UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JULIA BERNSTEIN, et al.,
Plaintiffs,
v.
VIRGIN AMERICA, INC.,
Defendant.

Case No.15-cv-02277-JST

ORDER DENYING MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION

Re: ECF No. 127

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

I. MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION

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

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

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

Virgin seeks reconsideration of the Court's summary judgment order on all three grounds. ECF No. 127 at 21. First, Virgin argues that the Court manifestly failed to consider facts and

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

A. Field Preemption

With respect to field preemption, Virgin argues that "the Court did not address why in-flight safety is *not* a proper field for consideration." ECF No. 127 at 9. The Court already considered, and rejected, this argument. ECF No. 121 at 23-24, n. 11-12; Civ. L.R. 7-9(c) (prohibiting repetition of argument in a motion for leave to file a motion for reconsideration).

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

B. Conflict Preemption

With respect to conflict preemption, Virgin argues that the Court manifestly failed to

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

Virgin argues that the California Supreme Court's recent decision in Augustus v. ABM Sec. Servs., Inc., 2 Cal. 5th 257 (2016) "is new, material authority that impacts the preemption analysis." ECF No. 127 at 21, 24, n. 9. That case does not represent a material change in the law; it simply repeats the well-established principle that, "[d]uring required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." Augustus, 2 Cal. 5th at 260. Indeed, the Augustus court cited a 2012 case for that proposition. See id. (citing Brinker Restaurant Corp. v. Superior Court, 53 Cal. 4th 1004, 1038-39 (2012)). In fact, in several respects Augustus supports, rather than undermines, this Court's prior order. The Augustus court explained that "[s]everal options nonetheless remain available to employers who find it especially burdensome to relieve their employees of all duties during rest periods—including the duty to remain on call." 2 Cal. 5th at 272. Those options include "provid[ing] employees with another rest period to replace one that was interrupted," or "pay[ing] the premium pay set forth in [the relevant wage order and Cal. Labor Code Section 226.7]." Id.[1] The Augustus court clarified that "[n]othing in our holding circumscribes an employer's ability to reasonably reschedule a rest period when the need arises." Id. at 271. The Augustus court also acknowledged the relevant wage order's exception for on-duty meal breaks when "the nature of the work prevents an employee from being relieved of all duty and when by written agreement." Augustus, 2 Cal. 5th at 264, n. 9.[2] The court noted yet another "option for employers" who consistently fail to provide duty-free breaks: "If an employer seeks to be excused generally from compliance with the obligation to provide rest periods free of all duty and

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

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

employer control, the employer should avail itself of the opportunity to request from the DLSE an exemption." Id. at 281.[3] Id. at 272, n. 14.

In sum, California's meal and rest break requirements give employers like Virgin some flexibility if the nature of the employee's work prevents off-duty breaks, and therefore Virgin can comply with both the Federal Aviation Regulations and California's meal and rest break requirements. Virgin, who bears the burden of proof with respect to the affirmative defense of federal preemption, does not claim to have availed itself of any of these options and has failed to demonstrate a conflict between the federal regulations and California's meal and rest break requirements. Bruesewitz v. Wyeth LLC, 562 U.S. 223, 251, n. 2 (2011).

C. ADA Preemption

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

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

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

[4] Virgin argues that there is a difference between the preemption language in the ADA and the FAAAA. ECF No. 127 at 26. The only difference between the ADA and the FAAAAA "is that the latter contains the additional phrase 'with respect to the transportation of property,' which is absent from the [ADA] and which 'massively limits the scope of preemption ordered by the

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

Virgin now relies on the amicus brief that the Department of Transportation filed in Dilts to argue that the holding should not apply to airline employees. ECF No. 127 at 26. As an initial matter, this is a new argument that was not previously "presented to the Court" as required by Local Rule 7-9(b)(3). "Generally, motions for reconsideration . . . are not the place for parties to make new arguments not raised in their original briefs." Gray v. Golden Gate Nat. Recreational Area, 866 F. Supp. 2d 1129, 1132 (N.D. Cal. 2011) (citing Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 925–26 (9th Cir. 1988)). In any event, and contrary to Virgin's assertion, the Ninth Circuit did not "heavily rel[y]" on that amicus brief. ECF No. 127 at 25. Although the court found the Department of Transportation's amicus brief to be "persuasive," it noted that it "would reach the same result in the absence of the agency's brief," and explained at the outset of its ADA preemption analysis that this was not even a "close case[]." Dilts, 769 F.3d at 650, 647. Given the limited role that the amicus brief played in the Ninth Circuit's decision, the Court finds it inappropriate to consider portions of that brief that the Ninth Circuit did not even mention in its opinion. This approach is particularly sound in light of Virgin's failure to previously present this argument to the Court.[5]

FAAAA.'" Dilts, 769 F.3d at 644 (internal citations omitted). That difference is completely immaterial here, and therefore this argument is meritless.

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

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

First, although this factual distinction could be relevant to other issues in this case—namely, the extraterritorial application of California law and the dormant commerce clause analysis[6]—it is unclear how the interstate nature of the job impacts the ADA preemption analysis. Indeed, the Dilts court explained that "[t]he fact that laws may differ from state to state is not, on its own, cause for FAAAA preemption" because "Congress was concerned only with those state laws that are significantly 'related to' prices, routes, or services." Dilts, 769 F.3d at 647-48. The Dilts court ultimately concluded that California's meal and rest break laws—the exact same laws at issue in this case—are not related to prices, routes, or services, and are therefore "permissible" even though they may differ from similar laws adopted in neighboring states. Id.

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

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

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that it will be required to comply with other states' laws." Id. Rather, "Virgin is simply being required [to] comply with the law of the state where it chose to headquarter its business, where its California-resident employees performed work based out of California airports, and where it made critical decisions regarding how it would compensate its employees that are not being challenged in this lawsuit." Id. Therefore, as in Dilts, applying California's meal and rest break laws to Virgin "would not contribute to an impermissible 'patchwork' of state-specific laws." Dilts, 769 F.3d at 647.

D. Application of California Law to Bernstein

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

Bernstein's residency in 2012 is a non-issue: Plaintiffs already conceded in their motion for class certification briefing that, "[a]lthough Bernstein filed taxes in California in 2011 (a year in which she transitioned from California to New York) and will be included in the subclass for 2011, she did not file taxes in California in 2012, and will therefore be excluded from the subclass in 2012." ECF No. 84 at 14, n. 26. The Court now reaffirms that the fact that Bernstein filed her taxes in California in 2011 is sufficient to both identify her as a member of the California Resident Subclass for that year and to create a triable factual issue regarding her residency.[7] ECF No. 121 at 8, n. 2; see also Sarviss v. Gen. Dynamics Info. Tech., Inc., 663 F. Supp. 2d 883, 899 (C.D. Cal.

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

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2009) (finding that the plaintiff was "a California resident who presumably received his pay in California" because "he paid California taxes"). Moreover, given the wealth of other factors that support the application of California law, including Virgin's deep ties to California and the fact that the wrongful conduct occurred in California, the fact that Bernstein did not file her taxes in California in 2012 does not alter this Court's conclusion that California law applies to her claims.[8] See ECF No. 121 at 7-8.

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

E. Reconsideration of the Court's Class Certification Order

Finally, Virgin argues that the Court's summary judgment order warrants reconsideration of the prior class certification order. ECF No. 127 at 32-33. Virgin argues that, because Bernstein's 2011 California income tax return "create[d] a triable factual issue" regarding her residency, and did not "confirm Bernstein's residency," the Court must reconsider its prior holding

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

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1 that it could identify California Resident Subclass members by looking to Virgin's business
2 records or tax records. Id. Virgin also argues that individual class member investigations into
3 residency and the right to recover for meal and rest break claims will now predominate over
4 common questions. ECF No. 127 at 33.

5 Virgin misunderstands both the ascertainability requirement and the Court's class
6 certification order. The purpose of the ascertainability requirement is to ensure that the class
7 definition allows a court to feasibly identify class members. Vietnam Veterans of Am. v. C.I.A.,
8 288 F.R.D. 192, 211 (N.D. Cal. 2012); Newberg on Class Actions § 3:3 (5th ed.). Again, the
9 Court can feasibly do so here by looking to Virgin's business records and the state where each
10 flight attendant paid income taxes. ECF No. 104. This information will allow the Court to easily
11 identify both California-based and California resident flight attendants during the relevant time
12 period.[9] Id. As the Court explained in the class certification order, ascertainability does *not*
13 require that every member of the class ultimately win on the merits, and Virgin cannot "defeat
14 class certification by pointing to the possibility that certain members of the class will not be able
15 to recover on their claims." ECF No. 104 at 20. Therefore, the fact that the Court did not
16 definitively "confirm Bernstein's residency" as a matter of law does not defeat class certification.

17 Nor will individual questions regarding residency and breaks predominate over issues
18 common to the class. Although residency turns on several factors, California's Franchise Tax
19 Board instructs potential filers to carefully consider those factors to determine whether they are a
20 California resident who is subject to California income tax. See Whittell v. Franchise Tax Bd.,
21 231 Cal. App. 2d 278, 286–88 (Ct. App. 1964); State of California Franchise Tax Board,
22 Publication 1031, available online at https://www.ftb.ca.gov/forms/2015/15_1031.pdf. Because
23 California Resident Subclass members have already made a determination regarding their
24 residency, filed a California tax return, and/or provided Virgin with a California address during the
25 class period, residency will likely be undisputed for the vast majority of subclass members, thus
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[9] Moreover, as the Court noted in its class certification order, "every member of the proposed California Resident Subclass is also a member of the proposed Class." ECF No. 104 at 11. Virgin does not dispute that its records allow the Court to easily identify Class members.

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reducing the potential for mini-trials regarding this issue. And, just as the parties' respective experts calculated the Plaintiffs' missed breaks by looking at the length of their duty periods (which are available on in the AIMS and CrewTrac records), the same calculation can be done for class members. ECF No. 101-38 at 14-15; ECF No. 98-2 at 6-7. As Virgin admitted in its motion to strike the Plaintiffs' expert report, the number of breaks that each class member missed is a damages issue, not a liability issue. ECF No. 74 at 6. And "damage calculations alone cannot defeat certification." Leyva v. Medline Indus. Inc., 716 F.3d 510, 513 (9th Cir. 2013) (quoting Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)). Indeed, because "damages determinations are individual in nearly all wage-and-hour class actions," decertifying a class on that basis "may well be effectively to sound the death-knell of the class action device." Id. (quoting Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004 (2012)). The overwhelming common issues in this case—namely, whether "Virgin's company-wide policies regarding its flight attendants' working conditions and pay" violate California law—remain the same. ECF No. 104 at 20-25.

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

II. MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

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

The final judgment rule ordinarily provides that courts of appeal shall have jurisdiction only over "final decisions of the district courts of the United States. 28 U.S.C. § 1291. However, "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in

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such order." 28 U.S.C. § 1292(b). "Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met." Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). "These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981), aff'd sub nom. Arizona v. Ash Grove Cement Co., 459 U.S. 1190 (1983). Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). To that end, "section 1292(b) is to be applied sparingly and only in exceptional cases." In re Cement Antitrust Litigation, 673 F.2d at 1027.

Virgin has failed to show that there is a substantial ground for difference of opinion regarding federal preemption of Plaintiffs' meal and rest break claims. Courts determine whether there is a "substantial ground for difference of opinion" by examining "to what extent the controlling law is unclear." Couch, 611 F.3d at 633. Traditionally, courts will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." Id. (quoting 3 Federal Procedure, Lawyers Edition § 3:212 (2010) (footnotes omitted)). The Ninth Circuit's decision in Dilts dealt with the exact same laws at issue here—California's meal and rest break requirements—and held that those laws were not preempted under the FAAAA, which was modeled on the ADA includes the exact preemption language at issue here. Dilts, 769 F.3d at 647-48 (holding that "California's meal and rest break requirements plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt," but rather "normal background rules for almost *all* employers doing business in the state of California"). In doing so, the Ninth Circuit rejected the same arguments that Virgin makes here, explaining that these arguments "equate[] to nothing more than a modestly increased cost of doing business, which is not cause for preemption." Id. at 647-50. The Dilts court proposed the

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same solution as this Court: "Defendants are at liberty to schedule service whenever they choose. They simply must hire a sufficient number of drivers and stagger their breaks for any long period in which continuous service is necessary." Id. Virgin fails to cite to a single post-Dilts case that would suggest "substantial grounds for difference of opinion" regarding its application to airline employees. If anything, post-Dilts cases suggest the opposite. See Valencia v. SCIS Air Sec. Corp., 241 Cal. App. 4th 377, 385 (2015), review denied (Jan. 27, 2016) (applying Dilts to the airline industry); Air Transp. Ass'n of Am., Inc. v. Port of Seattle, No. C14-1733-JCC, 2014 WL 12539373, at *3 (W.D. Wash. Dec. 19, 2014) (same). Nor has Virgin shown that there is a substantial ground for difference of opinion with respect to its other federal preemption theories.

Virgin fails to present any arguments as to why the second question should be certified for interlocutory appeal. Because the Court will not need to conduct factual inquiries into each putative class member's residence, the answer to this question will not materially affect the outcome of this litigation. In re Cement Antitrust Litig., 673 F.2d at 1026 ("[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court."). While it is possible to imagine a case in which a court would need to inquire into each individual class member's residence, this is not such a case. Virgin does not dispute that two out of the three named Plaintiffs are California residents. And, as explained above, residence will likely be undisputed with respect to most class members because they already made a residence determination by filing their taxes in California and providing Virgin with a California mailing address. To the extent Virgin disputes whether certain individual class members were actually California residents, those individualized inquiries pale in comparison to the overwhelming common issues in this case, and thus do not affect the class certification analysis. For the same reasons, the Court finds that an immediate appeal would not "materially advance the ultimate termination of the litigation." In re Cement Antitrust Litig. (MDL No. 296), 673 F.2d at 1026. In the unlikely event that individualized inquiries regarding residence predominate or otherwise render class treatment unmanageable, the Rules allow a district court to alter or amend a prior class certification order at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C). As a result, this is not an "exceptional case[]" in which certification

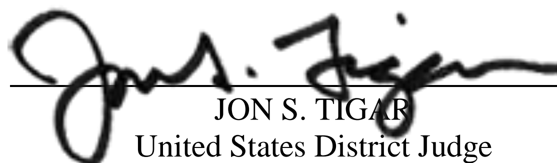
under Section 1292(b) is necessary to avoid expense and delay. In re Cement Antitrust Litigation, 673 F.2d at 1027.

CONCLUSION

The Court denies the motion in its entirety.

IT IS SO ORDERED.

Dated: March 27, 2017



JON S. TIGAR
United States District Judge

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