No. S248726

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT FLORES, individually, on behalf of others similarly situated, and on behalf of the general public,
Plaintiffs/Petitioners,
v.
DELTA AIR LINES, INC.,
Defendant/Respondent

Application To File Amicus Curiae Brief And Proposed Brief Of The California New Car Dealers Association In Support Of Defendant And Respondent Delta Air Lines, Inc.

After a 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

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Application For Leave To File Amicus Curiae Brief

Pursuant to California Rules of Court, rule 8.520(f), the California New Car Dealers Association (CNCDA) respectfully requests leave to file the attached amicus curiae brief in support of defendant and respondent Delta Air Lines, Inc.

CNCDA is a nonprofit corporation organized to protect and advance the interests of franchised new vehicle dealers in California. CNCDA has roughly 1,100 dealer-members. These members sell and lease new vehicles; they also engage in automotive service, repair and part sales. CNCDA frequently files amicus curiae briefs in cases such as this that implicate the important concerns of its dealer-members.

California's franchised new vehicle dealers have about 140,000 employees—i.e., over 100 employees per dealership on average. Their total payroll is over $8.5 billion annually. (*CNCDA 2018 Economic Impact Report* <https://www.cncda.org/wp-content/uploads/2018-Economic-Impact-Report.pdf> [as of Feb. 13, 2019].)

CNCDA members regularly confront wage-and-hour issues, including how to fashion incentive programs that promote productivity and comply with California law. CNCDA's members therefore have a direct interest in ensuring that California's minimum wage laws are fairly and properly construed, including

to ensure that incentive programs are permissible so long as employees are guaranteed minimum wage for every hour worked.

CNCDA's counsel have reviewed the briefing in this matter and believe that CNCDA can provide an important broader perspective regarding the Ninth Circuit's third certified question: "Does the *Armenta v. Osmose, Inc.* [(2005) 135 Cal.App.4th 314] /*Gonzalez v. Downtown LA Motors, LP* [(2013) 215 Cal.App.4th 36] 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?"

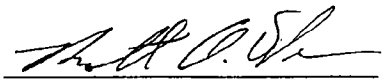
CNCDA has entirely funded the preparation and submission of its brief without any monetary contribution from any other person or entity. This brief is solely the work of counsel representing CNCDA. (See Cal. Rules of Court, rule 8.520(f)(4).)

For all of these reasons, CNCDA respectfully requests leave to file the accompanying Amicus Curiae Brief of the California New Car Dealers Association in support of defendant and respondent Delta Air Lines, Inc.

Dated: February 14, 2019

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Cynthia E. Tobisman

By: 
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Amicus Curiae Brief Of The California New Car Dealers Association

Introduction

California's wage and hour jurisprudence unfortunately has become a thicket of formal and complex traps for unwary employers. Instead of clear rules there are semantic tricks. It should not be so. Certainly, California's statutory scheme does not dictate that it be so.

To be clear: Employees must be paid at least the minimum wage for every hour worked. At the same time, however, compensation programs that allow employees to earn enhanced hourly rates, commission rates, or productivity bonuses should be encouraged and validated where employees are guaranteed being paid minimum wage or more for every hour worked. In addition, it should not matter whether bonus amounts are paid lump-sum or are averaged across all hours worked added to an already-payable, at-least-minimum-wage hourly rate (as is required to calculate an overtime pay rate). Such mixed-pay-rate compensation programs do not offend the law. Rather, they benefit both employers *and* employees.

This Court should so hold and, in so doing, provide simple,

straightforward guidance to bench and bar, employers and employees, on what is required for an employer to comply with the law. Making incentive-based compensation systems impossible to operate is good for neither employers nor employees and is a result that has never been hinted at by the Legislature.

The parties' briefing touches on the case-specific dimensions of the Ninth Circuit's certified question regarding the application of California's minimum wage law to Delta's credit-based pay formula. But the briefing does not address broader questions of when and how an employer can provide productivity incentive pay through enhanced hourly rates. We will address the broad issues with enhanced hourly rate compensation and the attacks on productivity-measured enhanced hourly rates. In particular, certain foundational principles should be recognized:

- The law should regard substance more than form.
- A small business owner should not need an advanced degree in mathematics to determine her compliance with minimum wage laws. Rather, a business owner that guarantees—and pays—at least minimum wage as a base for all worked hours should know that she is in compliance.

- A compensation program that provides an opportunity for *enhanced* hourly wages based on productivity incentives is proper, even if the rate of pay for that enhanced, above-minimum wage hourly pay is calculated by "averaging" certain pay components over a certain pay period. California has no across-the-board prohibition on averaging wages where doing so merely increases an already-existing at-least-minimum-wage rate.

- California law does not dictate *how* an employer must calculate an enhanced hourly rate. So long as each hour is compensated at least at minimum wage, the law's mandates are satisfied.

- The minimum wage law does not require that employees earn the same productivity incentives, have the same compensated time, or have equal access to the same earning incentives. Such differences are an inherent aspect of any incentive pay system.

These principles should not be controversial under California law. Attacks on compensation systems guaranteeing minimum wage for all hours worked but resulting in differing total wages or above-minimum-wage hourly rates are unfounded

and ill-advised. Concluding that such programs violate the law would torpedo incentive programs that, by their nature, provide *more* than minimum wage for certain types of work. That has never been the Legislature's intent, and this Court should so hold.

I. The nature of productivity-based compensation programs such as Delta's credit-based compensation program is to pay higher wages, not lower.

Many employers afford additional pay to employees to reward them for undertaking particular tasks or burdens, or for contributing to the employer's success. These programs take many forms, including sales commissions, piece-work compensation, performance pay, or hazardous-duty pay. A salesperson may receive a commission for every sale; a truck driver may be paid for every mile driven; a vehicle mechanic may be paid for every maintenance or repair task completed (see *Certified Tire & Service Centers Wage & Hour Cases* (2018) 28 Cal.App.5th 1, review granted No. S252517 (*Certified Tire*)); a musician may be paid extra while on stage compared to mere rehearsal time; and a pilot or flight attendant may be paid more for flight time.

Sometimes, additional pay amounts are added to an existing hourly rate. Other times, such productivity pay is used to increase an already-above-minimum-wage hourly pay rate.

Delta's compensation program falls into this latter model, compensating flight attendants at one rate for non-flight time and another, higher rate for in-flight time.[1] "The pay formula incorporates four different credit calculations. The credit calculations award credits based on different criteria. For example, the Flight Pay calculation awards one credit per hour flown or scheduled to be flown, while the Duty Period Credit calculation awards one credit per two hours on duty. The pay formula compares the result of the four credit calculations to determine which yields the most credits per [relevant pay period]. Delta then multiplies the highest number of credits by the flight attendant's hourly wage rate (plus additions not relevant here) to determine the flight attendant's pay." (*Oman v. Delta Air Lines, Inc.* (9th Cir. 2018) 889 F.3d 1075, 1077-1078 (*Oman.*).) "[T]he Flight Pay calculation provides credit only for hours flown or scheduled to be flown, not for hours preparing the airplane for passengers, for example. Still, a flight attendant is always paid

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[1] We accept the Ninth Circuit's description and profess no independent knowledge as to how Delta's program works.

an above-minimum-wage hourly rate because the Duty Period Credit calculation, in effect, guarantees a flight attendant half her hourly wage rate per hour on duty, and even the lowest flight attendant wage rate is more than double California's minimum wage." (*Id.* at p. 1078.)[2]

Thus, Delta's program pays at least minimum wage for every hour worked, and then provides for enhanced pay for certain types of work—i.e., employees' more productive hours—which is then effectively averaged across all working hours to come up with a single, above-minimum wage hourly rate which results in pay which is mathematically identical to if Delta had calculated pay based on different (above minimum wage) hourly rates for each hour. In this regard, Delta's program is like many other compensation programs that enhance an hourly rate based on performance.

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[2] Mathematically, Delta's formula is the same whether Delta awards ½ credit for duty hours and 1 credit for flying hours multiplied by rate $X / credit where X is more than twice the minimum wage hourly rate, or if Delta awards 1 credit for duty hours and 2 credits for flying hours multiplied by rate $X/2 per credit.

II. The rules for determining whether an employer has complied with the minimum-wage law should be straightforward and transparent.

Being an employer in California is extremely difficult. There are many legislatively or judicially imposed dos and don'ts, ranging from what questions can be asked of applicants to mandated meal and rest breaks to when and for what reason an employee might be disciplined or discharged. Frankly, it has gotten to the point where most employers, no matter how small, have difficulty navigating employment and wage-and-hour rules without soliciting expensive legal advice. This is a substantial impediment to doing business in California and a drag on greater employment in the State.

Complex minimum wage rules complicate matters. Employers who pay workers more than minimum wage are to be encouraged. Tying wages to performance criteria is a good thing. It encourages *and rewards* productive employees. Unfortunately, the current confusion in the case law—exemplified in the parties' briefing here—means that employers run the risk of being penalized, not for paying a less-than-minimum wage but for *how* the employer computes an above-minimum wage.

Creating judicially constructed traps for unwary or unsophisticated employers is not only unfair, it is

counterproductive, leading to a race to the bottom. Rather than face the risk of being hit with back wages, penalties and attorney fees, employers will simply pay the lowest possible hourly rate with no additions for performance. This isn't good for California employers *or* employees.

III. The "averaging" canard: California law does *not* bar all averaging of wage rates.

Boiled down, plaintiffs' theory is that the Delta program, and presumably any compensation scheme which adjusts above-minimum-wage hourly rates to reflect productivity factors, violates California law by *averaging* certain component pay rates. As the Ninth Circuit put it: Plaintiffs "argue that the Flight Pay formula impermissibly *averages* a flight attendant's wages for paid, productive time and unpaid, unproductive time." (*Oman, supra*, 889 F.3d at p. 1078, citing *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, italics added.)

But there is no statute that bars an employer from using averaging or any other particular mathematical formula to calculate an above-minimum wage hourly rate. Treating "averaging" as improper, even where it is used simply to generate an above-minimum-wage pay rate runs counter to a fundamental premise of California law: "The law respects form less than

substance." (Civ. Code, § 3528.) It should be the *substance* of an employer's compensation plan that should matter, not its particular form. The rule should be: So long as a compensation plan compensates for all hours worked at or above the minimum wage and does not reduce an employee's already-earned pay, it should pass muster. Period.

The notion that there is a ban on ever "averaging" pay rates comes from a misreading of several Court of Appeal decisions. These decisions have held, in essence, that an employee must be paid a minimum wage for all hours worked, and that where an employer does not *otherwise pay for nonproductive hours*, the employer cannot, unlike under federal law, average pay that is afforded for productive hours to show that it has met the California minimum wage obligation. These conclusions are not controversial. Unfortunately, however, the case law has spawned confusion regarding what constitutes impermissible "averaging." Litigants like plaintiffs here regularly take the position that *any* use of averaging for any purpose is verboten.

As we now show, nothing in the case law suggests, let alone holds, that an employer may not average above-minimum wage rates to derive a pay rate for a certain type of work, be it a pay rate for enhanced hours or a pay rate for non-productive hours. So long as the employee is to be paid at least minimum wage for

every hour *before* averaging is considered, averaging to derive a greater hourly pay rate passes muster. The relevant cases are:

***Armenta v. Osmose, Inc.*, (2005) 135 Cal.App.4th 314 (*Armenta*).** *Armenta* is the seminal Court of Appeal case in this area.[3] There, the contract required the employer to pay utility workers a set amount for every hour, but the employer failed to record all hours its employees worked. Payroll records showed only the hours that employees worked at job sites, and not the time spent traveling to and from job sites in company vehicles. (*Id.* at pp. 317-318.) The company did not pay for mandatory travel time—time that this Court has long held counts as compensable "hours worked." (*Id.* at pp. 319-320; see *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587.)

When employees sued for unpaid minimum wages, the employer argued that, as under the federal Fair Labor Standards Act, it "should be entitled to divide the total number of hours worked into the amount the employee was paid to arrive at an average hourly wage and then determine whether the employee's compensation complied with the minimum wage law." (*Armenta*, *supra*, 135 Cal.App.4th at pp. 321-322.) The Court of

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[3] This Court has not addressed this issue.

Appeal held that California's Labor Code requires employers to directly compensate employees at minimum wage for each hour worked, and not indirectly by averaging in above-minimum wage rates paid for other hours. (*Id.* at p. 324.)

Thus, *Armenta* teaches that an hourly employer cannot take a wage that the employee has earned in one hour and use it to meet the employer's obligation to pay minimum wage in another hour. The employer cannot fail to pay its employees for every hour on the clock, nor can it rationalize that failure by relying on the fact that an employee's overall pay averaged out to an amount greater than the minimum wage for the pay period.

Armenta does *not* bar an employer from "averaging" to come up with a higher pay rate for an employee based on productivity considerations where the employee is already receiving at least minimum wage for every hour worked. *Armenta* did not consider any such enhanced-hourly-rate program, let alone decide whether California law prescribes the means for determining an enhanced pay rate above an already-earned minimum-wage rate. (See *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1039 ["cases are not authority for propositions not considered"].)

***Gonzalez v. Downtown LA Motors, LP*, (2013) 215 Cal.App.4th 36 (*Gonzalez*)**. In *Gonzalez*, the Court of Appeal considered a "piece-rate" compensation program where car repair technicians were paid a flat rate for certain types of repairs performed during eight-hour shifts. When there were no repairs to perform, technicians were required to stay on the premises and to perform other tasks, including obtaining parts, cleaning up, and reviewing service bulletins. (*Id.* at p. 53.) Technicians were not paid by the hour during that time. (*Id.* at p. 42.) Instead, at the end of each pay period, the employer would determine how much a technician had earned for performing repairs and, if that total amount fell below what he would have earned if he had been paid an amount equal to his total hours multiplied by the minimum wage, the employer would supplement the pay in the amount of that shortfall. (*Id.* at pp. 41-42.)

The Court of Appeal held that this program violated the law because the employees were not being paid when they were required to be on duty but did not have a car to repair. As in *Armenta*, the court rejected the employer's reliance on averaging to claim that it paid its workers at least the minimum wage per hour. According to *Gonzalez*, "[a]veraging piece-rate wages over total hours worked results in underpayment of employee wages required 'by contract' under Labor Code section 223, as well as an

improper collection of wages paid to an employee under Labor Code section 221." (*Id.* at p. 50.) As in *Armenta*, the problem was that the employer was using amounts that the employer had deemed *already earned* for one hour to meet its minimum wage obligation for a different hour. The compensation program in *Gonzalez* defined the piece-rate amount as fully earned at the time that the repair was completed. That fully-earned amount could not be shifted to uncompensated time. Simply put, as in *Armenta,* the *Gonzalez* employees were *not* being paid at all for certain hours worked. Instead, wages paid for other time worked were "averaged" to cover the unpaid hours.

Gonzalez's holding was thereafter codified as to piece-rate compensation in Labor Code section 226.2. (See *post.*)

***Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864 and *Vaquero v. Stoneledge Furniture LLC* (2017) 9 Cal.App.5th 98.** *Bluford* and *Vaquero* applied the *Armenta / Gonzalez* approach in comparable circumstances. In *Bluford* drivers were paid "based on mileage rates applied according to the number of miles driven, the time when the trips were made, and the locations where the trips began and ended." (216 Cal.App.4th at p. 872.) The employer purported to subsume payment for rest periods into mileage rates negotiated in the

drivers' collective bargaining agreement. (*Id.* at p. 871.) But none of the bases on which the employer calculated drivers' pay directly compensated them for rest periods. The employer's plan did not "directly compensate[] for rest periods" "did not account for rest periods or provide an ability to be paid for them," and "provided no means by which an employee could verify he was paid for his rest periods." (*Id.* at pp. 870, 872.) The Court of Appeal held that the drivers had to be separately and directly paid for rest periods. (*Id.* at p. 871.) The court explained that "[t]he wage order's requirement not to deduct wages for rest periods presumes the drivers are paid for their rest periods." (*Ibid.*) Again, there was no separate minimum wage hourly rate that was enhanced; there was *no* initial rest period wage at all.

In *Vaquero,* furniture store employees were compensated on a commission basis, but the compensation program "did not include any component that directly compensated sales associates for rest periods." (9 Cal.App.5th at p. 114.) Even worse, the compensation scheme "clawed back" wages that the workers had already earned: "For sales associates whose commissions did not exceed the minimum rate in a given week, the company clawed back (by deducting from future paychecks) wages advanced to compensate employees for hours worked, including rest periods. The advances or draws against future commissions were not

compensation for rest periods because they were not compensation at all. At best they were interest-free loans." (*Id.* at p. 115.)

Not surprisingly, the *Vaquero* court held that the program violated the statutes prohibiting employers from taking back funds that had already been paid: "[T]aking back money paid to the employee effectively reduces either rest period compensation or the contractual commission rate, both of which violate California law." (*Id.* at p. 115, citing Lab. Code, §§ 221 [prohibiting employers from collecting or receiving from an employee "any part of wages theretofore paid by said employer"], 222 [prohibiting employers from withholding any part of a wage agreed upon], 223 [prohibiting employers from "secretly pay[ing] a lower wage while purporting to pay the wage designated by statute or by contract"].)

Instead, as in *Armenta*, *Gonzalez*, and *Bluford,* the employer was required "to separately compensate employees for rest periods if an employer's compensation plan does not already include a minimum hourly wage for such time." (*Id.* at p. 110.)

In sum, *Armenta*, *Gonzalez*, *Bluford,* and *Vaquero* teach one thing: An employer may not use productivity payment amounts from already-earned employee hours to cover the

employer's minimum wage obligation as to *otherwise unpaid* hours. These cases say nothing about whether or how an employer may provide enhanced hourly pay for all hours worked or how such above-minimum wage additional pay can be calculated. And they certainly do not bar averaging various components in order to obtain hourly pay *additions* where an employee is already being paid at least minimum hourly wage for every hour worked.

The bottom line: There is nothing inherently wrong with averaging. Appellate case law does not suggest otherwise. And, indeed, this Court's jurisprudence *requires* averaging wages in some instances. Just last year, in *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, this Court considered a compensation program under which employees received a flat $15 bonus for working on weekends, no matter if they worked in excess of a normal shift. *Alvarado* held that the bonus had to be *averaged* across all hour worked at the employees' regular rate of pay in order to calculate the base overtime pay rate (that is, the pay rate from which an overtime rate, say 1.5 times the base rate, for overtime wages was determined).

This Court has never addressed whether or when performance-enhanced wage compensation programs comport

with California's minimum wage laws or the specific issue presented here: Whether a credit-based, incentive-pay program survives scrutiny where certain hours, already earning at least minimum wage, are paid at an enhanced hourly rate that is calculated by averaging certain other components of the employee's other pay rate(s). But one thing is clear: "Averaging" pay rates is not prohibited, except in limited and constrained circumstances. As we now explain, enhanced hourly compensation programs are valid so long as all hours are compensated and so long as, from the outset, an employee will earn at least minimum wage for each hour worked.

IV. How enhanced hourly rates are calculated is irrelevant so long as employees earn, as a base, at least minimum wage for every hour worked and so long as an employer does not reduce an employee's already-earned pay to cover an uncompensated period.

Once the anti-averaging fallacy is debunked, it is clear that a compensation program that, as a base, pays at least minimum wage for every hour worked from the outset accords with California's minimum wage law no matter how additional wage payments are calculated. California's minimum wage law is not complicated. Labor Code section 1194 allows "any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee... to recover ... the

unpaid balance of the full amount of this minimum wage or overtime compensation," "[n]otwithstanding any agreement to work for a lesser wage...."[4] (§ 1194, subd. (a).) Thus, an employer cannot pay a wage that is less than minimum wage.

Sections 221, 222, and 223, in turn, prohibit employers from depriving an employee of any part of her statutorily or contractually-required wages. (See §§ 221 ["It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee]; 222 ["It shall be unlawful, in case of any wage agreement arrived at through collective bargaining ... to withhold from said employee any part of the wage agreed upon"]; 223 ["Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract"].) Thus, an employer cannot take money out of an employee's pocket.

Finally, section 226.2 directs that where an employer uses a piece-rate compensation program, "employees shall be compensated for rest and recovery periods and other non-

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[4] Statutory citations are to the Labor Code unless noted.

productive time separate from any piece-rate compensation." (§ 226.2, subd. (a)(1).) But, "[a]n employer who, in addition to paying any piece-rate compensation, pays an hourly rate of at least the applicable minimum wage for all hours worked, shall be deemed in compliance with" the statute. (§ 226.2, subd. (a)(7).)

Nothing in this scheme purports to bar employers from offering enhanced pay rates over and above an already payable minimum hourly rate or calculating such enhanced pay rates based on reaching various performance benchmarks, even if those benchmark achievements are "averaged" over the course of a pay period and are paid on top of already-payable minimum-wage hourly rates. Doing so in no way takes wages away from the employee or uses wages earned in one hour to meet a minimum hourly rate obligation in another hour.

Nothing in California's statutory scheme prescribes how an employer must calculate an enhanced pay rate. There is no prohibition on averaging components of an employee's pay in order to arrive at a higher, enhanced pay rate for high-performance hours. So long as an employee is to be paid—and is paid—from the outset an hourly rate that meets the minimum wage limit and which comports with the contract under which the wage is promised, the compensation program passes muster, no matter how the enhanced hourly pay is calculated.

Given this, the Delta plan would appear to pass muster. The flight attendants are to be paid above-minimum wage for every hour on duty (1/2 credit times a wage rate that is more than twice the minimum wage). They earn *additional*, above-minimum-wage amounts for every hour that they actually fly. Whether those additional amounts are "averaged" over all hours for the pay period or not, they are not being used to fulfill a minimum-wage obligation. The averaging is being used to calculate an enhanced pay rate that is mathematically equal to if the employee were just paid separate rates for different hours. The "averaging" is exactly how the pay is agreed to in the contract. There is nothing wrong with such a compensation program.

V. As a matter of public policy, incentive programs paying employees enhanced hourly rates, above an already earned at least minimum wage, based on performance or tasks undertaken should be encouraged and validated.

Public policy weighs in favor of encouraging and validating compensation programs that create incentives for workers to be more productive. We want employers to be able to reward employees with higher pay rates for certain productive work—be it time in flight, time on stage, or time fixing a carburetor.

Rewarding those who are most productive or who shoulder harder tasks is good for employers and employees alike.

But in encouraging such enhanced-pay programs, it is important to recognize that incentive and productivity rewarding programs inherently will benefit some employees more than others—i.e., the employees who perform more high-production, high-value tasks more often will earn more. Nothing in California law bars that. Such programs will necessarily result in some employees—earning at least minimum wage—obtaining a lower overall hourly rate in some pay periods or even consistently. For example, an employee who spends a week in training may not garner as many flight or maintenance-project hours as his or her peers. But so long as that employee is paid at least minimum wage and the employee's pay comports with the particular contract arrangement, there is no violation of California law.

Nor should a compensation plan be deemed improper simply because the enhanced hourly pay rate is calculated by looking back across an employee's *entire* pay period, rather than just a snapshot of the employee's most productive days. Take, for example, an employee who works five days during the week, and who is 125% efficient during the first four days but has no extra

efficiency on the last day. If the enhanced pay rate takes this last, less-efficient day into account, he may be entitled to a 1.2 multiplier, rather than a 1.25 multiplier. But the fact is that he is obtaining a multiplier on *all* hours worked. And his wages are identical whether calculated over the entire pay period or separately for each different day or hour. The mere fact that an *average* efficiency bonus was used to calculate an overall *bonus* multiplier, makes no difference in the wage and does not mean the employee is being deprived of compensation to which he is entitled. Rather, it *is itself* the calculation of the entitlement to an extra, above-minimum-wage hourly rate.

The correct view is that the bonus is not earned—and the rate of pay is not calculated—until the workweek is *completed*. As long as a pay plan is clear that increases in hourly rates, enhanced commissions, or productivity bonuses are not "earned" until certain criteria are met and the whole pay period is taken into account, it is simply not true that a pay rate that factors in less-productive hours takes away from bonuses already achieved.

Conclusion

Averaging across a given pay period to arrive at a bonus multiplier is a common, permissible practice. This Court should reject any contention that a compensation program that uses this practice is improper just because it averages certain pay components over a certain period of time to determine an enhanced pay rate.

The California New Car Dealers Association urges this Court to answer "no" to the Ninth Circuit's third certified question and to render an opinion holding that it is permissible for an employer to pay employees different rates for different types of work and to come up with an average above-minimum-wage hourly rate, so long as the employer starts with a base of paying the employee at least the minimum hourly rate for every hour worked. The Court should hold that in such circumstances,

the employer can calculate an enhanced pay rate any way it chooses—including by averaging certain pay components across a pay period.

Dated: February 14, 2019

Respectfully submitted,

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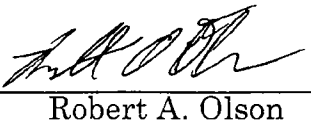
By: 
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Association

Certification

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this **Application To File Amicus Curiae Brief And Proposed Brief Of The California New Car Dealers Association In Support Of Defendant And Respondent** contains **4,959** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: February 14, 2019

Robert A. Olson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On February 15, 2019, I served the foregoing document described as: **Application To File Amicus Curiae Brief And Proposed Brief Of The California New Car Dealers Association In Support Of Defendant And Respondent Delta Air Lines, Inc.** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

(X) By Electronic Transmission: I caused the above-named document to be transmitted via electronic transmission to the offices of the addressee(s) at the Email address so indicated above.

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Executed on February 15, 2019, at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Monique N. Aguirre

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[Case No. 17-15124]

Via E-Submission and Personal Service

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