004 WL 1354300 (Cal. App. 2d June 17, 2004). This Court does not address that decision.

required a railroad to maintain and staff freight offices in towns with at least 1,000 persons, noting that "a loss to the company does not, without more, suggest that the Montana statute 'impede[s] substantially the free flow of commerce from state to state'") (quoting Southern Pacific, 325 U.S. at 767). Virgin argues that its compliance costs—an estimated $1,950,925 annually[10]—are significantly greater than those at issue in Barclays and Burlington. ECF No. 120 at 5. But the Ninth Circuit also rejected a Dormant Commerce Clause challenge to California's vessel fuel rules, even though compliance with those rules would cost the industry an additional $360 million annually. Pacific Merchant Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1159, 1177-82 (9th Cir. 2011). In doing so, the Court noted that the cost of compliance "would appear to be relatively small in comparison with the overall cost of a trans-Pacific voyage." Id. Virgin's compliance costs—$100 per flight according to Virgin's estimate—are also relatively small compared to the overall cost of a flight.

In sum, Virgin has failed to show that the burden on interstate commerce imposed by the California Labor Code is "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142. Virgin relies heavily on the professed conflict between California law and other states' laws to argue that there is an administrative burden, but this argument hinges on its faulty assumption that it will be subject to the wage and hour laws of other states' simply because it is subject to California law. Virgin also relies on the

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[10] This estimate reflects the cost of paying an additional flight attendant the lowest base rate ($20/hour) for every flight that lasts five hours. ECF No. 120 at 4-5.

fact that it operates within the national airline industry, but there is no conflict between the existing system of federal regulation (the FLSA) and the California Labor Code because Congress intended state regulations to supplement the FLSA's minimum requirements. Contrasted against the speculative burden of having to comply with various states' employment laws are the significant local benefits conferred by the wage and hour provisions at issue in this lawsuit, which ensure that workers are paid for all hours worked. Because these local benefits outweigh any potential burden on interstate commerce, there is no Dormant Commerce Clause violation.

C. Federal Preemption of Plaintiffs' Meal and Rest Break Claims

Third, Virgin argues that Plaintiffs' meal and rest break claims are preempted by the Federal Aviation Act ("FAA") and/or the Airline Deregulation Act ("ADA"). ECF No. 97 at 26– 29.

"Preemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" Tillison v. Gregoire, 424 F.3d 1093, 1098 (9th Cir. 2005) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995)). In particular, the Supreme Court has warned that "[p]re-emption of employment standards 'within the traditional police power of the State' 'should not be lightly inferred.'" Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987)).

However, this presumption is overcome where Congress expresses a "clear and manifest" intent to preempt state law. Californians For Safe &

Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1186 (9th Cir. 1998). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007) (internal quotation marks omitted). "There are two types of implied preemption: conflict preemption and field preemption." Id. "Courts may find conflict preemption when a state law actually conflicts with federal law or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal law." Id. "Implied preemption exists when federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" Id. (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)). "Thus, field preemption occurs when Congress indicates in some manner an intent to occupy a given field to the exclusion of state law." Id.

3. FAA Preemption

With respect to the FAA, Virgin argues that both types of implied preemption are present. ECF No. 97 at 26–28. First, Virgin argues that "[t]he FAA occupies the field with respect to setting rest and duty periods for [flight attendants], and California's meal period and rest break laws are therefore preempted." Id. Second, Virgin argues that California law conflicts with the FAA's requirements regarding meal and rest breaks. ECF No. 97 at 28.

a. Field Preemption

"The first step" in the field preemption inquiry "is to delineate the pertinent regulatory field." Nat'l Fed'n of the Blind v. United Airlines Inc., 813 F.3d

718, 734 (9th Cir. 2016). Virgin argues that flight attendant break requirements occupy the field of "aviation safety," whereas Plaintiffs define the pertinent field as "the field of airline employment." ECF No. 97 at 26–28; ECF No. 102 at 30. The Ninth Circuit has emphasized the need to define the relevant field "with specificity." Nat'l Fed'n of the Blind, 813 F.3d at 734. For example, where plaintiffs challenged the airline's policy of using automatic kiosks that were inaccessible to blind travelers, "the pertinent field for purposes of field preemption analysis [was] not 'air carrier accessibility' in general," but rather "airport kiosk accessibility for the blind." Id. at 737. And, in a personal injury suit challenging the safety of airstairs, the relevant field was not "plane design" generally, but rather the regulation of airstairs in particular. Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc., 555 F.3d 806, 811–12 (9th Cir. 2009). Although the Ninth Circuit has previously held that Congress intended to occupy "the field of aviation safety," Montalvo, 508 F.3d at 470, it has subsequently cautioned that "Montalvo should not be read . . . expansively with regard to the relevant field for preemption purposes." Nat'l Fed'n of the Blind, 813 F.3d at 734, n. 13 (internal quotation marks omitted) (quoting Gilstrap v. United Air Lines, Inc., 709 F.3d 995, 1004 (9th Cir. 2013)). The Court therefore defines the relevant field for preemption purposes as the regulation of meal and rest breaks for flight attendants.

With this definition in mind, the Court now turns to the second step of the field preemption analysis: "to survey the scope of the federal regulation within that field" and determine "whether the density and detail of federal regulation merits the inference that any state regulation within the same field will necessarily

interfere with the federal regulatory scheme." *Nat'l Fed'n of the Blind*, 813 F.3d at 734. Virgin points to four FAA regulations that it argues affect the provision of meal and rest breaks to flight attendants in some way.[11] ECF No. 107 at 7. Of these, the Court can identify only one that actually regulates the provision of breaks to flight attendants.[12] See 14 C.F.R. § 121.467(b) (prohibiting flight attendants from working duty periods of longer than fourteen hours and requiring a nine-hour rest period between duty periods). This lone regulation can hardly be described as comprehensive, detailed, or pervasive enough to justify federal preemption of the field. See Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc., 555 F.3d 806, 812 (9th Cir. 2009) (finding that a single FAA regulation regarding airstairs was not enough to preempt state law claims that the stairs are defective). Therefore, the FAA does not preempt the provision of meal and rest breaks to flight attendants.

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[11] Virgin also relies heavily on the FAA's statements about its flight attendant break regulation to argue that break requirements affect airline "safety," at least to some degree, and are therefore preempted. ECF No. 97 at 27 (citing 59 FR 42974-01). In doing so, Virgin adopts the overly broad reading of Montalvo that the Ninth Circuit has repeatedly counseled against. Nat'l Fed'n of the Blind, 813 F.3d at 734, n. 13 (internal quotation marks omitted) (quoting Gilstrap, 709 F.3d at 1004). The Court therefore rejects this argument.

[12] The other FAA regulations outline the requisite number of flight attendants and the requirements regarding where flight attendants should be located during takeoff, landing, taxi, and stops where passengers remain on board. See 14 CFR §§ 121.391, 121.393, 121.394.

b. Conflict Preemption

"Conflict preemption applies 'where compliance with both federal and state regulations is a physical impossibility,' and in 'those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Ventress v. Japan Airlines, 747 F.3d 716, 720–21 (9th Cir.), cert. denied, 135 S. Ct. 164 (2014) (internal citations and quotation marks omitted).

Virgin argues that there are two potential conflicts between FAA regulations and California's meal and rest break requirements. First, it argues that California law, which requires that employees are relieved of all duty during a thirty-minute meal break every five hours, conflicts with FAA regulations that "do not permit Plaintiffs to forego their responsibilities while in flight." ECF No. 97 at 27–28. Second, Virgin argues that "the FAA permits [flight attendants] to remain on duty for up to 14 hours straight before receiving a rest period," whereas California law requires a ten-minute rest-period every four hours and an additional thirty-minute meal period every five hours. ECF No. 107 at 7.

It is not "a physical impossibility" for Virgin to simultaneously comply with California law and FAA regulations. For example, Virgin could staff longer flights with additional flight attendants in order to allow for duty-free breaks. In addition, the FAA regulation that Virgin relies on is wholly consistent with California's break requirements because it merely establishes the maximum duty period time and minimum rest requirements. See 14 C.F.R. § 121.467. Therefore, there is no conflict preemption.

4. ADA Preemption

Next, Virgin argues that the application of California's Labor Code is preempted by the Airline Deregulation Act ("ADA"). ECF No. 97 at 28–29.

To support its argument, Virgin relies on the following express preemption provision in the ADA: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1). Based on this provision, Virgin argues that providing its flight attendants with breaks as required under California law could "prevent the aircraft from being prepared for takeoff or passengers being boarded on time," thereby having the effect of "regulating Virgin's services and routes." ECF No. 97 at 28–29. Virgin cites to several district court cases that support its argument that meal and rest break claims impact an airline's services and routes and are therefore preempted by the ADA. See id.

However, all of the cases that Virgin relies on predate the Ninth Circuit's decision in Dilts v. Penske Logistics, LLC, in which it squarely rejected the preemption argument that Virgin makes here. 769 F.3d 637 (9th Cir. 2014), cert. denied, 135 S. Ct. 2049 (2015). In that case, the Ninth Circuit decided to "draw a line between laws that are *significantly* 'related to' rates, routes, or services, even indirectly, and thus are preempted, and those that have 'only a tenuous, remote, or peripheral' connection to rates, routes, or services, and thus are not preempted." Id. at 643 (emphasis added) (quoting Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371 (2008)). The Court

explained that this limiting principle was necessary because the phrase "related to" was so broad that it could conceivably be interpreted to encompass every state law, even those that Congress did not intend to preempt. Id. ("[E]verything is related to everything else.") (quoting Dillingham Constr., 519 U.S. at 335 (Scalia, J., concurring)). With this guiding principle in mind, the court held that "California's meal and rest break laws plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt," adding that it was not even a "close case[]." Id. at 647. The court went on to specifically reject the argument that Virgin makes here—i.e., that providing duty-free breaks to its employees would affect service and routes—explaining that the defendants "simply must hire a sufficient number of drivers and stagger their breaks for any long period in which continuous service is necessary." Id. at 648.

Virgin tries to distinguish Dilts by arguing that it "dealt with neither ADA preemption nor the airline industry," but neither of those considerations changes this Court's analysis. ECF No. 97 at 29, n. 30; ECF No. 107 at 8, n. 7. Although Dilts involved preemption under the Federal Aviation Administration Authorization Act ("FAAAA"), and not the ADA, "the FAAAA was modeled on the Airline Deregulation Act of 1978" and "us[es] text nearly identical to the Airline Deregulation Act's," including the exact preemption language at issue in this case. Dilts, 769 F.3d at 643–44; see also 49 U.S.C. § 14501(c) ("[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . "). Therefore, the Dilts court relied extensively on cases that involved ADA preemption, noting that those

cases were "instructive for [the court's] FAAAA analysis as well." Dilts, 769 F.3d at 644. Virgin offers no persuasive argument as to why identical language in a statute with an identical purpose should be interpreted differently merely because it applies to a different industry.

Plaintiffs' meal and rest break claims are not preempted by the ADA.

D. Compliance With California Law

Next, Virgin argues that its compensation policy and wage statements comply with California law. ECF No. 97 at 31-34.

1. Compensation Policy

The relevant Wage Order requires that employers in the transportation industry pay minimum wages "for all hours worked." Cal. Code Regs. tit. 8, § 11090, Wage Order 9-2001 ¶ 4(A). "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). California courts have held that "[t]his language expresses the intent to ensure that employees be compensated at the minimum wage for each hour worked" and, therefore, employers may not average the total amount earned by an employee over all hours worked in order to comply with minimum wage laws. Armenta v. Osmose, Inc., 135 Cal. App. 4th 314, 323 (2005); Vaquero v. Ashley Furniture Indus., Inc., 824 F.3d 1150, 1154 (9th Cir. 2016).[13]

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[13] Despite this clear prohibition against averaging to meet minimum wage requirements, Virgin argues that "there is no *(cont'd)*

The wage order does not require, however, that employers necessarily compensate their employees through an hourly wage. Instead, it gives employers some flexibility in this regard, allowing them to calculate compensation "by time, piece, commission, or otherwise." Cal. Code Regs. tit. 8, § 11090, Wage Order 9-2001 ¶ 4(B); see also id, § 2(O) ("'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."). Therefore, the fact that Virgin does not pay its flight attendants on a straight hourly basis for all activities, but rather through a "credit-based system" that pays a fixed rate for certain activities, does not violate California law in and of itself.

However, Virgin must still compensate its employees for all time worked *in some way*, irrespective of how it calculates that compensation (e.g. based on hours worked, the particular task performed, or some other factor). See, e.g., Cardenas v. McLane FoodServices, Inc., 796 F. Supp. 2d 1246, 1249-53 (C.D. Cal. 2011) (holding that the employer's piece-rate pay formula for its truck drivers—which was based on miles driven, stops made, and products delivered—violated California's minimum wage law because the compensation formula "did not separately compensate employees for pre- and post-shift time not calculated for in the piece-rate plan"). If an employer's

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evidence that when applying the number of credits received for each Duty Period against their hours worked for the Duty Period that Plaintiffs received below the minimum wage." ECF No. 97 at 33. As explained above, that is not the relevant question under California law; the relevant question is whether the Plaintiffs were paid the minimum wage for each hour worked.

compensation system fails to account for all work duties in this way, it violates California's minimum wage law and the employer cannot make up the difference by relying on impermissible averaging. See id.

a. Compensation for Non-Block Duty Time

The Plaintiffs claim that Virgin has no identifiable means of paying for duty hours outside of block time—i.e., time spent before takeoff and after arrival. ECF No. 102 at 21-22. Plaintiffs argue that they are subject to Virgin's control and perform work during this non-block duty time, including participating in pre-flight briefings and boarding passengers, so they must be paid for that time.

Virgin responds that it compensates flight attendants for non-block duty time, relying largely on the following provision in its Work Rules: "[t]he credit value *for each duty period* within a pairing will consist of block hours, deadhead or ground transportation credit, and minimum duty credit . . ." ECF No. 97 at 31 (emphasis in original); see also ECF No. 45-4 at 12. Virgin appears to be arguing that, because its Work Rules *say* that flight attendants will be compensated "for each duty period," Virgin actually did compensate flight attendants for the entire duty period, including non-block time. But, as the court explained in Cardenas, "it is irrelevant whether the pay formula was *intended* to compensate pre- and post-trip duties, or even if employees believed it covered those duties, if its formula did not actually directly compensate those pre- and post-trip duties." Cardenas, 796 F. Supp. 2d at 1253 (emphasis in original). The Court must therefore look to Virgin's compensation formula to

determine whether it "separately compensate[s]" for non-block duty hours. Id.

It does not. The formula, as articulated in Virgin's work rules, always compensates flight attendants for block time and time spent deadheading. See ECF No. 45-4 at 12-13. However, it does not separately compensate non-block, non-deadheading duty time, which includes time when flight attendants are performing work (e.g. boarding and deplaning passengers) and subject to Virgin's control. One could argue that the "minimum duty period credit" presumably compensates for all time spent on duty, including non-block duty hours, but even that compensation is not guaranteed. See id. Rather, a flight attendant is only entitled to the "minimum duty period credit" for a given day if he or she has not already earned 3.5 hours of block time or deadheading credit for the day. Id. In addition, the Crew Pay Manual explicitly states that "crewmembers are not paid for time 'on the clock' (duty time); instead, they are typically paid only when the aircraft is moving (block time)." ECF No. 100-9 at 8. This further suggests that non-block duty time goes uncompensated. Ridgeway v. Wal-Mart Stores, Inc., 107 F. Supp. 3d 1044, 1052 (N.D. Cal. 2015), motion to certify appeal denied, No. 08-CV-05221-SI, 2015 WL 4463923 (N.D. Cal. July 21, 2015) (granting summary judgment on plaintiff's minimum wage claim because "certain required tasks are specifically designated as unpaid activities" under the employer's piece-rate compensation system). Because Virgin's formula does not separately compensate flight attendants for duty time that is not block time or deadheading time, the Court denies Virgin's motion for summary judgment that its compensation system for flight activities complies with California law.

The cases from this district that Virgin relies on are distinguishable. ECF No. 97 at 31-32. For example, the compensation formula at issue in Oman included a guaranteed "duty period credit" of one hour of pay for every two hours of duty, in addition to a "minimum duty credit" of approximately five hours. See Oman v. Delta Air Lines, Inc., 153 F. Supp. 3d 1094, 1098-99 (N.D. Cal. 2015). This duty period credit appeared to factor prominently in the Oman court's conclusion that "Delta's Work Rules ensure that Flight Attendants are paid for all hours worked." Id. at 1105-06. For instance, the court began its analysis by citing to another case in which a court relied on Delta's duty period credit to conclude 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. at 1102-03 (quoting DeSaint v. Delta Air lines, Inc., No. CIV.A. 13–11856– GAO, 2015 WL 1888242 (D.Mass. Apr. 15, 2015)). The Booher court similarly dealt with compensation formulas that included a guaranteed duty period credit and concluded that "Plaintiffs are paid for all hours worked, based on the minimum guarantee in the Bid Packet and considering all hours actually worked." Booher v. JetBlue Airways Corp., No. C 15-01203 JSW, 2016 WL 1642929, at *3 (N.D. Cal. Apr. 26, 2016).

Unlike the compensation formulas at issue in the cases above, which ensured that flight attendants were, "at a minimum," compensated for all hours on duty, Virgin's formula does not provide such a guarantee. As explained above, Virgin's flight attendants only receive credit for duty hours if they have not already earned 3.5 credits of block time or deadheading

time for the day. Virgin therefore fails to compensate its flight attendants for all hours worked.

b. Compensation for Non-Flight Activities

The Plaintiffs also claim that Virgin fails to pay for all hours worked doing certain non-flight activities, such as time spent undergoing mandatory drug testing, attending mandatory training, deadheading, completing incident reports, and being on reserve duty. ECF No. 32 ¶ 46.

With the single exception of time spent completing incident reports, Virgin's compensation formula accounts for all of the above non-flight work duties when calculating compensation. ECF No. 45-4 at 12-13. Specifically, it assigns thirty minutes of credit for drug testing, a flat monthly rate for initial flight attendant training, 3.5 hours of credit for annual training, and four hours of credit for airport reserve shifts in which flight attendants are not assigned to a flight. ECF No. 47-5 at 7, 9; ECF No. 45-4 at 16, 24. Because Virgin's formula directly compensates Plaintiffs for these non-flight work duties, albeit via a credit-based system instead of an hourly rate, Plaintiffs cannot succeed on their claims related to non-payment for these tasks. Oman, 153 F. Supp. 1098-99 (upholding a credit-based system that allotted one hour of pay for every two hours of duty). The Court therefore grants Virgin's motion for summary judgment as to claims based on those activities.

However, Virgin's compensation formula completely fails to account for time spent completing incident reports, and the Plaintiffs have presented evidence that they were unable to complete these mandatory incident reports during block time. ECF

No. 101-29 at 10. The Court therefore denies Virgin's motion for summary judgment as to claims based on the completion of incident reports.

2. Wage Statements

Under § 226 of the California Labor Code, an employer is required to provide "an accurate itemized wage statement" showing gross wages, total hours worked, net wages earned, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate, among other things. Cal. Lab. Code § 226(a). "The employer's violation of section 226 must be 'knowing and intentional.'" Garnett v. ADT LLC, 139 F. Supp. 3d 1121, 1133 (E.D. Cal. 2015), reconsideration denied, No. 2:14-02851 WBS AC, 2016 WL 146232 (E.D. Cal. Jan. 13, 2016) (quoting Cal. Labor Code § 226(e)(1)).

Virgin concedes that its wage statements do not show the effective hourly rate of pay for each hour on duty, but it claims that its compensation system prevents full compliance and that it nonetheless is "complying with Section 226 in good faith." ECF No. 97 at 34. Virgin also admits that, pursuant to its payment policies, its month end wage statement does not show the actual number of hours worked during that pay period, but rather just shows 37.5 hours at the flight attendant's base rate by default. ECF No. 101-30 at 10.

Good faith is not a defense to a wage statement violation under § 226. Garnett, 139 F. Supp. 3d at 1133-34. Moreover, the fact that Virgin's wage statement deficiencies are part of a centralized policy that fails to comply with § 226 suggests that the violation is knowing and intentional. Id.

The Court therefore denies Virgin's motion for summary judgment on the Plaintiffs' wage statement claims.

E. Plaintiffs' Overtime and Break Eligibility

Next, Virgin argues that, because the California Labor Code does not apply extraterritorially, the Plaintiffs must show that they worked the requisite number of hours within California to trigger overtime and break requirements. ECF No. 97 at 29. Virgin argues that the Plaintiffs cannot do so because time spent flying in the airspace above California is not time spent within California. Id.

The Court rejects Virgin's argument that California wage and hour law cannot apply to flight attendants while they are in the air. To support its argument, Virgin cites to a provision of the FAA (§ 40103), but the Court has already rejected Virgin's argument for FAA preemption. Although the federal government has exclusive sovereignty over the United States airspace and aviation safety, "Congress has not occupied the field of employment law in the aviation context and . . . the FAA does not confer upon the agency the exclusive power to regulate all employment matters involving airmen." Ventress v. Japan Airlines, 747 F.3d 716, 722 (9th Cir.), cert. denied, 135 S. Ct. 164 (2014). And the federal employment law proposed by Virgin, the FLSA, explicitly contemplates that state wage and hour laws like California's will apply concurrently with federal law. 29 U.S.C. § 218. The only conflicting authority that Virgin presents is a single footnote in a single, non-controlling district court case from the Northern District of Illinois. See Hirst v. Skywest, Inc., No. 15 C 02036, 2016 WL

2986978, at *10, n. 14 (N.D. Ill. May 24, 2016). The Court does not find the case persuasive.

There is evidence that the Plaintiffs worked more than eight hours some days such that they qualify for overtime pay. As explained above, the Plaintiffs' overtime claims do not seek to apply California law extraterritorially. Because the alleged wrongful conduct—i.e. Virgin's decisions about how to compensate its flight attendants and its payment of flight attendants in accordance with those decisions—occurred in California, Virgin may be held accountable for that wrongful conduct under California law regardless of where the Plaintiffs worked their shifts. In any event, there is also evidence that Plaintiffs worked shifts longer than eight hours *within California* such that they qualify for overtime pay. For example, Virgin's own expert testified that each of the Plaintiffs had at least one day where they worked in excess of eight hours within California. ECF No. 101-31 at 3:9-24. This evidence is sufficient to create a triable issue of fact regarding whether the Plaintiffs were eligible for overtime pay.

Although Plaintiffs' break claims are geographically limited, there is sufficient evidence that the Plaintiffs worked duty periods solely within California - for example, on flights between California airports - that were long enough to trigger meal period and rest break eligibility. ECF No. 101-17 (showing Plaintiffs' scheduled flights between California airports). Virgin's expert found that, when time spent on California tarmacs was considered, "the data reflects few instances when Plaintiffs potentially worked enough hours in California to be eligible for meal periods (days longer than 5 hours) or rest breaks (days longer than or equal to 3.5 hours)." ECF No. 98-2 at 6.

Specifically, Virgin's expert found fifty instances in which Plaintiff Smith was potentially eligible for a rest break, four instances in which Plaintiff Bernstein was potentially eligible for a rest break, and fifty-three instances in which Plaintiff Garcia was potentially eligible for a rest break. Id. He also found thirty-one instances in which Plaintiff Smith was potentially eligible for a meal period, four instances in which Plaintiff Bernstein was potentially eligible for a meal period, and twenty-six instances in which Plaintiff Garcia was eligible for a meal period. Id. This evidence is sufficient to create a triable issue of fact regarding whether Plaintiffs were eligible for breaks when working in California.

The Court accordingly denies Virgin's motion for summary judgment on the overtime and break claims.

F. Covered Employees Under the San Francisco Minimum Wage Ordinance

Next, Virgin argues that the Plaintiffs are not covered employees under the San Francisco Minimum Wage Ordinance ("SFMWO"). ECF No. 97 at 33. The SFMWO states that "Employers shall pay Employees no less than the Minimum Wage for each hour worked within the geographic boundaries of the City." S.F. Admin. Code § 12R.4. "City" is defined to include "the City and County of San Francisco," and an "Employee" is any person who "[i]n a particular week performs at least two (2) hours of work for an Employer within the geographic boundaries of the City." Id., § 12R.3. Although San Francisco International Airport (SFO) is owned by the City and County of San Francisco, it is located outside the city limits of San Francisco and in San Mateo County. Virgin's training facility is also located outside the City and County of San Francisco.

Plaintiffs fail to address this argument in their opposition. Because the Plaintiffs have failed to show that they are covered under the SFMWO, the Court grants summary to Virgin on those claims.

G. Business Expenses

The Plaintiffs claim that Virgin required Plaintiffs Garcia and Smith to maintain a valid passport, but that Virgin did not indemnify Plaintiffs for the costs incurred in purchasing and/or renewing passports. ECF No. 32 ¶ 101. However, Virgin argues that the Plaintiffs have not produced any evidence that they incurred business expenses related to their passports and, as a result, they cannot prevail on their claim for failure to indemnify for necessary expenditures. ECF No. 97 at 34-35.

Plaintiff Garcia testified that she obtained her passport before she began working for Virgin and did not renew her passport while she was working for Virgin. ECF No. 61-2 at 7:10¬15. Plaintiff Smith similarly testified that she had a passport before she started working for Virgin and her passport does not expire until 2020. ECF No. 61-3 at 23. Plaintiffs fail to point to any countervailing evidence in their opposition.

The Court therefore grants Virgin's motion for summary judgment as to the Plaintiffs' claim for business expenses under California Labor Code § 2802.

H. Remaining Claims

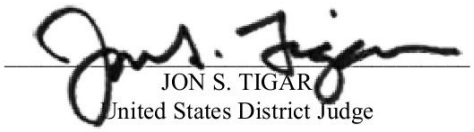
Because the Court has not dismissed all of the Plaintiffs' underlying claims for unpaid wages, it denies Virgin's motion for summary judgment on the derivative waiting time penalty, unfair competition, and Private Attorney General Act ("PAGA") claims.

CONCLUSION

For the reasons above, the Court denies in part and grants in part Virgin's motion for summary judgment.

IT IS SO ORDERED.

Dated: January 5, 2017



JON S. TIGAR
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No.15-cv-02277-JST

JULIA BERNSTEIN, et al.,
Plaintiffs

v.

VIRGIN AMERICA, INC.,
Defendant

ORDER DENYING MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION

Before the Court is Defendant Virgin America, Inc.'s motion for leave to file a motion for reconsideration or, in the alternative, an order certifying the summary judgment order for interlocutory appeal. ECF No. 127. The Court will deny the motion.

I. MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION

Under Civil Local Rule 7–9(a), "any party may make a motion before a Judge requesting that the Judge grant the party leave to file a motion for reconsideration of any interlocutory order on any ground set forth in Civil LR. 7–9 (b)." The party seeking reconsideration must show that at least one of the following grounds for reconsideration is present:

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought . . . ; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civ. L.R. 7-9(b).

Virgin seeks reconsideration of the Court's summary judgment order on all three grounds. ECF No. 127 at 21. First, Virgin argues that the Court manifestly failed to consider facts and dispositive legal arguments related to federal preemption of the Plaintiffs' meal and rest break claims and the application of California law to Plaintiff Bernstein. ECF No. 127 at 21-26, 30-32. Second, Virgin argues that the California Supreme Court's recent decision in Augustus v. ABM Sec. Servs., Inc. "is new, material authority that impacts the preemption analysis." Id. at 21. Finally, Virgin argues that "the Summary Judgment Order creates a change in the law of the case impacting the Class Certification Order." Id. After careful consideration of the motion for leave, the Court concludes that none of the grounds for reconsideration is satisfied here.

A. Field Preemption

With respect to field preemption, Virgin argues that "the Court did not address why in-flight safety is

not a proper field for consideration." ECF No. 127 at 9. The Court already considered, and rejected, this argument. ECF No. 121 at 23-24, n. 11-12; Civ. L.R. 7-9(c) (prohibiting repetition of argument in a motion for leave to file a motion for reconsideration).

Virgin also argues that the Court "manifestly failed to consider that a single regulation can occupy a relevant field to warrant preemption of a state law, the purpose and history of C.F.R. § 121.467, or the nature of the ITMs' work." ECF No. 127 at 9. The Court did not reject Virgin's field preemption argument based solely on the fact that there was just a single regulation that addressed the defined field. The Court explained that 14 C.F.R. § 121.467(b), in addition to being the "only [Federal Aviation Regulation] that actually regulates the provision of breaks to flight attendants," "can hardly be described as comprehensive, detailed or pervasive enough to justify federal preemption of the field." ECF No. 121 at 24. That regulation simply establishes a maximum duty period of fourteen hours (with some exceptions) and a minimum rest period of nine hours between duty periods; it says absolutely nothing about the provision of meal or rest breaks during those duty periods. This contrasts starkly with the "exhaustive" regulation at issue in Federation of the Blind, which "pervasively regulate[d] the accessibility of airport kiosks" and "inform[ed] airlines with striking precision about the attributes their accessible kiosks must have." Federation of the Blind, 813 F.3d at 734-35.

B. Conflict Preemption

With respect to conflict preemption, Virgin argues that the Court manifestly failed to consider the conflict between the "unpredictable" and "irregular"

factual context of airline employment, on the one hand, and the "rigid and mandatory requirements of California law," on the other hand. ECF No. 127 at 9-10. Again, the Court already considered and rejected this argument. ECF No. 121 at 25.

Virgin argues that the California Supreme Court's recent decision in Augustus v. ABM Sec. Servs., Inc., 2 Cal. 5th 257 (2016) "is new, material authority that impacts the preemption analysis." ECF No. 127 at 21, 24, n. 9. That case does not represent a material change in the law; it simply repeats the well-established principle that, "[d]uring required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." Augustus, 2 Cal. 5th at 260. Indeed, the Augustus court cited a 2012 case for that proposition. See id. (citing Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 1038-39 (2012)). In fact, in several respects Augustus supports, rather than undermines, this Court's prior order. The Augustus court explained that "[s]everal options nonetheless remain available to employers who find it especially burdensome to relieve their employees of all duties during rest periods—including the duty to remain on call." 2 Cal. 5th at 272. Those options include "provid[ing] employees with another rest period to replace one that was interrupted," or "pay[ing] the premium pay set forth in [the relevant wage order and Cal. Labor Code Section 226.7]." Id.[1] The Augustus

[1] The wage order for the transportation industry similarly allows employers to pay a premium of one hour of pay at the employee's regular rate for each workday that a meal period or rest period is not provided. Cal. Code Regs. tit. 8, § 11090, Wage Order 9-2001 ¶¶ 11(D), 12(B).

court clarified that "[n]othing in our holding circumscribes an employer's ability to reasonably reschedule a rest period when the need arises." Id. at 271. The Augustus court also acknowledged the relevant wage order's exception for on-duty meal breaks when "the nature of the work prevents an employee from being relieved of all duty and when by written agreement." Augustus, 2 Cal. 5th at 264, n. 9.[2] The court noted yet another "option for employers" who consistently fail to provide duty-free breaks: "If an employer seeks to be excused generally from compliance with the obligation to provide rest periods free of all duty and employer control, the employer should avail itself of the opportunity to request from the DLSE an exemption." Id. at 281.[3] Id. at 272, n. 14.

In sum, California's meal and rest break requirements give employers like Virgin some flexibility if the nature of the employee's work prevents off-duty breaks, and therefore Virgin can comply with both the Federal Aviation Regulations and California's meal and rest break requirements. Virgin, who bears the burden of proof with respect to the affirmative defense of federal preemption, does not claim to have availed itself of any of these options and has failed to demonstrate a conflict between the federal regulations and California's meal and rest break requirements.

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[2] The wage order for the transportation industry includes a similar provision. Cal. Code Regs. tit. 8, § 11090, Wage Order 9-2001 ¶ 11(C).

[3] The wage order for the transportation industry also allows an employer to seek an exemption from the rest period requirement if, in the discretion of the DLSE, the rest period requirement "would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer." Cal. Code Regs. Tit. 8, § 11090, Wage Order 9-2001 ¶ 17.

Bruesewitz v. Wyeth LLC, 562 U.S. 223, 251, n. 2 (2011).

C. ADA Preemption

Next, Virgin argues that the Court improperly relied on the Ninth Circuit's decision in Dilts v. Penske Logistics, LLC, 769 F.3d 637 (9th Cir. 2014) because that decision was "limited in its reach" and should not apply to interstate airline employees. ECF No. 127 at 10, 25-26. Virgin further argues that the Court "disregarded" pre-Dilts case law and failed to consider "material evidence" regarding the impact that California's meal and rest break laws would have on Virgin's routes and services. Id.

As the Court explained in the summary judgment order, "the Ninth Circuit's decision in Dilts v. Penske Logistics, LLC . . . squarely rejected the preemption argument that Virgin makes here." ECF No. 121 at 26. The Court also explained that Dilts is not distinguishable on the ground that it dealt with preemption under the Federal Aviation Administration Authorization Act ("FAAAAA"), rather than the ADA, because "'the FAAAA was modeled on the [ADA]' and 'us[es] text nearly identical to the [ADA's], including the exact preemption language at issue in this case." Id. (quoting Dilts, 769 F.3d at 643-44).[4] As the Dilts court

[4] Virgin argues that there is a difference between the preemption language in the ADA and the FAAAA. ECF No. 127 at 26. The only difference between the ADA and the FAAAAA "is that the latter contains the additional phrase 'with respect to the transportation of property,' which is absent from the [ADA] and which 'massively limits the scope of preemption ordered by the FAAAA.'" Dilts, 769 F.3d at 644 (internal citations omitted). That difference is completely immaterial here, and therefore this argument is meritless.

explained, "Congress meant to create parity between freight services provided by air carriers and those provided by motor carriers." Dilts, 769 F.3d at 644. In sum, the Court rejected Virgin's ADA preemption argument because Dilts is directly on point, "all of the cases that Virgin relie[d] on predate [Dilts]," and "Virgin offer[ed] no persuasive argument as to why identical language in a statute with an identical purpose should be interpreted differently merely because it applies to a different industry." ECF No. 121 at 26-27.

Virgin now relies on the amicus brief that the Department of Transportation filed in Dilts to argue that the holding should not apply to airline employees. ECF No. 127 at 26. As an initial matter, this is a new argument that was not previously "presented to the Court" as required by Local Rule 7-9(b)(3). "Generally, motions for reconsideration . . . are not the place for parties to make new arguments not raised in their original briefs." Gray v. Golden Gate Nat. Recreational Area, 866 F. Supp. 2d 1129, 1132 (N.D. Cal. 2011) (citing Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 925–26 (9th Cir. 1988)). In any event, and contrary to Virgin's assertion, the Ninth Circuit did not "heavily rel[y]" on that amicus brief. ECF No. 127 at 25. Although the court found the Department of Transportation's amicus brief to be "persuasive," it noted that it "would reach the same result in the absence of the agency's brief," and explained at the outset of its ADA preemption analysis that this was not even a "close case[]." Dilts, 769 F.3d at 650, 647. Given the limited role that the amicus brief played in the Ninth Circuit's decision, the Court finds it inappropriate to consider portions of that brief that the Ninth Circuit did not even mention

in its opinion. This approach is particularly sound in light of Virgin's failure to previously present this argument to the Court. [5]

Virgin also tries to distinguish Dilts on the ground that "the Ninth Circuit acknowledged that it was dealing exclusively with ***intrastate*** drivers who worked entirely within California and, thus, were not subject to the laws of any other state." ECF No. 127 at 26 (emphasis in original). This argument fails for two reasons.

First, although this factual distinction could be relevant to other issues in this case—namely, the extraterritorial application of California law and the dormant commerce clause analysis[6]—it is unclear how the interstate nature of the job impacts the ADA preemption analysis. Indeed, the Dilts court explained that "[t]he fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption" because "Congress was concerned only with those state laws that are significantly 'related to' prices, routes,

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[5] The Court also notes that at least two district courts have applied Dilts to the airline industry. See Valencia v. SCIS Air Sec. Corp., 241 Cal. App. 4th 377, 385 (2015), review denied (Jan. 27, 2016) (holding that plaintiff's meal and rest break claims against employer who performed security checks on catering equipment for airplanes was not preempted by the ADA) (citing Dilts, 769 F.3d at 637); Air Transp. Ass'n of Am., Inc. v. Port of Seattle, No. C14-1733-JCC, 2014 WL 12539373, at *3 (W.D. Wash. Dec. 19, 2014) (finding that the plaintiffs, an airline trade organization and an airline contractor, were not likely to succeed on the merits of their claim that the Port of Seattle's rules regarding employment standards, compensation, and time off for covered employees were preempted by the ADA) (citing Dilts, 769 F.3d at 647).

[6] Virgin does not seek reconsideration regarding, and Dilts does not address, either of those issues.

or services." Dilts, 769 F.3d at 647-48. The Dilts court ultimately concluded that California's meal and rest break laws—the exact same laws at issue in this case—are not related to prices, routes, or services, and are therefore "permissible" even though they may differ from similar laws adopted in neighboring states. Id.

Second, the only mention of the "intrastate" nature of the Dilts employees' work appears as dicta in a footnote. Id. at 648, n. 2. There, the Dilts court explained that it did not need to resolve the "open issue" as to whether a federal law can preempt a state law on an as-applied basis because it found that "California's meal and rest break laws, as generally applied to motor carriers, are not preempted." Id. It went on to explain that, if it were to construe the preemption argument as an "as-applied" challenge with respect to the particular defendant motor carriers in that case, "the argument against preemption [is] even stronger" because "Plaintiff drivers work on short-haul routes and work exclusively within the state of California" and "are not confronted with a 'patchwork' of hour and break laws." Id. This footnote makes clear that the intrastate nature of the employees' work provided further support for, but was not essential to, the court's holding. To the extent the interstate nature of the flight attendants work is somehow relevant to ADA preemption, Virgin is not being asked to comply with a "patchwork" of each state's wage and hour laws. ECF No. 121 at 16-17. In fact, "Virgin has presented no evidence to support its contention that it will be required to comply with other states' laws." Id. Rather, Virgin is simply being required [to] comply with the law of the state where it chose to headquarter its business, where its California-resident employees

performed work based out of California airports, and where it made critical decisions regarding how it would compensate its employees that are not being challenged in this lawsuit." Id. Therefore, as in Dilts, applying California's meal and rest break laws to Virgin "would not contribute to an impermissible 'patchwork' of state-specific laws." Dilts, 769 F.3d at 647.

D. Application of California Law to Bernstein

Next, Virgin argues that the Court's holding regarding the application of California law to Plaintiff Bernstein fails to consider undisputed, material evidence. ECF No. 127 at 30. Specifically, Virgin argues that the Court failed to consider that "Bernstein admits that she lived in New York in 2011 and in Florida in 2012" and that "she did not file a California income tax return in 2012—a year in which her paystubs were addressed to a Florida address." ECF No. 127 at 30-31. Virgin contends that, because "Bernstein was not a California resident in 2012, she cannot be a member of the California Resident Subclass for that year, and at a minimum, cannot assert a claim under California Labor Code § 226 (Wage Statements) for that time period." Id. at 31, n. 12. Virgin also argues that Bernstein was not based out of San Francisco International Airport ("SFO") during the course of her employment with Virgin. Id. at 31.

Bernstein's residency in 2012 is a non-issue: Plaintiffs already conceded in their motion for class certification briefing that, "[a]lthough Bernstein filed taxes in California in 2011 (a year in which she transitioned from California to New York) and will be included in the subclass for 2011, she did not file taxes

in California in 2012, and will therefore be excluded from the subclass in 2012." ECF No. 84 at 14, n. 26. The Court now reaffirms that the fact that Bernstein filed her taxes in California in 2011 is sufficient to both identify her as a member of the California Resident Subclass for that year and to create a triable factual issue regarding her residency.[7] ECF No. 121 at 8, n. 2; see also Sarviss v. Gen. Dynamics Info. Tech., Inc., 663 F. Supp. 2d 883, 899 (C.D. Cal. 2009) (finding that the plaintiff was "a California resident who presumably received his pay in California" because "he paid California taxes"). Moreover, given the wealth of other factors that support the application of California law, including Virgin's deep ties to California and the fact that the wrongful conduct occurred in California, the fact that Bernstein did not file her taxes in California in 2012 does not alter this Court's conclusion that California law applies to her claims.[8] See ECF No. 121 at 7-8.

Virgin's arguments regarding Bernstein's base airport and the nature of her flight schedules also fail. Bernstein declared that "[she] was based at SFO for

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[7] In addition, Bernstein's wage statements consistently reflect a California address between June 2010 and January 2012. ECF No. 101-23 at 34-71.

[8] The Court also notes that the Class is defined to include "[a]ll individuals who have worked as California-based flight attendants of Virgin America, Inc. *at any time during the period from March 18, 2011 . . . through the date established by the Court for notice of certification of the Class*." ECF No. 104 at 28-29 (emphasis added). The California Resident Subclass uses the same time frame and includes "[a]ll individuals who have worked as California-based flight attendants of Virgin America, Inc. while residing in California *at any time during the Class Period*." Id. (emphasis added).

[her] entire employment at Virgin" because Virgin only had one based airport (SFO) during her employment with them. ECF No. 101-33 ¶ 3-4. Virgin's Director of Inflight confirmed that "[a]ll InFlight Team Members were based out of SFO until LAX became a base in April 2013." ECF No. 71-3 ¶ 8. Even though her pairings started and ended in New York, Plaintiffs' expert calculated that "[o]ver 95 percent of flights that Julia Bernstein worked within the sample either arrived to or departed from a California airport, and she performed work in California for 100 percent of her workdays." ECF No. 101-38 ¶ 6. Even Virgin's expert concluded that Bernstein spent entire days in California during which she was potentially eligible for a meal period and rest break. ECF No. 98-2 at 6. Therefore, the Court did not manifestly fail to consider evidence regarding Bernstein's base airport and the nature of her flight schedules. ECF No. 121 at 2.

E. Reconsideration of the Court's Class Certification Order

Finally, Virgin argues that the Court's summary judgment order warrants reconsideration of the prior class certification order. ECF No. 127 at 32-33. Virgin argues that, because Bernstein's 2011 California income tax return "create[d] a triable factual issue" regarding her residency, and did not "confirm Bernstein's residency," the Court must reconsider its prior holding that it could identify California Resident Subclass members by looking to Virgin's business records or tax records. Id. Virgin also argues that individual class member investigations into residency and the right to recover for meal and rest break claims will now predominate over common questions. ECF No. 127 at 33.

Virgin misunderstands both the ascertainability requirement and the Court's class certification order. The purpose of the ascertainability requirement is to ensure that the class definition allows a court to feasibly identify class members. Vietnam Veterans of Am. v. C.I.A., 288 F.R.D. 192, 211 (N.D. Cal. 2012); Newberg on Class Actions § 3:3 (5th ed.). Again, the Court can feasibly do so here by looking to Virgin's business records and the state where each flight attendant paid income taxes. ECF No. 104. This information will allow the Court to easily identify both California-based and California resident flight attendants during the relevant time period.[9] Id. As the Court explained in the class certification order, ascertainability does *not* require that every member of the class ultimately win on the merits, and Virgin cannot "defeat class certification by pointing to the possibility that certain members of the class will not be able to recover on their claims." ECF No. 104 at 20. Therefore, the fact that the Court did not definitively "confirm Bernstein's residency" as a matter of law does not defeat class certification.

Nor will individual questions regarding residency and breaks predominate over issues common to the class. Although residency turns on several factors, California's Franchise Tax Board instructs potential filers to carefully consider those factors to determine whether they are a California resident who is subject to California income tax. See Whittell v. Franchise

[9] Moreover, as the Court noted in its class certification order, "every member of the proposed California Resident Subclass is also a member of the proposed Class." ECF No. 104 at 11. Virgin does not dispute that its records allow the Court to easily identify Class members.

Tax Bd., 231 Cal. App. 2d 278, 286–88 (Ct. App. 1964); State of California Franchise Tax Board, Publication 1031, available online at https://www.ftb.ca.gov/forms/2015/15_1031.pdf. Because California Resident Subclass members have already made a determination regarding their residency, filed a California tax return, and/or provided Virgin with a California address during the class period, residency will likely be undisputed for the vast majority of subclass members, thus reducing the potential for mini-trials regarding this issue. And, just as the parties' respective experts calculated the Plaintiffs' missed breaks by looking at the length of their duty periods (which are available on in the AIMS and CrewTrac records), the same calculation can be done for class members. ECF No. 101-38 at 14-15; ECF No. 98-2 at 6-7. As Virgin admitted in its motion to strike the Plaintiffs' expert report, the number of breaks that each class member missed is a damages issue, not a liability issue. ECF No. 74 at 6. And "damage calculations alone cannot defeat certification." Leyva v. Medline Indus. Inc., 716 F.3d 510, 513 (9th Cir. 2013) (quoting Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)). Indeed, because "damages determinations are individual in nearly all wage-and-hour class actions," decertifying a class on that basis "may well be effectively to sound the death-knell of the class action device." Id. (quoting Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004 (2012)). The overwhelming common issues in this case—namely, whether "Virgin's company-wide policies regarding its flight attendants' working conditions and pay" violate California law—remain the same. ECF No. 104 at 20-25.

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The Court denies the motion for leave to file a motion for reconsideration.

II. MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

As an alternative to reconsideration, Virgin moves to certify the following two questions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): (1) whether California's meal and rest break laws are preempted under any of the three preemption theories advanced by Virgin; and (2) whether any class or subclass based on residence can be maintained when individual triable issues of fact would exist as to each putative class member's residence. ECF No. 127 at 11, 26-30.

The final judgment rule ordinarily provides that courts of appeal shall have jurisdiction only over "final decisions of the district courts of the United States. 28 U.S.C. § 1291. However, "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." 28 U.S.C. § 1292(b). "Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met." Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). "These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." In re

Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981), aff'd sub nom. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983). Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). To that end, "section 1292(b) is to be applied sparingly and only in exceptional cases." In re Cement Antitrust Litigation, 673 F.2d at 1027.

Virgin has failed to show that there is a substantial ground for difference of opinion regarding federal preemption of Plaintiffs' meal and rest break claims. Courts determine whether there is a "substantial ground for difference of opinion" by examining "to what extent the controlling law is unclear." Couch, 611 F.3d at 633. Traditionally, courts will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." Id. (quoting 3 Federal Procedure, Lawyers Edition § 3:212 (2010) (footnotes omitted)). The Ninth Circuit's decision in Dilts dealt with the exact same laws at issue here—California's meal and rest break requirements—and held that those laws were not preempted under the FAAAA, which was modeled on the ADA includes the exact preemption language at issue here. Dilts, 769 F.3d at 647-48 (holding that "California's meal and rest break requirements plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt," but rather "normal background rules for almost all employers doing business in the state of

California"). In doing so, the Ninth Circuit rejected the same arguments that Virgin makes here, explaining that these arguments "equate[] to nothing more than a modestly increased cost of doing business, which is not cause for preemption." Id. at 647-50. The Dilts court proposed the same solution as this Court: "Defendants are at liberty to schedule service whenever they choose. They simply must hire a sufficient number of drivers and stagger their breaks for any long period in which continuous service is necessary." Id. Virgin fails to cite to a single post-Dilts case that would suggest "substantial grounds for difference of opinion" regarding its application to airline employees. If anything, post-Dilts cases suggest the opposite. See Valencia v. SCIS Air Sec. Corp., 241 Cal. App. 4th 377, 385 (2015), review denied (Jan. 27, 2016) (applying Dilts to the airline industry); Air Transp. Ass'n of Am., Inc. v. Port of Seattle, No. C14-1733-JCC, 2014 WL 12539373, at *3 (W.D. Wash. Dec. 19, 2014) (same). Nor has Virgin shown that there is a substantial ground for difference of opinion with respect to its other federal preemption theories.

Virgin fails to present any arguments as to why the second question should be certified for interlocutory appeal. Because the Court will not need to conduct factual inquiries into each putative class member's residence, the answer to this question will not materially affect the outcome of this litigation. In re Cement Antitrust Litig., 673 F.2d at 1026 ("[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court."). While it is possible to imagine a case in which a court would need to inquire into each individual class member's residence, this is not such a case.

Virgin does not dispute that two out of the three named Plaintiffs are California residents. And, as explained above, residence will likely be undisputed with respect to most class members because they already made a residence determination by filing their taxes in California and providing Virgin with a California mailing address. To the extent Virgin disputes whether certain individual class members were actually California residents, those individualized inquiries pale in comparison to the overwhelming common issues in this case, and thus do not affect the class certification analysis. For the same reasons, the Court finds that an immediate appeal would not "materially advance the ultimate termination of the litigation." In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d at 1026. In the unlikely event that individualized inquiries regarding residence predominate or otherwise render class treatment unmanageable, the Rules allow a district court to alter or amend a prior class certification order at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C). As a result, this is not an "exceptional case[]" in which certification under Section 1292(b) is necessary to avoid expense and delay. In re Cement Antitrust Litigation, 673 F.2d at 1027.

CONCLUSION

The Court denies the motion in its entirety.

IT IS SO ORDERED.

Dated: March 27, 2017

JON S. TIGAR
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 15-cv-02277-JST

JULIA BERNSTEIN, LISA MARIE SMITH, and ESTHER GARCIA, on behalf of themselves and all others similarly situated,
Plaintiffs

vs.

VIRGIN AMERICA INC.; ALASKA AIRLINES, INC. and Does 1-10, inclusive;
Defendants

JUDGMENT

IT IS ORDERED, ADJUDGED, and DECREED that Virgin America Inc. ("Virgin") has violated the California Labor Code, the California Unfair Competition Law (UCL) and the California Private Attorneys General Act (PAGA) for the reasons stated in this Court's order granting in part and denying in part Plaintiffs' motion for summary judgment and Plaintiffs' motion for summary judgment on damages. ECF No. 317, 365. As a result of these violations, Virgin, and Defendant Alaska Airlines, Inc. as the successor-in-interest to Virgin, are liable to the Class, California Resident Subclass and Waiting Time Penalties

Subclass for failing to pay for all hours worked, failing to pay overtime premiums, failing to provide meal periods, failing to provide rest breaks, failing to provide accurate wage statements, and for waiting time penalties, derivative violations of the UCL, and derivative violations of the PAGA.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that judgment is hereby entered against Defendants Virgin America Inc. and Alaska Airlines, Inc. and for Plaintiffs, all Class members, all California Resident Subclass members, and all Waiting Time Penalties Subclass members on the following claims in the following sums:

1. $13,166,793.31 in damages and restitution to the Class for failure to pay for all hours worked and $5,242,406.04 in prejudgment interest for a total of **$18,409,199.35** through January 31, 2019, plus $3,604.87 per day in continuing prejudgment interest for each day after January 31, 2019 until the date of the entry of Judgment;

2. $12,970,133.45 in damages and restitution to the California Resident Subclass for failure to pay for all hours worked and $5,405,518.71 in prejudgment interest for a total of **$18,375,652**.16 through January 31, 2019, plus $3,551.03 per day in continuing prejudgment interest for each day after January 31, 2019 until the date of the entry of Judgment;

3. $37,171.94 in damages and restitution to the Class for failure to pay overtime and $14,313.57 in prejudgment interest for a total of **$51,485.51** through January 31, 2019, plus $10.18 per day in continuing prejudgment interest for each day after January 31, 2019 until the date of the entry of Judgment;

4. $6,287,420.27 in damages and restitution to the California Resident Subclass for failure to pay premium pay for overtime hours and $2,352,311.38 in prejudgment interest for a total of **$8,639,731.65** through January 31, 2019, plus $1,721.40 per day in continuing prejudgment interest for each day after January 31, 2019 until the date of the entry of Judgment;

5. **$190,525.46** in damages and restitution to the Class for failure to provide legally compliant meal periods;

6. **$410,841.20** in damages and restitution to the Class for failure to provide legally compliant rest breaks;

7. **$4,398,600** in statutory penalties to the Class and California Resident Subclass for violation of California Labor Code § 226 for failure to provide legally compliant wage statements;

8. **$2,306,210** in statutory penalties to the Waiting Time Penalties Subclass for violation of California Labor Code § 203 for willful failure to pay all wages due at the time of separation of employment; and

9. Civil penalties pursuant to the Private Attorney General Act of 2004, Labor Code § 2698 *et seq.*, in the total amount of **$24,981,150** with 75% of each stated amount to be paid to the LWDA and 25% of each stated amount to be distributed to the specified groups of aggrieved employees as follows:

(a) **$4,085,700** to the LWDA and the Class for failure to pay minimum wages;

(b) **$413,550** to the LWDA and the California Resident Subclass for failure to pay minimum wages;

(c) **$76,612.50** to the LWDA and the Class for failure to pay overtime;

(d) **$2,498,400** to the LWDA and the California Resident Subclass for failure to pay overtime;

(e) **$268,950** to the LWDA and the Class for failure to provide legally compliant meal periods;

(f) **$548,137.50** to the LWDA and the Class for failure to provide legally compliant rest breaks;

(g) **$7,086,900** to the LWDA and Class for failure to provide accurate wage statements;

(h) **$765,975** to the LWDA and California Resident Subclass for failure to provide accurate wage statements; and

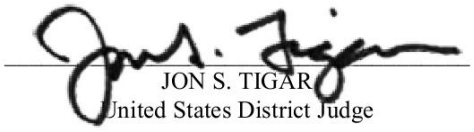
(i) **$9,236,925** to the LWDA and the Class for failure to pay timely wages.

10. Judgment is hereby entered in favor of Plaintiffs, all Class members, all California Resident Subclass members, and all Waiting Time Penalties Subclass members and against Defendants, Virgin America Inc. and Alaska Airlines, Inc., in the amount of **$77,763,395.33** through January 31, 2019, plus **$8,887.48 per day** in continuing prejudgment interest for each day after January 31, 2019 until the date of the entry of Judgment.

11. This Court retains jurisdiction over this action for purposes of addressing a proposed plan of allocation, as well as Plaintiffs' submission of a Bill of Costs and motion for attorneys' fees and expenses and award of service awards for Plaintiffs as Class Representatives.

IT IS SO ORDERED.

Dated: February 4, 2019



APPENDIX E

STATUTORY PROVISIONS INVOLVED

Title 49, United States Code, Section 41713 provides:

(a) Definition.—In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—**(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States

may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.—Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).—This paragraph shall not limit the applicability of paragraph (1).

* * *

The California Labor Code, Section 226.7, provides:

(a) As used in this section, "recovery period" means a cooldown period afforded an employee to prevent heat illness.

(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

(d) A rest or recovery period mandated pursuant to a state law, including, but not limited to, an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, shall be counted as hours worked, for which there shall be no deduction from wages. This subdivision is declaratory of existing law.

(e) This section shall not apply to an employee who is exempt from meal or rest or recovery period

requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.

(f)(1) An employee employed in the security services industry as a security officer who is registered pursuant to the Private Security Services Act (Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code) and who is employed by a private patrol operator registered pursuant to that chapter, may be required to remain on the premises during rest periods and to remain on call, and carry and monitor a communication device during rest periods. If a security officer's rest period is interrupted, the security officer shall be permitted to restart the rest period anew as soon as practicable. The security officer's employer satisfies that rest period obligation if the security officer is then able to take an uninterrupted rest period. If on any workday a security officer is not permitted to take an uninterrupted rest period of at least 10 minutes for every four hours worked or major fraction thereof, then the security officer shall be paid one additional hour of pay at the employee's regular base hourly rate of compensation.

(2) For purposes of this subdivision, the term "interrupted" means any time a security officer is called upon to return to performing the active duties of the security officer's post prior to completing the rest period, and does not include simply being on the premises, remaining on call and alert, monitoring a radio or other communication device, or all of these actions.

(3) This subdivision only applies to an employee specified in paragraph (1) if both of the following conditions are satisfied:

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

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

(4) This subdivision does not apply to existing cases filed before January 1, 2021.

(5) In enacting the legislation adding this subdivision, it is the intent of the Legislature to abrogate, for the security services industry only, the California Supreme Court's decision in Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257, to the extent that decision is in conflict with this subdivision.

(g) This section shall remain in effect only until January 1, 2027, and as of that date is repealed.

* * *

The California Labor Code, Section 512 provides:

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

(b)(1) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

(2) Notwithstanding paragraph (1), a commercial driver employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer subject to Section 15051 of the Food and Agricultural Code to a customer located in a remote rural location may commence a meal period after six hours of work, if the regular rate of pay of the driver is no less than one and one-half times the state minimum wage and the driver receives overtime compensation in accordance with Section 510.

(c) Subdivision (a) does not apply to an employee in the wholesale baking industry who is subject to an

Industrial Welfare Commission wage order and who is covered by a valid collective bargaining agreement that provides for a 35-hour workweek consisting of five 7-hour days, payment of one and one-half times the regular rate of pay for time worked in excess of seven hours per day, and a rest period of not less than 10 minutes every two hours.

(d) If an employee in the motion picture industry or the broadcasting industry, as those industries are defined in Industrial Welfare Commission Wage Order Numbers 11 and 12, is covered by a valid collective bargaining agreement that provides for meal periods and includes a monetary remedy if the employee does not receive a meal period required by the agreement, then the terms, conditions, and remedies of the agreement pertaining to meal periods apply in lieu of the applicable provisions pertaining to meal periods of subdivision (a) of this section, Section 226.7, and Industrial Welfare Commission Wage Order Numbers 11 and 12.

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

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

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

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

(1) An employee employed in a construction occupation.

(2) An employee employed as a commercial driver.

(3) An employee employed in the security services industry as a security officer who is registered pursuant to Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code, and who is employed by a private patrol operator registered pursuant to that chapter.

(4) An employee employed by an electrical corporation, a gas corporation, or a local publicly owned electric utility.

(g) The following definitions apply for the purposes of this section:

(1) "Commercial driver" means an employee who operates a vehicle described in Section 260 or 462 of, or subdivision (b) of Section 15210 of, the Vehicle Code.

(2) "Construction occupation" means all job classifications associated with construction by Article 2 (commencing with Section 7025) of Chapter 9 of Division 3 of the Business and Professions Code, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, and repair, and any other similar or related occupation or trade.

(3) "Electrical corporation" has the same meaning as provided in Section 218 of the Public Utilities Code.

(4) "Gas corporation" has the same meaning as provided in Section 222 of the Public Utilities Code.

(5) "Local publicly owned electric utility" has the same meaning as provided in Section 224.3 of the Public Utilities Code.