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ARBITRATION BEFORE JUDICIAL ARBITRATION GROUP

(Arbitrator William G. Meyer)

ROBERT H. WATROUS, ROBERTA E. DILLON, ANITA K. WATKINS, and CRAIG R. CHERRY , individually and on behalf of all those similarly situated, Plaintiffs, vs. GROUP VOYAGERS, INC., a corporation, and DOES 1 – 100, inclusive, Defendants.	**JAG No. 2009-1089A** **CLASS ACTION** **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** **DATE: August 9, 2010** **TIME: 1:30 p.m.** **HEARING: San Francisco**

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I. INTRODUCTION

Plaintiffs Robert H. Watrous, Roberta E. Dillon, Anita K. Watkins, and Craig R. Cherry ("Plaintiffs") now oppose the Motion of Defendant Group Voyagers, Inc. ("GVI") for summary judgment or partial summary judgment directed to *their* individual claims ("Motion") on the following grounds:

1. Insofar as the employment agreements incorporate Colorado law, they also incorporate Colorado's conflict of law rules under which California law applies. (California applies the same rules.) Were Colorado/California's conflict of law rules misinterpreted to support application of Colorado wage and hour law, summary judgment cannot be granted because GVI, as the drafting party, bears responsibility for the ambiguity in its adhesionary Tour Director employment contracts concerning the law controlling the employment relationship. Thus, though the body of the contracts contains a general reference to Colorado law, GVI's Associate Handbooks, expressly incorporated by reference into the employment contracts, statements of management, and course of conduct more specifically provide that residency controls which wage and hour protections apply to GVI's non-exempt employees, regardless of where they work. Under GVI's contracts, Plaintiffs, admitted to be California residents, are entitled to the full protection of California law, though working a minor part of the time during the 2003-07 recovery period, if at all, outside California. Plaintiffs offer the arguments that follow, assuming, contrary to the evidence, that GVI and Plaintiffs had entered into contracts that unambiguously provided for the application of Colorado wage and hour law.

2. By contract GVI cannot deprive Plaintiffs, whom GVI admits during the recovery period were California residents, hired in California, who principally or exclusively worked in California, and who never worked in Colorado of the unwaiveable protections herein sought to be vindicated. The

Motion tellingly ignores the decades of California judicial and legislative authority confirming that the subject wage and hour protections embody the fundamental and strongly held California policy of protecting its wage earners. Colorado has no interest in extending wage and hour protections to residents of other states who do not work in Colorado. In that California fundamental policy would thus be materially impaired, any choice of Colorado wage and hour law is void under Restatement Second Conflict of Law ("Restatement") § 187. The analysis that follows under Restatement §§ 188 (which incorporates § 6) and 196 as a matter of law leaves no doubt that California wage and hour law governs the relationship between GVI and these Plaintiffs.

3. California law requires an employer to continue to observe its wage and hour laws when a California resident employee, who principally works in California, temporarily goes out of state. GVI knows this – that is why in response to this lawsuit it has proceeded accordingly in its dealings with California resident Tour Directors, including Plaintiffs Watrous and Cherry.

4. The Dormant Interstate Commerce Clause argument fails because GVI has not carried its heavy burden to show that California's exercise of core police powers in a manner that is not facially discriminatory against non-residents is clearly excessive in its impact on interstate commerce.

Plaintiffs request that the Motion be denied. For purposes of arbitral efficiency, Plaintiffs request that the Arbitrator's decision include confirmation that California wage and hour protections govern to the four named Plaintiffs' claims. Although giving lip service that the rights of putative class members may not be adjudicated pre-class certification, the Motion, contrary to the Arbitrator's June 22, 2010 Order, nevertheless, improperly seeks a decision that California law does not apply to non-residents working here.

Why the rush to have the Arbitrator decide this issue – before putative class members would be bound by any decision and in violation of the Arbitrator's Order? The reason is the pending California Supreme Court decision in Sullivan v. Oracle Corporation, CA S. Ct. case no. S170577. By background, the Ninth Circuit Court of Appeals initially held that California wage and hour protections applied to non-residents while working in California, even those Coloradans who overwhelmingly worked in Colorado. After analyzing the "material" difference between Colorado and California wage and hour protections insofar as work performed in California, the Ninth Circuit rejected that employer's/GVI's Dormant Commerce Clause argument. See Sullivan v. Oracle Corporation 547 F.3d 1177 (9th Cir. 2008), depublished 557 F.3d 979 (9th Cir. 2008). In consideration of permitting the highest California Court to opine on this issue before the federal court, the Ninth Circuit depublished the initial decision and requested the California Supreme Court to state its opinion on the matter, to which the California Supreme Court has agreed. That case has been fully briefed and is scheduled for hearing. As GVI's counsel (whose arguments are strikingly similar to those rejected by the Ninth Circuit) doubtless is aware, the prospects before the California Supreme Court are poor for GVI's position, though of course no certain prediction is possible. GVI thus buries deep in its brief a reference to the pendency of the California Supreme Court's decision. Although the California Supreme Court has its own, internal timing for issuing decisions, Plaintiffs expect that by the time certified classes are formed, assuming the Arbitrator grants class certification, the parties and the Arbitrator will have the benefit of the California Supreme Court's decision.

For present purposes, Plaintiffs concentrate on the challenge to their four claims. Although much of their analysis may pertain to the putative class members' claims, Plaintiffs do not comprehensively respond to arguments concerning non-residents or California residents who did not work primarily in California. Plaintiffs are not implying that GVI's arguments have merit. Plaintiffs

therefore will supplement this Opposition when the issues concerning those two groups are properly before the Arbitrator.

Supporting this Opposition are the accompanying declarations of each named Plaintiff (hereinafter, e.g. "Watrous Opp. Declaration.") and the declaration of Plaintiffs' counsel ("Sitkin Opp. Declaration."). Plaintiffs refer to the Declaration of Paul Sirner supporting the Motion as the "Sirner Dec." and the Declaration Paul Hall supporting the Motion as the "Hall Dec." Wherefore, Plaintiffs request that GVI's Motion be denied and this Arbitrator issue a decision confirming that California law controls Plaintiffs' employment relationship with GVI insofar as the subject claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

This action arises from the failure under California law of Defendant employer, GVI, a New York incorporated, Colorado headquartered, and California licensed package bus tour operator of multi-state tours, to pay overtime compensation, provide pay stubs with required information, maintain required time records, reimburse employees for job expenses, and provide duty free meal/rest breaks to tour guides, called "Tour Directors," whom it "..hires… as employees to escort its tours." Sitkin Opp. Declaration, Ex. 3, i.e. Sirner Declaration, executed July 29, 2008, ¶ 3. GVI self-describes itself as "…among the five largest guided package coach tour operators in the United States." Id., ¶ 5. GVI is being modest, moreover. To its employees, GVI has identified the Cosmos/Globus group of tour companies as "the largest operator of escorted tours worldwide" with "500,000 passengers per year on escorted tours." Sitkin Opp. Declaration, Ex. 1, i.e. 2005 Associate Handbook, p. D02277, "Company Highlights." Accord, Id., i.e. 2007 Associate Handbook, p. D02383.

Plaintiffs were California resident Tour Directors during some or all of the July 2003-December 2007 recovery period ("2003-2007"). During the recovery period, at least the majority, if not all, of

their tour days and non-tour work were performed in California, and no work in Colorado. Cherry/Watrous Opp. Declarations, ¶ 18-19, Dillon Opp. Declaration, ¶ 14-15, Watkins Opp. Declaration ¶ 12, Sitkin Opp. Declaration, Ex. 8.[1]

According to the Sirner Declaration. (¶ 5-6) the putative classes, including former and current Tour Directors, consist of 43 Tour Directors resident in California and 30 non-resident Tour Directors, who are either classified as full-time or seasonal, depending on the number of weeks that GVI anticipates having them escort tours. See Sirner Declaration, ¶ 12-13 and Sitkin Opp. Declaration, Ex. 5.[2] Plaintiffs Cherry and Watrous were California resident Full Time Tour Directors and Plaintiffs Dillon and Watkins were California resident Seasonal Tour Directors during the recovery period. GVI has identified only a de minimis number of four Tour Directors among the putative class members who resided in Colorado. The balance of the non-residents are scattered across fifteen other states, for nine of which there was only one resident. Sitkin Opp. Declaration, Ex. 9 (GVI expanded the number of states from which it drew non-residents to conduct California tours after the inception of this action in May 2007). Thus, although GVI reports that its Tour Directors reside in 36 states (Sirner Declaration, ¶ 4), the pertinent residency of the putative class members is more concentrated by half.

In an effort to understate the California nexus of the putative class, GVI's Motion understates the tour experience of the putative class members. It instead averts to the experience of Tour Directors who are not potential class members. Although this Motion exclusively concerns the four Plaintiffs,

[1]Nor did GVI through the recovery period conduct its annual Tour Director meetings in Colorado. Cherry/Watrous Opp. Declaration, ¶ 19, Dillon Opp. Declaration ¶ 15, Watkins Opp. Declaration ¶ 13.

[2] Sitkin Opp. Declaration, Ex. 3 i.e. Sirner Declaration executed 7/29/08 (¶ 7) attests to a third category, Tour Directors paid on a fee basis, but this category does not include Plaintiffs or putative class members. Id., ¶ 6.

Plaintiffs describe in this paragraph the relative California focus of the putative class members' employment as a corrective to GVI's description.[3] GVI, a New York corporation, is headquartered in Littleton, its tours are typically multi-state. Sirner Declaration, ¶¶ 2, 10. They last from a few days to a couple of weeks. Sirner Declaration, ¶ 3. For California resident putative class members, the 2003-2007 median for California tour days as a percentage of all U.S. tour days was 63.42 % and the comparable median for Colorado tour days was 0%. Sitkin Opp. Declaration, ¶ 3.h, Ex. 8-9. For non-resident putative class members, the 2003-2007 the median for California tour days as a percentage of all U.S. tour days for the years in which they did any California tour work was 30.95% and the median for Colorado tour days was 0%. Sitkin Opp. Declaration, ¶ 3.h and Ex. 8-10.

The medians more closely reflect the putative class members' experience than does averages/means based on aggregate tour days, which are subject to distortion due to idiosyncratic tour histories, i.e. 'outliers' in statistical parlance. Nevertheless, the averages also reflect that GVI's focus on the experience of Tour Directors with no relation to this lawsuit understates California's predominance over other states. GVI has reported that putative class members worked 14,161 tour days during 2003-2007, of which a plurality of 5,362 tour days (37.86%) were performed in California. By contrast, for all years, only 154 tour days (1.08%) were performed in Colorado. See Sitkin Opp. Declaration, ¶ 3.h and Ex. 10. (Of the 154 Colorado tour days spread over almost 5 years, over 46% (71 days) were performed by two Tour Directors whom GVI identifies as California residents, out of the total of fourteen class members who had a single tour day in Colorado.). California tour days represented more than three times the number of tours days in the next largest state, Arizona, with 1,650 tour days. GVI has identified a total of 8,758 tour days (over 67% of U.S. Tour Days) in

[3] The figures in this paragraph derive from tour history information that GVI provided and conform to the recovery period. Sitkin Opp. Declaration, ¶ 3.h.

California and the contiguous states of Oregon, Nevada, and Arizona.[4] In contrast to GVI's focus on idiosynscratic tour histories, the medians and even the means reflect the predominance of the putative class members' California tour work versus any other state and the de minimis Colorado tour work.

A. Prior Overtime Class Action Sets the Stage for the Revised 2003-2007 Employment Agreements.

This action followed GVI's settlement of an earlier wage and hour class action named Scherrer v. Group Voyagers, Inc., ND CA (Hon. Susan Illston) ("Scherrer") in which GVI paid overtime based on an assumed 12.6 hour tour day. There were two overtime classes, one paid under California law, one paid under the FLSA. Plaintiffs were members of the California class. Sitkin Opp. Declaration, ¶ 2; Plaintiffs' Opp. Declarations, ¶ 2. Based on an agreed statistical regression analysis, Tour Directors with exactly the same tour and compensation history were paid 7.197 or 6.249 times as much under the California formula as under the FLSA formula. (The lower multiple applied to 1998-99 when California temporarily reduced overtime rights, now restored to their pre-1998 status.). Payment was based on state of residence. In other words, if resident of California, regardless of where the Tour Director conducts tours, the settlement included the Tour Director in the California overtime class. If a

[4]There are business reasons that explain the greater correlation between Tour Director residency and tour location: cost containment in terms of GVI's positioning costs. All other factors being equal, it would make no business sense for GVI to pay to fly a New York resident Tour Director to conduct a California tour if a California resident Tour Director lives in the same city that the tour starts. Tendencies toward geographic concentration also logically follow because wants the benefit of Tour Directors' experience in conducting particular tours. Hence, GVI's tour data, both within a year, and from year to year, often reflect a Tour Director's repeating escorting the same tour or tours in the same area. Sitkin Opp. Declaration, ¶ 3.h. Although of course sales volume impacts tour assignments, GVI's implied random tour allocation and denial that it has any inkling which tours it may allocate to which Tour Driectors neither makes senses nor is it consistent with the record.

non-California resident, the Tour Director class member was paid under the FLSA, no matter how much or little the Tour Director worked in California. The recovery period for this class action settlement was through June 2003.

B. GVI's Response to the Scherrer Action: Change its Tour Director Employment Agreements and Pay Structure, and Continue to Treat Tour Directors as Exempt Employees Whose States of Residence Control Their Employment.

GVI's sent to Plaintiffs' homes in California their 2003-2007 employment agreements after they had communicated their willingness to work for GVI in the upcoming tour season. Plaintiffs' Opp. Declarations, ¶ 3. They were told that to take care of the requirement of having an employment agreement, they had to sign and return to GVI the employment agreement, which they did. Paul Sirner communicated to them, as to other Tour Directors, that Tour Directors had to sign the employment agreement as a condition of being employed. Ibid. Plaintiffs therefore understood that the employment agreement was non-negotiable and offered on a take it or leave it basis. Ibid.

GVI's assignment of specific tours routinely followed Plaintiffs' return of the employment agreements and involved each signing and returning to GVI an "Exhibit A" that formed part of their employment agreements. Cherry/Dillon/Watrous Opp. Declarations, ¶ 6, Watkins Opp. Declaration ¶ 3. Although GVI significantly exaggerates the time permitted to review the employment agreement before Plaintiffs were assigned tours (Sirner Declaration, ¶ 15), sufficient time existed for GVI to make disclosures concerning the changes in the standard form employment agreements that it never did, much less counter consistent statements that the Tour Directors' states of residence governed their employment relationship with GVI (see subsection B.4, infra). Conversely, from year to year during

2003-2007, Plaintiffs, like other Tour Directors, were not told that the form of the employment agreement would be the same. Cherry/Watrous Opp. Declarations, ¶ 12, Dillon Opp. Declaration, ¶ 11.

GVI never told Plaintiffs that, to complete or to make effective any employment agreement, GVI needed to sign the agreement. Cherry/Dillon/Watrous Opp. Declarations, ¶ 5, Watkins Opp. Declaration, ¶ 4. As reflected on the attached copies forming Exhibit 1 to Plaintiffs' Opp. Declarations, GVI did not sign the agreements. Plaintiffs signed their 2003-2007 employment agreements while in California and sent them back to GVI from California. Cherry/Dillon/Watrous Opp. Declarations, ¶ 5, Watkins Opp. Declaration, ¶ 4. GVI before this litigation did not send Plaintiffs back signed copies. Ibid. GVI's statement (p. 40:11-12), tellingly without evidentiary cite, that it "executed the employment agreements in Colorado" is false, which the Arbitrator may confirm by looking at the attached copies of Plaintiffs' employment agreements as produced by GVI in discovery.

1. Change of Tour Director Pay Structure

Effective July 2003, GVI changed its compensation structure from paying Tour Directors on a daily basis to paying a base wage plus commissions on sales of GVI approved optional tour extensions that were in addition to the basic tour package. Sitkin Opp. Declaration, Ex. 5.[5] GVI subdivided Tour Directors into three groups: Full Time, Seasonal, and Fee Basis. (Tour Directors are not paid on a fee basis for tours in California. Id., p. D2018.) Whether Full Time or Seasonal turned on duration of tour assignments within a year (Sirner Declaration, ¶¶ 12-13).[6] The classification also involves whether the

[5]Plaintiffs are not implying that what GVI described as a "salary" met the Salary Test for exempt status.

[6]The Sirner Declaration differently describes the cut-off from his earlier communications to Tour Directors. C.f. Sirner Declaration, ¶ 12-13 and Sitkin Opp. Declaration, Ex. 5, p. 2018.

Tour Director must be available for tour assignments throughout the year or for a designated season and whether the Tour Director is at liberty to work for competitors. Ibid.

The base wage for Full time Tour Directors, like Plaintiffs Watrous and Cherry, was an annual amount that was paid in even amounts in bi-monthly payments, regardless of whether or not on tour. Section 4 of the standard form agreement for Full Time Tour Directors (Cherry/Watrous Opp. Declarations, Ex. 1; Sirner Decl., Ex. 5) thus reads as follows:

> "Compensation: Employee shall receive an annual salary as set forth on Exhibit A, payable on regularly scheduled bi-weekly paydays. Employer shallmake necessary withholdings pursuant to state and federal income taxation laws. …"

Exhibit A identified Plaintiffs Cherry and Watrous' base wage for July-December 2003 at $10,500. For 2004-2007, the form of Section 4 was modified so that instead of having my base wage stated in an attachment, it was stated in Section 4 itself:

> "Compensation: Employee shall receive an annual salary of [$xxxx], payable on regularly scheduled bi-weekly paydays. Employer shall make necessary withholdings pursuant to state and federal income taxation laws. Employee shall receive such benefits as are from time to time instituted by Employer, subject to eligibility requirements."

For 2005, Plaintiff Cherry and Watrous' base wage was $19,250, for 2006 and 2007, it was $23,360. Cherry/Watrous Opp. Declarations, ¶ 8.[7]

Of the 72 putative class members, GVI paid annual base wages of at least $28,080 during 2003-2006 and at least $31,200 for 2007 only to four Tour Directors. Sitkin Opp. Declaration, Ex. 2, i.e. GVI's answer to special interrogatory no. 3. As discussed infra, the reason this is significant is that

[7]Although GVI has not supplied copies of these Plaintiffs' 2004 employment agreements, their recollection is that their base wages were no more than that in the next year, i.e. $19,250. Cherry/Watrous Opp. Declarations, ¶ 8.

these are the minimum annual salary levels for a worker employed on a year round basis, like Full Time Tour Directors, to qualify under the California administrative or professional exemptions.[8]

The base wage for Seasonal Tour Directors, like Plaintiffs Dillon and Watkins, was paid on a weekly basis, but only for weeks during which they were on tour and not for weeks in which they did other job-related work. Dillon Opp. Declaration, ¶ 7, Watkins Opp. Declaration, ¶ 5. Section 4 of the standard form agreement for Seasonal Tour Directors during the recovery period (Dillon/Watkins Opp. Declarations, Ex. 1; Sirner Decl, Ex. 6) thus reads as follows:

> "Compensation. Employee shall receive compensation at the rate specified on **Exhibit A**, payable on regularly scheduled bi-weekly paydays. Employee shall not receive any compensation for weeks in which Employee performs no work for Employer. Employer shall make necessary withholdings pursuant to state and federal income taxation laws from Employee's compensation. Employee shallnot be entitled to any employee benefits. Employee compensation is based upon tour allocated, as more fully described on **Exhibit A.**

Plaintiffs Dillon and Watkins' weekly compensation," i.e. base wage, stated on the cross-referenced Exhibit A was $763.

During 2003-07, the ranges of the compensation (base wage + commissions) that GVI paid to Plaintiffs were as follows: Cherry ($19,272.83-$32,196.57, Cherry Opp. Declaration ¶ 9), Dillon ($7,537.44 - $16,013.16, 2003-2005, Dillon Opp. Declaration, ¶ 8), Watkins ($5,685.86, 2003, Watkins Opp. Declaration, ¶ 6), Watrous ($24,195-$32,756.23, Watrous Opp. Declaration, ¶9)

. GVI's payments to Plaintiffs for 2003-2007 were wired into their home bank accounts in California. This is how GVI routinely pays Tour Directors. Cherry/Watrous Opp. Declarations, ¶ 10, Dillon Opp. Declaration, ¶9, Watkins Opp. Declaration, ¶ 7.

[8] The Motion misleads in suggesting that Full Time Tour Directors were paid on the basis of the number of weeks that they escorted tours. As their full time employment agreement is clear, they were

2. Addition of Reference to Colorado Law in Employment Agreements.

Effective July 2003 (and continuing through 2007), GVI revised its standard form Tour Director employment contracts to insert without negotiation, explanation, or notice (Cherry/Watrous Opp. Declarations, ¶ 12, Dillon Opp. Declaration, ¶ 11) the following language:

> "Section 11. Disputes. Any dispute between employee and employer arising out of or relating to this agreement shall be first submitted to mediation in Denver, Colorado before a mediator mutually agreed to by the parties. Each party shall bear its own costs for mediation and split the mediator's fee. If mediation is not successful, Employer and Employee shall submit to personal jurisdiction and subject matter jurisdiction in the State of Colorado and agree that all disputes arising out of or relating to this agreement shall be resolved by mandatory, binding arbitration before the Judicial Arbiter Group, or its successor, at 1601 Blake St, Denver, Colorado 80202. The prevailing party in the arbitration shall be entitled to an award of costs and reasonable attorneys' fees. This agreement, and all rights, obligations and remedies under this agreement, and the entire relationship between Employer and Employee formed by this agreement, or otherwise, shall be governed by the laws of the State of Colorado." (Cherry/Watrous Opp. Declarations, ¶ 12, Dillon Opp. Declaration, ¶ 11, Watkins Opp. Declaration, ¶ 9 and Plaintiffs' Opp. Declarations, Ex. 1; Sirner Dec., ¶ 14, Ex. 5-6).

The pre-2003 versions of GVI Tour Director employment agreements had no reference to arbitration or to the laws of the State of Colorado. Cherry/Watrous Opp. Declarations, ¶ 12; Dillon Opp. Declaration, ¶ 11; Watkins Opp. Declaration, ¶ 9.

3. Associate Handbooks Incorporated by Reference into Tour Director Employment Agreements Refer to Application of the Law of Other States.

The 2003-2007 GVI employment agreements also contained the following language in Section 7:

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paid on an annual basis.

"Tour Director Guidelines and Associate Handbook: Employer shall provide Employee a Tour Director Guidelines and Associate Handbook, which Employer may amend from time to time. Employee agrees to follow the policies, procedures and guidelines contained in the Manual and Handbook to the extent those policies, procedures and guidelines do not conflict with any provision of this agreement." Cherry/Watrous Opp. Declarations, ¶ 11, Dillon Opp. Declaration, ¶10, Watkins Opp. Declaration, ¶ 8, Plaintiffs Opp. Declarations, Ex. 1, Sirner Dec., Ex. 5-6.

The June 20, 2003 GVI letter to Tour Directors that enclosing the revised employment agreements also stated, "All previous criterial for allocation of tours are still applicable. Tour Directors, as all employees, are held to the standards and guidelines in the Associates' Handbook and will be required to sign a general confidentiality statement and an acknowledgement that you have aread the enclosed Handbook." Sitkin Opp. Declaration, Ex. 5, p. D2019. The Associate Handbooks during 2003 –2005 (Sitkin Opp. Declaration, ¶ 3.a and Ex. 1) stated as follows concerning overtime:

Exempt/Non Exempt Employees

According to the Fair Labor Standards Act (FLSA), employees are classified as exempt or non-exempt (hourly). Exempt employees are not entitled to overtime pay. Colorado non-exempt employees will be compensated for the number of hours they work in any work week at their regular rate of pay, plus overtime for all hours worked over 40 in any given week at the rate of 1 ½ times their regular rate of pay. The work week begins on Monday at 12:01 a.m. Non-exempt Associates residing outside Colorado will be paid overtime as required by applicable state laws. [¶] If you have any questions concerning your exempt/non-exempt status as an employee, please feel free to ask your work area management or Human Resources for assistance." (pp. D2126, D2206, D2295).

…

"***Work Schedules and Hours***

…Non-exempt Associates residing in Colorado will be paid overtime at the rate of 11/2 times their regular nonexempt rate of pay for all hours worked in excess of 40 hours in a single workweek or 12 hours in a single workday. Non-exempt Associates residing outside Colorado will be paid overtime as required by applicable state laws…." (pp. D2128, D2207, D2296).

The Associate Handbooks during the 2006-2007 balance of the recovery period substituted the following language:

"**Overtime**

From time to time, associates may be required to work overtime. Non-exempt associates are paid at the rate of one and one-half (11/2) times their regular hourly rate for hours worked in excess of 40 during the established workweek or by applicable state law. The established workweek begins at 10:01 a.m. on Monday and ends at 12)00 midnight on Sunday. [¶] For purposes of calculating overtime payments, only hours actually worked are counted." (D 2375)

The Associate Handbooks also refer to the application of non-Colorado law to other aspects of the employment relationship. The 2003-2005 Associate Handbooks state as follows concerning workers compensation:

"After a waiting period (three days in Colorado; more or less in other states), you are entitled to weekly benefits for a compensable injury or illness. …" (pp. D2167, D2249, D2338)

The Associate Handbooks during the 2006-2007 balance of the recovery period dropped the discussion of workers compensation coverage, but add the following concerning paid time off:

"PTO taken is paid on regularly scheduled paydays. Depending upon the stqate you reside, a maximum of 240 PTO hours (320 paid time off days) must be carried forward to the following year. Any associate residing in California will not accrue PTO if their balance is equal to 240 hours at any given time in a year." (pp. D2360, D2388)

4. Plaintiffs Believed GVI Management's Statements Before this Lawsuit, Consistent with GVI's Conduct, that the Law of the Tour Directors' States of Residence Governed their Employment Relationships.

Before this lawsuit, GVI management, including Paul Sirner, consistently communicated to Plaintiffs, as to other Tour Directors, that GVI was applying the law of the Tour Directors' state of residence when it came to the respective Tour Directors' employment relationship, regardless of where the Tour Directors conducted tours. Throughout Plaintiffs' employment by GVI, GVI made withholdings from their paychecks only based on California requirements and not according to other states' requirements, though some tours were escorted in other states. Cherry/Watrous Opp.

Declarations, ¶16, Ex. 3; Sitkin Opp. Declaration, ¶ 3.d and Ex. 4. GVI also paid California Unemployment Insurance and provided California worker's compensation insurance. Sitkin Opp. Declaration, ¶ 3.b, Ex. 2, i.e. GVI's answer to Special Interrogatory No. 8, ¶ 3.d, Ex. 4 and ¶ 3.e, Ex. 5 ("With the exception of those working under a Full-Time Contract, TDs will be able to collect unemployment when they are not working for GVI under the specified terms of the contract, provided they meet state eligibility requirements.").

At no time before the filing of this lawsuit did GVI communicate to Plaintiffs or to any other Tour Directors to Plaintiffs' knowledge, anything about the above-quoted Section 11 in their 2003-2007 employment agreements. Cherry/Watrous Opp. Declarations, ¶ 13; Dillon Opp. Declaration, ¶ 12; Watkins Opp. Declaration, ¶ 10. Before this lawsuit, Plaintiffs were therefore unaware that, by agreeing to Colorado law, they were giving up or GVI was contending that they were giving up, any employee protections under California law, including overtime or minimum wage. Ibid. Plaintiffs also were unaware of any difference between employee protections under California and Colorado law, including any respect in which Colorado law offers inferior employee protections. Ibid.

C. The Present Action

On May 22, 2007, Plaintiffs filed the instant action. The pending First Amended Complaint ("FAC") summarizes the claims as follows: "GVI has improperly failed and continues to refuse to pay and provide legally mandated employee benefits, including minimum wages and overtime pay, to Plaintiffs and the members of the California Classes, in violation of the provisions of the California Labor Code, California Industrial Welfare Commission Wage Orders, and California Business & Professions Code § 17200. GVI has violated the California Labor Code and California Wage Order's provisions concerning prompt final payment to departing employees, including Plaintiffs Roberta E.

Dillon and Anita K. Watkins, and payment for working without a meal/rest break. GVI has also failed to maintain records of the actual hours Tour Directors work and provided legally required information in pay statements as required by California law." The first claim is a putative class claim for violation of the California Labor Code/California Wage Order 9 (8 California Regulations, § 11090).[9] The second claim is a putative class claim for violation of the California Business and Professions Code, §§ 17200, et seq. ("UCL") (where the predicate acts are the violations of the California Labor Code/Wage Order and the FLSA).[10] The third claim is a representative claim under Labor Code §§ 2698-99,

[9]California Labor Code §§ 1173 and 1182 empower the Industrial Welfare Commission ("IWC") to promulgate Wage Orders that define an employer's wage and hour obligations. The Commission acts in a quasi-legislative capacity. Morillion v. Royal Packing Co., 22 Cal.4th 575, 995 P.2d 139, 146 (CA 2000). The IWC is vested with broad statutory authority to establish standard conditions of employment for all employees in this state, including the maximum hours of work, consistent with the health and welfare of the employees. Industrial Welfare Com. v. Superior Court, 27 Cal.3d 690, 700, 701, 613 P.2d 579 (CA 1980). The Wage Orders, codified in California Regulations, supplement the California Labor Code. The IWC has promulgated 15 overtime orders-12 orders cover specific industries and three orders cover occupations-and one general minimum wage order which applies to all California employers and employees (excluding public employees and outside salesmen). (Cal.Code Regs., tit. 8, §§ 11010, 11020, 11030, 11040, 11050, 11060, 11070, 11080, 11090, 11100, 11110, 11120, 11130, 11140, 11150.) The overtime orders, with minor exceptions establish the same daily and weekly overtime requirements for nonexempt employees as those found in Wage Order 9 under which GVI falls.

[10]The UCL creates a private cause of action for an "… unlawful, unfair or fraudulent business act or practice" (California Business and Professions Code § 17200). "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1143, 63 P.3d 937 (CA 2003). "Any business act or practice that violates [labor law] through failure to pay wages is, by definition, an unfair business practice." Cortez v. Purolator Air Filtration Products Co., 23 Cal.4th 163, 178, 999 P.2d 706 (CA 2000). Unlawfully withheld wages are the property of the employee and § 17200 authorizes recovery of unpaid wages as restitution…." Although violations of California wage and hour law may form predicate acts, a UCL claim is a distinct claim with a distinct four year statute of limitations. Ibid. Direct claims based on Labor Code/Wage Order violations generally are subject to a three years statute of limitations. Aubry v.Goldhor, 201 Cal.App.3d 399, 404, 247 Cal.Rptr. 205, 208 (CA App. 1988). The differing limitations periods explains the only difference in the definitions of the two putative classes, their recovery periods.

California's Labor Code Private Attorneys General Act of 2004 ("PAGA").[11] Based on PAGA, Plaintiffs seek to recover civil penalties, which are described in the Complaint as follows: "Such penalties include, but are not limited to, those set forth in California Labor Code §§201-03 (failure to pay wages due in timely manner to terminated or quitting employees), 210 (failure to pay wages due in timely manner), 225.5 (refusal to pay wages), 226 (failure to provide paycheck information), 226.3 (failure to provide paycheck information and keep time records), 226.7 (failure to provide meal/rest periods), 558 (violation of wage orders), 1174.5 (failure to keep payroll records), 1197.1 (minimum wage penalties), and 2699."

FAC ¶ 9 defines the two classes as follows:

> "a) Violations of California Wage Law: all persons: i) who performed services or perform services in California as a Tour Director for GVI at any time since three years before the filing of this legal action; or ii) who resided or reside in California while providing Tour Director services for GVI at any time from three years before the filing of this legal action to December 31, 2007 (the "California Wage and Expense Recovery Class").
>
> b) Violations of California Unfair Business Practices Act/Unfair Competition Law, California Business and Professions Code § 17200: all persons: i) who performed services or perform services in California as a Tour Director for GVI at any since four years before the filing of this legal action; or ii) who resided or reside in California while providing Tour Director services for GVI at any time from July 1, 2003 to December 31, 2007 ("California Unfair Business Practices Recovery Class")."[12]
>
> Under all claims, Plaintiffs seek injunctive relief and recovery of attorneys fees/costs.

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[11]The California Supreme Court recently elucidated the nature of a PAGA claim in Arias v. Superior Court, 46 Cal.4th 969, 209 P.3d 923 (CA 2009).

[12]The 2010 Sirner Decl., ¶ 5 and the Motion misstates that Plaintiffs have separate classes based on residency, which would be inconsistent with California coverage of non-residents when working in California, the Sullivan v. Oracle issue. Starting from this misstatement of Plaintiffs' class definitions, the 2010 Sirner Decl., mirrored in GVI's Motion, submerges the fact that the putative classes each include a majority of California resident Tour Directors, the majority of whom conducted at least a majority, if not all, their tour days in Colorado. In a similar rhetorical device, GVI submerges the greater California focus of the putative class members in an off point discussion of what all its Tour Directors do, though not all are putative class members.

By November 3, 2008 Order (Hall Declaration, Ex. 1), the San Francisco Superior Court ordered this matter to arbitration. It has retained vestigal jurisdiction, for example having the parties periodically report on the progress of the Arbitration. The Superior Court also will be the court that will be called upon to enter a judgment based on the arbitral award and will be the first court of review of any award. (Under California law, arbitral awards deciding statutory wage and hour claims are subject to substantive, judicial review to an extent not accorded other arbitral awards as a means of safeguarding these statutory rights. Pearson Dental Supplies, Inc. v. Superior Court, 48 Cal.4th 665, 679-80, 229 P.3d 83, 92(2009)).

Much of the Order compelling arbitration has nothing to do with the Motion's resolution. The Order repeatedly makes clear that it did not decide and left it to the Arbitrator to decide the validity of GVI's claim that Colorado law controlled the parties' substantive rights and duties, the issue that the Motion now raises. In the context of finding valid the employment contracts' selection of Colorado procedure, the Superior Court found that the GVI drafted contracts were adhesionary as offered on a take-it-or-leave it basis and that GVI had superior bargaining power, but that GVI afforded Tour Directors adequate time to review the contracts each year, did not threaten them, and that they could have elected employment with another tour operator. The Court also conducted its own choice-of-law analysis insofar as determining which states' law governed Plaintiffs' unconscionability challenge and determined that California law controlled.

During this arbitration, GVI answered Plaintiffs' First Amended Complaint, the version pending when this case was ordered to arbitration. Its Answer admits its use of standard form contracts to employ Tour Directors (¶ 13.i), which contracts contained an allegedly controlling Colorado choice-of-law clauses (¶¶ 19, 35). The Answer reaffirms that, throughout July 2003 – December 2007, GVI had a

uniform policy and practice of not paying overtime to Plaintiffs and putative class members (¶ 13.b). The Answer concludes with twenty-eight affirmative defenses. The eighth affirmative defense is that Colorado substantive law controls by virtue of the choice-of-law clause or operation of law.

D. GVI's Response to the Present Lawsuit: Reclassify Tour Directors as Non-Exempt, Hourly Employees and Continue its Conduct of Applying the Laws of their States of Residence, Despite an Amended Choice-of-Law Provision Invoking Colorado's Internal Law.

Effective January 1, 2008, GVI responded to this action by amending all its standard employment agreements with Tour Directors to change their status to non-exempt, hourly employees (¶ 11). Copies of Plaintiff Watrous and Cherry's 2008 employment contracts are included in Exhibit 1 to their respective declarations. The new employment contracts provision now separates into two separate clauses the subject matter previously covered by Section 11. After substituting AAA for JAG in the new Section 11 concerning arbitration, the new Section 12 reads as follows:

> "Section 12: Governing Law
> This Agreement, and all rights, obligations and remedies under this Agreement, or pursuant to the relationship between Employer and Employee formed by this Agreement, or otherwise, shall be governed by and construed in accordance with the internal law of the State of Colorado, without regard to its choice of law rules." (Cherry/Watrous Opp. Declarations, ¶ 15, Ex. 1)

To the extent it thereafter has paid overtime, it has paid overtime to California residents based on California wage and hour law, regardless of the extent to which they work outside California. Cherry/Watrous Opp. Declarations, ¶ 17, Ex. 3. It continues to make the same California withholdings, pay California workers compensation, and pay California Unemployment Insurance for its California resident Tour Directors. Ibid. It is only in response to this lawsuit that GVI has taken the position that Colorado wage and hour law governs GVI's relations with all Tour Directors.

III. LEGAL ANALYSIS WHY MOTION MUST BE DENIED.

The parties concur that California and Colorado apply the Restatement Second to resolve choice/conflicts of law issue. Brack v. Omni Loan Co., Ltd., 164 Cal.App.4th 1312, 1321-22, 80 Cal.Rptr.3d 275, 280 – 287 (CA App. 2008); Washington Mutual Bank v. Superior Court, 24 Cal.4th 906, 914-919,15 P.3d 1071 (CA 2001); Application Group v. Hunter Group, 61 Cal.App.4th 881, 897, 72 Cal.Rptr.2d 73 (CA App. 1998) (holding unenforceable covenant not to compete in employment agreement between Maryland employer and Maryland resident later hired by California employer);[13] Davis v. Advanced Care Technologies, Inc., 2007 WL 2288298, p. *4 (ED CA 2007) (same result applying CA law); Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 465, 834 P.2d 1148 (CA 1992) (dictum); Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc. 532 F.3d 1063, 2008 WL 2655797, fn. 12 (10th Cir. 2008) ("Colorado has adopted the approach of the Restatement (Second) of Conflicts of Laws resolving contract choice of law questions.). Indeed, the Restatement analysis "…is not affected by whether the choice-of-law provision stipulates forum or non-forum law. …" Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023, 1030, fn.12 (4th Cir.1983).[14] The result

[13] MCS Services, Inc. v. Coronel, 2008 MDBT 3, 2008 Md. Cir. Ct. LEXIS 3 [no Westlaw cite] (MD Cir. Ct. 2008) cannot be reconciled with Application Group. For present purposes, the Arbitrator, moreover, need not decide which state (California or Maryland) has the greater interest in enforcing its laws concerning non-compete agreements. MCS heavily relied on the extent of disclosure to the plaintiff who unsuccessfully invoked California law in the face of the Maryland choice of law clause. Here, the comparable circumstances of full disclosure do not exist. To the contrary, GVI management before this lawsuit consistently informed Plaintiffs that their employment relationship was according to California law.

[14] "By contrast, under the rule of *Van Dusen v. Barrack,* 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), a transferee court applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed." Menowitz v. Brown, 991 F.2d 36, 40 (2nd Cir. 1993).

should be the same if the conflicts of law issues are resolved in a California court or in this proceeding. Restatement § 187 states:

> "(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either [¶] (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or [¶] (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties…."

The parties also concur that GVI's Colorado presence satisfies the initial threshold requirement of a "substantial relationship" or "other reasonable basis" for a Colorado choice of law provision. As addressed in detail in the subsections that follow. Plaintiffs, however, disagree with many corollaries that GVI applies and improperly derives from distinguishable contexts, as well as its conclusion that a Colorado choice of law provision would not violate fundamental California policy in which California has materially greater interest.

Plaintiffs organize their legal argument as follows. First, they address why the misinterpretation of Plaintiffs' employment agreements' general reference to Colorado law to require application of Colorado wage and hour law would render ambiguous their agreements insofar as the designation of controlling substantive law and therefore bar summary judgment. Proceeding thereafter on the assumption that GVI's contracts with Plaintiffs had unambiguously required application of Colorado wage and hour law, Plaintiffs describe some of the major effects of substituting Colorado law for California law in their contracts. Plaintiffs then review the overwhelming statutory and case law indiciae that California's non-waiveable wage and hour protections embody fundamental California policy of protecting resident California wage earners, in contrast with Colorado's complete lack of

interest in the extra-territorial application of comparable laws. The analysis under Restatement Second § 187 follows, concluding that a substitution of Colorado for California wage and hour law would materially violate much stronger fundamental policy held by California. Upon confirming the invalidity of the Colorado choice of law provision, the analysis under Restatement Second § 188 and 196 follows, concluding that California wage and hour law controls Plaintiffs' employment relationships with GVI. Plaintiffs conclude their legal argument by disposing of GVI's fallback arguments that California's protecting its resident wage earners who principally work here was not intended by the California Legislature and that to do so offends the Dormant Interstate Commerce Clause.

A. Summary Judgment Cannot Be Granted Against Plaintiffs Based on an Ambiguous Choice of Law Provision.

In light of the Superior Court's Arbitration Order, Plaintiffs assume that Colorado procedural law applies, which in material respects for present purposes is the same as California law. **"**Summary Judgment is a drastic remedy", and is only appropriate where the moving party demonstrates that "no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." Brodeur v. Am. Home Assur. Co., 169 P.2d 139, 146 (CO 2007). When, through the pleadings and affidavits, the non-moving party demonstrates that "material facts are in dispute, it is error to grant summary judgment." Struble v. Am. Family Ins. Co., 172 P.3d 950, 955 (CO App. 2007). The objective of summary judgment is "not to weigh the evidence and decide what occurred", but instead to determine whether a genuine issue of fact exists for a jury to decide. Andersen v. Lindenbaum, 160 P.3d 237, 239 (CO 2007).

The burden of showing that no genuine issue of material fact exists rests with the moving party. Civil Serv. Com'n v. Pinder, 812 P.2d 645, 649 (CO 1991). Only after the moving party has satisfied

that requirement does the burden shift to the non-moving party to demonstrate a material fact. Ibid. Even then, "the non-moving party is entitled to all favorable inferences that may be drawn from the undisputed facts, and all doubts as to whether a triable fact exists must be resolved against the moving party." AviComm, Inc. v. Colo. Pub. Util. Comm'n, 955 P.2d 1023, 1029 (CO 1998). See also, City of Colorado Springs v. Mountain View Electric Association, Inc., 925 P.2d 1378, 1388 (CO App. 1996) ("When applying these doctrines of contract law in an appeal from summary judgment:'[i]t is often the case that although the basic facts are not in dispute, the [contracting] parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist should be drawn from such facts. [cites] Under such circumstances, the case is not one to be decided by the trial court on a motion for summary judgment. [cites]")

Colorado and California also share principles of contract interpretation that bear on the Motion's resolution. Where a contract drafted by an employer is ambiguous, the contract must be strictly construed against the employer. Schaefer v. Horton-Cavey, 692 P.2d 1132, 1135 (CO App. 1984). See Neal v. State Farm Ins. Cos., 188 Cal.App.2d 690, 695, 10 Cal.Rptr. 781, 784 (CA App.1961) ("The rule that any ambiguities caused by the draftsman of the contract must be resolved against that party … applies with peculiar force in the case of the *contract of adhesion.* Here the party of superior bargaining power not only prescribes the words of the instrument but the party who subscribes to it lacks the economic strength to change such language. Hence, any ambiguity in the contract should be resolved against the draftsman, and questions of doubtful interpretation should be construed in favor of the subscribing party."). Accord, F.D.I.C. v. Renfroe Group, Ltd., 989 F. Supp. 1052, 1070 (D. CO 1997) (relying upon 10th circuit caselaw which in turn relies upon caselaw of other state). Both states apply the doctrine of Ejusdem Generis (specific language controls over general). Davidson v. Sandstrom, 83

P.3d 648, 656 (CO 2004). Accord, Kavruck v. Blue Cross of Calif., 108 Cal.App.4th 773, 781, 134 Cal.Rptr.2d 152 (CA App. 2003)(trial court erred in granting summary judgment in breach of contract action to health insurer that changed policies so that premiums were no longer based on insureds' initial enrollment age but on their attained age at time of renewal where, while one portion of policies gave insurer general authority to modify premiums, another portion, specifically addressing entry age rating, could be reasonably understood to promise that rating would continue).

"[W]hen a contract or agreement has been given a practical construction, as reflected by the conduct and acts of the parties in its performance, such construction may, and perhaps even should, be considered by the court in eliminating any ambiguity, and in ascertaining the mutual meaning of the parties at the time of the contracting." Nahring v. Denver, 484 P.2d 1235, 1237 (CO 1971). Accord, Crestview Cemetery Ass'n v. Dieden, 54 Cal.2d 744, 754, 356 P.2d 171, 176 (CA 1960) ("This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.").

Burchett v. MasTec North America, Inc., 322 Mont. 93, 98-99, 93 P.3d 1247, 1249-1250 (MT 2004) is informative how an employer's course of conduct may constitute an affirmative election to be bound by another state's law. Burchett's employer was a Florida corporation; the division of its business relevant to this appeal was operated out of Oklahoma. Its business was laying fiber optic cable throughout the United States. Burchett was hired by telephone while working temporarily in Massachusetts. His employment contract was never reduced to writing. Employer hired Burchett to work as a field mechanic, a job which required travel. While so employed, Burchett lived and worked in the same town as his division was headquartered in Oklahoma, in California, and in Indiana. When

hired, his employer requested his state of residence, which Burchett identified as Montana. While working in Indiana, Burchett had a dispute with his supervisor and was fired. Burchett filed a complaint against his employer alleging violations of Montana's Wrongful Discharge from Employment Act. Although not stated expressly in an employment contract, Burchett argued that with regard to Restatement § 187, the parties chose Montana law to govern their contract based upon the parties undisputed agreement that income taxes, unemployment insurance premiums, and wages were to be paid to Montana. Reversing the lower court, the Montana Supreme Court agreed with Burchett that these indicated an agreement that Montana law should apply, including the WDEA.

The Montana Supreme Court approvingly noted the decision in Dailey v. Transitron Electronic Corp., 475 F.2d 12, 13-14 (5th Cir. 1973). In that case, the employee resided in California when initially contacted by the employer regarding his employment. The employee was assigned to work in Mexico but maintained a residence in Texas. The written employment contract was signed in Mexico. The Fifth Circuit held that the parties manifested their intent to have the employment contract governed by Texas law rather than Mexican law. The court based its holding, in part, on the fact that the employee was paid with checks drawn on a United States bank, United States social security and withholding taxes were deducted from his paycheck, and the employer paid unemployment compensation taxes to Texas on his wages.

Section 11 of Plaintiffs' employment agreement's reference to Colorado law includes Colorado's adoption of the Restatement's approach to resolution of conflicts of law issues. Having recognized that Colorado conflicts of law rules may well mandate that California wage and hour law applies to the putative class members' claims, GVI in its 2008 Tour Director employment agreements amended its choice of law provision to require application of the "the internal law of the State of

Colorado, without regard to its choice of law rules."[15] Thus, it is entirely consistent with the general choice of law provision on which the Motion relies to decide that California law governs Plaintiffs' claims. As elaborated infra, this is the correct result.

A misinterpretation of Section 11 or, more specifically, its incorporated conflicts of law rules to provide for application of Colorado wage and hour law, moreover, would render Plaintiffs' employment agreements ambiguous, requiring the Motion's denial. As quoted in § II, supra, GVI's employment agreements with Plaintiffs (and other Tour Directors) incorporate the Associate Handbooks that support application of California wage and hour law based on Plaintiffs' residency. The onus for any ambiguity falls on GVI, which drafted these adhesionary contracts. Also, the provision in the Associate Handbooks is more specific than the general language that refers to Colorado law and therefore should control. The parties' course of conduct (California withholdings, California worker's compensation coverage, California Unemployment Insurance) and GVI's representations to Plaintiffs and other Tour Directors moreover, is consistent with an interpretation that GVI committed to apply the wage and hour laws of the states of residence of its Tour Directors, in the case of Plaintiffs, California. At no time before this lawsuit did GVI communicate to Plaintiffs or any other Tour Directors that it contended otherwise.

For present purposes, it suffices that GVI cannot obtain summary judgment or partial summary judgment based on an ambiguous choice of law provision – putting aside the question of whether a hypothesized contractual provision requiring application of Colorado wage and hour law to Plaintiffs' claims would be valid, to which question Plaintiffs now turn. The arguments that follow assume, solely

[15] Plaintiffs deny that the amended choice of law provision is legally effective. That is an issue for another day because 2007 is the last year of the recovery period. Plaintiffs also are not suggesting that the application of non-California law to non-California residents to the extent they work in California is valid. This is the Sullivan v. Oracle Corp. issue not framed by this Motion.

arguendo, that GVI's employment contracts unambiguously chose Colorado wage and hour law to govern Plaintiffs' parties' substantive rights and duties.

B. The Differences Between the Subject Wage and Hour Protections Under California and Colorado Law: the Most Generous Statutory Protection Versus No Protection.

At the core of GVI's Motion is an effort to substitute the absence of *any* protections of Plaintiffs under Colorado wage and hour law, which we now contrast with the unwaiveable California protections under attack. The Motion (p. 32:5-13) understates the differences.

1. Colorado Wage and Hour Law Does Not Apply to Work Outside Colorado.

Under Colorado Revised Statutes § 8-4-101(4), a protected "Employee" is one "… performing labor or services for the benefit of an employer …" Under subsection (5), an "Employer" means "…a corporation … employing any person in Colorado; …" One is not protected under Colorado law, even if a Coloradan working for a Colorado employer, if performing services out of state. The consequence of applying Colorado wage and hour law would be to strip Plaintiffs, as well as other class members, of *any* state wage and hour protection except for the de minimis extent tours cross into Colorado. The following points highlighting the inferior employee protections under Colorado wage and hour law assume class members are protected "Employees." In the case of Plaintiffs, since they did not work in Colorado during the recovery period, they would be entitled to no protection under Colorado wage and hour law and[16] summary judgment would be entered in GVI's favor.

[16]Plaintiffs are not suggesting that Colorado could not afford extra-territorial protection to Colorado resident employees in the manner of California (see § III.C.2, infra). Colorado has elected not to do so. Parenthetically, the Ninth Circuit in Sullivan v. Oracle Corp., supra, noted the territorial limits of

2. Colorado's Lower Minimum Wage.

Colorado Wage Orders 22 and 23, which were in effect during the 2003-2007 recovery period, required a lower minimum wage than has California. The differential is even greater in this case because Colorado law requires a dramatically lower minimum wage for employees who receive *tips*, such as Tour Directors, who qualify as tipped employees.[17] See Sitkin Opp. Declaration, Ex. 6, i.e. U.S. Department of Labor historical surveys of states' minimum wages; Colorado Minimum Wage Order Number Wage Order 22 ("Colorado Wage Order 22"); Colorado Minimum Wage Order Number 23 ("Colorado Wage Order 23"); Colorado Constitution, Article XVIII, § 15. California law expressly prohibits an employer from crediting tips toward the minimum wage. See California Labor Code § 351—tips are the sole property of the employee to whom they are given; Henning v. Industrial Welfare Comm'n , 46 Cal.3d 1262, 1280, 762 P.2d 442 (CA 1988); People v. Los Angeles Palm, Inc., 121 Cal.App.3d 25, 35, 175 Cal.Rptr. 257, 263 (CA App. 1981)—crediting tips against minimum wage is unfair business practice. The following chart summarizes the two states' differing minimum wage requirements during the recovery period:

Colorado wage and hour law as a basis for concluding that California wage and hour law protected Coloradans to the extent they work in California, even if the great majority of their work time is spent in Colorado.

[17]Colorado Wage Orders 22 and then 23, § 2 ("Definitions"), define a tipped employee "…as any employee engaged in an occupation in which he or she customarily and regularly receives more than $30.00 a month in tips…." That Tour Directors may expect this level of tips is apparent from GVI's recommendations that each passenger pay between $2.00 and $5.00/day/passenger as a tip to the Tour Director. See Sitkin Opp. Declaration, Ex. 1, i.e. 2003 Associate Handbook, p. D2160/2004 Associate Handbook, p. D2242/2005 Associate Handbook, p. D02330, "Gratuities" ("It is recommended that Tour Directors and Drivers receive $2.00 - $5.00 each per tour day per traveler."). See also Sitkin Opp. Declaration, Ex. 11, i.e. 2007 TD Manual, p. 56/D01890, "YOU AND THE DRIVER RECEIVE YOUR GRATUITIES" ("The suggested gratuity in the customers' documentation is US$3 to US$5 per person per day for both the Tour Director and driver. An example of what the gratuity would be based on US $4 per person is advised. …").

Year	CA Minimum Wage	CO Minimum Wage (general)	CO Minimum Wage (tipped employees)	CO Minimum Wage (tipped employees) as % CA Minimum Wage (rounded to nearest .1%)
2003	$6.75	$5.15	$2.13	31.6%
2004	$6.75	$5.15	$2.13	31.6%
2005	$6.75	$5.15	$2.13	31.6%
2006	$6.75	$5.15	$2.13	31.6%
2007	$7.50	$6.85	$3.83	51.1%

It therefore is only in the last year that the Colorado minimum wage for tipped employees has surpassed *one third of what California mandated.*

3. <u>Colorado's Lesser Overtime.</u>

Colorado overtime protection are substantially less than those that California affords to protected, non-exempt employees. Under 8 Cal.Regs. § 11090 (Wage Order 9), California during the recovery period had three overtime triggers. Under the daily overtime trigger, the employee received no less than 1.5 times the regular rate of pay for all hours over 8, increasing to no less than 2.0 times the regular rate of pay for all hours over 12. Under the overtime trigger for the seventh consecutive work day of a work week, the employee received no less than 1.5 times the regular rate of pay for the first 8 hours of work on the seventh consecutive day of a work week, increasing to no less than 2.0 times the regular rate of pay for all hours over 8 on that day. Under the hours in a workweek trigger, the employee received no less than 1.5 times the regular rate of pay for all hours over 40 in a work week.

Colorado does not recognize seventh consecutive work day overtime; its daily trigger is set at 12 hours in a day or consecutive hours; and overtime hours are compensated at 1.5 times regular rate of pay, i.e. no double time. See Colorado Wage Orders 22-23, § 4.

Of great financial impact is the difference in how the regular rate of pay is calculated for purposes of a litigated recovery. Colorado follows the FLSA's fluctuating work week approach, distilled to calculating the regular rate of pay by dividing total compensation in a week by total hours of work, subject to a floor of the federal minimum wage. See Sitkin Opp. Declaration, Ex. 7, i.e. Colorado Department of Labor & Employment, Advisory Bulletin. This results in a reduction in the regular rate and hence the overtime premium if the employee works longer hours. California eschews this approach and calculates the regular rate by dividing weekly compensation by non-overtime hours, subject to a floor of the California minimum wage. This means that an employee does not reduce his regular rate of pay and hence overtime premium by working more overtime hours. It also means that under California law overtime hours are treated in a recovery as if nothing has been paid by the employer. California therefore only attributes compensation earned in a work week to non-overtime hours. Skyline Homes, Inc. v. Dept. of Industrial Relations,165 Cal.App.3d 239**,** 247-48, 211 Cal.Rptr. 792 (CA App. 1985) overruled on diff. grounds, Tidewater Marine Western, 14 Cal.4th 557, 573, 927 P.2d 296 (CA 1996); Ghory v. Al-Lahham, 209 Cal.App.3d 1487, 1490-91, 257 Cal.Rptr. 924, 925-26 (CA App. 1989); Alcala v. Western AG Enterprises, 182 Cal.App.3d 546, 227 Cal.Rptr. 453, 456-57 (CA App. 1986). In the Scherrer settlement, GVI's expert undertook a statistical regression analysis that the parties adopted by which, assuming a 12.6 hour work day, those paid under the California overtime measure now in effect received 7.197 times as much as those paid under the FLSA (Colorado) measure. Sitkin Opp. Declaration, ¶ 2. While this is not a precise ratio, it provides some indication of what class members

stand to lose by way of recovery, even assuming Colorado wage and hour law extended beyond Colorado's borders.

4. Colorado's Shorter Recovery Period.

Applying Colorado instead of California wage and hour law translates to a markedly shorter recovery period. The California UCL claims have a four year limitation period. Cortez v. Purolator Air Filtration Products Co., 23 Cal.4th 163, 179, 999 P.2d 706, 716 (CA 2000). The California Labor Code claims have a three year limitations period. Aubry v.Goldhor, 201 Cal.App.3d 399, 404, 247 Cal.Rptr. 205, 208 (CA App. 1988). Under Colorado Revised Statutes § 8-4-122, statutory actions for unpaid minimum wage or overtime have a two year limitations period, except that a willful violation extends the period to three years.

5. Colorado's Less Extensive Civil Penalties.

California law provides for a private litigant to recover civil penalties not recognized under Colorado law. See § II.C, supra, identifying California penalties. As the California Supreme Court elaborated in Arias v. Superior Court, 46 Cal.4th 969, 209 P3d 923 (CA 2009), California in 2004 significantly expanded the scope of civil penalties that could be collected by a private litigant by enacting the Labor Code Private Attorneys General Act, California Labor Code §§ 2698, et. seq., ("PAGA"). PAGA provides that a private litigant, after the State passes on an opportunity to assume control of the prosecution of claims, is empowered to collect from an errant employer civil penalties previously collectible by the State, subject to a division between the State and the private attorney general of amounts of such penalties recovered. C.f. Leonard v. McMorris, 106 F.Supp.2d 1098, 1106 (D. CO 2000), overruled on diff. grounds, 320 F.3d 1116 (10th Cir. 2003) (penalty under Colorado Revised Statutes, § 8-4-109 limited to bad faith refusal to pay termination wages).

6. Colorado's Lower Threshold to Establish that One Primarily Performs Duties Exempt Under the Administrative or Professional Exemptions.

California law provides for a strict quantitative test of primary duties for purposes of exempt status. An employee who spends less than half his or her time in exempt duties cannot be exempt. California Labor Code § 515(e). On the other hand, the FLSA and presumably Colorado[18] provides than an employee may be exempt even if less than half his or her time is spent in performing exempt duties. 29 CFR § 541.700(b).

Also, there is a significant difference in the minimum salaries to qualify under the Salary Basis Test for the exemptions. Colorado Wages Orders 22-23, though requiring that exempt employees be salaried, did not define the minimum salary amounts. The California Salary Test for these exemptions requires "a monthly salary equivalent to no less than twice the state minimum wage for full-time employment" (meaning forty hours/week) (California Labor Code § 515(a)). This equates to GVI's paying a base salary (i.e. excluding commissions, discretionary bonuses, and tips) of at least $28,080 in the case of 2003 – 2006 or at least $31,200 in the case of 2007. In that for only four Full Time Tour Directors did GVI in any year during 2003-2007 pay the minimum, it cannot claim exempt status for most of these Tour Directors within the putative class.

7. Colorado Greater Latitude to a Prevailing Employer to Recover Fees.

California law affords the employee a unilateral right to recover fees on prevailing on a wage and hour claim. Labor Code § 1194(a) specifically allows fees only to the employee, not the employer. See also, Labor Code § 218.5 (last sentence); Earley v. Superior Court, (2000) 79 Cal.App.4th 1420, 1426-1427, 95 Cal.Rptr.2d 57 (CA App. 2000); Bell v. Farmers Ins. Exch., 87 Cal.App.4th 805 at 829,

105 Cal.Rptr.2d 59 (CA App. 2001) ("Labor Code section 1194 is a 'one-way' fee-shifting statute, which gives employees the right to recover reasonable attorney fees in a successful suit for overtime compensation, without giving employers any corresponding right in the event of a successful defense of an employee suit.)" An employer's efforts to make fee recovery bilateral thus are void under California law and recognized as a deterrent to assertion of wage and hour claims. On the other hand, Colorado Revised Statutes, § 8-4-110(1) authorizes a court to award fees to an employer where the employee's recovery does not exceed the amount the employer tendered. It also affords the employer the right to make a tender up to 14 days after the demand. In addition, under Colorado Revised Statutes, § 13-22-225 (3), the party prevailing on a motion for the Court to confirm, modify, or vacate an arbitral award may recover fees and expenses.

The Motion's understatement of the above-described pertinent differences between Colorado and California wage and hour law is misleading. Insofar as their pertinent provisions are concerned, there could be no contrast more stark than the absence of any protection to Plaintiffs under Colorado wage and hour law and the most generous wage and hour protections afforded to Plaintiffs under California law.

C. <u>California's Unwaivable, Statutory Wage and Hour Protections Embody Strong Fundamental California Policy.</u>

In determining whether the fundamental policy of another state is violated, thus barring the application of a choice of law provision, Colorado courts will look to the statutes and decisions of the other state. See e.g. <u>Wood Bros. Homes, Inc. v. Walker Adjustment Bureau</u>, 601 P.2d 1369, 1373 (CO 1979) (discussing New Mexico law); <u>Farris v. ITT Cannon</u>, 834 F. Supp. 1260, 1266 (D. CO 1993).

[18] See <u>Allsopp v. Akiyama, Inc.</u>, 2010 WL 1258006, p. 4 (D. CO 2010) (Re Minimum Wage Order 25,

Accord, (Beatty Caribbean, Inc. v. Viskase Sales Corp., 241 F.Supp.2d 123, 128-29 (D. PR 2003))

Factors bearing on whether a state's law embodies fundamental policy include the following:

*whether the "…statute … makes one or more kinds of contracts illegal…" (Restatement § 187, comment g); Brack v. Omni Loan Co., Ltd., 164 Cal.App.4th 1312, 1321-1330, 80 Cal.Rptr.3d 275, 280 – 287 (CA App. 2008) ("…the requirements of a statute may also be fundamental when the Legislature provides that an agreement entered into in violation of the statute is void…").

*whether contravening conduct is criminalized (Banek Inc. v. Yogurt Ventures U.S.A., Inc., 6 F.3d 357, 362, fn. 3 (6th Cir. 1993),

*whether the "…statute…is designed to protect a person against the oppressive use of superior bargaining power" (Restatement § 187, comment g); Washington Mutual, *supra,* 24 Cal.4th at pp. 917-918, 15 P.3d 1071 (CA 2001) ("… the weaker party to an adhesion contract may seek to avoid enforcement of a choice-of-law provision therein by establishing that 'substantial injustice' would result from its enforcement (Rest., § 187, com.(b), p. 562) or that superior power was unfairly used in imposing the contract [citation]. In light of these protections, we conclude *Nedlloyd's* analysis is properly applied in the context of consumer adhesion contracts.")

*whether the state prohibits waiver by private agreement. Brack v. Omni Loan Co., Ltd., 164 Cal.App.4th 1312, 1321-1330, 80 Cal.Rptr.3d 275, 280 – 287 (CA App. 2008) ("The relative significance of a particular policy or statutory scheme can be determined by considering whether parties may, by agreement, avoid the policy or statutory requirement."); Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023, 1030 -1031 (4th Cir. 1983),[19]

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at § 5(a): "This exemption models the administrative exemptions contained in the FLSA …").

[19] "At the other extreme, it seems apparent that where the law chosen by the parties would make enforceable a contract flatly unenforceable [FN21] in the state whose law would otherwise apply, to honor the choice-of-law provision would trench upon that state's 'fundamental policy.' [cites]

*whether a proscription of waiver is set forth by statute (Brack, supra);

*whether attorneys fees are recoverable in private actions (Banek Inc. v. Yogurt Ventures U.S.A., Inc., 6 F.3d 357, 362 fn. 3 (6th Cir.1993);

*whether the state creates a dual track of public and private administrative enforcement to uphold the right (Brack, supra). Plaintiffs now apply these factors and others to California and, § III.D to Colorado, wage and hour protections in the present context of Plaintiffs' claims as California residents, who principally or exclusively worked in Californian and never in Colorado:

1. California Statutory Wage and Hour Protections.

One would expect a credible analysis of whether the *subject* statutory, California wage and hour protections embody fundamental California policy to review at least what the California legislature and courts had to say. The Motion, tellingly evasive on this point, reviews authorities concerning non-statutory breach of contract claims, franchise agreements, non-compete agreements – everything under the sun, but the subject statutory, California wage and hour protections. The reason for this omission is that all these factors compel the conclusion that the subject statutory wage and hour protections embody fundamental California policy, as the California Supreme Court summarized in Gentry v. Superior Court, 42 Cal.4th 443, 455, 165 P.3d 556, 562-563 (CA 2007):

> "In the present case, Gentry's lawsuit is pursuant to statute. Section 510 provides that nonexempt employees will be paid one and one-half their wages for hours worked in excess of eight per day and 40 per week and twice their wages for work in excess of 12 hours a day or

FN21. We distinguish here between contracts void and unenforceable within a state, as a matter of public policy, and those that are voidable by the parties on questions related to matters of validity. *Cf.* Sedler, *supra* note 10, at 296 ("questions analytically going to validity, such as the existence of consideration, do not involve a strong public policy")."

> eight hours on the seventh day of work. Section 1194 provides a private right of action to enforce violations of minimum wage and overtime laws.[FN3] That statute states: " *Notwithstanding any agreement* to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (§ 1194, subd. (a), italics added.) By its terms, the rights to the legal minimum wage and legal overtime compensation conferred by the statute are unwaivable. " Labor Code section 1194 confirms 'a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers.' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340, 17 Cal.Rptr.3d 906, 96 P.3d 194 (*Sav-On Drug Stores*).) Although overtime and minimum wage laws may at times be enforced by the Department of Labor Standards Enforcement**563 (DLSE), it is the clear intent of the Legislature in section 1194 that minimum wage and overtime laws should be enforced in part by private action brought by aggrieved employees. (See *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 746, 9 Cal.Rptr.3d 544 (*Bell*) [noting declaration of former *456 chief counsel of DLSE indicating that without private enforcement through class actions department's resources to resolve claims would be overtaxed].)
>
> The public importance of overtime legislation has been summarized as follows: "An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages (above the minimum wage) are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy.... 'The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer. [Citations.] California courts have long recognized [that] wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." [Citation.] ... [O]ne purpose of requiring payment of overtime wages is " 'to spread employment throughout the work force by putting financial pressure on the employer....' " [Citation.] Thus, overtime wages are another example of a public policy fostering society's interest in a stable job market. [Citation.] Furthermore ... the Legislature's decision to criminalize certain employer conduct reflects a determination [that] the conduct affects a broad public interest.... Under Labor Code section 1199 it is a ***782 crime for an employer to fail to pay overtime wages as fixed by the Industrial Welfare Commission.' " (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430, 95 Cal.Rptr.2d 57.) Moreover, the overtime laws also serve the important public policy goal of protecting employees in a relatively weak bargaining position against " 'the evil of "overwork." ' " (*Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 [commenting on overtime provision of the federal Fair Labor Standards Act].) [¶] In short, the statutory right to receive overtime pay embodied in section 1194 is unwaivable."

See also, Crab Addison, Inc. v. Superior Court, 169 Cal.App.4th 958, 970-973, 87 Cal.Rptr.3d 400, 409 - 411 (CA App. 2008) ("So great is the public policy protecting employees' right to overtime compensation that the right is 'unwaivable.' [cite]); Earley v. Superior Court, 79 Cal.App.4th 1420,

1430-1431, 95 Cal.Rptr.2d 57, 63 - 64 (CA App. 2000); Association of Community Organizations for Reform Now v. Department of Industrial Relations, 41 Cal.App.4th 298, 301-302, 48 Cal.Rptr.2d 486, 488 (CA App.1995) ("California's wage and hours law promotes important societal interests."); Gould v. Maryland Sound Industries, Inc. 31 Cal.App.4th 1137, 1150, 37 Cal.Rptr.2d 718, 726 (CA App.1995) ("…if MSI discharged Gould in retaliation for his reporting violations of the overtime wage law to MSI management, it violated a fundamental public policy of this state."); Monzon v. Schaefer Ambulance Service, Inc., 224 Cal.App.3d 16, 29-30, 39, 273 Cal.Rptr. 615, 621 – 622 (CA App. 1990) (one purpose of requiring payment of overtime wages is " 'to spread employment throughout the work force by putting financial pressure on the employer....' "); California Grape Etc. League v. Industrial Welfare Com., 268 Cal.App.2d 692, 703, 74 Cal.Rptr. 313 (CA App. 1969) (wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare."); Kerr's Catering Service v. Department of Industrial Relations, 57 Cal.2d 319, 326, 369 P.2d 20 (CA 1962) ("It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due.").[20] California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 295-296, 140 P.2d 657, 662 (CA 1943), approvingly quoting West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393, 57 S.Ct. 578, 582, (1937) ("In dealing with the relation of employer

[20]Federal and California law also confirm that state wage and hour protections may endow employees with greater wage and hour protections than under the FLSA. The FLSA merely sets the floor and California can regulate wage and hour law within its border where the FLSA declines to do so. Pacific Merchant Shipping Assoc. v. Aubry, 918 F.2d 1409, 1419 (9th Cir. 1990); 29 U.S.C. §218 (FLSA savings clause); Morillion v. Royal Packing Co., 22 Cal.4th 575, 593, 995 P.2d 139 (CA 2000); Rivera v. Division of Industrial Welfare, 265 Cal.App.2d 576, 602-03, 71 Cal.Rptr 739 (CA App. 1968).

and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. [cites]").

As the above cases discuss, several statutory enactments support the conclusion that the subject wage and hour protections embody fundamental California policy. See California Labor Code § 50.5,[21] § 90.5, [22] § 206.5,[23] § 219,[24] § 1171 (crime punishable by fine and imprisonment to requires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by IWC Wage Order, pay or cause to be paid to any employee less than the minimum wage, or violates any provision of this chapter or any Wage Order or IWC ruling); §§ 1174.5-1175 (a crime for an employer to fail to keep or refuse to furnish payroll records showing the hours worked daily by, and

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[21] "One function of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment"

[22] "(a) It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

(b) In order to ensure that minimum labor standards are adequately enforced, the Labor Commissioner shall establish and maintain a field enforcement unit, which shall be administratively and physically separate from offices of the division that accept and determine individual employee complaints…."

[23]" (a) An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made. A release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee. Violation of this section by the employer is a misdemeanor."

[24] "(a) Nothing in this article shall in any way limit or prohibit the payment of wages at more frequent intervals, or in greater amounts, or in full when or before due, but no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

wages paid to, its employees), § 1194,[25] § 1199 (crime for an employer to fail to pay overtime wages as fixed by the IWC). See also, California Constitution, Art. 14, § 1 ("The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers."). C.f. Volvo Construction Equipment North America, Inc. v. CLM Equipment Co., Inc., 386 F.3d 581, 607 (4th Cir. 2004) (Motion, p. 3:26) (Louisiana auto dealer protection statute not fundamental as no legislative declaration); Melt Franchising LLC v. PMI Enterprises, Inc., 2009 WL 325587 (CD CA 2009) (Motion, p. 34:8-17 (concluding in one sentence without analysis that plaintiff's UCL claim based on franchise law violation had not shown fundamental California policy); In re U.S. Foodservice Inc. Pricing Litigation, 2009 WL 5064468, 26 (D CT) (Motion, p. 34:17-19) (same: "Because CHW has not forwarded any fundamental public policy of California that would be contravened by application of the law chosen by the parties to the contract, the Court need not determine whether California or Illinois has a materially greater interest in application of its law. Therefore, the Court will apply Illinois law and dismiss CHW's UCL claim").

In sum, every one of the above-described factors that courts have used to identify whether a statute embodies a state's fundamental policy confirms that the subject California wage and hour protections of resident wage earners, like Plaintiffs embody fundamental California policy.[26]

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[25] "(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

[26] Although immaterial to the disposition of GVI's Motion, its argument (pp. 22, fn. 11, 23, fn. 12) that affording non-residents California wage and hour protections while working in California places

2. California's Fundamental Policy of is Protecting Resident Wage Earners, Including When Out of State During Which California Wage and Hour Statutes Still Protect Them.

In contesting California wage and hour protections embody fundamental California policy, GVI makes a subsidiary argument that any fundamental policy would not extend to the minority of Plaintiffs' time spent outside California. GVI rests this argument on two mistaken predicates: a) so applying California wage and hour law would render California wage earners uncompetitive insofar as obtaining work outside California and b) that the California Legislature did not intend such coverage of California wage earners.

The first argument's analogue is that American business, encumbered by the cost of any employee protections (mine safety, minimum wages, child labor laws, overtime, etc.) cannot compete with third world sweatshops. Its corollary is a classic late 19th century economic liberalism, long rejected, that held that there should be no brake on how little an employee earns or other restraint on the operations of labor markets, despite the market imperfections arising from an inequality of bargaining power. To bring it home, were GVI successful in its gambit of substituting Colorado's lack of any wage and hour protection, where would it end? Are we to cheer legally allowing GVI to have no limits on how low GVI can pay Plaintiffs or how long they must work under the banner of their being more competitive? As set forth in numerous legislative and judicial pronouncements (see last subsection), a function of wage and hour laws is to support employees and their families in adequate standards of living by elevating mandated compensation so that when they work they make enough to sustain those standards. One expressed purpose of wage and hour protections is to encourage limits on the hours worked. GVI disagrees, but it is not (fortunately) GVI's place to make those judgments. It can lobby the California legislature with its anachronistic views.

Plaintiffs in a conflict of interest, which undermines their adequacy as class representatives, is without merit. It effectuates the fundamental policy of California wage and hour laws to protect California resident wage earners to avoid non-residents competing for the same jobs within the State, but without the same job protections. This issue will be resolved in Sullivan v. Orcale Corp.

The second argument relies on misstatements of California case law. Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 578, 927 P.2d 296, 309 (CA 1996) did not hold "California wage and hour laws will ordinarily not apply to work performed outside California" (Motion, p. 7:4-6). This characterization cannot be reconciled with what the California Supreme Court actually said:

> "The Labor Code provides that "[o]ne of the functions of the Department of Industrial Relations (which includes the IWC and the DLSE) is to foster, promote, and develop the welfare of the *wage earners of California* ...." (Lab. Code, § 50.5, italics added.) If 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. (Cf. *United Air Lines, Inc. v. Industrial Welfare Com.* (1963) 211 Cal.App.2d 729, 735, 748-749 [28 Cal.Rptr. 238] [court assumes that IWC regulations apply to persons who are domiciled in California but work principally outside the state].)…"

See also, Pacific Merchant Shipping Ass'n v. Aubry, 918 F. 2d 1409, 1427 (9th Cir. 1990) (application of California overtime laws to California residents who primarily worked in the ocean outside California's territorial boundaries was not unconstitutional nor pre-empted by federal law; recognizing that "California has strong interests."). See also, Application Group, Inc. v. Hunter Group, Inc., 61 Cal.App.4th 881, 900 -901, 72 Cal.Rptr.2d 73 (CA App.1998), which, in invalidating non-compete in employment agreement between former employer and Maryland resident whom California employer had hired, held as follows: "It follows that California has a strong interest in protecting the freedom of movement of persons whom California-based employers (such as AGI) wish to employ to provide services in California, regardless of the person's state of residence or precise degree of involvement in California projects, and we see no reason why these employees' interests should not be "deemed paramount to the competitive business interests" of out-of-state as well as in-state employers. [cite]." See also, Davis v. Advanced Care Technologies, Inc., 2007 WL 2288298, p. *4 (ED CA 2007), in which the court invalidated a Connecticut choice of law clause that would have permitted a non-compete as materially impairing fundamental California policy. The plaintiff employee was a

California resident salesperson who traveled outside California on business, as well as working within the state.

Nor is a foreign employer's mandated adherence to the wage and hour protections accorded a state's resident while working outside the state some anomaly of California law. In Bostain v. Food Express, Inc., 153 P.3d 846, 851-52 (WA 2007), a truck driver who was employed in Washington to work for a California company's Washington operation sued under Washington state law for unpaid overtime wages, including for time worked outside the state in Oregon and Idaho. The Supreme Court of Washington analyzed the state statute in question and held that it facially required Washington employers to pay Washington-based employees overtime – regardless of where the work was performed. Id., at 852.[27] In arriving at this conclusion, the court first rejected basing a territorial limit on coverage on the statutory recital of the purposes of Washington's minimum wage act of insuring "minimum standards of employment within the state of Washington" and "to encourage employment opportunities within the state." "…[W]e do not agree that references … to employment within the state of Washington mean that overtime must be paid only with respect to total hours worked within the state's borders. Rather, the legislature's policy declaration … describes the purpose of the MWA and speaks to the importance of minimum wage protections for Washington employees in order to encourage Washington employment opportunities. The act's purpose does not depend on the work itself being performed within the state." (p. 851). The court also relied on the remedial purpose of the wage act, the principle that exemptions must be narrowly construed, and that the definition of hours worked was not limited to work within the state, and the spirit of liberal construction appropriate for wage and hours protections (p. 852). California wage and hour law is the same in all these respects.

See § III.C (remedial nature and liberal construction of California wage and hour laws); Wage Order 9, 9 Cal.Regs. § 11090 (2)(H) (defining "Hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so"); Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal.4th 785, 794, 978 P.2d 2 (CA 1999) (exemptions from statutory mandatory minimum wage and overtime provisions are narrowly construed). Indeed, the California counterpart to the above-described Washington legislative statement of intent does not as readily lend itself to the argument that the protections of California residents end when they temporarily leave the state. See California Labor Code § 50.5 ("One of the functions of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment."). GVI (p. 42:9-20) acknowledges, as it must per Industrial Welfare Com. v. Superior Court, 27 Cal.3d 690, 725, 613 P.2d 579, 599-601, 166 Cal.Rptr. 331, 351 - 353 (CA 1980), that Tour Directors are not among those interstate workers exempted from Wage Order 9's coverage. Their omission reflects the IWC's intent, in the exercise of its quasi-legislative functions, that they be covered, also undermining the *rebuttable* presumption on which GVI relies from North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 4, 162 P. 93 (1916) ("The intention to make the act operative, with respect to occurrences outside the state, will not be declared to exist unless such intention is clearly expressed or reasonably to be inferred 'from the language of the act or from its purpose, subject matter or history.' [cites] "). GVI's Motion rests on a fundamental flaw. The California overtime laws at issue do not regulate a place; they regulate the conduct of employers and seek to protect the welfare of California wage earners within or without California. These Californians

[27] The Court in Bostain then engaged in a Commerce Clause analysis and held that because such application of the state law was facially non-discriminatory, and the local interest outweighed any

do not cease being wage earners on temporarily crossing the state border for work reasons, nor is whether their employer observes minimum wage and hour protections without affect on their welfare.

Turning to the UCL, Plaintiffs concur that the case most directly on point and that most clearly describes the correct California UCL analysis is Norwest Mortgage v. Superior Court, 72 Cal.App.4th 214, 85 Cal.Rptr.2d 18 (CA App. 1999). Again, what the case actually says cannot be reconciled with GVI's description: "UCL does not apply to conduct outside of the [sic] California." Motion, p. 7:7-8. In Norwest, the defendant company engaged in alleged illegal business conduct in two of its business locations – one inside and one outside California, and its illegal practice injured two groups of people – one inside and one outside California. Norwest allegedly charged unfair insurance premiums to its customers. Norwest, 72 Cal.App.4th at 217. The practice of imposing such fees on its customers, having the effect of generating kick-backs to itself, was deemed an unfair business practice. Id. at 219. During a 12-month portion of the statutory period in issue, Norwest's business decision to charge these illegal premiums emancipated from an office in Riverside, California. Id. at 218. At all other times, the business decisions arose from Norwest offices in other states. Id. at 218-19. As a result, three categories of injured plaintiffs were created: a first category comprised of California residents (whose claims were permissible regardless of Norwest's location at the time of the making of the unfair business decisions, because they were in California); a second category comprised of non-California residents whose claims were based on Norwest's decisions made from its Riverside, California office; and a third category comprised of non-California residents whose claims were based on Norwest's decisions from locations outside California. Id., at 222, 225.

In Norwest, the rule to be applied for analysis was straight forward: claims were properly subject to California UCL when application of California's UCL to the claims was neither arbitrary nor

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burden imposed on interstate commerce, the law passed Constitutional muster. Id. at 856-7.

unfair. Relying on Clothesrigger v. GTE Corp., 191 Cal.App.3d 605, 613, 236 Cal.Rptr. 605 (CA App. 1987) and Phillips Petroleum v. Shutts, 472 U.S. 797, 821-822 (1985), the Norwest court reasoned that application of California's UCL to claims was neither arbitrary nor unfair in two situations: 1) when injuries occurred in California, regardless of the defendant's location (Category 1); and when the defendant's injurious conduct took place in California and its customers were injured outside of California (Category 2). Norwest, 72 Cal.App.4th at 222. The only situation when Norwest has no UCL liability – when there actually was a due process problem – occurred when both the injury-causing conduct took place outside of California and the defendant's customers were injured outside of California (Category 3). Ibid. In that situation, application of California's UCL was deemed to be arbitrary or unfair because California had no connection to the claims whatsoever." (pp.26-27)[28]

That GVI's decisions or administrative nerve center[29] is in Littleton does not insulate them from UCL liability to Plaintiffs for injuries suffered in California. Plaintiffs have both predominantly worked here and been underpaid here. There is no 'category 3' limit on the UCL's application. Moreover, the UCL's territorial coverage should extend at least as far as that of the statutes, the violation of which forms the UCL claim's predicate acts. Here, as the California wage and hour protections cover Plaintiffs while spending a minority of their time working outside California, so

[28]Originally, Business and Professions Code § 17200 applied to anyone "performing or proposed to perform an act of unfair competition within the state." In 1992, however, the California Legislature amended Section 17200, deleting the "within the state" requirement, thereby clarifying that the applicability of § 17200 is not limited solely to conduct that occurs within the state of California. Statutes, 1992, ch. 430, § 3, p. 1707. This clearly reflects a legislative intent not to limit the UCL to wrongful conduct within California as GVI (pp. 51:10-52:3) and overcomes any presumption under North Alaska Salmon Co., 174 Cal. 1, 162 P. 93 (CA 1916).

[29]GVI is rather opportunistic in its description of its offices control over all things administrative. Contrast the current depiction with GVI's position when it attempts to advance the administrative exemption defense on the ground that Tour Directors have broad discretion and rarely communicate with Littleton.

should the UCL. See also, Application Group, Inc. v. Hunter Group, Inc., 61 Cal.App.4th 881, 900-901, 72 Cal.Rptr.2d 73 (CA App.1998) (former Maryland employer subject to UCL claim when invoked non-compete clause). See also, Yu v. Siognet Bank, 69 Cal.App.4th 1377, 82 Cal.Rptr.2d 304 (CA App. 1999) (suit by California resident against Virginia defendant credit card issuer whose conduct occurred outside California because injury occurred in California.)

GVI's added authorities do nothing to alter this conclusion. On the issue of protection of residents while working out of state, GVI (p. 46:6-25) invokes a June 12, 2002 DLSE Opinion Letter. Preliminarily, it misstates the deference accorded these responses typically to an individual employer's inquiries. The California Supreme Court thus stated, "[a]ccordingly, we review the relevant DLSE policy statements and DLSE advice and opinion letters as evidence of the DLSE's interpretation of sections 2802 and 2804, recognizing that its interpretation is entitled to no deference but also that this court may adopt the DLSE's interpretation if we independently determine that it is correct." Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal.4th 554, 563, 169 P.3d 889, 894 (CA 2007). This does not mean that DLSE Opinion Letters cannot be helpful if the circumstances are the same or, after independent review, even persuasive. But they are not precedental. GVI quotes the majority of the text of this brief and an unilluminating Opinion Letter. It omits that the context was an employee who was going to be working in Saudi Arabia "for at least 18 months, but not more than 24 months…" To equate the inconclusive statements concerning the effect of a "written expat agreement" concerning this person's protections with those accorded Plaintiffs, who were residents and predominantly worked here is not helpful. Accorded at least equal deference is the clearer statement in the DLSE Enforcement Manual, § 46.6.12 that "…the IWC Orders presumptively cover individuals who are domiciled in California but who work partly or under some circumstances, even principally, outside the state." GVI (Motion, p. 47:1-9) goes through real contortions to try to import a qualifier based on choice of law provisions, to

which there is no reference. As discussed infra, § III.D, supra, no conflict arises where California wage and hour law accords greater protections than Colorado law.

On the issue of the UCL's application, Churchill Village LLC v. General Electric Co., 169 F.Supp.2d 1119, 1126-27 (ND CA 2000) and Speyer v. Avis Rent A Car Systems, Inc., 415 F.Supp.2d 1090, 1099 (SD CA 2005) (Motion, p. 51:16-21) are distinguishable as involving a non-resident's efforts to use UCL to challenge conduct that lacked any nexus with California.

Even further afield is Diamond Multimedia Systems, Inc. v. Superior Court, 19 Cal.4th 1036, 1058 -1059, 968 P.2d 539 (CA 1999) (Motion, p. 7:8-10) (out of state securities purchasers who suffered out of state injuries could sue for price fluctuations attributable to acts within California).

3. The UCL Claim Embodies Fundamental California Policy At Least to the Same Extent as the Predicate Statutory Violations Violate Fundamental California Policy.

As noted, a violation of California wage and hour law constitutes a predicate act for purposes of a California UCL claim. Cortez v. Purolator Air Filtration Products Co., 23 Cal.4th 163, 179, 999 P.2d 706, 716 (CA 2000) (violation of overtime statute formed predicate act for UCL claim). GVI erroneously argues that the UCL claim does not embody fundamental California policy. It does to the same extent as implicated by the predicate statutory violations. See Cardonet, Inc. v. IBM Corp., 2007 WL 518909, 5 (ND CA 2007):

> "Whether a § 17200 claim implicates fundamental California policy depends on the predicate violation. *Compare Nibeel v. McDonald's Corp.,* 1998 WL 547286 at *11 (N.D.Ill.1998) (concluding that § 17200 claim did not implicate fundamental California policy so as to bar enforcement of choice-of-law provision after finding that enforcement of provision as to underlying fraud claim would not implicate fundamental California policy) *with Application Group, Inc. v. Hunter Group Inc.,* 61 Cal.App. 4th 881, 907-08 (1998) (concluding that there was a conflict of California policy as to § 17200 claim after determining that there was a conflict as to underlying statutory claim)."

See also, Gentry v. Superior Court, 42 Cal.4th 443, 456, 165 P.3d 556, 563, fn. 3 (CA 2007)

("Although Gentry pleads causes of action under Business and Professions Code section 17200 et seq. as well as for common law conversion, these actions are based on Circuit City's alleged violation of the overtime laws, which Labor Code section 1194 is intended to enforce. We therefore focus on the ability of employees to vindicate their rights pursuant to section 1194.").

All Plaintiffs' claims allege violations of statutes that embody fundamental California policy. The sundry cases that GVI cites (pp. 18:33-19:34) in which a choice of law clause trumped a UCL claim all involved different predicate acts or plaintiffs who didn't bother to make any showing that the violated statutes embodied fundamental California policy.

D. No Fundamental Colorado Policy is Involved.

Colorado has no governmental interest in a Colorado headquartered corporation's paying their non-resident employees working outside Colorado less and their not being protected by the superior wage and hour protections of their resident states and states in which they perform their services. In light of Plaintiffs' undisputed circumstances that is all that is properly at issue in GVI's Motion. After all, Colorado, like its sister states, has not enacted a *maximum* wage law. Colorado by limiting the operation of its wage and hour laws to within its state borders, even as to its own residents, has expressed that no fundamental Colorado policy is involved regarding the application of other states' wage and hour law when non-residents perform work outside Colorado.

In Bostain, supra, the Washington Supreme Court noted that the defendant there failed to establish any irreconcilable obligations under other state laws, while the plaintiffs there made "a strong argument that if an employer is subject to the [Washington overtime law] for an employee's wages, that employer would not be required, under a choice of law analysis, to comply with another state's wage and hour statutes as to that employee." Id. at 856. That conclusion is not surprising. The only states

outside of Washington the plaintiff in Bostain worked in were Idaho and Oregon. Id. at 849. Idaho has no state overtime law and Oregon's state overtime law is less protective than Washington's. *See* Oregon Revised Statute § 653.261. So under a conflict of law analysis, the two states with less protective overtime laws would have no interest in seeing their laws (or lack thereof) applied to deny overtime wages under Washington law to Washington-based employees temporarily in their states. In the present case, no state affords more generous overtime protections than California. With only a couple exceptions, none provide higher minimum wages. See Sitkin Opp. Declaration, Ex. 6, i.e. US DOL comparison of states' overtime and minimum wage laws. So, similarly the application of California wage and hour law is unlikely to offend any fundamental policy of Colorado (or any other state).

Colorado's only conceivable interest implicated in the choice-of-law analysis is its general interest in having upheld the contracts of its resident corporations. This general interest is materially less than the highly protected California wage and hour protections herein at issue. Thus, holding that Nevada's interest in upholding its resident's contractual choice of law provision must succumb to California's statutory limits on lenders (even without a statutory non-waiver provision), Brack v. Omni Loan Co., Ltd., 164 Cal.App.4th 1312, 1321-1330, 80 Cal.Rptr.3d 275, 280 - 287 (CA. App. 2008) stated as follows:

> "Nevada on the other hand has no policy which prevents its lenders from subjecting themselves to the regulatory authority of other states. That is to say, nothing in Nevada law prevented Omni from fully complying with California law. Rather, Nevada's interest in applying its law is limited to its more general interest in enforcing the provisions of contracts made by one of its citizens. Given these circumstances, application of Nevada law would impair California's regulatory interests to a far greater extent than application of California law would impair Nevada's interests.")."

Accord, Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023, 1029 -1031 (4th Cir. 1983) ("These interests in regulating business relationships within the states outweigh any generalized interest Ohio might have in applying its own law to protect the interstate contracts of its domiciliary,").

Nor has GVI carried its burden to identify any fundamental policy of the State of Colorado implicated by not applying Colorado wage and hour law to Plaintiffs, who neither lived nor worked there during the recovery period. See Beatty Caribbean, Inc. v. Viskase Sales Corp., 241 F.Supp.2d 123, 128, fn. 1 (D. PR 2003) ("Apart from insisting on the contractual choice of law provision defendant has not pointed out any specific portion of Illinois law which would apply to the situation at hand nor to any policy concerns that would merit consideration under the Restatement analysis…."). Under Restatement 187(b), California has a materially greater interest in its policies implicated in the application to Plaintiffs of its wage and hour protections than has Colorado. It follows from the gross disparity of the strength of their respective policies, that if the "…application of the law…" of Colorado "would be contrary to a fundamental policy.." of California embodied in the subject wage and hour protections, then the choice of law provision cannot be construed to require application of Colorado law.

E. The Application of Colorado Law Would be Contrary to California's Strongly Held Fundamental Policy to Protect its Resident Wage Earners.

At least with regard to statutory wage and hour claims subject to non-waiver statutes, it is simply untrue, as GVI contends (p. 2:19) that "[b]oth states ordinarily give effect to choice-of-law agreements in employment contracts." This phrasing obfuscates the difference between claims for breach of contract, employment contract or otherwise, and claims for violation of statutes subject to anti-waiver statutes and criminal penalties. Thus, Pirkey v. Hospital Corp. of America, 483 F.Supp.

770, 773 (D. CO 1980) (Motion, p. 2:20),[30] John Morrell & Co. v. Halbur, 476 F.Supp.2d 1061, 1075 (ND IO 2007) (Motion, p. 19:25), Hansen v. GAB Business Services, Inc., 876 P.2d 112, 113 (10th Cir. 1994) (branch manager sued his former employer for breach of contract, promissory estoppel, and quantum meruit, after manager's branch did not meet the budget goal necessary to establish manager's eligibility for a bonus under employer's written incentive compensation plan), and FBS AG Credit v. Estate of Walker, 906 F.Supp. 1427, 1429 (D CO 1995) (without analysis) applied choice of law clauses to breach of contract claims. In Britton v. Whittmanhart, Inc., 2009 WL 2487410 (ED PA 2009) (Motion, p. 20, fn. 9), the court upheld an Illinois choice of law clause insofar as contract interpretation and a breach of employment contract claim, while concluding that the plaintiff could still sue under the Pennsylvania wage statute claim. See also Narayan v. Eagle Freight Systems, Inc., 2010 DJDAR 10844 (9th Cir. 7/13/10)[31] in which the Ninth Circuit invalidated the Texas choice of law clause's application to the statutory claims for overtime, reimbursement of business expenses, off-duty meal periods under California wage and hour law by drivers contesting their independent contractor designation. That the Texas employer had a network of 400 facilities located in over 100 countries did not salvage the choice of law clause.

Olnick v. BMG Entertainment, 138 Cal.App.4th 1286, 1304, 42 Cal.Rptr.3d 268 (CA App. 2006) (Motion, p. 2:21-22) specifically noted that California's Fair Employment Housing Act did not contain an anti-waiver statute. So did Volvo Construction Equipment North America, Inc. v. CLM Equipment Co., Inc., 386 F.3d 581, 607 (4th Cir. 2004) (Motion, p. 3:26) (Louisiana auto dealer protection statute not fundamental as no legislative declaration and anti-waiver statute; but voiding

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[30]What constituted fundamental Colorado policy was not even an issue in the case.

[31] The decision is so new that there no official cite. This is the cite to the advance sheets in the Daily Journal, a California legal paper. When an official cite is available, Plaintiffs will provide it.

choice of law provision in face of comparable Arkansas statute that did have anti-waiver statute).[32] So did Banek Inc. v. Yogurt Ventures U.S.A., Inc., 6 F.3d 357, 360-361 (6th Cir. 1993) (Motion, p. 4:15-16), finding an absence of statutory anti-waiver provision because choice of law clauses, unlike forum selection clauses, were not listed in specific statutory listing of provisions that Michigan franchise law prohibited.[33] So did Hambrecht & Quist Venture Partners v. American Medical International, Inc., 38 Cal.App.4th 1532, 1548, 46 Cal.Rptr.2d 33, 43-44 (CA App. 1995) (Motion, pp. 28:27-29:5) (noting California permits reasonable shortening of statutes of limitations).[34]

Colorado courts have repeatedly used § 187 of the Restatement to find choice of law clauses unenforceable. Most of the Colorado cases which address the issue in an employment context have found choice of law provisions purporting to choose other states' laws unenforceable in light of Colorado public policy supporting statutory protections. Dresser Industries, Inc. v. Sandovick, 732 F.2d 783 (10th Cir. 1984) (applying Colorado choice of law principles, Court found noncompetition agreement's choice of law clause purporting to choose Texas law unenforceable where employees were residents of Colorado, North Dakota, and Wyoming, contracts were signed in those states, and work

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[32]Even further afield is GVI's reliance (p. 52:4-12) on Expansion Pointe Properties, Ltd. Partnership v. Procopio, etc., 152 Cal.App.4th 42, 59-60, 61 Cal.Rptr.3d 166, 179 (CA App. 2007) involving the effectiveness of a choice of law clause in a law firm's retainer agreement vis a vis a legal malpractice claim.

[33] "The Michigan legislature may have purposefully omitted choice of law provisions from those clauses prohibited because it may have realized that other states' laws might provide more protection to franchisees; thus, if a franchisee and franchisor want to choose a different state's law to govern any disputes, the parties may so contract."

[34]Even then, whether a statute of limitations embodies fundamental policy depends on which statute of limitations is under consideration. See Farb v. Superior Court, 174 Cal.App.4th 678, 685-686, 94 Cal.Rptr.3d 586, 592 (CA App. 2009) (one year statute of limitations for breach of contract claim against decedent's estate represented fundamental California policy; California choice of law in breached contract upheld against longer limitations under Texas law where probate).

was to be performed in Wyoming and Montana, and all states but Texas barred noncompetition agreements, despite the fact that employer's principle place of business was Texas); Haggard v. Spine, 2009 WL 1655030 at * 3-5 (D. CO 2009) (Colorado choice of law principles barred enforcement of clause selecting Pennsylvania law as noncompetition agreement violates Colorado's fundamental policy). Colorado courts have declined to enforce choice of law clauses not just in the area of noncompetition agreements, where long judicial history of fundamental public policy exists, but also with respect to the remedies contained in the Colorado Wage Claim Act as contrary to the Act's anti-waiver statute. However, this particular statute also expressly prohibits the waiver of rights contained within the statute. See Morris v. Towers Financial Corp., 916 P.2d 678, 679 (CO App. 1996) (reversing trial court dismissal based on choice of law clause purporting to select New York law, and holding that policy embodied in Wage Claim Act made selection clause unenforceable); Lambdin v. District Court, 903 P.2d 1126 (CO App. 1995) (refusing to enforce chosen arbitral forum in California on claims covered by Wage Claim Act).[35] These cases generally involve an employer's unsuccessful effort to use a choice of law provision to avoid unwaiveable statutory protections of a Colorado resident employee. Plaintiffs are in the opposite circumstance, but the same logic applies. Per § III.C, supra, no reasonable doubt can exist that California as zealously safeguards its residents' non-waiveable wage and hour protections.

Nor is Colorado alone in upholding statutory wage and hour laws protected by an anti-waiver statute against a challenge based on a choice of law clause. Healthcare Management and Investment

[35]The Colorado Supreme Court (p. 1131) eschewed considering the Federal Arbitration Act in its alternative holding that Colorado statutory claims are not arbitrable because the appellant failed to assert the FAA in a timely manner. This part of the decision is not consistent with the FAA, but that does nothing to detract from the court's comments about the illegality of a purported waiver of wage and hour protections effected through a choice-of-law provision included in the arbitration clause.

Holdings, LLC v. Feldman, 2006 WL 2660628, 5 -7 (ND OH 2006) involved a dispute between an Ohio employer by a Pennsylvania resident employee who primarily, not exclusively, worked in Pennsylvania and from whose paycheck the employer made Pennsylvania deductions. The claim was for final wages under the Pennsylvania Wage Payment and Collection Law. The Ohio district court voided as contrary to the WPCL's anti-waiver statute the employment agreement's choice of law provision that would have rendered the WPCL inapplicable. To the same effect, Campanini v. Studsvik, Inc., 2009 WL 926975, 5 (ED PA 2009) held as follows:

> "Additionally, a breach of contract claim in which an employment agreement must be construed in accordance with Tennessee law is not necessarily mutually exclusive with a claim brought under a Pennsylvania statutory scheme that permits employees to collect unpaid wages. *See Bowers v. Foto-Wear, Inc.,* Civ. A. No. 03-1137, 2007 WL 906417, at *12 (M.D.Pa. Mar.22, 2007) (noting that choice of law provision limited to contractual dispute did not apply to statutory claims). Plaintiff may also be able to convince a court that the WPCL should apply notwithstanding the choice of law provision. *See Feldman,* 2006 WL 2660628, at *6 (holding that, in case transferred from Pennsylvania to Ohio, that WPCL precluded enforcement of choice of law provision). And were this action to remain in this Court, the Employment Agreement still requires Plaintiff to prove either that he is entitled to recover in accordance with Tennessee law and/or that Pennsylvania law prohibits enforcement of the choice of law provision-thus Plaintiff is in the same situation regardless of which court hears his claims."

See also, Beatty Caribbean, Inc. v. Viskase Sales Corp., 241 F.Supp.2d 123, 128 (D. PR 2003) (choice of Illinois law in distributorship agreement unenforceable by Illinois franchisor against Puerto Rico franchisee distributing in Dominican Republic as violating Puerto Rico's fundamental policy underlying Puerto Rico Distributorship Act and Act's anti-waiver statute); Southern Intern. Sales v. Potter & Brumfield Div., 410 F.Supp. 1339, 1342, 1343 (SD NY 1976) (Indiana law that would give effect to unilateral right to terminate voided as contrary to fundamental policy of Puerto Rio in Puerto Rico Distributorship Act and Act's anti-waiver statute; noting franchise law intended to address dependency and inequality in franchise relationship); Grand Kensington, LLC v. Burger King Corp., 81 F.Supp.2d 834, 839, 840 (ED MI 2000) (fast-food restaurant franchisees sued Florida franchisor for

breach of an agreement to permit them to open 25 additional stores in Michigan. Denying defendant's motion to dismiss, the court held, inter alia, that the contractual choice of Florida law substantially eroded the protection that plaintiffs enjoyed under the Michigan franchise statute that included anti-waiver statute, and that application of Florida law to this matter would be contrary to a fundamental policy of Michigan. Moreover, since Michigan, where the contract was to be performed and the subject matter of the contract was located, had more contacts to the contract than did Florida, the court concluded that Michigan rather than Florida law applied.).

As § III.B, infra elaborates, the application to Plaintiffs of Colorado law affording no protection couldn't be more contrary than the generous protections accorded under California law to California wage earners. This is not comparable to the situation in Olnick v. BMG Entertainment, 138 Cal.App.4th 1286, 1304, 42 Cal.Rptr.3d 268 (CA App. 2006) (Motion, p. 2:21-22) where the New York anti-discrimination law provided an adequate remedy. (The dispute was over differing measures of damage recovery, not absence of protection versus generous non-waiveable wage and hour statutory protections.). Similarly, Samica Enterprises, LLC v. Mail Boxes Etc. USA, Inc., 2010 WL 807440 (CD CA 2010) (Motion, p. 4:24-25) involved upholding chosen state's franchise law that did not materially conflict with those of other states that similarly prohibited misrepresentations. Similarly, in Net2phone, Inc. v. Superior Court, 109 Cal.App.4th 583, 590, 135 Cal.Rptr.2d 149, 154 (CA App. 2003) (Motion, pp. 27:26-28:2) Common Cause still could pursue comparable relief on plaintiff's behalf; so no material impairment by arose from upholding choice of law clause invoking New Jersey law with comparable relief.[36] Similarly, Brazil v. Dell, Inc., 585 F.Supp.2d 1158 (ND CA 2008) and Dajani v. Dell, Inc.,

[36] In Intermetro Industries Corp. v. Kent, 2007 WL 518345, 3 (MD. PA 2007) (Motion , pp.29:19-30:12), the court found no material impairment when both states similarly recognized the enforceability of non-compete agreements, but differently measured the consideration required to support them. The

2009 WL 815352 (ND CA 2009) (Motion, p. 37:17-27) found no material differences in the relief available under the Consumer Legal Remedies Act/UCL and its Texas counterparts, the Texas choice of law clauses were upheld. C.f. America Online, Inc. v. Superior Court, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (2001), in which the court determined that Virginia law would not be applied because it does not allow consumer lawsuits to be brought as class actions and that the remedies under Virginia law are more limited than under California law. Based on these determinations, the court held that public policy considerations embodied in the CLRA's anti-waiver provision would be violated. And contrary to GVI's presumption (Motion, p. 33:18-34:1), the court in Medimatch, Inc. v. International Trading & Exchange, Inc., 120 F.Supp.2d 842, 862 (ND CA 2000), in upholding the application of New Jersey's counterpart to the UCL noted those plaintiffs' concession of how much plaintiffs applauded its scope and protections.[37]

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court specifically relied on the Restatement § 187's comment noting that jurisdictional differences over what constitutes consideration typically do not implicate fundamental state policies. There is no corresponding statement in the Restatement's commentary dismissing the importance of statutory wage and hour protections.

[37]Again, GVI has parsed a quote out of context. This time, as indicated by bold typeface, deleting key text in the middle of the quote without any indicating that it has done so:

> "Plaintiffs' position is clearly untenable, and defendants correctly label it a "heads I win, tails you lose" argument. Under California law, a choice of law made by sophisticated commercial parties through arms length negotiation will be enforced unless the chosen law conflicts *862 with a fundamental public policy of California. *See Nedlloyd Lines, B.V. v. Superior Court,* 3 Cal.4th 459, 465-66, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992). The mere fact that the chosen law provides greater or lesser protection than California law, or that in a particular application the chosen law would not provide protection while California law would, are not reasons for applying California law. ***See Wong v. Tenneco,* 39 Cal.3d 126, 135-36, 216 Cal.Rptr. 412, 702 P.2d 570 (1985) (the standard is whether the chosen law is so offensive to California public policy as to be "prejudicial to recognized standards of morality and to the general interest of the citizens").** Plaintiffs cannot, and do not, argue that New Jersey consumer protection law, if applied in California, would violate the state's public policy toward consumers. Indeed,

GVI misplaces its reliance on Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023, 1029 -1031 (4th Cir. 1983) (Motion, p. 3:22-23) for the inaccurate statement that "[t]ypically the 'fundamental policy' exception is invoked only in "black and white" situations where the two states have diametrically opposed policies …" (Motion, pp. 3:27-28, 29:14, 30:14).[38] In the course of voiding a choice of law clause as violating the fundamental policy underlying the statutory limits on non-compete clauses of some states in which the plaintiff salesperson lived, here is part of what Barnes said that is not included in the Motion (the part the Motion quoted is in bold type face):

> "A basic principle under contemporary choice-of-law doctrine is that parties cannot by contract override public policy limitations on contractual power applicable in a state with materially greater interests in the transaction than the state whose law is contractually chosen. *See Restatement (Second) of Conflicts* § 187(2)(b) (1971). While contemporary doctrine recognizes a sphere of party autonomy within which contractual choice-of-law provisions will be given effect,[FN8] it also limits the extent to which deft draftsmanship will be allowed to bypass legislative judgments as to basic enforceability or validity….
>
> It is apparent that there can be no clear-cut delineation of those policies that are sufficiently "fundamental," within the meaning of § 187(2)(b), to warrant overriding a contractual stipulation of controlling law. *See Restatement (Second) of Conflicts* § 187 comment *g.* Nonetheless, a few general landmarks offer some structure for this inquiry. **First, not every situation where contractually chosen law diverges merely in degree [FN18] from that of the state whose law would otherwise apply impinges upon the fundamental policy of that state.[FN19]** *See Warren Brothers Co. v. Cardi Corp.,* 471 F.2d 1304, 1307 n. 3 (1st Cir.1973) (a contractual choice of law will not be respected "if a *serious* conflict with state policy were to result") (emphasis added). This is seen most clearly in regard to usury statutes, where the parties' choice of law has been held to validate interest rates that would be usurious and unenforceable in the jurisdiction whose law would prevail absent the contractual stipulation of controlling law. [cites] At the other extreme, it seems apparent that where the law chosen by the parties would make enforceable a contract flatly unenforceable [FN21] in the state whose law would otherwise

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> plaintiffs' note in their briefing that the New Jersey CFA "is intended to be 'one of the strongest consumer protection laws in the nation.' [footnote]"

[38]The quoted phrase "black and white" is without citation to legal authority. GVI appears to be quoting itself for a new legal standard that its cases do not support. Even were this the standard, the instant circumstance involves just that situation.

> apply, to honor the choice-of-law provision would trench upon that state's "fundamental policy." [cites].[FN22]
>
> …
>
> FN18. As one commentator has put it, laws differing only in degree would "provide similar but not identical protection." Note, *supra* note 7, at 1685.
>
> …
>
> …[T]he "fundamental policy" exception of § 187(2)(b) does not come into play merely because the contractually chosen law touches on a matter of fundamental state concern. Rather, fundamental policy is impinged upon only when there are significant differences between the chosen law and that of the jurisdiction whose law otherwise would apply.
>
> FN22. Between these extremes fall situations where the law of the jurisdiction stipulated by the parties and that of the state whose law would control absent the choice-of-law provision differ significantly-not merely in degree but in approach-as to the enforceability of the contract. A likely example is presented by a comparison of Louisiana and Ohio law on restrictive covenants between employers and employees. While Ohio would enforce such covenants if "reasonable," Louisiana limits their enforceability to narrowly defined circumstances far more precise than a general concept of 'reasonableness,' [cite]. Applying a mere "reasonableness" standard to such covenants-as opposed to those at issue here, involving independent contractors-could well abridge a "fundamental policy" of Louisiana. [cite]

GVI argues that there is no material conflict between Colorado and California law because both have wage and hour statutes supporting the general welfare. True and, as noted above, Colorado courts do not hesitate to void a choice of law clause that conflicts with its statutory protections of resident employees. But GVI's argument (Motion, pp. 31:11-32:17) misapprehends the Restatement analysis. As Estee Lauder Companies Inc. v. Batra, 430 F.Supp.2d 158, 173, fn. 4 (SD NY 2006) (Motion, pp. 5:24-6:1) explains:

> "…The second prong of the choice of law analysis asks not whether the policy of California conflicts with the policy of New York, but rather whether the *application of New York law* would run contrary to California's fundamental policy. Irrespective of whether New York's general policies overlap with those of California, the fact remains that the enforcement of the restrictive covenant at issue under New York law would run contrary to California's policy against such enforcement. Indeed, as Plaintiff notes,

> "under New York's policy, a slightly different balance is struck," (Pl. Mem. L. In Supp. Mot. For PI p. 8), allowing for the enforcement of restrictive covenants under certain circumstances where reasonable in time and geographic scope. Therefore, when the application of this policy balances toward the enforcement of a non-compete agreement, that application runs contrary to California's fundamental policy."[39]

No reasonable question can exist that the "*application"* of Colorado law would run contrary to California's fundamental policies. Under Colorado and California's common choice of law rules, Section 11 of Plaintiffs' employment agreements is ineffective to substitute Colorado's absence of any wage and hour protection for California wage and hour statutory protection.

GVI quotes from Shipley Co., Inc. v. Clark, 728 F.Supp. 818, 826 (D. MA 1990) (Motion, p. 31:1-10) for the "critical distinction between Michigan's public policy and Michigan's law." It omits that the divergence was because of the post-facto repeal of the alleged violated Michigan statute barring non-compete agreements. There has been no comparable repeal of California wage and hour protections, California's anti-waiver statute, nor California's extensive civil and criminal penalties for violating these highly protected (fundamental) rights.

And Flake v. Medline Industries, Inc., 882 F.Supp. 947, 950 (ED CA 1995) (Motion, p. 33:13-17) enforced a forum selection clause, leaving it to the transferee court to resolve which law applied. Bowman v. CMG Mortg. Inc., 2008 WL 3200662, 3 (ND CA 2008) cannot support the weight that

[39]In Estee Lauder Companies Inc. v. Batra 430 F.Supp.2d 158, 170-74 (SD NY 2006) (Motion, pp. 5:24-6:1), while finding New York law and California law seriously at odds over enforceability of non-competes, the district court upheld a New York choice of law clause and issued a preliminary injunction. Although sometimes working from home in California, the plaintiff had substantial responsibility and direct involvement in supervising his ex-employer's New York operations. No Plaintiff (nor for that matter any other class member) is in the comparable situation of a majority of tour days in Colorado. Parenthetically, it is hard to reconcile this district court decision with the Second Circuit's decisions it holds do not apply nor with Application Group v. Hunter Group, 61 Cal.App.4th 881, 897, 72 Cal.Rptr.2d 73 (CA App. 1998) (holding unenforceable covenant not to compete in employment agreement between Maryland employer and Maryland resident later hired by California employer).

GVI (Motion, p. 37:14-25) assigns to it as support for a choice of law clause's overriding California wage and hour protections: "Plaintiffs contend, and defendants do not dispute, that the California Labor Code applies to this action, because defendants included a California choice-of-law provision in all of their contracts with plaintiffs." Whether California or Washington law should apply wasn't even an issue!

F. In the Absence of an Effective Choice of Law Provision, California Law Applies to the Arbitration Clause (responding to Motion, § IV.C.5.b).

As Application Group, Inc., Davis, and Nedlloyd Lines B.V. elaborate, the conflict of law analysis does not end with the vitiation of a contractual choice-of-law clause. A court then identifies controlling law as if there was no choice-of-law provision ab initio, applying the test under Section 188 of the Restatement Second, which reads as follows:

> § 188 Law Governing in Absence of Effective Choice by the Parties
>
> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles state in § 6. [40]

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[40] The incorporated Section 6 of the Restatement Second reads as follows:

"§ 6 Choice-Of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  (a) the needs of the interstate and international systems,
  (b) the relevant policies of the forum,
  (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  (d) the protection of justified expectations,
  (e) the basic policies underlying the particular field of law,
  (f) certainty, predictability and uniformity of result, and
  (g) ease in the determination and application of the law to be applied.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 [41] and 203.

These factors overwhelmingly mandate the application of California law. In analyzing these factors, Plaintiffs initially address those set forth in Restatement Second, § 6, expressly incorporated by reference into § 188(1), and then the added factors under § 188(2).

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[41] Among the sections incorporated by reference into Section 188 is the following:

"§ 196. Contracts For The Rendition Of Services

The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the event the local law of the other state will be applied."

1. Factors Under Restatement Second of Conflicts of Law, §§ 6, 188(1) Mandate Application of California Law, Not Colorado Law.

The statutory proscriptions against waiver of the subject wage and hour protections effect a constitutional, statutory directive that is dispositive (see Restatement Second, § 6(1)).

Assuming solely arguendo the absence of a controlling directive, the remaining factors compel application of California law. As analyzed supra in the context of the Arbitration Clause's choice-of-law provision, California has strong interest in and public policy supporting application of its wage and hour protections and Colorado has no countervailing interest that its resident employers pay less (see Restatement Second, § 6(2)(b) – (d)). See generally, 1 Witkin, Summary of California Law (10th ed.), "Contracts," § 79 ("The forum will not enforce a contract that is valid in accordance with an otherwise applicable foreign law if enforcement of the contract is deemed to be opposed to some important consideration of public policy. [cites, including to Hall v. Superior Court, (1983) 150 Cal.App.3d 411, 417, 197 Cal.Rptr. 757 (CA App. 1983)]." Abston v. Levi Strauss & Co., 684 F.Supp.152, 154-55 (ED TX 1987) is instructive in its applications of the Restatement Second to an employment dispute that did not even involve the more highly protections wage and hour protections herein at issue. The court rejected the request of the California employer to apply California law, to a claim by a Texas resident who largely performed services in Texas and had brought suit in Texas. It reasoned as follows:

> "Section 6 of the Restatement (2d) specifies several factors to identify which state has the "most significant relationship" to an action. Those factors clearly point to the applicability of Texas law in this case. Most important here are the relevant policies of the forum state and of other states alleged to have an interest in the application of their law to the case. Texas, **the forum state, undoubtedly has a strong interest in the application of Texas employment law to its residents and to employment activities which occur within its boundaries, as well as to litigation within its forum.** [cite]

> Although California also has an interest in ensuring that its residents are governed by California's own employment rules, this interest is attenuated when the out-of-state activities of a California corporation are concerned. *Id.* Finally, in regards to those Section 6 factors which point to predictability of outcome and the expectations of the parties, it can hardly be said that a party who has lived and worked in Texas for eleven years, and has brought suit here, would be unfairly surprised to have Texas law apply to him. Thus, the Section 6 test clearly shows that Texas has the most significant relationship to this case. In short, application of either the "most significant relationship" test or the Section 196 approach to the facts of this case shows that Texas and not California law should govern plaintiff's pendent state law claims, and the court so holds." (emphasis added)

Accord, Pruitt v. Levi Strauss & Co., 932 F.2d 458, 462 (5th Cir. 1991) (TX law), abrogated on diff grounds, Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc., 55 F.3d 181(5th Cir. 1995). The instant case implicates the same strong interest of California in applying its employment law both to its resident employees and those working within its borders. To permit an employer to strip employees of these protections through such an Arbitration Clause would gut these protections. It would create an underclass of unprotected residents and employees working in California and improperly award a competitive advantage to such employers. Even were the contractual prerogative that GVI claims limited to out-of-state employers, that would place resident California employers at a competitive disadvantage. California's strong public policy concerns compel application of its law.

GVI contends that it needs to apply one body of law in an effort to achieve uniformity in its personnel practices.[42] This ignores that it can achieve that uniformity by compensating its Tour Directors according to the highest, not lowest common denominator among the various states. GVI's position is tantamount to destroying certainty, predictability and uniformity of result when it comes to those within the coverage of California's wage and hour protections (see Restatement Second, § 6(2)(f)). Moreover, GVI already tailors its compensation practices to California law to the extent that it

makes California withholdings for California resident Tour Directors, such as Plaintiffs. See Cherry/Watrous Opp. Declarations, ¶ 16, Dillon Opp. Declaration, ¶ 13. See Burchett v. MasTec North America, Inc., 322 Mont. 93, 102-103, 93 P.3d 1247, 1252 (MT 2004) ("The Comment on this subsection states that, '[i]deally, choice of law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice of law rules lead to desirable results.' Restatement (Second) of Conflict of Laws § 6, cmt. j.").

The basic policies underlying this area of law (see Restatement Second, § 6(2)(e)) firmly support that different states may afford different level of protections under their respective wage and hour laws. Reflective of this policy is the savings clause within the FLSA protecting the states' rights to grant greater employee wage and hour protections (see fn. 20, supra). Were the claimed need of multi-state employers to have one body of law apply to all employees paramount, one would expect that the FLSA would have preemptive effect, which it does not. Local conditions among the several states may vary, depending in part of economic and political considerations. Upholding each state's tailoring of its wage and hour protections sustains healthy participation in interstate commerce (see Restatement Second, § 6(2)(a)). Nor does Plaintiffs' position portend any difficulty in determining whether or not to apply California wage and hour protections (see Restatement Second, § 6(2)(g)). If GVI employs California residents or brings non-residents into California to escort tours here, it must comply with California law.

GVI's complaints over the practicality, if Plaintiffs prevail, of accounting for how much time a Tour Director spends in different jurisdictions does not apply to Plaintiffs' claims because Plaintiffs contend that they were entitled to the application of California wage and hour protections whether they

[42]The language that GVI quotes from Kruzits v. Okuma Machine Tool, Inc., 40 F.3d 52, 57 (3rd Cir. 1994) (Motion, p. 20, fn. 9) pertains to the effect of a choice of law clause on an indemnity agreement.

worked inside or outside California. GVI's complaints really pertain to non-residents, whom Plaintiffs contend are entitled to the protections of California wage and hour law only to the extent that they work here (the Sullivan v. Oracle Corp. issue). That issue therefore is not framed by the Motion. Plaintiffs, nevertheless, offer the following comments

GVI's argument that application of the overtime law would impose new economic record-keeping burdens is belied by the fact that all employers are already obligated to keep the exact records at issue. In order to comply with local state income tax reporting laws, such as the one in California, all employers must keep track of the amount of time their employees spend working in various states. *See, e.g.*, Title 18 Cal. Code Regs. § 17951-5(a)(explaining that gross income earned in the state is determined by the total volume of business the employee transacted "within and without the state"). GVI is already obligated to track its employees' time spent in California, so it can establish no burden whatsoever in doing exactly that for the purposes of paying overtime. See Newman v. Franchise Tax Board, 208 Cal.App.3d 972, 977 -78, 256 Cal.Rptr. 503 (CA App. 1989). In that case Paul Newman was required to pay – and the employer was therefore required to report – California income taxes on just 30 days of intermittent work while in California filming "The Sting." Ibid. See also Wilson v. Franchise Tax Bd., 20 Cal.App.4th 1441, 25 Cal.Rptr.2d 282 (CA App. 1993) (nonresident profession football player for the L.A. Raiders owed California income tax); Valentino v. Franchise Tax Bd., 87 Cal.App.4th 1284, 105 Cal.Rptr.2d 304 (CA App. 2001) (subchapter S corporation pass-through income to nonresident was taxable by California). While there are provisions in the Tax Code for certain credits or offsets so as to avoid double taxation, (*see* Cal. Rev. & Tax Code § 17041; see also Noble v. Franchise Tax Bd. (2004) 118 Cal.App.4th 560, 566, 13 Cal.Rptr.3d 363 (CA App. 2004)), but there is no minimum taxable income below which there is no tax. Cal. Rev. & Tax Code § 17041.

There are also requirements for employers to report income in withhold California income tax on nonresidents as well as residents. Air Couriers Intern. V. Employment Development Dept. (2007) 150 Cal.App.4th 923, 932, 59 Cal.Rptr.3d 37 (CA App. 2007) (citing to Cal. Un. Ins. Code § 13020). The exact records that would be required for purposes of complying with California's tax obligations – records of the amount of time spent working in the state – are the same records that would be used to comply with California's overtime payment obligations here insofar as non-residents who periodically work in California.[43]

Without attempting to argue all the intricacies of California income tax laws, it is apparent that a certain amount of accounting work, and even professional accounting work, may be required for a company doing business in California as well as by employees who earn income here. That accounting work may be required regardless of whether the nonresident employee is exempt or non-exempt under California law. That Plaintiffs do not resolve all GVI's hyper-technical hypotheticals, in a brief that should pertain only to overtime wages, does not mean that such issues cannot be resolved by accounting or tax professionals. So when GVI argues that as an out-of-state employer, it should not have to consider the work performed and the income generated by workers while in the state of California, it has failed to recognize that such requirements are already in existence, have been litigated, and have not been found to be unconstitutional. A certain amount of accounting work is required for work and income related to the State of California regardless of the outcome of this case, and there is no evidence to suggest that applying California's overtime laws to non-residents who work overtime here will create any insurmountable obstacles, much less one rising to a violation of the Dormant Commerce Clause (see § III.G infra).

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[43]At Motion, pp. 21:25-22:7, GVI, citing to Hoiles v. Alioto, 461 F.3d 1224, 1231, fn. 3 (10th Cir. 2006)

Aside from its tax reporting obligations, GVI has an obligation under the FLSA to account for Tour Director hours as they are classified as hourly, non-exempt employees.

2. Factors Under Restatement Second of Conflicts of Law, §§ 188(2), 196 Mandate Application of California Law, Not Colorado Law.

The first factor under Restatement Second, § 188(2) is the place of contracting (§ 188(2)(a)). This is the place where the last act is done that is necessary to give a contract binding effect, under the forum's rules of offer and acceptance, "assuming hypothetically, that the local law of the state where the act occurred rendered the contract binding." Restatement Second, § 188(2)(a), comment e. GVI thus sent to the four named Plaintiffs in California their employment contracts where they were executed and sent back to GVI. This reflects the sequence of contract formation for Plaintiffs, and the majority of the putative class members who reside in California (with only a de minimis number claimed by GVI to reside in Colorado). Cherry/Dillon/Watrous Opp. Declarations, ¶ 3-5, Watkins Opp. Declaration, ¶ 4. Colorado law thus supports an argument that a letter containing an offer of employment can become a contract at the time it is executed by the employee. *See* Seethaler v. Indus. Com'n of State of Colo., 660 P.2d 11, 12 (CO App. 1982) (signed offer letter constituted contract); Dorman v. Petrol Aspen, Inc., 914 P.2d 909 (CO 1996) (letter setting forth terms of employment constituted offer and invited acceptance); Farris, supra. (verbal offer of employment was made in California, and offer was accepted by means of a telephone call from employee in Colorado, therefore, place of contracting was Colorado). Given that the employment agreements at issue in this case were signed in California, Colorado courts would find that California is the "place of contracting" under § 188 of the Restatement. California law is similar the place of contracting therefore was California. See

Hardy v. Musicraft Records, 93 Cal.App.2d 698, 701, 209 P.2d 839 (CA App. 1949) (offer sent from New York to California, acceptance mailed here; held made in California).[44]

The second factor under § 188(2), place of negotiation of the contract (see § 188(2)(b)), is irrelevant as there was no negotiation. As discussed above, these are contracts of adhesion, which GVI admits it offered to Plaintiffs, like other Tour Directors, on a take-it-or-leave-it basis.

The next two factors under § 188(2), place of performance (see § 188(2)(c) and § 196[45] incorporated by reference into § 188(3)), and location of the subject matter of the contract (§ 188(2)(d)), again compel application of California law, not Colorado law. None of the four named Plaintiffs have even been to GVI's Colorado headquarters nor conducted a tour that was even partly in Colorado during 2003-07. Cherry/Watrous Opp. Declarations, ¶ 19, Dillon Opp. Declaration, ¶ 15,

[44]GVI does not execute the employment contracts. See Cherry/Dillon/Watrous Opp. Declarations, ¶ 5, Watkins Opp. Declaration, ¶ 4 and Ex. 1. Consequently, the execution formalities were concluded in California on the Plaintiffs' execution of their contracts. This does not render the contracts unenforceable, which obviously GVI does not contend in having subsequently assigned to Tour Directors tours following their return of the employment agreements that the Tour Directors had executed. See Performance Plastering v. Richmond American Homes of California, Inc., 153 Cal.App.4th 659, 668, 63 Cal.Rptr.3d 537 (CA App. 2007) ("Simply put, the lack of a party's signature does not make a fully executed contract unenforceable.") Dallman Supply Co. v. Smith-Blair, Inc., 103 Cal.App.2d 129, 132, 228 P.2d 886 (1951) (bound to unsigned contract that acted upon); Minton v. Mitchell, 89 Cal.App. 361, 364, 265 P. 271 (CA App. 1928) (party accepting benefits of unsigned contract bound by contract though did not sign).

[45] Farris v. ITT Cannon, 834 F. Supp. 1260, 1266 (D. CO1993) upheld Restatement § 196's rebuttable presumption that in the event a contract is for the performance of services, the law of the state where the services, or a major portion of the services, are to be performed, shall govern. In Farris, the parties entered into an employment agreement. The plaintiff resided in Colorado. The employer's principal place of business was California, but it had a presence in California and Colorado. The court, applying Colorado choice of law principles, found that because the contract was to be performed primarily in Washington, the contract's subject matter was also in Washington (as this location was where the true risk of breach arose), and that therefore Washington law governed, despite the fact that the contract was entered into in Colorado, negotiations took place in Colorado, and one of the parties was domiciled in Colorado. Ibid. Given that Plaintiffs in this case can demonstrate the contract was to be performed primarily in California, the risk of breach was in California, negotiations took place in California, Farris provides a strong precedent that California law should control in the absence of an effective choice.

Watkins Opp. Declaration, ¶13. California tour days represent a plurality of almost 40% of all tour days of the putative class; Colorado tour days represent about one percent. Sitkin Opp. Declaration, Ex. 10.[46] A majority of the tour days of virtually all California residents, including Plaintiffs, are in California. For non-residents, insofar as Plaintiffs only seek application of California wage and hour protections for the time that they are working in California, all their relevant tour days are California tour days. Insofar as payment is concerned, GVI paid all four Plaintiffs through direct payment into their California bank accounts – after making California income tax and SDI withholdings. Cherry/Watrous Opp. Declarations, ¶ 10, Dillon Opp. Declaration, ¶ 9, Watkins Opp. Declaration, ¶ 7, Sitkin Opp. Declaration Ex. 4. And, as of the end of the recovery period, GVI had never held an annual Tour Director meeting in Colorado. Cherry/Watrous Opp. Declarations, ¶ 19, Dillon Opp. Declaration, ¶ 15, Watkins Opp. Declaration, ¶13.

At Motion, pp. 21:25-22:7, GVI, citing to Hoiles v. Alioto, 461 F.3d 1224, 1231, fn. 3 (10th Cir. 2006), GVI argues that this Court should not consider place of performance under Restatement § 196 because such was unknown to GVI before the work began. That is factually untenable in light of GVI's tour allocation system and the incorporation of Ex. A listing the specific tours into the respective employment agreements before a Tour Director meets the passengers. It also overlooks that GVI repeatedly assigns the same tours to the same Tour Director – for the apparent reason that they have experience on that tour. Common sense. There also is an irony to GVI's argument. In the course of

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[46] In an effort to downplay the predominance of California tour days, GVI has lumped together the tour histories of Tour Directors who are and are not putative class members. See e.g. Sirner Declaration, ¶ 4; Sitkin Opp. Declaration, ¶ 3.h. The tour experience of non-putative class members, such as a non-California resident Tour Director escorting Canadian tours is immaterial. Plaintiffs, using GVI's data, have therefore focused on the tour experience of putative class members whom GVI has identified. But even were one to consider the experience of Tour Directors who are not putative class members, California tour days form a plurality of all tour days and far exceed Colorado tour days.

obtaining the Arbitration Order, GVI argued that Tour Directors had ample time to review their employment agreements and look elsewhere for a job if they didn't like the arbitration clause – an argument that received some traction in the San Francisco Superior Court. Now, GVI does an opportunistic about-face and argues that with all its resources, insufficient time exists for it to appreciate the legal obligations that ensue from its tour assignments.[47]

The last factor under § 188(2), the parties' domicile, residence, nationality, place of incorporation and place of business, has mixed results. While GVI's operational headquarters are now in Colorado (having closed its California office), it is incorporated in New York and its place of business in terms of where putative class members conduct tours overwhelmingly favors California over Colorado law. Sirner Declaration, ¶ 10; Sitkin Opp. Declaration, Ex. 8-10. Similarly, an absolute majority of putative class members, like all four Plaintiffs during 2003-07, are Californians. Virtually none are Coloradans. In the net, this factor, too compels application of California law. Under the standards for determining applicable law in the absence of an effective choice-of-law clause, California law clearly trumps Colorado law and must be applied.

G. No Constitutional Infirmity Attaches to Continued Coverage of a California Resident While Temporarily Working Outside California.

The only Constitutional argument raised by GVI now is application of the dormant commerce clause implicit in Article 1, Section 8. As interpreted by the United States Supreme Court, the

[47]GVI's arguments (not evidence) over the practicalities of tracking the overtime obligations of the different jurisdictions in which the class members reside or escort tours ignores that most the majority of the jurisdictions mirror the FLSA, with which GVI must comply in any case, or have no overtime protections. See Sitkin Opp. Declaration, Ex. 6. Of the limited number of remaining states, only two (Kansas and Minnesota) do not have a 40 hour/week overtime trigger. Ibid.

Commerce Clause of the U.S. Constitution both grants Congress the power to regulate commerce among the states and acts as a limitation to states' ability to enact legislation impeding interstate commerce. Freeman v. Hewitt, 329 U.S. 249, 252, 67 S.Ct. 274 (1946). State laws that are facially discriminatory in favor of local business are subject to rigorous scrutiny and are generally impermissible except in the narrowest of circumstances. See Waste Mgmt. of Alameda Cnty., Inc. v. Biagini Waste Reduction Sys., Inc., 63 Cal.App.4th 1488, 1494, 74 Cal.Rptr.2d 676 (CA App. 1998). State laws that are nondiscriminatory and are applied even-handedly to in-state and out-of-state interests, such are here, "are subject to a less rigorous balancing test under which the law is valid unless the burden so imposed is clearly excessive when balanced against the intended local benefits." Ibid. Thus, to determine whether a state law violates the dormant commerce clause, courts first look to whether the state law favors in-state interests over other states. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79, 106 S.Ct 2080, 90 (1986)). If a statute "regulates even-handedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the local putative benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142; 90 S.Ct. 844, 847 (1970).

State laws dealing with the health and safety are given the greatest deference. "When a state statute regarding safety matters applies equally to interstate and intrastate commerce, the courts are generally reluctant to invalidate [it] even if [it] may have some impact on interstate commerce." People v. Hutchinson, 211 Cal.App.3d Supp. 9, 13, 260 Cal.Rptr. 178 (CA App. 1989); see also Bibb v. Navajo Freight Lines, 359 U.S. 520, 524, 79 S.Ct. 962 (1959); Excelsior College v. Board of Registered Nursing, 136 Cal.App.4th 1218, 1235, 39 Cal.Rptr.3d 618 (CA App. 2006). Generally, a state law touching on health and safety concerns will be upheld unless the state law is of inconsequential value

when compared to a national need to preserve commerce from serious impediments. Waste Mgmt., supra, 63 Cal.App.4th at 1494 and 1498-99; Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429, 443, 98 S.Ct. 787 (1978) (local statute will be upheld unless it is of inconsequential value and interstate commerce would be seriously impeded if the law were enforced). If California chooses to have higher wage rates or higher hotel taxes or higher sales taxes or lower speed limits than other states, that is California's business. The Dormant Commerce Clause will not invalidate California's actions "as long as the state does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation." Maine v. Taylor, 477 U.S. 131, 150, 106 S. Ct. 2440, (1986). "If a legitimate local purpose is found, then the question becomes on of degree." Bostain v. Food Express, Inc., 153 P.3d 846, 855 (WA 2007) (rejecting Dormant Commerce Clause challenge to application of overtime statute to resident while traveling out of state).

California's wage and hour laws are important health and safety protections (see § III.C, supra). GVI fails to provide any showing that California would be economically isolated if resident workers were paid overtime wages for work performed while temporarily outside California. GVI has made no showing that their application to residents while working outside California is of inconsequential value, nor that their application would seriously impede interstate commerce.

GVI cites to United Air Lines, Inc. v. Industrial Welfare Commission, 211 Cal.App.2d 729, 28 Cal.Rptr. 238 (CA App. 1963) (Motion, p. 48:7-27) to support that application of California wage and hour laws to residents while out of state is barred on Dormant Commerce Clause grounds. United Airlines is distinguishable for two very important reasons: it involves flight attendants and it has nothing to do with health or safety. The issue in that case was whether California could require airlines to purchase the uniforms of flight attendants (referred to as "stewardesses" in the vernacular of the case). Resolution of that issue involved interplay between the federal Railway Labor Act, 45, U.S.C. §

151, *et seq.*, the federal Fair Labor Standards Act, 29 U.S.C. § 210, *et seq*. ("FLSA"), and regulations promulgated by California's Industrial Welfare Commission ("IWC").

Flight attendants were covered by the Railway Labor Act, which had as its express purpose avoiding interruption or interstate commerce. United Air Lines, supra, 211 Cal.App.2d at 737, 28 Cal.Rptr. 238 (CA App. 1963). With regard to non-health and safety state laws – and even the FLSA for the most part – the Railway Labor Act "preempted the field, leaving the regulation to bargaining agreements between the employee and the employer." *Id.* at 744. Where and employee was covered by the Railway Labor Act and was subject to a collective bargaining agreement under that Act, the court held Dormant Commerce Clause principles would preclude local regulations, even though the burden of paying for uniforms on interstate commerce was slight. *Id.* at 749.

Moreover, flight attendants were only one of the groups of employees at issue in the United Air Lines case. The case also involved ticket agents. Although flight attendants were covered by a collective bargaining agreement under the Railway Labor Act – and thus not entitled to California's protections regarding the purchase of uniforms – the court found that the ticket agents were not covered by any collective bargaining agreement. Even though the exact same Dormant Commerce Clause issues were raised for ticket agents, because there was no collective bargaining agreement for them the court held: "we can see no burden imposed on interstate commerce [by requiring the employer to purchase their uniforms], except an incidental one affecting the cost of transportation, nor does there seem to be such a necessity for uniformity throughout the airline's system as exists with reference to stewardesses." Ibid.

Here, there is no argument that Plaintiffs or other class members are covered by preempting statutes such as the Railway Labor Act, let alone a collective bargaining agreement authorized under that Act. Here, we are not dealing with flight attendants or interstate carriers. There is no express

federal purpose to preempt state regulations with regard to overtime or minimum wages for GVI's Tour Directors. The class members at issue in this case are more akin to the ticket agents in United Air Lines; requiring GVI to pay them overtime wages imposes no burden on interstate commerce beyond the incidental one affecting the additional money GVI must pay them. Just as with the ticket agents, that is not a sufficient burden to toss out California's health and safety overtime laws.

GVI also omits to mention that the California Supreme Court in Industrial Welfare Com. v. Superior Court, 27 Cal.3d 690, 727-728, 613 P.2d 579, 601, fn. 15 (CA 1980) specifically disapproved United Air Lines on grounds directly applicable here: "To the extent that the case of United Air Lines v. Industrial Welfare Com. (1963) 211 Cal.App.2d 729, 744, 28 Cal.Rptr. 238, supports the contention that state regulation of working conditions is invalid outside the realm of health and safety provisions, that decision is disapproved. Numerous legislative enactments and judicial authorities make it clear that the state possess broad authority, under their police power, to prescribe minimum standards of employer conduct found necessary to protect the welfare of employees, even when health or safety considerations are not directly implicated. [cites]"

GVI also cites to Archibald v. Cinerama Hawaiian Hotels, Inc. 73 Cal.App.3d 152, 159, 140 Cal.Rptr. 599 (CA App. 1977) (Motion, p. 7:14-15) for the argument that to uphold the application of California wage and hour laws to Plaintiffs while working outside California would impermissibly meddle in other states' internal affairs. In Archibald, the court rejected application of California's Unruh Act, an anti-discrimination statute, to a Hawaii hotel based on its treatment of a Californian while in Hawaii. Archibald has been distinguished where out of state events translate to in state injury. Butler v. Adoption Media LLC, 486 F.Supp.2d 1022, 1052-53 (ND CA 2007) (California had stronger governmental interest than Arizona in action brought under Unruh Act by same-sex domestic partners against Arizona operators of adoption website, stemming from rejection of their application to have

their profile posted on the website, and thus California law was applicable to action). See also, Kearney v. Salomon Smith Barney, Inc., 39 Cal.4th 95, 106, 137 P.3d 914, 922 (CA 2006) (application of California privacy law, requiring both parties' consent to recording of telephone conversation, to California clients' action against financial institution for recording calls from California to office in Georgia, where only one party's consent was necessary, did not facially violate federal commerce clause; application of law affected only businesses' conversations with clients or consumers in California and did not compel any action with regard to conversations with non-California clients or consumers). See also, In re Title U.S.A. Ins. Corp., 36 Cal.App.4th 363, 373-374, 42 Cal.Rptr.2d 498, 504 (CA App.1995) ("Cases recognize that principles of comity do not require one state to apply the law of another state when to do so would damage the rights of that state or its citizens", citing to Clark v. Williard, 294 U.S. 211, 55 S.Ct. 356 (1935)).

In the present case, Plaintiffs are not seeking to force the application of California law on the citizens of other states where their conduct has no nexus to California. Stated otherwise, Plaintiffs are not seeking to apply California wage and hour laws to other states' "internal affairs." Plaintiffs also have suffered injury in California which is where they are paid. Archibald's limits do not apply. On the same basis, the two U.S. Supreme Court cases that GVI cites, but does not discuss, are distinguishable: Healy v. The Beer Institute, 491 U.S. 324, 366 (1989) (Motion, p. 48:28) (one state could not regulate price charged for beer in another state); Bigelow v. Virginia, 421 U.S. 809, 824-25 (1975) (Motion, p. 47:24) (Virginia without power to regulate abortions authorized in New York).

IV. CONCLUSION

Plaintiffs request that the Motion be denied and that the Arbitrator's decision confirm that California wage and hour protections govern these Plaintiffs' claims.

Respectfully Submitted,

Dacey & Sitkin

~~**SPECIAL INTERROGATORY NO. 23:**~~

~~See response to special interrogatory no. 21, incorporated herein by this reference.~~

~~**SPECIAL INTERROGATORY NO. 24:**~~

~~See response to special interrogatory no. 21, incorporated herein by this reference.~~

~~**SPECIAL INTERROGATORY NO. 25:**~~

~~NEED D. SPECTOR INPUT This Responding Party objects to this interrogatory on the grounds that it seeks information protected by the attorney client and attorney work product privileges.~~

~~**SPECIAL INTERROGATORY NO. 26:**~~

~~NEED D. SPECTOR INPUTDaniel Spector.~~

~~**SPECIAL INTERROGATORY NO. 27:**~~

Burton J. Goldstein, Jeffrey A. Baruh, and I John Dacey, and this Responding Party were involved in its preparation, on the understanding that the interrogatory does not inquire about anyone whose involvement was merely clerical.

SPECIAL INTERROGATORY NO. 28:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey.

SPECIAL INTERROGATORY NO. 29:

That is what the Dissolution Agreement expressly provides as alleged in the amended petition.

SPECIAL INTERROGATORY NO. 30:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey, William Taraday.

SPECIAL INTERROGATORY NO. 31:

See response to special interrogatory no. 29, which is incorporated herein by this reference.

SPECIAL INTERROGATORY NO. 32:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey, William Taraday.

SPECIAL INTERROGATORY NO. 33:

Burton J. Goldstein, Jeffrey A. Baruh, and I had written communications, numerous meetings and phone calls culminating in the execution of the Dissolution Agreement. Subsequent thereto, we also had written communications, phone calls and one or more meetings where the Dissolution

Agreement was discussed. All such written communications still in my possession, custody or control will be produced This Responding Party objects to this interrogatory on the grounds that it is overbroad, causes undue burden, and calls for a narrative. Subject to and without waiver of the foregoing objections, this Responding Party will produce any and all documents which reflect or evidence any such communications or meetings, reference to which documents is made in response to this interrogatory pursuant to CCP 2030(F).

SPECIAL INTERROGATORY NO. 34:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey, and William Taraday .

SPECIAL INTERROGATORY NO. 35:

The funds were distributed in conformity with the Dissolution Agreement.

SPECIAL INTERROGATORY NO. 36:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey.

SPECIAL INTERROGATORY NO. 37:

The funds were distributed in conformity with the Dissolution Agreement.

SPECIAL INTERROGATORY NO. 38:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey.

SPECIAL INTERROGATORY NO. 39:

TheThis Responding Party is uncertain whether such funds were distributed in conformity with the Dissolution Agreement, due to the lack of a comprehensive accounting ever being provided by Burton Goldstein, despite request from this Responding Party.

SPECIAL INTERROGATORY NO. 40:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey.

SPECIAL INTERROGATORY NO. 41:

The funds were distributed in conformity with the Dissolution Agreement.

SPECIAL INTERROGATORY NO. 42:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey.

SPECIAL INTERROGATORY NO. 43:

The funds were distributed in conformity with the Dissolution Agreement.

SPECIAL INTERROGATORY NO. 44:

Burton J. Goldstein, Jeffrey A. Baruh, and John J. Dacey.

SPECIAL INTERROGATORY NO. 45:

I am unaware of any deivations except by Taraday as alleged in the amended petitionBurton Goldstein failed to pay amounts he aved John Dacey and/or this Responding Party pursuant to section 8 of the Dissolution Agreement.

~~**SPECIAL INTERROGATORY NO. 46:**~~

~~William Taraday, Burton Goldstein, Jeffrey A. Baruh, and John J. Dacey.~~

~~**SPECIAL INTERROGATORY NO. 47:**~~

~~In phone calls with William Taraday and his attorney William Warne after my receipt on November 18, 2005 of William Taraday's November 17, 2005 letter, it was apparent that I (and Jeffrey A. Baruh) were assertingthis Responding Party and John Dacey asserted our rights under the Dissolution Agreement and in that context asked for confirmation of the recovery in the Yuba Levee Cases, which still has not been received.~~

~~**SPECIAL INTERROGATORY NO. 48:**~~

~~William Taraday, William R. Warne, Jeffrey A. Baruh, and John J. Dacey.~~

DATED: March 28, 2011

By: _____
James M. Sitkin
Attorneys for ~~Petitioners~~Plaintiffs