Case No. S248726

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs-Appellants-Petitioners,

v.

DELTA AIR LINES, INC.

Defendant-Appellee-Respondent.

ANSWER BRIEF ON THE MERITS OF DEFENDANT-APPELLEE-RESPONDENT DELTA AIR LINES, INC.

On Grant of Request to Decide Certified Questions from the United States Court of Appeals for the Ninth Circuit Pursuant to California Rules of Court, Rule 8.548 Ninth Circuit No. 17-15124
The Honorable William H. Orrick, Case No. 15-cv-00131-WHO

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TABLE OF CONTENTS

		Page
I.	INTRODUCTION	11
II.	STATEMENT OF THE CASE	16
	A. Delta Provides Interstate and International Air Transportation	16
	B. The Typical Flight Attendant Workday	18
	C. Flight Attendants Shape And Obtain Their Work Schedules Through A Seniority Bid Process And Subsequent Modifications	19
	D. Delta Pays Flight Attendants Pursuant To A Formula-Based Compensation System	20
	1. Duty Period Credit (1 for 2) Formula	22
	2. Flight Pay Formula	23
	3. Minimum Duty Period Credit/Duty Period Average Formula	23
	4. Trip Credit Formula	24
	E. Flight Attendants Have Consistent Access To Information About The Credits And Additional Payments They Earn	24
	F. Plaintiffs Are Flight Attendants Who Each Principally Worked Outside Of California Throughout The Relevant Time Period	25
	1. Plaintiff Oman	25
	2. Plaintiff Eichmann	26
	3. Plaintiff Lehr	27
	4. Plaintiff Flores	28
	G. The District Court Grants Summary Judgment To Delta	28
III.	ARGUMENT	31

TABLE OF CONTENTS
(continued)

Page

A. The Answer To The First Two Certified Questions Is No: California's Laws Do Not Apply To Employees Who Work In California Only Episodically And For Less Than A Day At A Time 31

1. The Job Situs Test Governs 32

a. Tidewater And Sullivan Establish The Job Situs Test 32

b. The Job Situs Test Is Easy to Administer and Provides Predictability 34

2. Plaintiffs' Proposed Standard Is Impractical, Creates Conflicts Of Law, And Results In An Impermissible Extraterritorial Application Of California Law 41

a. Plaintiff's Proposed Standard Is Unworkable 41

b. Plaintiff's Proposed Standard Creates Unnecessary Conflicts of Law 43

c. Plaintiffs Proposed Standard Results In The Impermissible Extraterritorial Application Of California Law 48

(1) The Wage And Hour Laws At Issue May Not Be Applied Extraterritorially 48

(2) Plaintiffs Impermissibly Seek Exterritorial Application of California Law 51

3. Other Decisions Regarding The Applicability Of California Law Support Use Of The Job Situs Test 53

TABLE OF CONTENTS
(continued)

Page

B. Delta's Formula-Based System Does Not Average Wages; Nonetheless, The Answer To The Third Certified Question Is, No, The Armenta/Gonzalez Bar On Averaging Wages Does Not Apply To A Pay Formula That Awards Credit For All Hours On Duty 55

IV. CONCLUSION 72

TABLE OF AUTHORITIES

Page(s)

CASES

Aguilar v. Zep, Inc.
(N.D. Cal. Aug. 27, 2014) 2014 WL 4245988 37

Anderson v. Mt. Clemens Pottery Co.
(1946) 328 U.S. 680 38

Armenta v. Osmose, Inc.
(2005) 37 Cal.Rptr.3d 460 ..... passim

Balasanyan v. Nordstrom, Inc.
(S.D. Cal. 2011) 913 F.Supp.2d 1001 69

Bernstein v. Virgin America
(N.D. Cal. 2017) 227 F.Supp.3d 1049 54

Bluford v. Safeway Inc.
(2013) 216 Cal.App.4th 864 50

Booher v. JetBlue Airways Corp.
(N.D. Cal. Dec. 12, 2017) 2017 WL 6343470 54
(N.D. Cal. Apr. 26, 2016) 2016 WL 1642929 ..... 38, 57

Bostain v. Food Express, Inc.
(2007) 159 Wash. 2d 700 46

Brown-Forman Distillers Corp. v. New York State Liquor Auth.
(1986) 476 U.S. 573 48

Cardenas v. McLane Foodservices, Inc.
(C.D. Cal. 2011) 796 F.Supp.2d 1246 69

Del Rosario v. Labor Ready Se., Inc.
(S.D. Fla. Aug. 25, 2015) 2015 WL 5016613 38

DeSaint v. Delta Air Lines, Inc.
(D. Mass. Apr. 15, 2015) 2015 WL 1888242 ..... 29, 38, 57

TABLE OF AUTHORITIES
(continued)

Page(s)

Douglas v. Xerox Bus. Servs., LLC
(9th Cir. 2017) 875 F.3d 884 ..... 38, 59

Dynamex Operations W. v. Superior Court
(2018) 4 Cal.5th 903 71

Espinal v. Northwest Airlines
(9th Cir. 1996) 90 F.3d 1452 35

Fowler Packing Co., Inc. v. Lanier
(9th Cir. 2016) 844 F.3d 809 66

Garnett v. ADT, LLC
(E.D. Cal. 2015) 138 F.Supp.3d 1121 49

Gonzalez v. Downtown LA Motors, LP
(2013) 155 Cal.Rptr.3d 18 ..... 12, 66

Hernandez v. NJK Contractors, Inc.
(E.D.N.Y. May 1, 2015) 2015 WL 1966355 ..... 36, 46

Himes Assocs., Ltd. v. Anderson
(Md. Ct. Spec. App. 2008) 943 A.2d 30 45

Hirst v. SkyWest Airlines, Inc.
(N.D. Ill. May 24, 2016) 2016 WL 2986978 35
(N.D. Ill. 2017) 283 F.Supp.3d 684, *appeal docketed*,
No. 17-cv-03643 (7th Cir. Dec. 28, 2017) 45

Holmes v. Jones
(2000) 83 Cal. App. 4th 882 49

In re Certified Tire & Serv. Ctrs. Wage & Hour Cases
(2018) 238 Cal.Rptr.3d 825 ..... 64, 65

Martinez v. Combs
(2010) 49 Cal.4th 35 ..... 70, 71

TABLE OF AUTHORITIES
(continued)

Page(s)

Mazza v. Am. Honda Motor Co.
(9th Cir. 2012) 666 F.3d 581 ..... 44, 45

Montalvo v. Spirit Airlines
(9th Cir. 2007) 508 F.3d 464 36

Moore v. C.R. England, Inc.
(C.D. Cal. Aug. 29, 2011) 2011 WL 13189805 ..... 62, 66

Mulford v. Computer Leasing, Inc.
(N.J. Law. Div. 1999) 759 A.2d 887 45

North Alaska Salmon Co. v. Pillsbury
(1916) 174 Cal. 1 ..... 48, 49

Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil Corp.
(1976) 426 U.S. 407 32

Oman v. Delta Air Lines, Inc.
(9th Cir. 2018) 889 F.3d 1075 ..... 22, 29, 43

Ontiveros v. Safelite Fulfillment, Inc.
(C.D. Cal. Feb. 7, 2017) 2017 WL 679167 66

Ontiveros v. Zamora
(E.D. Cal. Feb. 20, 2009) 2009 WL 425962 ..... 67, 68

Quezada v. Con-Way Freight, Inc.
(N.D. Cal. Jan. 16, 2014) 2014 WL 186224 67
(N.D. Cal. July 11, 2012) 2012 WL 2847609 68

Ridgeway v. Wal-Mart Stores.
(N.D. Cal. May 28, 2015) 2015 WL 3451966 68

Rivera v. Div. of Indust. Welfare
(1968) 265 Cal.App.2d 576 71

TABLE OF AUTHORITIES
(continued)

Page(s)

Saginaw Firefighters Ass'n v. City of Saginaw
(1984) 137 Mich. App. 625 38

Sandoval v. M1 Auto Collision Centers
(N.D. Cal. Sept. 23, 2016) 2016 WL 6561580 ..... 66, 68

Sarviss v. Gen. Dynamics Info. Tech., Inc.
(C.D. Cal. 2009) 633 F.Supp.2d 883 54

Shook v. Indian River Transport Co.
(E.D. Cal. Feb. 15, 2017) 2017 WL 633895 54

Sullivan v. Oracle Corp.
(2011) 51 Cal.4th 1191 ..... passim

Thind v. Healthfirst Management Services, LLC
(S.D.N.Y. July 29, 2015) 2015 WL 4554252 38

Tidewater Marine West Inc. v. Bradshaw
(1996) 14 Cal.4th 557 ..... passim

Torrey Hills Cmty. Coalition v. City of San Diego
(2010) 186 Cal.App.4th 429 58

Troester v. Starbucks Corp.
(2018) 5 Cal.5th 829 40

Vaquero v. Stoneledge Furniture
(2017) 9 Cal.App.5th 98 ..... 67, 68

Vidrio v. United Airlines, Inc.
(C.D. Cal. Mar. 15, 2017) 2017 WL 1034200 53

Villalpando v. Exel Direct Inc.
(N.D. Cal. 2016) 161 F.Supp.3d 873 66

Ward v. United Airlines, Inc.
(N.D. Cal. July 19, 2016) 2016 WL 3906077 ..... 32, 39, 53, 55

TABLE OF AUTHORITIES
(continued)

Page(s)

Wright v. Renzenberger, Inc.
(C.D. Cal. Mar. 8, 2018) 2018 WL 1975076 66

STATUTES

49 U.S.C. § 40103(a) 16, 35

8 Cal. Admin. Code
§ 11090(1) 57
§ 11090(1)(A) 72
§ 11090(4)(B) 15, 57

Cal. Lab. Code
§ 204 ..... passim
§ 226 ..... passim
§ 226.2 50
§ 1178.5(a) 71
§ 1182.12 28
§ 1194 28
§ 1194.2 28

Fla. Stat. Ann. § 448.110 45

FLSA (Fair Labor Standards Act) 38, 59

Mass. Gen. Laws Ann.
ch. 149, § 148 47
ch. 151, § 1 45

PAGA (Private Attorneys General Act), Cal. Lab. Code
§§ 2698 *et seq.* 29, 30

RLA (Railway Labor Act) 35

OTHER AUTHORITIES

7 C.C.R. 1103-1 46

TABLE OF AUTHORITIES
(continued)

Page(s)

18 C.C.R.
§ 17014(a) 39
§ 17014(c) 39

14 C.F.R. § 121.467 ..... 18, 19

29 C.F.R. § 541.601(b) (2014) 72

85th Cong., 2d Sess. (1958) 35

Nev. Admin. Code § 608.115 (2004) 38

I. INTRODUCTION

The fundamental issue before this Court is whether and to what extent California may regulate the employment relationship between an out-of-state employer and an employee who works in California only episodically and for less than one day at a time. Plaintiff-Petitioners ("Plaintiffs") are flight attendants for Defendant-Respondent Delta Air Lines, Inc. ("Delta") who work in multiple jurisdictions every workday and spend the vast majority of their work time in federally-regulated airspace. It is undisputed that Plaintiffs principally work outside of California – approximately 86, 89, 91, and 97 percent of their time, respectively. Nonetheless, they claim California's minimum wage, pay statement, and timing of pay laws apply to them whenever they work in California, however briefly.

The Ninth Circuit has certified three questions to this Court:

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

(2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee

who works in California only episodically and for less than a day at a time? And

(3) Does the *Armenta v. Osmose, Inc.* (Ct. App. 2005) 37 Cal.Rptr.3d 460/*Gonzalez v. Downtown LA Motors, LP* (Ct. App. 2013) 155 Cal.Rptr.3d 18 bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credits for all hours on duty?

Although the questions are framed broadly, and are not limited to the airline industry, the interstate nature of Plaintiffs' work should inform and guide the Court's answers. Each question should be answered "No."

Plaintiffs' proposed "any work done in California" standard for triggering California's minimum wage, pay statement, and wage payment laws not only invites a departure from this Court's precedent, *Tidewater Marine West Inc. v. Bradshaw* (1996) 14 Cal.4th 557 and *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, but also is unworkable, creates conflicts of laws, and results in an impermissible, extraterritorial application of California law. This is particularly so in

the context of *interstate* workers like Plaintiffs whose work takes them to multiple jurisdictions every workday.

Instead, the Court should reaffirm the job situs test as the standard for determining whether California's laws apply. The job situs test sets forth a clear, simple, fair, and predictable method for determining the applicability of California law. Under this test, if an individual principally or exclusively works for an out-of-state employer in California during the relevant pay period, then California law governs. California law does not apply to employees who work episodically in California, or for less than a day at a time, particularly when the employee is working in other jurisdictions on the same day.

The job situs test also avoids the impracticalities, the conflicts of law, and the impermissible extraterritorial application of California law that would result from Plaintiffs' proposed "any work done in California" approach. Though Plaintiffs claim they only seek California's protections for their ground time worked in California, their legal theory would require Delta to apply California Labor Code sections 204 and 226 to entire pay periods whenever Plaintiffs set foot in California. Inherent in Plaintiffs' theory is that every other state could claim the same entitlement over Plaintiffs' employment – work

for a single second within our borders and our wage-and-hour laws apply to you. Nothing suggests that California intended to or could apply its wage-and-hour laws in such a broad fashion.

Even if California minimum wage law applies to Plaintiffs for any period of time they work within the state, Delta's formula-based compensation system fully complies with California's requirement that Plaintiffs receive the minimum wage rate for all hours worked and does not implicate California's restrictions on averaging. Unlike the employers in *Armenta* and *Gonzalez*, Delta does not take wages it agreed to pay Plaintiffs for certain work and use them to satisfy minimum wage obligations for other uncompensated work performed. Rather, Delta fully discloses the guaranteed minimum compensation flight attendants will receive for all work during a Duty Period (the time they are working) before they bid on or work a Duty Period. Delta's system applies four different formulae to determine flight attendant pay for "each Duty Period" and pays flight attendants under the formula that results in the greatest compensation. It is undisputed that the Duty Period encompasses every minute a flight attendant is on duty, including all the time Plaintiffs claim as uncompensated. At a minimum, the Duty Period Credit formula ensures that Plaintiffs have

always been paid ***at least $22.87*** for each hour on duty, an amount that far exceeds California's minimum wage. If another formula is used, it is because that formula generates greater compensation for that Duty Period. As a result, "Delta's formulas ensure that Flight Attendants are compensated for *all* time spent on duty" and "expressly consider all hours worked in the first instance." ER 19, 31-32.

Accordingly, Delta's compensation system complies with IWC Wage Order 9's requirement that Delta pay "not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission or *otherwise*." 8 Cal. Admin. Code §§ 11090(4)(B). With its use of the phrase "otherwise," Wage Order 9 expressly allows employers to pay employees using something other than an hourly system, as long as the employee is paid not less than the applicable minimum wage for all hours worked. Delta's system complies with this requirement.

II. STATEMENT OF THE CASE

A. Delta Provides Interstate and International Air Transportation

Delta is a Delaware corporation headquartered in Atlanta. SER 39.[1] It provides scheduled air transportation services. *Id.* Delta is subject to an array of federal laws and regulations that affect every aspect of its business. SER 98.

Passengers travel through Delta's extensive route network. During the "relevant time period,"[2] Delta's route network centered on a system of thirteen domestic and international gateway airports and, along with its affiliates, Delta offered services to 312 destinations located in 54 countries. SER 4, 98. Delta passengers routinely travel through airspace above the United States that is under the exclusive sovereignty of the federal government. 49 U.S.C. §40103(a). The primary responsibilities of flight attendants are to provide passenger service and ensure passenger safety. SER 11-16.

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[1] The record is from the federal proceedings. Excerpts of Record, Supplemental Excerpts and Petitioner's Opening Brief are cited as "ER__," "SER__" and "POB___," respectively. Emphasis has been added to quoted material except where indicated.

[2] The relevant time period for Plaintiffs' minimum wage claim is May 1, 2012 to present; for Plaintiffs' Sections 204 and 226 claims, January 9, 2014 to present.

Plaintiffs contend "[t]he California market is critically important to Delta." POB 11. But Delta's contacts with California are minimal when compared to its overall operations. Delta's U.S.-based flight attendants are primarily based at one of Delta's eight domestic hub airports. SER 39 & 665. Between May 2012 and September 2015, Delta had 1,061 to 1,344 flight attendants (5.3% to 6.2% of its U.S.-based flight attendant workforce) based out of Los Angeles International Airport ("LAX") and 241 to 303 flight attendants (1.2% to 1.5%) based out of San Francisco International Airport ("SFO"). SER 665. During this time, Delta employed between 17,719 and 18,687 U.S.-based flight attendants located outside California. ER 1126-27. While these flight attendants occasionally worked flights that arrived at or departed from a California airport, that flight activity is a small portion of their overall work schedules. While Plaintiffs assert that Delta's non-California-based, U.S. flight attendants flew more than 24,400 flights into or out of California in April 2015 (POB 11), those same flight attendants worked 299,587 flights that never touched a California airport – 92.4% of their flights. ER 1142. Thus, a typical flight attendant

worked 17.3 flights that month and touched California on only 1.3 flights.[3]

B. The Typical Flight Attendant Workday

Flight attendant work schedules consist of Rotations, Duty Periods, and flights. A "Rotation" is a planned sequence of flights that may consist of one or more flights or one or more Duty Periods (*i.e.,* the flight attendant equivalent of a "shift"). SER 286, 302, 441, 451, 461-62 & 581-83. Flight attendants begin their workday (their Duty Period) by reporting to airports at designated report times. SER 184, 450, 465, 473 & 588-89. Duty Periods end fifteen minutes after the "Block In" of the last flight within that Duty Period. SER 184, 224, 461-63 & 600.[4] FAA regulations establish that each Duty Period must include pre-flight meetings, aircraft cabin preparation, passenger

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[3] Similarly, Delta $229 million investment in its LAX facilities (POB 11) pales in comparison to Delta's "nearly $2 billion investment in New York City Airports." ER 1115-16.

[4] FAA regulations set specific duty limitations and rest requirements that govern the maximum amount of time a flight attendant may work within a Duty Period and the minimum amount of rest a flight attendant is required to take between Duty Periods. 14 C.F.R. § 121.467. The FAA defines Duty Period as the time elapsed between reporting for an assignment and being released from that assignment. *Id.*

boarding, flight time, turn time,[5] and deplaning of passengers. ER 702-07; SER 303-04 & 470. If deplaning takes more than fifteen minutes, flight attendants notify Delta's Scheduling Department and their Duty Period is extended to account for the additional time spent working. SER 224, 463 & 600.

C. Flight Attendants Shape And Obtain Their Work Schedules Through A Seniority Bid Process And Subsequent Modifications

Flight attendants have considerable influence over their work schedules. Every month, they receive a Bid Packet that lists all available Rotations for their base. SER 215, 304, 442-43 & 621-30. The Bid Packet describes: the number and length of each Duty Period within the Rotations; report times and total scheduled flight times for the flights within the Rotations;[6] and the amount of time the flight attendant can expect to be away from base. SER 304-09, 313-18, 474-77, 480-81, 621-30 & 632-63; ER 1356-65. The Bid Packet

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[5] For Duty Periods comprising multiple flights, there is a time-gap between one flight's arrival and the next flight's departure. This is called "turn time." SER 584-86. During turn time, flight attendants are generally free to do as they wish. SER 576, 601 & 611-12. Nonetheless, turn time is included within the Duty Period and fully compensated. SER 601; 14 C.F.R. § 121.467.

[6] Flight Time is calculated based on the aircraft's "Block Out" (when it pushes back from the gate) and "Block In" times (when it pulls into the gate). ER 558 & 562; SER 486, 583-84 & 613.

allows each flight attendant to determine the compensation formula that will apply to the work, and calculate the credit value for each.[7] SER 308, 318 & 481-82. The times set out in the Bid Packets also establish the minimum, guaranteed credits the flight attendant will receive. SER 481. Flight attendants are never credited with an amount lower than what the Bid Packet specifies. *Id.* They can, however, earn more in the event of flight delays or other contingencies. *Id.* As a result, before they work a Duty Period, flight attendants know the minimum credit they will receive for all time they are working that day. After reviewing the Bid Packets, flight attendants bid for their preferred Rotations and monthly schedules are generated. SER 443-46.

D. Delta Pays Flight Attendants Pursuant To A Formula-Based Compensation System

All Delta flight attendants are compensated according to Delta's Work Rules. SER 179-80, 216, 301, 439 & 579. Under them, "[e]ach ***duty period*** of a rotation pays the greatest of (1) flight time (includes

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[7] Delta applies four formulae to determine the number of credits a flight attendant will receive for each Rotation (*i.e.*, the credit value). *See infra*, Section III.B. Those credits are multiplied by the flight attendant's Flight Pay Rate to determine the compensation Delta pays. *Id.*

deadhead,[8] flight time, minutes under, and flight pay for ground time), or (2) a 4:45 minimum duty period credit (MDC), or (3) 1 for 2 duty period credit (DPC). The sum of the duty period credits listed above is then compared to 1 for 3.5 trip credit (TRP), which guarantees at least 1 hour pay for every 3.5 hours away from base. You will be paid the greater of the two values." ER 363 (emphasis added).

For each Duty Period, Delta calculates the total number of credits available under each formula, multiplies them by either the Flight Pay Rate[9] or a higher rate (if premium pay applies), compares the sums, and pays the flight attendant the greatest amount. SER 217-18, 310, 483-84 & 615. As Lehr testified, he is not aware of any Rotation when the formulae would not have compensated him at least the minimum wage for each hour he worked.[10] SER 160-61; *see also*

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[8] A deadhead flight is a flight segment within a Rotation that transports the flight attendant to/from a flight assignment. ER 560. A dead-heading flight attendant is not part of that flight's working crew. *Id.*

[9] Delta's formula-based flight attendant compensation policy applies a base rate called the "Flight Pay Rate." The Flight Pay Rate for Plaintiffs Oman ("Oman"), Eichmann ("Eichmann") and Lehr ("Lehr") was $45.75 per hour as of May 1, 2012, $47.58 per hour as of July 1, 2012, $49.96 per hour as of January 1, 2013, $51.46 per hour as of April 1, 2014. SER 666. For Eichmann and Lehr, the Flight Pay Rate was $53.52 per hour as of April 1, 2015. *Id.*

[10] Lehr earned over $95,000 as a flight attendant for Delta in 2014.

Oman v. Delta Air Lines, Inc. (9th Cir. 2018) 889 F.3d 1075, 1078. Moreover, as the district court held, Delta takes account of all hours worked and pays flight attendants for all hours on duty regardless of the formula applied. ER 19.

The formulae are fully disclosed to flight attendants and form the basis for the minimum promised credit amount specified in the Bid Packet. ER 363; SER 308, 318 & 481-82. Even when flights are delayed or rescheduled, flight attendants receive the minimum credit amount promised in the Bid Packet or the highest pay produced by applying the four formulae to the Duty Periods actually worked. SER 217-18, 310, 481-84 & 615. No matter the formula applied, the resulting amount compensates flight attendants for their entire Duty Period.

1. Duty Period Credit (1 for 2) Formula

A Duty Period is the time from a flight attendant's Report Time to his release from duty. There is no dispute that each Duty Period encapsulates all hours each flight attendant works. SER 302, 451 & 582. The Duty Credit Formula credits flight attendants with one hour at their Flight Pay Rate for every two hours on duty. ER 367; SER

ER 1100.

487 & 614. This means flight attendants are compensated at a minimum of one-half of their Flight Pay Rate for every hour on duty.[11] ER 367; SER 487 & 614. Because flight attendants are credited with the greatest total value calculated by the four formulae, they will never earn less than the Duty Period Credit formula; it serves as a floor.

2. Flight Pay Formula

The Flight Pay Formula multiplies the flight attendant's Flight Pay Rate by the greater of the scheduled flight time (*i.e.*, what was estimated in the Bid Packet) or the actual flight time. SER 485 & 620. When the formula is applied, the flight attendant receives credits equal to the entire flight time. ER 366.

3. Minimum Duty Period Credit/Duty Period Average Formula

The Duty Period Average guarantees that flight attendants receive an average of at least 4 hours, 45 minutes of credit for each Duty Period within a Rotation. ER 556. As of April 1, 2014, the Minimum Duty Period Credit replaced the Duty Period Average. It

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[11] As a result, the Duty Period Credit formula guaranteed Plaintiffs a baseline rate of at least $22.87 for every hour they were considered on duty throughout the relevant time period. SER 666.

awards 4 hours, 45 minutes of credit for each Duty Period within a Rotation. ER 368; SER 613-14 & 616.

4. Trip Credit Formula

The Trip Credit formula utilizes the flight attendant's "Time Away From Base." ER 363 & 570; SER 489 & 614-15. Time Away From Base is the total number of hours between a flight attendant's initial reporting for duty at the beginning of a Rotation to the flight attendant's final release at the end of the Rotation, including any off-duty time between Duty Periods. *Id.* Under the formula, flight attendants receive one credit for every three-and-one-half hours they spend away from base.[12] *Id.*

E. Flight Attendants Have Consistent Access To Information About The Credits And Additional Payments They Earn

The credits and all the other payments earned by flight attendants, are tracked on Delta's Monthly Time Display System ("MOTS") which is available to all flight attendants. SER 99. MOTS is a real-time display showing how flight attendants have earned credits as they progress through their schedule. SER 31-33 & 99.

[12] In addition to flight-credit-based compensation, Plaintiffs received additional payments, including Report Pay, Standby Pay, Holding Pay, and Time Away from Base ("TAFB") pay. SER 99 & 619.

Flight attendants may also access electronic databases (*i.e.*, iCrew and DBMS) to see the details of each Rotation, including the total number of Duty Hours. SER 99.

F. Plaintiffs Are Flight Attendants Who Each Principally Worked Outside Of California Throughout The Relevant Time Period

1. Plaintiff Oman

During the relevant time periods, Oman lived in New York and was based out of John F. Kennedy International Airport ("JFK"). SER 55, 61-62, 103 & 178. From May 2012 through September 2014, he worked 106 Rotations that contained 369 flights. SER 185-202 & 234-42. Of those, only 26 flights across 11 Rotations arrived at or departed from a California-based airport. SER 227-42. Ten of the 13 flights that arrived in California were the last flight segment within a Rotation, meaning Oman was off-duty after arrival. SER 234-42. For the remaining three arrivals during this 29-month period, Oman had a total turn time of 5 hours and 12 minutes. SER 253-72. None of his flights was an intra-California flight—*i.e.*, a flight that departed from and arrived at California-based airports. SER 234-42.

From January 1, 2014 through September 2014, Oman did not begin or end a Rotation at a California-based airport. SER 103. He

did not work any flight that departed from or arrived at a California-based airport during 9 of his 16 pay periods. SER 103, 239-42. Of the 123 flights Oman flew during this period, only 16 departed from or arrived at a California airport, while 81 departed from or arrived at a New York airport. SER 103. During this period, Oman was on duty for 504.9 hours: approximately 14.4 of those (2.9%) involved work in California. SER 126.

For the pay period January 16 through 31, 2014, Oman departed from and/or arrived at nine different airports located in seven different U.S. states and in Senegal. SER 103. He was on duty for 75.2 hours, of which he spent 1.5 hours (2%) working in California, 10.5 hours (14%) working in Minnesota and 8.1 hours (10.8%) working in New York. SER 127.

2. Plaintiff Eichmann

Eichmann has been based out of LAX since February 2014. SER 437 & 440. Before that, Eichmann's bases were the Detroit and Seattle–Tacoma Airports. *Id.*

From May 2012 until his relocation to the LAX base in 2014, Eichmann worked 83 Rotations containing 312 flights. SER 452-61

& 499-506. Only five of those Rotations touched California. Each consisted of one California arrival and departure. *Id.*

For the period January 1, 2014 through June 30, 2016, Eichmann was on duty for 3,723.7 hours. SER 126. He spent approximately 319.6 of these (8.6%) working in California. *Id.*

For the pay period September 1 through 15, 2014, Eichmann was on duty for 79.6 hours; 5.5 of these hours (6.9%) were spent working in California. SER 127.

3. Plaintiff Lehr

Lehr has been based out of SFO and living in Las Vegas throughout his employment. SER 285. From January 1, 2014 to June 30, 2016, he was on duty for 3,587.3 hours. SER 126. He spent approximately 500.7 hours (14%) working in California. *Id.*

For the pay period November 1 through 15, 2015, Lehr departed from and/or arrived at nine airports in nine different states. SER 103. He was on duty for 57.5 hours and spent 3.3 hours (5.7%) in California, 3.3 hours in Georgia, 6.5 hours (11.3%) in Michigan, and 4.7 hours (8.2%) in Minnesota. SER 127.

4. Plaintiff Flores

Flores is based out of LAX and lives in California. SER 18. From January 1, 2014 through June 30, 2016, he was on duty for 3,200.7 hours. SER 126. He spent approximately 347.7 hours (10.9%) working in California. *Id.*

During the pay period April 15 through 30, 2015, he worked at airports located in nine states. SER 103. He was on duty for 76.6 hours, and spent 4.3 hours (5.7%) in California, 11.4 hours (14.9%) in Minnesota and 6.7 hours (8.7%) in Georgia. SER 127.

G. The District Court Grants Summary Judgment To Delta

Delta sought summary judgment on Plaintiffs' claims for: (a) failure to pay minimum wage in accord with California Labor Code §§1182.12, 1194 and 1194.2 and Wage Order 9; (b) non-compliance with San Francisco's Minimum Wage Order; and (c) non-compliance with San Jose's Minimum Wage Ordinance. ER 19-20.

The district court granted Delta's motion, concluding "that Delta's Flight Attendants are compensated for all hours worked in California at an amount exceeding the minimum wage." ER 19. The court rejected the same mischaracterizations of Delta's compensation system that Plaintiffs raise in this Court, including that Delta's Flight

Pay formula does not compensate flight attendants for: (a) pre-boarding time; (b) post-landing time; and (c) turn time. ER 30-35. The court recognized that, through its formulae, Delta considers "all hours worked in the first instance" and does not apply payments earned for compensated time to cover otherwise uncompensated tasks. ER 31-32.[13] Rather, "Delta's formulas ensure that Flight Attendants are compensated for all time spent on Duty" and "each hour worked." ER 19-20 & 35.

Following the decision, the parties stipulated that Plaintiffs could amend their complaint to add claims under the Private Attorneys General Act ("PAGA"), California Labor Code §§ 2698 *et seq.*, and add Flores as a plaintiff. SER 138-42.

Thereafter, Delta again moved for summary judgment, this time on Plaintiffs' claims for wage statement noncompliance under Section

[13] Delta's compensation system was similarly upheld in *DeSaint v. Delta Air Lines, Inc.* (D. Mass. Apr. 15, 2015) 2015 WL 1888242, where, as in *Oman*, plaintiffs argued that Delta's formulae did not compensate flight attendants at the minimum wage rate for all hours worked and constituted improper averaging, in violation of Massachusetts law. The court disagreed. *Id.* at *11.

226, civil penalties under PAGA, and violation of California's unfair competition law.[14]

The district court granted Delta's motion and rejected Plaintiffs' argument that *Sullivan* requires that employers provide California-compliant wage statements whenever an employee performs any work within California "regardless of where the bulk of her or his work in the relevant pay period is performed." ER 13-14. Per the district court, "[g]iven the nature of the claim under Section 226 and the nature of the plaintiffs' jobs as Flight Attendants, it is wrong to ignore whether California can be considered the situs of the Flight Attendants' work sufficient to invoke Section 226's wage statement requirements." ER 14. Accordingly, to determine whether Section 226 applies to an employee who performs work in multiple jurisdictions, including California, the court decided that "the appropriate analysis must focus on the particular Labor Code provision invoked, the nature of the work being performed, the amount of work being performed in California, and the residence of the plaintiff and the employer." ER 15. As the undisputed facts show

[14] Delta also opposed Plaintiffs' cross-motion for summary judgment as to liability for purported violations of Section 204. SER 11.

Plaintiffs only worked between 2.6 and 14 percent of their time in California, "and in light of the nature of their work (necessarily working in federal airspace as well as in multiple other jurisdictions... during each pay period *and day* at issue)," the court held that Section 226 does not apply to Plaintiffs. ER 16 (emphasis original).

Plaintiffs conceded that the determination regarding Section 226 would also resolve their Section 204 claims, which concerns the time when wages must be paid.[15] ER 17; SER 682-83. Hence, the court properly held that Section 204's rules do not apply to Plaintiffs. ER 17.

III. ARGUMENT

A. The Answer To The First Two Certified Questions Is No: California's Laws Do Not Apply To Employees Who Work In California Only Episodically And For Less Than A Day At A Time

The *job situs* test articulated in *Tidewater* provides the correct, workable, real-time standard by which to determine when California's wage-and-hour laws apply.

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[15] Under Section 204, "[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays...." The statute then elaborates on how payments are to be calculated.

1. The Job Situs Test Governs

a. *Tidewater* And *Sullivan* Establish The Job Situs Test

The Court's precedent establishes that an employee must principally work in California for this state's wage-and-hour laws to apply. *Tidewater* held that "[i]f an employee resides in California, receives pay in California, and ***works exclusively, or principally, in California***, then that employee is a 'wage earner of California' and presumptively enjoys the protection of IWC regulations." 14 Cal.4th at 578; *see also Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil Corp.* (1976) 426 U.S. 407, 418-20 (to "minimize the possibility of patently anomalous extra-territorial application of any given State's right-to-work laws," the plaintiff's "predominant job situs" would dictate whether Texas law applies); *Ward v. United Airlines, Inc.* (N.D. Cal. July 19, 2016) 2016 WL 3906077, at *3. The application of California law does not depend on where the employee resides, or is assigned, but on the extent to which the employee works in California. While the Court in *Tidewater* was "not prepared to hold that IWC wage orders apply to *all* employment in California, and *never* to employment outside California" (14 Cal.4th at 578), *Tidewater*'s job situs test establishes a baseline analysis for

determining whether Plaintiffs can be considered California wage earners – do the employees in question "work[] exclusively, or principally, in California."[16]

This is precisely the analysis applied in *Sullivan*. There, this Court did not reject or replace *Tidewater*'s job situs test. Rather, it held that the employees of a "California employer" could be subject to California law if they spend "entire days or weeks working in California." 51 Cal.4th at 1200. The employees in *Sullivan* were eligible for California-law-based overtime because they worked *exclusively* in California on those days and weeks at issue. Further, the work at issue was not interstate in nature: the training services provided by the *Sullivan* plaintiffs were capable of being exclusively performed within California, and were, in fact, exclusively performed in California. *Id.* at 1205-06. Flight attendants, who constantly work interstate, cannot make the same claim.

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[16] As the *Tidewater* test was created to determine when the Wage Orders govern the employment of California residents, it certainly applies to Eichmann and Flores who are California residents. Whether the test also applies to Lehr (a Nevada-resident) and Oman (a New York-based and resident flight attendant) is an open issue, but if it does not, they would clearly be subject to a more stringent analysis as non-residents.

b. The Job Situs Test Is Easy to Administer and Provides Predictability

The job situs test provides a clear, workable standard that allows both employers and employees to identify the applicable law based on the location where the work is performed. Take, for instance, Plaintiffs' hypothetical employee who begins her employment working in California before transferring to Nevada. POB40.[17] As the hypothetical employee exclusively works in California for the first three weeks of employment, she is presumptively subject to California's laws for that period. Upon her transfer, she had a Nevada work situs that applied to subsequent periods of her employment. This result would not "strip[]...her rights under California law" for the first three weeks of her employment or deny her under Nevada law rights for subsequent periods of employment. Moreover, if a hypothetical employee did not work exclusively or principally in any location, as is the case with air flight crews, the employee would still enjoy the wage-and-hour protections

[17] Plaintiffs rely on a hypothetical employee – instead of themselves – in an effort to make their point, because there is no evidence that Plaintiffs ever worked exclusively (or principally) in California.

of federal law and retain her right to negotiate working conditions pursuant to the Railway Labor Act ("RLA").[18]

Each day flight attendants work in multiple jurisdictions. They spend the vast majority of their work hours in federally-regulated airspace (49 U.S.C. § 40103(a))[19] and at airports located outside of California. This has been true regardless of where they are based or reside and for every pay period in this case. ER 16. For example, in 2014, Oman, a New York-based-and-resident flight attendant, spent 2.9% of his time (14.4 out of 504.9 hours) working in California. SER 126. He never began or ended a Rotation at a California-based airport and did not work in California ***at all*** during nine of the sixteen pay periods that year. SER 103, 239-42. Similarly, during the 21-

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[18] The RLA governs labor relations in the airline industry and is intended to "promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Espinal v. Northwest Airlines* (9th Cir. 1996) 90 F.3d 1452, 1456.

[19] That airspace falls under the U.S. Government's exclusive sovereignty. *See Hirst v. SkyWest Airlines, Inc.* (N.D. Ill. May 24, 2016) 2016 WL 2986978, at *10, n. 13 (Illinois has no sovereignty over the airspace above it; its wage-and-hour laws arguably should not apply to time flight attendants spend over Illinois: "none of the flight time...can be said to have occurred within [the state]"), *appeal docketed*, No. 17-cv-03643 (7th Cir. Dec. 28, 2017). Even amongst transportation industries, the airline industry is unique, as "it is the only one whose operations are conducted almost wholly within federal jurisdiction." S. Rept. 1811, 85th Cong., 2d Sess. (1958).

month period when he was not based in California, Eichmann worked only five Rotations that touched California, three of which were the last flight of his Duty Period. SER 499-506. Even on those few, sporadic days when Oman and Eichmann worked in California (before or after spending the majority of their day working in other jurisdictions), they spent as little as 15 minutes on duty in California.[20]

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[20] Though not presently before this Court, Delta raised that requiring it to comply with California's requirements with respect to Plaintiffs would violate the Dormant Commerce Clause. ECF No. 22 at p. 44 of 67, No. 17-15124 (9th Cir. Aug. 9, 2017). Though the Ninth Circuit has not asked this Court to address any question concerning the Dormant Commerce Clause, the applicable statutes must be construed in a manner that do not raise serious constitutional questions. *See Sullivan*, 51 Cal.4th at 1201. Plaintiffs unquestionably work in and above multiple jurisdictions on a daily basis facilitating passengers from one location to the next through the federally-regulated airspace as part of an "inherently national" industry that requires a "uniform system of regulation." *Montalvo v. Spirit Airlines* (9th Cir. 2007) 508 F.3d 464, 474 ("Regulation on a national basis is required because air transportation is a national operation."). As a result, there are multiple jurisdictions with an interest in each Plaintiffs' employment. This makes it administratively impossible for employers to determine when and how the laws of the multiple jurisdictions apply. For example, when Oman worked a round-trip Duty Period from JFK to LAX and back, with only a 58-minute turn in LAX, would Delta need to ensure that he is compensated for those 58 minutes in accordance with California law or New York law? That question is made even more difficult because New York may consider Oman's time spent in a California airport as incidental work time covered by New York's wage laws. *See, e.g., Hernandez v. NJK Contractors, Inc.* (E.D.N.Y. May 1, 2015) 2015 WL 1966355, at *42 (finding that plaintiffs' commute between their home base in New York and job sites in New Jersey, which inevitably included time spent travelling in New Jersey,

ER 1264-66, 1278-83. They were not "regularly scheduled" to work in California. They were out-of-state employees, who infrequently worked in California as a result of their own bidding preferences. As such, they lack "significant contact or a significant aggregation of contacts" with California to warrant the application of California's minimum wage law to their limited time spent within California. *See, e.g., Aguilar v. Zep, Inc.* (N.D. Cal. Aug. 27, 2014) 2014 WL 4245988, at *13 ("A nonresident plaintiff must allege that there is 'significant contact or significant aggregation of contacts to the claims asserted to ensure that application of the state law to a defendant's conduct would not violate the Constitution.'").

Even the California-based Plaintiffs spent between 86% and 91.4% of their time working outside of California. Like Oman, they had days when they worked in California for as little as 15 minutes (time included in the Duty Period and paid for under Delta's formulae). ER 1284-94, 1332-43; SER 126. Plaintiffs are not employees "who leave the state ***temporarily*** during the course of the ***normal workday***." *Sullivan*, 51 Cal.4th at 1199. They report to their

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would be covered by the New York Labor law because the New Jersey travel was incident to plaintiffs' labor performed in New York).

base for the specific purpose of immediately leaving on multi-day trips where they work and stay in various states,[21] report to airports located throughout the country, and perform duties "designed to facilitate the air transportation of passengers from one location to the next." SER 11-14. As the nature of their job, as well as their own bid preferences, limit their time in California to mere fractions of their overall time worked, Plaintiffs should not be deemed California wage earners covered by California law when they do not principally work in California.

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[21] Notwithstanding that compensation systems like Delta's have been found ***not*** to involve impermissible averaging (*see* ER 19; *Booher v. JetBlue Airways Corp.* (N.D. Cal. Apr. 26, 2016) 2016 WL 1642929, at *3; *DeSaint*, 2015 WL 1888242, at *2), Plaintiffs claim Delta's formula-based system relies upon averaging that is impermissible under California law. Even if Plaintiffs are correct, Plaintiffs have admitted—as they must—that Delta's system "is not unlawful under federal or most states' laws." ECF No. 36 at p. 7 of 36, No. 3:15-cv-00131-WHO (Oct. 14, 2015); *Douglas v. Xerox Bus. Servs., LLC*, 875 F.3d 884, 887 (9th Cir. 2017). In almost every jurisdiction where Plaintiffs work and live, including New York, would allow Delta to satisfy minimum wage law requirements by averaging. In other words, what Plaintiffs brand as unlawful "averaging" in California is perfectly lawful and would not support a claim under the Fair Labor Standards Act or the laws of other states where they are based or resided. *See, e.g., Thind v. Healthfirst Management Services, LLC* (S.D.N.Y. July 29, 2015) 2015 WL 4554252, at **4-5; *Del Rosario v. Labor Ready Se., Inc.* (S.D. Fla. Aug. 25, 2015) 2015 WL 5016613, at *13; *Saginaw Firefighters Ass'n v. City of Saginaw* (1984) 137 Mich. App. 625, 631-32; Nev. Admin. Code § 608.115 (2004).

In correctly holding that Sections 204 and 226 do not apply to Plaintiffs, the district court went beyond the job situs test and stated that "[t]o determine whether a particular California Labor Code provision should apply in a situation where work was performed in California *and* in other jurisdictions, the appropriate analysis must focus on the particular Labor Code provision invoked, the nature of the work being performed, the amount of work being performed in California, and the residence of the plaintiff and the employer." ER 15. Delta believes the appropriate test is the job situs test.[22]

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[22] Focusing on the employee or employer's residence as a part of the basic test can lead to various anomalous results. First, residency turns on several factors. "The term 'resident,' as defined in the law, includes (1) every individual who is in [California] for other than a temporary or transitory purpose; and (2) every individual who is domiciled in [California] who is outside the State for a temporary or transitory purpose." 18 CCR § 17014(a). Accordingly, a flight attendant can be a resident of California without being domiciled in California, and, conversely, could be domiciled in California without being a resident. *Id.*; *see also* 18 C.C.R. § 17014(c) ("Domicile has been defined as the place where an individual has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the *intention* of returning."). Accordingly, it is not always easy or possible for an employer to know an employee's actual "residence" in real time. Second, flight attendants and pilots are highly mobile and may not reside in the state where they are based, as evidenced by Lehr in this case who resides in Nevada but is based out of SFO. Third, focusing on the employer's residence may create incentives for employers to locate themselves outside of California and ship workers into the state to avoid application of California law. *See Ward*, 2016 WL 3906077, at *4.

Nonetheless, the district court reached the correct conclusion: Sections 204 and 226 do not apply to Plaintiffs, because "the undisputed facts show that the named plaintiffs only worked a *de minimis* amount of time in California (ranging from 2.6% to a high of 14%), and in light of the nature of their work ("necessarily working in federal airspace as well as in multiple other jurisdictions...during each pay period *and day* at issue...."). ER 16.[23]

The job situs test avoids these issues by focusing on where the work is actually performed.

[23] Plaintiffs chastise the district court's use of the phrase "*de minimis*" in its ruling and argue that *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 "eliminates the argument, relied on by the district court, that there should be an exemption to Sections 226 and 204 because the 'plaintiffs only worked a *de minimis* amount of time in California...." POB 39. But the district court's decision regarding wage statements and wage payment intervals did not rely upon the *de minimis*, off-the-clock doctrine set forth in *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, and recently addressed in *Troester* – a case focused entirely on unpaid wage claims. ER 15. Moreover, in *Troester*, this Court was not asked whether certain California wage-and-hour laws apply to "an employee who...works in California only episodically and for less than a day at a time" as it is here. There was no dispute as to whether the *Troester* plaintiff "principally, or exclusively" worked in California: he was a shift supervisor working exclusively at a California-based Starbucks, *see id.* at 835.

2. Plaintiffs' Proposed Standard Is Impractical, Creates Conflicts Of Law, And Results In An Impermissible Extraterritorial Application Of California Law

a. Plaintiff's Proposed Standard Is Unworkable

Plaintiffs notably refrain from specifying how Delta would comply with their "any work done in California" standard. That is because under either interpretation, their standard is unworkable.

The first interpretation is that California law applies to the limited work Plaintiffs perform in California and leave all other work governed by some other jurisdiction's law. If Delta is required to comply with California law only with respect to Plaintiffs' limited work performed in California, Delta would have to provide a California-compliant wage statement covering limited amounts of California-situs work time and pay only those amounts in accordance with Section 204, while paying and reporting other time in accordance with the laws of other jurisdictions where Plaintiffs worked. To accomplish this, Delta would have to monitor each Plaintiff's schedule on a flight-by-flight basis, determine the jurisdictions where Plaintiffs work, the amount of time spent working there, and then convert Plaintiffs' credits into an hourly-equivalent reflecting the

wages earned in each jurisdiction, and then pay those wages and provide the corresponding wage statements within the timeframes set forth by each jurisdiction. Such a system is not even remotely "workable."

The alternative interpretation is that California law would govern Plaintiffs' entire pay period, including their wage statements and the timing of their payments, once they set foot in California, no matter for how long. That is, Sections 204 and 226 will directly control how Plaintiffs will be paid and the manner in which that pay is reported in every state (and country) in which Plaintiffs work during that pay period. Take, for example, Oman's January 16 through 31, 2014 pay period, during which he worked three Rotations, that began and ended in New York. SER 103, 106. During those Rotations, Oman was present at eight other airports located in seven different states (including California) and Senegal. SER 103. Under Plaintiffs' theory, once Oman arrived at SFO at the end of his second Duty Period, California law would govern, at a minimum, the manner in which he was paid and the wage statement he was to receive for that pay period, including for work he performed in New York and Georgia before arriving in California. SER 106, 127, 239. California

law would then also govern work Oman performed after departing California—in six other states (including New York again) and one foreign country. *Id.* California law would also be stretched to apply to six other pay periods (out of 15) where Oman performed some work in California in 2014.[24] For each pay period, Plaintiffs would maintain that Oman's limited time worked in California, whenever it occurs, regulates his wages and wage statement regardless of his time spent working outside of California. That too is unworkable.

b. Plaintiff's Proposed Standard Creates Unnecessary Conflicts of Law

As the Court held in *Sullivan*, and the Ninth Circuit noted in its certification order in this case, courts must balance California's interest in applying its law with considerations of "interstate comity," in order to avoid unnecessary conflicts of state law. *Oman*, 889 F.3d at 1079. Courts resolve conflict of law issues by applying a three-step governmental interest analysis: (1) whether the law of each potentially affected jurisdiction with respect to the issue in question is the same or different; (2) if there is a difference, the jurisdictions'

[24] Plaintiffs do not even attempt to explain how their proposed test would determine which jurisdiction's laws would apply to Oman during the remaining nine pay periods when he never worked in California.

interest in the application of their own laws under the circumstances of the case to determine whether a true conflict exists; and (3) the nature and strength of each jurisdiction's interest in the application of its own law "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state," applying "the law of the state whose interest would be more impaired if its law were not applied." *Sullivan*, 51 Cal.4th at 1202-03.

Under Plaintiffs' proposed "any work done in California" approach, every jurisdiction in which Plaintiffs work potentially could claim that its laws apply because every state has the same "police powers" as California "to regulate the employment relationship to protect workers within the state." POB 28; *see also Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 592 ("California law also acknowledges that a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders...."). As one court noted in the airline context, "each state and locality defines the parameters of its own wage laws", consequently, "it can be assumed that if California, or any other state, were permitted to enforce its labor laws against interstate airlines, every other state would also be permitted to enforce their labor laws to the extent

applicable." *Hirst v. Skywest, Inc.* (N.D. Ill. 2017) 283 F.Supp.3d 684, 700; *see also Mazza*, 666 F.3d at 592 (district court erred in concluding "no foreign state has 'an interest in denying its citizens recovery under California's potentially more comprehensive consumer protection laws,'"; court improperly discounted other states' valid interests).

If every state where Plaintiffs worked could apply its laws, each of numerous jurisdictions could claim that their laws govern Plaintiffs' employment on any given day. Many jurisdictions hold their laws apply to work performed in their state, even if that work is temporary or performed by an out-of-state employee. *See, e.g., Himes Assocs., Ltd. v. Anderson* (Md. Ct. Spec. App. 2008) 943 A.2d 30 (Maryland Wage Payment and Collection Law applied to a project manager based in Virginia because employee attended meetings twice per month in Baltimore); *Mulford v. Computer Leasing, Inc.* (N.J. Law. Div. 1999) 759 A.2d 887, 891 (New Jersey has "paramount interest" in enforcing its wage-and-hour laws against a New York employer employing workers in New Jersey); Mass. Gen. Laws Ann. ch. 151, § 1 (Massachusetts wage laws apply to "any person" employed "in this commonwealth"); Fla. Stat. Ann. § 448.110

(Florida minimum wage law applies to "all hours worked in Florida"); 7 CCR 1103-1 (Colorado wage laws apply to employees who perform work "within the boundaries of the state of Colorado").[25] To determine whether California or some other jurisdiction's laws apply to Plaintiffs, a governmental interest analysis would need to be performed for each Plaintiff for each pay period worked. For example, in the January 16 to 31, 2014, pay period for Oman, he spent 65.3% of his time in the air and 34.7% of his time on the ground in Minnesota (14%), New York (10.8%), Senegal (2.1%), California (2%), Georgia (1.7%), South Dakota (1.6%), Tennessee (1.6%), and Montana (1.9%). SER 103, 127. So which, if any, state's minimum wage, pay statement, and timing of pay laws should apply to Oman in this pay period? Under Plaintiffs' "any work done in California" standard, for each of these jurisdictions a determination would have to be made as to whether the laws at issue were the same or different, whether a true conflict exists, and the nature and strength of the

[25] Certain states also hold that work an employee performs in a second state is incidental to the work performed in the first state such that the first state's law applies to all work in both states. *See, e.g., Hernandez,* 2015 WL 1966355, at *42; *Bostain v. Food Express, Inc.* (2007) 159 Wash. 2d 700, 710-11 (Washington-based interstate truckers are protected by Washington's wage and hour laws).

interest of each jurisdiction in applying its own law.[26] *Sullivan*, 51 Cal. 4th at 1202-03. The answer to this conflict of laws question is not readily apparent and likely would differ pay period to pay period depending on the jurisdictions where Plaintiffs worked. Moreover, the analysis involved to arrive at an answer would be extremely complicated for an employer to perform at all, let alone repeatedly and in the normal course of its business (and there will always be the risk a court may later disagree with the employer's analysis). By contrast, the job situs test furnishes a clear answer: Because Oman did not exclusively or principally work in any particular state during this pay period, no state's minimum wage, timing of pay, or wage statement laws apply to him. Rather, federal law governs, which is appropriate

[26] An examination of the various wage statement and timing of pay laws across the country shows that they impose inconsistent and contradictory requirements. ECF No. 22 at pp. 50-53 of 67, No. 17-15124 (9th Cir. Aug. 9, 2017); SER 5. Plaintiffs have already conceded – as they must – that a California-compliant wage statement would not comply with the requirements of every state. ECF No. 31 at pp. 31-32 of 43, No. 17-15125 (9th Cir. Aug. 30, 2017). The same is true if Delta were required to pay everyone in accordance with Section 204 – the timing of those payments would not comply with every state's law. *See, e.g.*, Mass. Gen Laws Ann. 149, § 148 (employee pay required within six days following the end of the pay period).

given Oman worked predominantly in federally-regulated airspace and also in eight different jurisdictions.

c. Plaintiffs Proposed Standard Results In The Impermissible Extraterritorial Application Of California Law

(1) *The Wage And Hour Laws At Issue May Not Be Applied Extraterritorially*

California did not intend its laws to apply extraterritorially (and the Dormant Commerce Clause precludes it from doing so).[27] Similarly, California law cannot follow workers into every jurisdiction where their work takes them, because there is a presumption against the extraterritorial application of California law. *North Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1, 4. This presumption is rebutted only when a contrary intent is "clearly

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[27] In the federal courts, Delta has argued that the application of California law in the manner Plaintiffs demand would violate the Dormant Commerce Clause. Plaintiffs' argument is that Delta would have to pay wages in accordance with Section 204 and provide a California-compliant wage statement to Oman for a pay period in which he worked outside of California ***ninety-eight percent*** of the time. SER 103. That result would improperly allow California to project its laws into every other state where Oman worked. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.* (1986) 476 U.S. 573, 583 (holding states may not project their legislation into other states even when the law in question is limited to activities occurring within the state if the practical effect of the law is to control activities occurring in other states). Such constitutional issues are not among those certified to this Court.

expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history." *Id.* at 4.

Despite Plaintiffs' protracted analysis of other California laws, nothing in the language, purpose, subject matter, or history of Sections 204 or 226 expresses or even suggests any intent to override the presumption against extraterritorial application of California laws – an intent the legislature expresses when it wishes to do so, as it has done with certain workers' compensation laws. *Tidewater*, 14 Cal. 4th at 577 (noting that, "[i]n some circumstances, state employment law explicitly governs employment outside the state's territorial boundaries."); *Holmes v. Jones* (2000) 83 Cal. App. 4th 882, 890 ("Where a statute with reference to one subject contains a general provision, omission of that provision from a similar statute concerning a related subject shows that a different intention existed."). As the district court correctly recognized, this absence of any intent to apply California law beyond state borders is reinforced by Section 226's recent amendment, which was made in response to a federal court decision involving the outside salesperson exemption from overtime pay requirements: *Garnett v. ADT, LLC* (E.D. Cal. 2015) 138 F.Supp.3d 1121, 1130-31; *see also* ER 16 ("Plaintiffs also make a

totally unfounded legislative history argument that recent amendments to Section 226 evince the legislature's intent to apply Section 226 to all other workers who sometimes work outside of the state.").[28] Nothing about the Section 226 amendment relates to its alleged extraterritorial application. Nor does anything within the recently adopted Section 226.2, codifying the holdings in *Gonzalez* and *Bluford v. Safeway Inc.* (2013) 216 Cal.App.4th 864, 867, suggest that California's minimum wage or wage statement requirements apply to employees "who ... work[] in California only episodically and for less than a day at a time."

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[28] The legislature amended Section 226 to extend its exemption for employees whose compensation is solely based on a salary to ***all*** employees exempt from overtime after recognizing the futility of requiring employers to report the hours worked for exempt employees, because they are not paid by the hour or eligible for overtime. ER 176-180 (Sen. Lab & Ind. Rel. Committee, Senate Floor Analysis for AB2535 (June 29, 2016)). That list of existing exempt employees includes crew members on commercial passenger fishing boats who are exempt under IWC Wage Order No. 10, which applies to the Amusement and Recreation Industry. IWC Wage Order 10-2001(1)(H); Cal. Lab. Code §226(a). Plaintiffs' efforts to analogize the position of crewmembers on a commercial passenger fishing boat with that of flight attendants is misguided, as 98.7% of all commercial fishing occurs within California's waters. SER 87-96. Even in those limited instances where fishing boats enter international waters, they do so temporarily, as part of their normal workday. Commercial fisherman are not, like Plaintiffs, spending mere fractions of their work time in California.

Plaintiffs' reliance on Wage Order 9 and California's paid sick leave law are unavailing. Nothing in the text, purpose, subject matter, or history of Wage Order 9 suggests that it has extraterritorial application. Similarly, nothing suggests the legislature contemplated extraterritorial application of California's paid sick leave law when it amended the law to exclude "flight deck and cabin crew." Further, while Plaintiffs claim the amendment shows the Legislature knows "how to exclude certain employees or employers when that was their intent," the legislature plainly understands how to express its clear intent that a law should apply extraterritorially, as it did with workers' compensation laws. *Tidewater*, 14 Cal.4th at 577.

(2) *Plaintiffs Impermissibly Seek Exterritorial Application of California Law*

Though Plaintiffs claim they only seek California's protections for their ground time worked in California, their legal theory would require Delta to apply California's laws to all time worked, including work performed outside of California. Labor Code Sections 204 and 226 do not govern a particular moment within respective Plaintiffs' workdays, but rather the manner in which Delta provides payments and corresponding wage statements for an entire pay period. As a

result, if Sections 204 and 226 apply to Plaintiffs whenever they work in California, then all wages Plaintiffs earn during that pay period would need to be paid in accordance with Section 204 and reported on a California wage statement "regardless of where the bulk of [their] work in the relevant pay period is performed." ER 13-14. For example, during the April 15 through 30, 2015 pay period, Flores worked at airports located in nine different states and was on duty in Minnesota almost three times longer than he was on duty in California. SER 127. Nonetheless, Plaintiffs contend that Sections 204 and 226 still govern Flores' employment, including the work he performed in Minnesota and seven other states, which would result in an impermissible extraterritorial application of California law.

Applying California law would also not advance the purpose of the wage payment and wage statement laws. The purpose of Section 226 is "to give employees clarity as to how their wages are calculated, so they can verify that their wages are calculated *under* California law." ER 16. As Plaintiffs primarily work outside of California, that purpose cannot be advanced by imposing statutory requirements on Plaintiffs who do not work principally in California. There is no basis for any argument that Delta's wage statements or the timing of its

wage payments, must comply with California law as to wages earned for work performed outside of California. As the district court held in *Ward*, "Section 226 must be subject to the same jurisdictional limits as the wage-and-hour statutes and regulations to which it relates." 2016 WL 3906077, at *4-5. Finding that the same rationale applies to Section 204, the district court correctly declined to apply Sections 226 and 204 to Plaintiffs here. ER 16-17.

3. Other Decisions Regarding The Applicability Of California Law Support Use Of The Job Situs Test

Regardless of the test this Court adopts, it is clear that the situs of Plaintiffs' employment must be a factor, even if not the only one. Every decision involving flight attendants and pilots has taken into consideration the location of the employees' actual work. Each court considering an out-of-state airline like Delta has deemed time worked in California like that found in this record insufficient to justify the application of California law. ER 16 (Section 226 does not apply because Plaintiffs only worked between "2.6% to a high of 14%" of their time in California); *Ward,* 2016 WL 3906077, at *6 (Section 226 does not apply to pilots who spent as little as 58% of their time working outside of California); *Vidrio v. United Airlines, Inc.* (C.D.

Cal. Mar. 15, 2017) 2017 WL 1034200, at *6 (Section 226 does not apply to flight attendants who spent more than 82% of their time working outside of California); *Booher v. JetBlue Airways Corp.*, 2017 WL 6343470, at *7 (flight attendants who spent 83.2% and 74.6% their hours working outside of California principally worked outside of California and, thus, Section 226 did not apply to them); *see also Shook v. Indian River Transport Co.* (E.D. Cal. Feb. 15, 2017) 2017 WL 633895, at *6-7 (declining to apply California law to California-resident drivers whose routes began or ended in California; these drivers spent the majority of their work time outside of California); *Sarviss v. Gen. Dynamics Info. Tech., Inc.* (C.D. Cal. 2009) 633 F.Supp.2d 883, 899 (holding California law inapplicable to California resident who spent 80-90% of his work time outside of California). In the only case applying the California Labor Code to flight attendants, *Bernstein v. Virgin America,* the district court predicated its decision on the percentage of time those plaintiffs worked in California for an employer—Virgin America—that had what the district court characterized as "deep ties" to California, including: its California headquarters, where the employment policies at issue were conceived and implemented; that almost 90% of

Virgin's daily flights departed from California; and that Virgin purportedly received millions of dollars in state subsidies to train flight attendants in California. Ber.[29] Though Delta does not believe that the *Bernstein* multi-factor analysis should be used to determine whether California's laws apply, Delta still would prevail under a test like that used in *Bernstein*. As the district court here correctly decided, Delta lacks sufficient "ties" to California. ER 15-16.

B. Delta's Formula-Based System Does Not Average Wages; Nonetheless, The Answer To The Third Certified Question Is, No, The *Armenta/Gonzalez* Bar On Averaging Wages Does Not Apply To A Pay Formula That Awards Credit For All Hours On Duty

Delta's formula-based system fully complies with California's requirement that Plaintiffs receive the minimum wage rate for all hours worked. No matter which formula ultimately determines the compensation Delta pays Plaintiffs for their Duty Period, the outcome

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[29] *Bernstein* also factored in the plaintiffs' purported state of residence. As *Ward* noted, however, any argument that an employee's residence in California would result in Section 226 governing the form of her wage statement, "would yield absurd results. An employer in Nevada would need to apply Nevada wage-and-hour law to all paychecks, but it would need to comply with the wage-statement laws of each state of residence of its employees. Similarly, a California wage earner who resides elsewhere would not be entitled to the added protections guaranteed by California's wage statement statute." 2016 WL 3906077, at *4.

is the same – Delta compensates Plaintiffs for every minute they work at an hourly rate that exceeds the California minimum wage.

There is no dispute that the Duty Period encompasses each hour that Plaintiffs are on duty, including all of the alleged unpaid time. There is also no dispute that, through the bid packets, Plaintiffs know in advance the guaranteed, minimum credit amount for each particular Duty Period and Rotation they bid on and work, and that Delta has always credited Plaintiffs with the guaranteed or actual amount (whichever is greater) due to them. Plaintiffs do not claim that there is a single instance in which they were not paid in accordance with Delta's formula-based system. Instead, Plaintiffs chastise the system for not being an hourly system and challenge its legitimacy by citing cases interpreting piece-rate systems. But Delta's formula-based system is neither, and unlike the compensation systems in the series of cases upon which Plaintiffs rely, Delta's system assures that Plaintiffs are paid for each hour on duty and at a rate that is well above California's minimum wage rate. If California minimum wage laws apply, Delta complied with them.

As correctly held by the district court, "Delta's formulas ensure that Flight Attendants are compensated for *all* time spent on Duty"

and "expressly consider all hours worked in the first instance." ER 19, 31-32; *see also DeSaint*, 2015 WL 1888242, at *2; *Booher*, 2016 WL 1642929, at *3. "Delta is not arguing, as the *Armenta* defendant did, that it can avoid paying Flight Attendants for certain hours on duty because when considering all hours on Duty the average amount earned exceeds California's minimum wage floor." ER 31. Nor is Delta "using a post-hoc averaging to ensure the state's minimum wage floor is met" as the defendant did in *Gonzalez*. ER 35. Rather, Delta's formulae, in the first instance, determine the amount Plaintiffs will be credited for ***each duty period***. ER 23, 363.

California law is clear that a transportation employer like Delta must compensate its non-exempt employees at a rate equivalent to at least the minimum wage and pay them for all hours worked. *See* 8 Cal. Admin. Code §§ 11090(1), (4)(B). They can do so on a "time, piece-rate, commission, *or other basis*." 8 Cal. Admin. Code § 11090(1); *see also id.* at § 11090(4)(B) (every employer must pay a covered employee "not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission or *otherwise*"). Throughout the pendency of this case, Plaintiffs have insisted that courts read the "or

other basis" or "otherwise" language out of Wage Order 9 and require Delta to pay them on an hourly-basis.[30] California law, however, provides Delta the flexibility to utilize other methodologies for determining compensation as long as Plaintiffs are paid above the hourly minimum wage for all hours worked, which Delta does.

Delta's system ensures that no time goes unaccounted for or uncompensated by paying Plaintiffs the highest amount available under the formulae for each Duty Period (*i.e.*, all hours on duty). The formulae individually focus on particular periods of time within a Rotation (or, in the case of the Minimum Duty Period Credit, ensures Plaintiffs receive at least 4 hours, 45 minutes for each Duty Period). The Trip Credit Formula measures the Plaintiffs' total Time Away From Base, including all off-duty time between Duty Periods, and

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[30] Principles of statutory construction require this Court to give the phrases "or other basis" and "otherwise" not just meaning but a meaning other than "time, piece rate, [or] commission." *Torrey Hills Cmty. Coalition v. City of San Diego* (2010) 186 Cal.App.4th 429, 440 ("[E]ffect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."). Plaintiffs' effort to either read those phrases out of the wage order or to give them a meaning strictly relating to hourly or time-based compensation would be inconsistent with the plain language of the Wage Order, and must therefore be rejected.

credits Plaintiffs one hour at their Flight Pay Rate for every three-and-one-half they spend away from base. The Flight Pay Formula measures the Plaintiffs' scheduled and actual flight times, and multiplies whichever is greater by their Flight Pay Rate. Finally, the Duty Period Credit Formula measures the time between Plaintiffs' report and release for each Duty Period, divides that time by two and multiplies the resulting amount by their Flight Pay Rate.[31] There is no dispute that each formula is applied to every trip Plaintiffs work and that Plaintiffs are, and always have been, credited with the greatest amount of compensation generated by the formulae. And no matter which formula ends up generating the greatest compensation, the resulting pay covers all hours on duty. ER 17, 23.

The nature of Delta's formulae results in each serving as a minimum compensation guarantee. For instance, the Minimum Duty Period Credit Formula ensures that Plaintiffs never receive less than 4 hours, 45 minutes for any Duty Period. More importantly here, the

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[31] As a matter of basic mathematics, the Duty Period Credit Formula necessarily compensates for each hour worked within the Duty Period. *See Douglas*, 875 F.3d at 887 (noting that both the per-hour and averaging methodologies for establishing minimum wage compliance "accomplish the stated goal [under the FLSA]: employees receive compensation for every hour worked at a rate no less than the...prescribed minimum hourly wage").

Duty Period Credit Formula guarantees that Plaintiffs receive, at a minimum, half of their Flight Pay Rate for each hour they work. Accordingly, Plaintiffs each earned at least $22.87 for each hour they were on duty. For those Duty Periods where a different formula is applied, it is because that other formula provides greater compensation.

Nonetheless, Plaintiffs contend that whenever Delta uses a specific formula to calculate their pay, the use of that formula limits the resulting compensation to the period of time utilized in that calculation. Specifically, Plaintiffs contend that when they are paid pursuant to the Flight Pay Formula, they are only compensated for flight time, and not for pre- and post-flight work. POB 50.

Delta does not dispute that the Flight Pay Formula is used to determine compensation. However, it is used only when it generates the highest credit amount when compared with the four formulae. Further, while the Flight Pay Formula uses Plaintiffs' flight time as a variable in its calculation, it still pays Plaintiffs for all hours on duty. ER 363.

In arguing otherwise, Plaintiffs misinterpret Delta's formulae and how they are applied. Consider Plaintiffs' arguments in a world

where Delta did not publicize the formulae. What if Delta set and published the credit value for each trip without divulging how it determined that value? [32] For instance, Plaintiffs cite Oman's February 15, 2014 and February 17, 2014 Duty Periods as purported examples of why Delta's system is unlawful. On those days, Oman earned approximately $273.11 for a 7 hour, 32-minute-long Duty Period ($49.96 x 5.467 credits) and approximately $283.94 for a 6 hour, 57-minute-long Duty Period ($49.96 x 5.683 credits), respectively, under the Flight Pay Formula (excluding any premiums).[33] If Oman was simply told in advance that he would earn a flat amount of $273.11 for February 15, 2014 and $283.94 for February 17, 2014 for all hours on duty during the Duty Period, Plaintiffs would have no challenge to such a system because using a

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[32] As stated above, through the bid packets, Plaintiffs learn the expected value of each Rotation and Duty Period and can determine their projected compensation under each formula in advance. SER 308, 318, 481-82.

[33] Though the Duty Periods consisted of the same flight–LAX to JFK—the February 2014 Bid Packet showed anticipated credit amounts based upon the anticipated formula to be applied and the scheduled times. Nonetheless, in each instance, Oman received more credits than initially scheduled because of extenuating circumstances. The fact that Oman received more credits for February 17 – despite being on duty longer on February 15 – does not render Delta's compensation system improper.

flat rate for all hours worked is legal in California, as long as the employee is paid at least minimum wage for all hours worked. *See, e.g., Moore v. C.R. England, Inc.* (C.D. Cal. Aug. 29, 2011) 2011 WL 13189805, at *9, *18 (holding employer's policy of paying flat daily rate complied with California minimum wage law, because, based on an eight-hour work day in California, the plaintiff earned more than the applicable hourly minimum wage). But because Delta discloses to Plaintiffs how it calculates the minimum compensation guarantee for each Duty Period, rather than simply stating the guaranteed amount, Plaintiffs argue that Delta's formula-based system is somehow unlawful. That Delta could have called Plaintiffs' pay a "piece rate," "daily rate," or even "Duty Period rate" and in so doing provided significantly less transparency and information than it does to Plaintiffs about their pay, yet still comply with California minimum wage law, reveals that Plaintiffs' challenge to Delta's pay system is nothing more than semantics.

Again, Delta informs Plaintiffs of the minimum compensation for each trip in advance through the bid packets. That guaranteed compensation will only increase if, as a result of the trip, one of the formulae generates a higher credit amount, or in instances of, for

example, suspended departures, extended flight times, or deplaning delays. SER 99, 463, 600, 617-19. At the same time, the guaranteed compensation will not decrease if, as a result of the trip, each formula generates a credit amount lower than that published in the bid packet. Delta accurately records all of Plaintiffs' time on duty (and beyond in the case of the Trip Pay Credit Formula), and pays them more than is necessary when the individual circumstances of their Duty Periods and Rotations warrant such an increase.

As they did before the federal courts, Plaintiffs argue that authorizing Delta's formula-based system to determine their compensation is tantamount to permitting Delta to engage in the post-hoc averaging that California courts disapprove. But the "averaging" Plaintiffs attribute to Delta is the mathematical equation Plaintiffs insist on performing to convert their Duty Period compensation into an hourly-equivalent pay rate: their total compensation divided by their total hours on duty.

That same equation needs to be performed under any permissible compensation system (with the exception of an hourly-compensation system under which the equation would be redundant) to calculate an hourly-equivalent pay rate. Plaintiffs' use of that

equation, however, does not convert Delta's formula-based compensation system into impermissible averaging. Nor is Delta's system rendered improper by the fact the resulting hourly-equivalent pay rates may vary depending on the Duty Period. *See In re Certified Tire & Serv. Ctrs. Wage & Hour Cases* (2018) 238 Cal. Rptr. 3d 825, 826, 834-35 (although plaintiffs' hourly rate differed from pay period to pay period, defendant's compensation system complied with California law because plaintiffs were always paid at a rate above minimum wage).[34] Plaintiffs must be paid at least the minimum wage

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[34] Though the defendant's compensation system in *Certified Tire* was ultimately deemed to be a California-compliant hourly-system, the court's analysis is instructive here. There, the technicians were guaranteed to earn an agreed-upon minimum hourly rate for each hour worked and could earn a higher hourly rate based on a formula tied to "each billed dollar of labor charged to a customer as a result of the technician's work during the pay period [that] is referred to as the technician's 'production dollars.'" *Id.* at 827. Here, by contrast, Plaintiffs are guaranteed to earn at least half their Flight Pay Rate for each hour they are on duty, and may earn additional compensation if one of the other formulae generates a higher credit value. ER 367; SER 487 & 614. In *Certified Tire*, plaintiffs argued that when the alternative formula applied, the technicians were not paid for all hours worked and "earn no wages for time spent on tasks that do not generate labor dollars for [Certified Tire] (*i.e.*, oil changes, tire rotations, cleaning, meeting, Preventative Maintenance Analysis (PMA), running errands and waiting for customer cars to work on) since those tasks do not add to 'Production Dollars'...." *Id.* at 829-30. Here, Plaintiffs argue that when the Flight Pay Formula applies, they are not paid for work performed pre- and post-flight because those hours are not incorporated in the time variable used in the Flight Pay

for all hours worked and that is precisely what occurs under Delta's system.

Delta's system does not involve post-hoc averaging of the kind addressed in *Armenta* and *Gonzalez*. In *Armenta*, the employer compensated employees only for hours it classified as "productive hours," refusing to compensate for "non-productive" hours during the workday, including driving time and time spent processing paperwork. 135 Cal.App.4th at 317, 324. The employer argued it had not violated California's minimum wage law because, consistent with the "averaging" method utilized by federal courts, when each employee's weekly earnings for productive hours were divided by total hours (*i.e.*, productive hours plus non-productive hours) the resulting average hourly rate exceeded California's minimum wage. *Id.* at 319. The court of appeal rejected the employer's argument and use of the federal, averaging model when deciding if the employer fulfilled its minimum wage obligation. *Id.* at 324.

Formula calculation. The court rejected the plaintiffs' arguments because "technicians earn wages for every single work activity that they perform, including waiting for customers and performing tasks that do not have billed labor costs associated with them." *Id.* at 834. This Court should similarly reject Plaintiffs' arguments here, because the formulae determine the pay Plaintiffs receive for each hour they work.

Gonzalez is equally inapposite. There, the defendant credited its service technicians with a pre-determined amount for repair work technicians completed and did so regardless of the actual time expended as well as other time when technicians were "on duty." 215 Cal.App.4th at 41; ER 34-35.[35]

Delta is not excluding certain hours Plaintiffs work from its compensation policy. Its formulae are fully transparent and Delta fully discloses the credits Plaintiffs will earn in advance. Delta may adjust those estimated credits depending upon the circumstances of Plaintiffs' trip, but those adjustments only increase compensation and never to reduce it. *See* ER 35 ("Delta is not attempting to avoid paying an agreed-to hourly rate for specific tasks and is not using a

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[35] Plaintiffs rely heavily on a series of cases – including *Gonzalez* – addressing piece-rate compensation. *See Wright v. Renzenberger, Inc.* (C.D. Cal. Mar. 8, 2018) 2018 WL 1975076; *Ontiveros v. Safelite Fulfillment, Inc.* (C.D. Cal. Feb. 7, 2017) 2017 WL 679167; *Fowler Packing Co., Inc. v. Lanier* (9th Cir. 2016) 844 F.3d 809; *Villalpando v. Exel Direct Inc.* (N.D. Cal. 2016) 161 F.Supp.3d 873; *Sandoval v. M1 Auto Collision Centers* (N.D. Cal. Sept. 23, 2016) 2016 WL 6561580; *Ontiveros v. Zamora* (E.D. Cal. Feb. 20, 2009) 2009 WL 425962. Delta does not use a piece-rate system. Even if Delta did, that system would still comply with California law. Here, the "piece" for which Plaintiffs are paid would be the Duty Period, which includes all time Plaintiffs are on duty, including all pre-departure, turn, and deplaning time. *Cf. Moore*, 2011 WL 13189805, at *9, *18. Plaintiffs cannot show that there are uncompensated tasks they perform that fall outside of the "piece."

post-hoc averaging to ensure the state's minimum wage floor is met....Delta's Work Rules function in a different, fully-disclosed way to ensure that Flight Attendants are paid for each hour worked....") (comparing *Gonzalez*); and ER 32 ("This is not a case where the amount earned at an agreed-to rate for 'paid hours" is used to compensate other unpaid work.") (comparing *Ontiveros,* 2009 WL 425962). Moreover, unlike the employer's piece-rate system in *Gonzalez*, Delta does not apply its formulae only when Plaintiffs would earn less than the minimum wage to increase their compensation above the "minimum-wage 'floor.'" *See* POB 51. Rather, Plaintiffs were guaranteed to earn well above the California minimum wage in the first instance, and Delta's formulae simply determine how much more Plaintiffs may be paid.

Plaintiffs' remaining cases are also distinguishable. Delta does not withhold sums owed (*compare Quezada v. Con-Way Freight, Inc.* (N.D. Cal. Jan. 16, 2014) 2014 WL 186224, at *2), use wages for compensable time to satisfy minimum wage obligations for uncompensated time or time compensated at less than minimum wage (*compare id.*), or use compensation from a subsequent pay period to cover an earlier shortfall. *Compare Vaquero v. Stoneledge Furniture*

(2017) 9 Cal.App.5th 98.[36] Delta's formulae account for all hours worked in the first instance.

Plaintiffs also do not claim, and there is no evidence, that Delta ever failed to credit them with the guaranteed or actual amount due (whichever is greater). This is not a case where Delta prevented flight attendants from performing compensable tasks by requiring them to perform non-compensable tasks. ER 33. Nor does *Quezada v. Con-Way Freight, Inc.* (N.D. Cal. July 11, 2012) 2012 WL 2847609 apply, as Delta's system is not a "built into" pay scheme; Plaintiffs are paid for all hours worked at a rate that is fully disclosed. ER 33-34.

Further, Plaintiffs are not expected to perform tasks that are specifically designated as "unpaid," as was the case with the drivers in *Ridgeway v. Wal-Mart Stores.* (N.D. Cal. May 28, 2015) 2015 WL 3451966 at n. 6 (defendant's manual specified that employees would not be paid for certain activities); *see* ER 34. Delta does not have one formula that is limited to a certain period of time or that ignores Plaintiffs' pre- and post-flight responsibilities, as the defendant did in

[36] Unlike the commission-based compensation system in *Vaquero*, or the piece-rate system in *Sandoval v. M1 Auto Collision Centers* (N.D. Cal. Sept. 23, 2016) 2016 WL 6561580, Delta's system accounts for and pays for all California-mandated rest periods, as they occur within the Duty Period for which total compensation is calculated.

Cardenas v. McLane Foodservices, Inc. (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1253 (pay formula consisted of a calculation based on the number of cases of product delivered, the number of miles driven, and the number of stops, but ignored pre and post-shift duties and breaks); *see* ER 32-33 ("Delta's Work Rules do not suffer from the same defect identified by the *Cardenas* court, where the applicable pay formula did not calculate for the pre and post shift duties required by the employer. Instead, the Work Rules expressly consider all hours worked, and a Flight Attendant will always be paid the highest value...under the applicable formulae."). Finally, Plaintiffs never had a period of time on duty when they could not earn wages. Delta did not prohibit Plaintiffs from generating compensation because they were performing non-compensable activities that suppressed the compensation of the sales people in *Balasanyan v. Nordstrom, Inc.* (S.D. Cal. 2011) 913 F.Supp.2d 1001; *see also* ER 33 ("[T]he Delta Work Rules do not require Flight Attendants to perform uncompensated tasks at the expense of their ability to perform compensated tasks....").

Unlike the compensation systems found unlawful in those cases, Delta accounts for every contingency within Plaintiffs' Duty

Periods and ensures that the formulae measure and cover those contingencies. As a result, Delta pays Plaintiffs at a rate that far exceeds the minimum wage for each hour they work. Even if the Court were to construe Delta's pay system as "averaging" (which Delta does not do), *Armenta* and *Gonzalez* do not impose a *per se* ban on averaging, nor could they have based on Wage Order 9 permitting employers to pay on a "time, piece-rate, commission, or other basis." For example, an employer who pays on a piece-rate basis cannot ascertain whether it has paid a worker for all "productive" hours at or above minimum wage unless it averages the compensation earned on a piece-rate basis over the productive hours. Compliance with the minimum wage requirements is determined mathematically by averaging the total compensation for productive time by the total productive hours worked.

Furthermore, Delta's pay formulas are wholly consistent with the history and purposes underlying California's minimum wage law, which this Court recounted in *Martinez v. Combs* (2010) 49 Cal.4th 35, 52-57. In 1913, the Legislature created the Industrial Welfare Commission ("IWC") and delegated to it "broad authority to regulate the hours, wages and labor conditions of women and minors," with

the IWC's jurisdiction later expanding to include all employees. *Id.* at 54. The IWC issued wage orders fixing for each industry "[a] minimum wage to be paid . . . adequate to supply . . . the necessary cost of proper living and to maintain [their] health and welfare, the maximum hours of work, and the standard conditions of labor." *Id.* at 56 (internal quotations and citations removed).

When instituting a minimum wage, the IWC's concern was with establishing a wage floor to ensure workers earned an amount sufficient to cover their basic living needs. Cal. Lab. Code § 1178.5(a); Stats. 1913, ch. 324, §§ 5, 6(a); *Rivera v. Div. of Indust. Welfare* (1968) 265 Cal.App.2d 576, 595-98, n. 34 (the minimum wage's "statutory standard of adequacy is a floor" designed to ensure workers make enough money to "maintain a minimum but adequate mode of living"); *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 952 ("The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided *at least the minimal wages* and working conditions that are necessary to enable them *to obtain a subsistence standard of living* and to protect the workers' health and welfare.").

Even though Plaintiffs have brought minimum wage claims, they earned enough on an annual basis during the relevant time period to satisfy the salary threshold for exempt employees to whom the minimum wage laws do not even apply. 8 Cal. Admin. Code, § 11090(1)(A); ER 136, 142, 146, 1100. Lehr, for example, *earned over $95,000* as a flight attendant with Delta in 2014. ER 1100. The salary threshold for exempt employees in 2014 was $37,440. 8 Cal. Admin. Code, § 11090(1)(A)(1)(f). Lehr, therefore, earned more than 2.5 times what California law required for an employee to meet the exempt employee salary threshold and nearly satisfied the FLSA's "highly compensated" employee, $100,000 salary threshold. *See* 29 C.F.R. § 541.601(b) (2014).

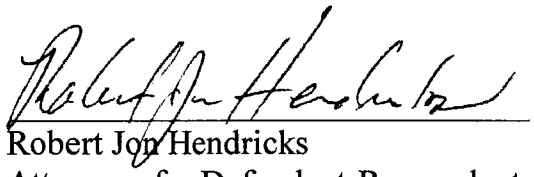
Regardless of how this Court construes an employer's minimum wage obligations under Wage Order 9, Delta's compensation system is lawful.

IV. CONCLUSION

For the foregoing reasons, this Court should answer No to each of the certified questions.

Dated: November 9, 2018 Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: 

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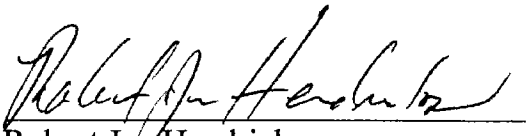
CERTIFICATION OF WORD COUNT

I hereby certify that pursuant to California Rules of Court, Rule 8.520(c)(1), the attached brief, excluding those materials that may be excluded under Rule 8.520(c)(3), contains 13,669 words, as counted by the Microsoft Word word-processing program and is produced using 14-point Times New Roman type used to generate the brief.

Dated: November 9, 2018 MORGAN, LEWIS & BOCKIUS LLP

By: 

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CERTIFICATE OF SERVICE

I, Davace Chin, declare that I am a resident of the State of California, County of San Francisco. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On November 9, 2018, I caused the following document to be served:

ANSWER BRIEF ON THE MERITS OF DEFENDANT-APPELLEE-RESPONDENT DELTA AIR LINES, INC.

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and via U.S. Postal Service – by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

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For the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on November 9, 2018, at San Francisco, California.

By: /s/ Chin
Dayace Chin