In the United States Court of Appeals for the Ninth Circuit

No. 15-15133

Dannielle Estrada, Robert Hernandez, Armando Sanchez, Steven Sperling, Marcelina Call, and Shirley Nelson, individually and on behalf of all others similarly situated,
Plaintiffs / Appellants
v.
Kaiser Foundation Hospitals, The Permanente Medical Group, Inc., Kaiser Foundation Health Plan, Inc., and Southern California Permanente Medical Group,
Defendants / Appellees.

On Appeal from the United States District Court, Northern District, Magistrate Judge Donna M. Ryu, Presiding

No. 14-CV-4465 DMR

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

A. No court has ever removed on the basis of §301 interpretation when the substance of every individual contract term was undisputed.

Kaiser, in its Appellees' Answering Brief ("AAB"), agrees that there is no dispute over the relevant substantive rights and obligations agreed to in the Collective Bargaining Agreements.[1] AAB 8-10, 18, 25, 34-35. Kaiser and Plaintiffs agree: (1) that the agreements provide for percentage wage increases of three percent per year in the 2012 agreement; (2) that the separate LMP Trust provisions require an employee nine-cent-per-hour contribution; and (3) that the "wage rates in the local collective bargaining agreement" reflect the ***net*** result of "three-percent minus nine cents per hour." E.R. 57-58; 69:12-16; AOB parts VII.A, X.A.

As Kaiser puts it in its Motion to Dismiss: "***Kaiser and the Coalition*** could have agreed to fund the Partnership Trust ***in any number of ways***. Kaiser and the Coalition, as the bargaining agent for the employees represented by the various Coalition unions, including Plaintiffs here, agreed to a ***funding mechanism on behalf of the employees*** that ***does not require*** any ***check-off, contribution or***

[1] Capitalized terms used herein have the meanings defined in Appellants' Opening Brief dated July 6, 2015.

deduction from the employees." Docket item 10, Motion to Dismiss Memorandum of Points and Authorities ("MTD") at 1:9-12 (emphasis added).

Plaintiffs and Kaiser agree that Kaiser has complied with the foregoing terms. AOB X.B. This is, instead, a dispute about the legality of the contracts and wage statements under California law. Kaiser seeks to avoid a determination of these questions by asserting preemption under Labor-Management Relations Act of 1947, Section 301 ("§301"), but this argument fails.

If the substantive interpretation of the individual terms of the Collective Bargaining Agreements are undisputed – and they are, as there is no dispute about how the contract is to be executed and enforced – then by definition there is "interpretive uniformity," and the purpose of §301 in our national labor laws has been successfully achieved.[2]

[2] The "interpretive uniformity" purpose of §301 preemption extends to the substantive meaning – i.e., who, how much, what, where, when, and how – of individual contract terms as established and fixed at the time of the meeting of the minds of the parties to the agreement. See *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) (describing federal interest in the uniform "substantive interpretation" of "individual contract terms"); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) ("Lueck") (The federal interest in uniformity pertains to the substantive economic rights, or "right to collect benefits under certain circumstances," created by the parties to the contract in a given "contract phrase or term." The "meaning given a contract phrase or term" is "what the parties to a labor agreement agreed.").

Similarly, where there is no dispute over the substantive terms, there is no possibility of §301-type interpretation.[3] "[B]ecause there is no dispute over the meaning of any terms within the agreement, resolution…does not depend on interpretation of the collective bargaining agreement." *Detabali v. St. Luke's Hosp.*, 482 F.3d 1199, 1203 (9th Cir. 2007).

Instead, the ambiguity and dispute here – as Kaiser and the District Court themselves contend – is about how California law classifies these fixed and undisputed contract terms. ER 12:18-27, 15:15-21, 16:1-2, 17:4-6, 18:1-6; AAB 1, 25; AAB 1-2, 5, 11-13, 17-49; see, e.g., AAB 1 (first sentence). The only step necessary here is for a California court to assess[4] the legality of the structure[5] of the

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[3] Out of respect for state standards, the doctrinal meaning of words such as "interpret," "construe," and "meaning" in the context of §301 complete preemption has always been limited to this purpose of "interpretive uniformity." "We have stressed that, in the context of §301 complete preemption, the term 'interpret' is defined narrowly - it means something more than 'consider,' 'refer to,' or 'apply.'" *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000).

[4] See, e.g., *Gregory v. SCIE, L.L.C.*, 317 F.3d 1050, 1053 (9th Cir. 2003)("While overtime is calculated in accordance with the terms of the CBA, this case involves no issue concerning the *method* of calculation. The issue here is not *how* overtime rates are calculated but whether the *result* of the calculation complies with California law." (emphasis in original)); see, also, *Ramirez v. Fox Television Station*, 998 F.2d 743, 748-49 (9th Cir. 1993) ("Fox errs in equating 'reference' with 'interpret.'… Although the inquiry may begin with the Bargaining Agreement, it certainly will not end there.")

[5] "[A]ny part of the wage agreed upon," "any portion of an employee's wages," "deduction," "gross wages earned," "all deductions," and "net wages

agreement under California law. *Associated Builders & Contrs. v. Local 302 IBEW*, 109 F.3d 1353, 1357 (9th Cir. 1997) (no §301 interpretation or preemption where "[t]he only controversy concerns the legality of the agreements under state law").

No court that we can find – or that Kaiser can find – has ***ever*** removed or preempted on the basis of §301 interpretation when the substance of every individual contract term was undisputed, much less when doing so would also "grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Lueck*, 471 U.S. at 211-12. This case should be remanded to the California courts immediately and summarily.

B. Kaiser's own cases illustrate why this case must be remanded.

Three cases comprise the entirety of the direct authority cited in Kaiser's Answering Brief and the District Court's Order. AAB 24-31; ER 12:1-14:6, 17:12-18:19. They fail to support preemption of this case.

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earned" are the phrases used in §§222, 224 and 226. While Kaiser tries repeatedly to manufacture disagreement between the parties, the only question here is whether the agreements contain a deduction. ER 69:8-16 (Kaiser's Removal Notice describing this a dispute over which wage term should be classified as "***gross wages***").

In *Mendes v. W.M. Lyles Co.*, CIV F 07-1265 AWI GSA, 2008 U.S. Dist. LEXIS 6480 (E.D. Cal. Jan. 17, 2008)("*Mendes*") Mendes alleged as his second cause of action that he was not paid the wage rate set forth in the collective bargaining agreement:

> From…2000, through…2005, Lyles paid Mendes what it referred to as a "utility rate." Lyles told Mendes that it had an agreement with the Operating Engineers Union whereby Lyles could pay this "utility rate" to Mendes…
>
> Lyles knew of its contractual and statutory duties to pay Mendes wages according to the [CBA] and California law. However, Lyles intentionally and improperly failed to pay the wages due and owing to Mendes [from 2000 to 2005].

Id. at *3-4.

In deciding the case, the district court judge observed: "This claim is about a violation of a collective bargaining agreement." *Id.* at *22. He held that "this cause of action arises from a violation of, and depends on, a collective bargaining agreement and requires that a collective bargaining agreement be construed. Accordingly, Mendes's claims based on §§222 and 227 (all citations to Cal. Lab. Code when not indicated otherwise) for non-payment of wages are preempted by LMRA §301." *Id.* at *25-6.

The breach-of-contract claim in *Mendes* has no relevance whatsoever to this case. The agreement promised Mendes a wage rate of X, but Mendes alleged that for five years Lyles paid him a wage rate of less than X. *Id.* at *3-4. Mendes

therefore alleged that Lyles violated the collective bargaining agreement. *Id.* at *22. Mendes' claim was squarely preempted under §301 because it arose solely as a result of the CBA. See, *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007)("If the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there.")

Here, Plaintiff and Kaiser agree that Kaiser complied with the terms of the Collective Bargaining Agreement. AOB part X.B. Plaintiffs have never alleged that Kaiser violated the agreement. *Ibid.* The rights here asserted by Plaintiffs arise entirely from California law, as the District Court observes. ER 12:7-10 ("Here, Kaiser does not dispute that the rights asserted by Plaintiffs…are rights conferred upon an employee by virtue of state law.") Plaintiffs pursue claims to enforce minimum California standards of transparency and disclosure, not for the under-payment of wages or to enforce contract terms. AOB part VIII.

Nevertheless, the District Court relies primarily upon *Mendes* for its holding on all claims and presents a lengthy two-paragraph block quote from *Mendes* as the cornerstone of its decision. ER 13:7-17. Kaiser similarly leads off with *Mendes* in the small portion of its brief that presents direct authority. AAB 26-27. The facts of *Mendes* show that the District Court and Kaiser's reliance is misplaced.

In *Cornn v. UPS*, No. C03-2001 TEH, 2004 U.S. Dist. LEXIS 20578, 2004 WL 2271585 (N.D. Cal. Oct. 5, 2004) ("Cornn"), plaintiffs argued that UPS improperly deducted a standard lunch period from drivers' timesheets and failed to provide meal and rest periods as required by California law. See *Cornn v. UPS*, No. C03-2001 TEH, 2005 U.S. Dist. LEXIS 47052, at *2-3, 2005 WL 588431 (N.D. Cal. Mar. 14, 2005). Plaintiffs' first amended complaint included five claims for relief: (1) failure to pay for all time worked; (2) failure to provide an accurate itemized wage statement; (3) failure to provide a second meal period for some employees; (4) failure to provide meal and rest periods for drivers; and (5) violation of Cal. Bus. & Prof. Code §17200 ("§17200"). *Ibid.*

The court ruled that resolution of plaintiffs' first claim would require interpretation of collective bargaining agreements, but it did not preempt the remaining four claims, including the second claim under §226 (see, also, *Cornn v. UPS, Inc.*, 2006 U.S. Dist. LEXIS 9013, *13 (N.D. Cal. Feb. 22, 2006)), which eventually resulted in a settlement of $87 million for the class of 20,000 drivers.[6]

The court preempted the first claim, for failure to pay for all time worked, because of the need to interpret the " ***'fair day's work for a fair day's pay'***

[6] See Amanda Ernst, UPS Settles California Overtime Suit, Law360, Nov. 7, 2006. Available at: http://www.law360.com/articles/13110/ups-settles-california-overtime-suit (last visited: 10/23/15).

provision" in the labor contract "to determine the scope of work and other terms and conditions of employment agreed upon by Plaintiff's and UPS." *Cornn*, 2004 U.S. Dist. LEXIS 20578, at *5. Regarding the first claim, the judge distinguished between ***referring*** to the CBA to determine the ***wage rate***, which was clear, and ***interpreting*** the obviously ambiguous "'fair day's work for a fair day's pay' provision" in the collective bargaining agreement to determine compensable ***hours*** of work. *Ibid.* Were it not for the substantive ambiguity regarding compensable hours of work in the "fair day's work for a fair day's pay" provision of the labor contract, the court would not have preempted plaintiffs' first cause of action in *Cornn*. *Ibid*.

Under precisely the reasoning set forth in *Cornn,* the §222/224 claims here cannot be preempted because Kaiser and Plaintiffs explicitly agree about the substantive meaning of every individual contract term. AOB part X.A. While *Cornn* preempted plaintiff's claim for not being paid for all hours worked, this preemption did not prevent the court from deciding the §§226 and 17200 claims.[7] As we pointed out in our Opening Brief, it is more than ironic that Kaiser and the District

[7] *Cornn*, 2004 U.S. Dist. LEXIS 20578, at *6; *Cornn v. UPS, Inc.*, 2006 U.S. Dist. LEXIS 9013, *12-13, 152 Lab. Cas. (CCH) P60, 163 (N.D. Cal. Feb. 22, 2006).

Court premise their arguments upon "following" *Cornn,* but reject its holding regarding the §§226 and 17200 claims. AOB 57 (fn. 8).

In *Bernardi v. Amtech/S.F. Elevator Co.*, No. C 08-01922 WHA, 2008 U.S. Dist. LEXIS 120634 (N.D. Cal. June 5, 2008)("*Bernardi*") a district court judge held that plaintiffs' claims under §222 were preempted because:

> The parties dispute the meaning of the CBA – particularly the part stating that "vacation pay accrued from January 1 of one year through June 30 of the same year shall be paid in full to the employee by July 15 of that year. The vacation pay accrued from July 1 of one year through December 31 of the same year shall be paid in full to the employee by January 15 of the succeeding year" (Def. Exh. E). Plaintiffs argue that defendants failed to pay the full amount of their vacation pay *on* January 15 or July 15. Defendants, on the other hand, counter that they did pay the amounts *by* the aforementioned dates… In essence, **both parties dispute the amount due and owing under the CBA**, which requires more than a mere look at the CBA.

Id. at *12 (italics in original; boldface added).

The judge based preemption on the need to resolve a dispute over the substantive meaning of a term in the agreement regarding the timing and amount of payments to plaintiffs for vacation pay. *Ibid.* He emphasized that preemption hinged on the presence of this ambiguity, just as the judge in *Cornn* emphasized that his decision hinged on the ambiguity in the "fair day's work for a fair day's pay" provision. *Ibid.*

Again, there is simply no such ambiguity here. AOB part X.A. Kaiser and the District Court's reliance on *Bernardi*, like its reliance on *Mendes* and *Cornn*, is

misplaced and ironic. See *Ramirez*, 998 F.2d at 749 ("Examining the cases relied upon by Fox strengthens our conviction that Ramirez's action is not preempted.")

C. Apart from their theory based on *Mendes*, *Cornn* and *Bernardi*, neither Kaiser nor the District Court state any basis for preempting the §226 and §17200 claims.

Mendes, *Cornn*, and *Bernardi* are the entirety of the direct authority presented by Kaiser and the District Court for removing ***and*** defensively preempting, not only Plaintiffs' §§222/224 claims, but also Plaintiffs' §§226 and 17200 claims.

The District Court states:

> Plaintiffs' theory for why Kaiser's wage statements were inaccurate depends on the same allegations upon which their Section 222 rely; namely, that the $.09 per hour…should be construed as a deduction from agreed upon wages. For the reasons explained above…Plaintiffs' Section 226…is preempted by Section 301 of the LMRA.
>
> ER 18:1-8.
>
> * * *
>
> Plaintiffs' UCL claim is in fact entirely derivative of their California Labor Code claims… As such, the UCL claim is also preempted.
>
> ER 18:14-19.

Kaiser's Answering Brief likewise states that the §226 claims are preempted "for the same reasons that Plaintiffs' Section 222 claim is preempted," and that the §17200 claim is "completely derivative of [Plaintiffs'] California Labor Code claims." AAB 28-30. Kaiser argues in the alternative for federal supplemental

jurisdiction, which would also be derivative of their theory based on *Mendes*, *Cornn*, and *Bernardi*. AAB 30 (fn. 8).

Kaiser bears the burden to establish beyond any doubt the propriety of removal of each claim. "The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper, and that the court resolves all ambiguity in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (quotation and citation deleted). Their only direct authority for removing all claims consists of *Mendes*, *Cornn*, and *Bernardi*. AAB 24-31.

The above examination of *Mendes*, *Cornn*, and *Bernardi* reveals that, while superficially similar to this case, they are completely different in the fundamental aspects that are crucial to applicability of the doctrine of §301 complete preemption. All three courts made it clear that there would have been no preemption absent a claim for breach or a substantive ambiguity in an individual contract term. In *Cornn*, the court held that §§226 and 17200 claims identical to those here were not preempted ***despite*** the substantive ambiguity. Kaiser not only fails to meet its burden, it fails to lift the smallest part of it.

This is not to take a swipe at Kaiser's counsel, who doubtless rank among the best lawyers in the country. If a scrap of real authority for Kaiser's position

existed anywhere – in any state or federal court in the United States – Kaiser's counsel would have found it.

They can't find any authority because it does not exist.

Similarly, if there existed a credible policy[8] argument for why the §301 preemption doctrine should be expanded as Kaiser here requests, Kaiser would have made it. Kaiser would not have devoted its briefs here and below to word games. They would have eagerly addressed the facts and principles in cases such as *Lucas Flour, Lueck, Livadas, Lingle, Gregory, Associated Builders, Cramer, Burnside, Firestone, Balcorta*, and *Valles*.

They don't argue the law because it isn't on their side.

Kaiser has instead chosen to adopt a legal strategy of deliberate superficiality. It must argue for a radical expansion of the §301 doctrine, but it cannot admit this because there is no logical or doctrinal basis for the expansion that it requests. Rather it must pretend that this is a normal application of the doctrine. Hence it focuses on superficial similarities between this case and *Mendes*, *Cornn* and *Bernardi*, accompanied by semantic trickery designed to conflate the *ex post*

[8] "[T]he totality of the policies underlying § 301 – promoting the arbitration of labor contract disputes, securing the uniform interpretation of labor contracts, and protecting the states' authority to enact minimum labor standards – guides our understanding of what constitutes 'interpretation.'" *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d at 1108-1109.

statutory classification of contract terms (based on facts outside and after the contract) with the substantive economic meaning of those terms as agreed by the parties.

In truth, Kaiser is requesting that this Court permanently deprive all California union members of the protections of §§222, 224, and 226. The deprivation would be permanent and sweeping because all that would be required in the future to escape liability would be to argue as Kaiser does here: "The deduction isn't really a deduction; it's merely a factor in the calculation of gross wages. You need to interpret the CBA to see if we are right."

D. Plaintiffs do not seek to change the substance of the contracts.

Increasing Plaintiffs' union dues by nine-cents-per-hour and subsequent payments from the unions to the LMP trust could create an economic outcome identical to the three wage terms at-issue. This structure would be legal. Other structures – such as a slightly reduced across-the-board wage increase – could accomplish same. As Kaiser states: "Kaiser and the Coalition could have agreed to fund the Partnership Trust in any number of ways." Docket item 10, MTD at 1:9-10. The §226 violations can likewise be halted anytime. (We have requested that Kaiser disclose the deduction on wage statements during the pendency of this litigation, and it has refused.)

Plaintiffs are not attacking the substance of the terms at-issue – that is, the use of employee wages to help finance the LMP Trust – and this action need have no effect on substance. Plaintiffs seek only to require Kaiser to express the substance in keeping with California's seventy-year tradition of regulating the use and disclosure of deductions in the structure and reporting of wages. See, *e.g.*, AOB part VIII. The facts of this case are a poster-child for the wisdom of these California rules.

This distinction between the substance of a labor contract and independent state-law rights is useful in comparing this case to *Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063 (9th Cir. 2000) (petition for rehearing *en banc* denied in *Firestone v. S.Cal. Gas Co.*, 281 F.3d 801 (9th Cir. 2002) ("*Firestone*"). *Firestone* turned on an ambiguity within "complex pay and overtime provisions"[9] regarding which rate was the "regular" rate, creating, in turn, ambiguity about whether plaintiffs were receiving a "premium" for overtime work, thereby creating ambiguity about

[9] This Court's opinion described the provisions as follows:

> According to the PPR document itself, the unassigned overtime hours posted were computed as follows: (assigned hours/actual hours) X .3334 X (actual hours-8). That figure was then multiplied by one and one-half the hourly rate set forth in the collective bargaining agreement and added to the flat rate for the assigned hours.
>
> *Firestone*, 219 F.3d at 1065-1066.

whether the contract qualified for opt-out exemption from standard overtime rules under California law. *Firestone*, 219 F.3d at 1064-1068.

The panel noted that the California exemption was "a narrowly drawn opt-out provision[] exempt[ing] employees covered by a collective bargaining agreement that contains a negotiated provision on the same subject but different from the statutory provision." *Id.* at 1067 (quotation omitted). Depending on a court's determination of which rate was the regular rate, the opt-out would or would not apply, and different rates of overtime compensation would be due and payable under the contract. *Id.* at 1067; see *Firestone v. S. Cal. Gas Co.*, 281 F.3d 801, 802 (9th Cir. 2002) ("The agreement would be enforced differently depending on which party's interpretation is accepted.") Thus, in *Firestone* "the state law claims are inextricably intertwined with the meaning of terms in the CBA." *Id.* at 802 (citation and quotation omitted).

Firestone concerned the relatively minor question of whether employees would enjoy the overtime rate afforded by state law or, alternatively, the overtime rate afforded by the contract. *Firestone*, 219 F.3d at 1066. The question before this Court is whether the employees will be deprived of the minimum protections of state law altogether. See *Lueck, supra*, 471 US at 212; *Balcorta*, 208 F.3d at 1111. In *Firestone*, there was ***no*** allegation of illegality; it was perfectly legal for an employer

and union representative to agree to overtime terms that opted employees out of standard overtime rules. *Firestone,* at 1067-1068. Here, by contrast, the ***sole*** issue is illegality, and an employer and union cannot bargain away the California standards at-issue. §219. This case against Kaiser does not involve a "narrowly drawn opt-out provision," but non-waivable rights.

Second, the resolution of the interpretive dispute in *Firestone* lay within the four corners of the contract. *Id*. at 1067 (distinguishing *Firestone* from *Livadas*). Here, the situation is instead similar to *Livadas*. The resolution of the dispute depends mostly on facts outside the agreement[10] because California courts focus on the implementation of a compensation scheme to assess the presence of a deduction.[11]

The facts regarding implementation are overwhelming. Kaiser internally accounted for the nine-cents-per-hour as a "wage deferment." ER 40:22-41:2. Kaiser provided wage calculators to Plaintiffs that calculated their future wages solely as a function of the across-the-board wage increases. Defs. Supp. ER 30:9-15. And when three bargaining units that were formerly part of the Coalition joined a

[10] "Purely factual questions" do not require a court to interpret any term of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). "Although the inquiry may begin with the Bargaining Agreement, it certainly will not end there." *Ramirez,* 998 F.2d at 748-49 (9th Cir. 1993).

[11] See, AOB 33-34, 45; Defs. Supp. ER 6, 17-19, 22, 27.

non-Coalition union, Kaiser granted those employees an upward wage "adjustment" of nine cents per hour and repaid any nine cent per hour deductions that had been made from their wages from the day they left the Coalition. E.R. 80 (¶37); AOB 45.

Finally, unlike *Firestone*, these claims under §§222, 224 and 226 involve an assessment of illegality that does not intrude into the substantive terms of the contract. Kaiser and the unions easily could have structured the agreements legally. They chose instead to scoff at California law. In *Firestone*, by contrast, the "narrowly drawn opt-out provision" was "inextricably intertwined" with the amount of overtime compensation that would be ***legally*** provided ***under*** the contract.

One can see why Kaiser's Answering Brief only cites *Firestone* a few times without discussion, and why the District Court avoids mention of *Firestone* altogether. Kaiser nevertheless cites *Firestone* as unexplained authority for the key assertion in its brief: "Interpretation of the collective bargaining agreement is ***clearly necessary*** when the parties 'disagree on the meaning of the terms in the collective bargaining agreement for purposes of California law.' *Firestone*, 219 F.3d at 1066." AAB 23-24 (emphasis added). The error of this absurdly broad statement is that *Firestone* involved a narrowly-drawn state-law opt-out provision that

determined how much employees would be legally paid under the contract. It was an unusual fact pattern. Far from creating law that is broadly applicable, *Firestone* is the narrow exception that proves the rule.

That is why *Firestone* has been distinguished by nearly every court that has considered it, including at least three Ninth Circuit Court of Appeal opinions (*Gregory*, 317 F.3d at 1053; *Bearden v. U.S. Borax Inc.*, 227 F. App'x 585, 586 (9th Cir. 2007); *Burnside,* 491 F.3d at 1073), ten Ninth Circuit district court opinions,[12] two California Court of Appeal opinions, one Third Circuit district court opinion, and one Tenth Circuit district court opinion.

Plaintiffs do not question the substance of their labor contracts, but their legality under California law.

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[12] *Sperry v. Securitas Sec. Servs.*, No. C 13-0906 RS, 2014 U.S. Dist. LEXIS 58060, at *19-20 (N.D. Cal. Apr. 25, 2014); *Martinez v. Mann Packing Co.*, 5:12-CV-02122-EJD, 2012 U.S. Dist. LEXIS 133421, at *7-8 (N.D. Cal. Sept. 18, 2012); *Melchor v. Foster Poultry Farms, Inc.*, No. 1:12-cv-00339 AWI GSA, 2012 U.S. Dist. LEXIS 70760, at *17-18 (E.D. Cal. May 21, 2012); *Cicogni v. Safeway Inc.*, No. CIV. S-11-3258 KJM-CKD, 2012 U.S. Dist. LEXIS 14625, at *5-6 (E.D. Cal. Feb. 3, 2012); *Perez v. Daughters of Charity Health Sys.*, No. CV 10-5832-GHK (PJWx), 2012 U.S. Dist. LEXIS 1547, at *14 (C.D. Cal. Jan. 5, 2012); *Avalos v. Foster Poultry Farms*, 798 F. Supp. 2d 1156, 1162 (E.D. Cal. 2011); *Daniels v. Recology, Inc.*, C 10-04140 JSW, 2010 U.S. Dist. LEXIS 137613, at *10 (N.D. Cal. Dec. 20, 2010); *Faaola v. GES Exposition Servs.*, No. C 09-02394 WHA, 2009 U.S. Dist. LEXIS 74096, at *11 (N.D. Cal. Aug. 7, 2009); *Bonilla v. Starwood Hotels & Resorts Worldwide, Inc., 407* F. Supp. 2d 1107, 1112 (C.D. Cal. 2005); *Chan v. Albertson's, Inc.*, No. C 02-01157, 2002 U.S. Dist. LEXIS 9296, at *8 (N.D. Cal. May 1, 2002).

E. Section 219 prohibits the waiver of §§222, 224, and 226.

The District Court errs when it states that it should consider whether the parties ***agreed*** that the nine-cents-per-hour was ***not*** to be treated as a deduction under California law, thereby waiving §222, 224, and 226:

> To determine whether this "contribution" was a deduction from earned wages or merely a factor in the calculation of the agreed-upon wage, the court may be required to ***consider***…the intentions, expectations, and expressions of the bargaining parties during the period of negotiation, e.g., regarding whether the $.09 contribution was incorporated into the agreed-upon wages.
>
> ER 16:1-13 (emphasis added).

The described inquiry amounts to assessing waiver. This is improper. The bargaining parties cannot under any circumstances "agree" in advance that a term is not a deduction under California law. This is precisely the danger addressed in cases like *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d 156 (1979). See AOB 20-22. This is exactly why §219 makes these Labor Code sections non-waivable. Time and again, such arguments that collective bargaining parties may waive non-waivable state rights have been rejected by this Court and the Supreme Court.[13]

[13] *Associated Builders & Contrs.*, 109 F.3d at 1357; *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 692 (9th Cir. 2001) ("Where a party defends a state cause of action on the ground that the plaintiff's union has bargained away the state law right at issue, the CBA must include clear and unmistakable language waiving the covered employees' state right for a court even to consider whether it could be given effect.") (quotations omitted); *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1081-82

The same applies to Kaiser and the District Court's awkward arguments regarding the National and Local Agreements. AAB 10-11, 32-33, 36-38; ER 7:27-9:5, 16:1-13. Those arguments are invalidated by the admitted fact that "the National Agreement and the Local Agreement ***together*** constitute the applicable collective bargaining agreement governing the wages, hours, and working conditions of the Plaintiffs." AAB 9 (emphasis added); AOB 9-10, Ex. A at 3. If the three substantive terms are all binding and undisputed, as Kaiser admits, then any argument about a hierarchy of terms once again reduces to a waiver argument. The bargaining parties may not agree in advance how contract terms are to be classified under California law.

(9th Cir. 2005) ("We need not, indeed may not, construe the Ivy Hill collective bargaining agreement in order to consider whether a waiver exists because any provision of the collective bargaining agreement purporting to waive the right to meal periods would be of no force or effect: The right in question is plainly nonnegotiable."); *Balcorta*, 208 F.3d 1102 ("§301 does not permit parties to waive, in a collective bargaining agreement, nonnegotiable state rights."); *Lueck*, 471 U.S. at 211-12 ("In extending the preemptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.")

F. Kaiser's attempts to distinguish key cases presented in our Opening Brief reinforce the teachings of these cases.

Regarding *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal. 4th 217, 228 (2007), Kaiser writes: "Indeed, in the order granting remand in that case, the district court there noted '[d]efendants have pointed to no ***specific language*** in the collective bargaining agreement that will need to be interpreted in the course of this action.'" AAB 45 (emphasis added). This is a wonderful point. Kaiser has indeed never pointed to any ***specific language*** to be interpreted, one of many similarities between this case and *Prachasaisoradej*.

Kaiser then seeks to distinguish this fact in *Prachasaisoradej,* but refuses to do so in the manner suggested – that is, by simply "pointing" to "specific language" in an individual contract term that is ambiguous. Instead Kaiser evasively asserts: "Unlike the *Prachasaisoradej* case, in this case, there is disagreement ***as to*** the terms of the collective bargaining agreement that a court must first ***determine*** before it can ***assess*** whether the agreement's terms violate state law. As the Court below found, it must first ***resolve the disputed interpretation*** of the contract ***as to what constitutes*** the 'agreed-upon wage' before it can ***determine*** whether the agreement is lawful." AAB 45. Kaiser can point to no specific language that is ambiguous, and its evasions demonstrate that it knows it cannot.

Similarly, Kaiser states regarding *Associated Builders*: "***The parties there did not dispute the meaning of the provision in the collective bargaining agreement or the rights and responsibilities guaranteed under the terms of agreement or the job-targeting programs provision in the agreement.***" AAB 43 (emphasis in original). This sentence is exactly true here, as Kaiser has always conceded. See AOB part X.A.

But in the sentences that follow, Kaiser instead states: "***Plainly, that is not the case here.*** Kaiser and Plaintiffs dispute the ***meaning*** and legal effect of the $.09 per hour contribution, the across-the-board pay increases, and the specified wage rates in the collective bargaining agreement." AAB 43-44 (emphasis added). Apparently Kaiser's idea here is to confuse two very different usages of the word "meaning." The parties in *Associated Builders* did not dispute the substantive meaning of the contract terms, but they did dispute the terms' legality under California law. The disputed meaning to which Kaiser appears to be referring in this case is the classification of undisputed wage terms to assess the contract's legality under California law. But that is precisely the type of disputed meaning that *Associated Builders* says is ***not*** preempted.

Kaiser continues: "Therefore, unlike in *Associated Builders*, the Court must first interpret what Kaiser and Plaintiffs' union ***actually agreed to*** and what legal

consequences were intended to flow from that agreement ***as to the 'agreed-upon wage.' Only then can the legality be assessed.***" AAB 44. Kaiser is now adding a waiver argument reminiscent of defendant Fox's arguments in *Balcorta*:

> First, Fox ***may be arguing that state law permits the parties to adopt*** timing-of-payment ***requirements that differ from the minimum labor standards*** enacted in §201.5 and ***thereby render the state's standards inapplicable***. In such case, the argument continues, it would indeed be the collective bargaining agreement that we would be required to construe, and complete preemption would ensue. Alternatively, Fox ***may be arguing that even if the state law does not authorize a waiver of its requirements, §301 permits such a waiver***. ***In either case, Fox's argument is without merit***. The rights granted to employees by California Labor Code §201.5 are ***not subject to negotiation***, and §301 of the LMRA ***does not grant private parties the power to waive nonnegotiable state rights***.
>
> *Balcorta*, 208 F.3d at 1111 (emphasis added).

Like Fox, Kaiser argues that the parties may have ***agreed*** that the nine-cents-an-hour was not a deduction, and that the net amounts in the local agreements were gross wages, that is, the same argument Fox made regarding §201.5. But like §201.5, the rights granted to employees by §§222, 224, and 226 are not subject to negotiation, and §301 does not grant private parties the power to waive these nonnegotiable state rights. See, *supra*, section E.

In trying to distinguish *Gregory*, Kaiser again resorts to word-play:

> In *Gregory*, a case concerning the payment of overtime, the court found that there was no dispute concerning *how overtime rates were calculated* (the parties agreed) but "whether the *result* of the

> calculation compli[ed] with California law." *Id.* at 1053. Here, unlike in *Gregory*, Kaiser and Plaintiffs dispute the **method** of calculating "agreed-upon wages," which can only be resolved by interpretation of the collective bargaining agreement.
>
> AAB 46 (fn. 16) (emphasis in original).

Just as it did with "meaning," Kaiser here tries to confuse two different usages of the word, "method." One is a ***method*** for calculating benefits due under a contract ("method" as used in *Gregory*). The other is a ***method*** for assessing the legality of a contract ("method" as used by Kaiser here). And the method to which Kaiser refers (assessment of legality) does not actually include "calculations." These are just games with the English language, tricks with which Kaiser hopes to dupe this Court.

Kaiser's attempts to distinguish *Livadas v. Bradshaw*, 512 U.S. 107 (1994), *Burnside*, 491 F.3d 1053, *Balcorta*, 208 F.3d 1102, and *Cramer*, 255 F.3d 683, are even more conclusory. AAB 46-49. Kaiser starts out by establishing the unexceptional proposition that complete preemption applies to state-law claims that require §301-type interpretation. AAB 46-47. That point is undisputed. Kaiser then states that each case was remanded only because it did not involve interpretation, which makes it distinguishable from this case that does involve interpretation. AAB 47-49. This is circular and says nothing.

The relevance of the four cases is that they show the boundaries of §301-type interpretation. In order to distinguish the cases, Kaiser should explain how the state-law inquiry here somehow falls inside the boundaries, even though the state-law inquiries in *Livadas, Burnside, Balcorta*, and *Cramer* were all found to fall outside the boundaries. Kaiser does not do this because it cannot. Instead it tries to conflate non-preempted usages of "interpret" (such as "interpret California law" or "interpret facts outside the agreement") with "interpret" in the context of §301 complete preemption, which is limited to the substantive (i.e., who, how much, what, where, when, how) interpretation of individual contract terms. See, Section A, *supra*, (fn. 2, 3).

G. Kaiser abandons its opportunity to address other arguments.

Our Opening Brief argues that Kaiser and the District Court deliberately ignore the California law at-issue by repeatedly restating our claims as if they were breach of contract claims under §222. AOB part VIII, X.B., 58. Kaiser abandons its opportunity to address this argument, and its silence should be taken as a concession that it is true. In fact, Kaiser completely fails to mention §224 in its Answering Brief. The District Court mentions §224 only once in passing. ER 14:26. Kaiser and the District Court also fail to mention relevant California labor regulations, or to address relevant California common law.

Kaiser further asserts in notes 14 and 15 that effectively all of the California common law raised by Plaintiffs is "inapposite" because it involves §221 or "had nothing to do with the issue of remand." AAB 40 (fn. 14, 15). The District Court makes similar blanket disavowals of virtually all California common law raised by Plaintiffs. AOB 55-56. Even if we ignore the pretextual nature of these disavowals, they beg a question. Upon which California cases ***do*** Kaiser and District Court base their understanding of this California law inquiry? Or do Kaiser and the District Court contend that California is a civil law state like Louisiana?

The truth appears to be that cannot find any California cases or regulation that actually support their theory and therefore simply ignore §224, California regulations, and California common law altogether. Their entire "California law" theory is that Plaintiffs' claims are indistinguishable from breach of contract claims under a stilted and myopic construction of a few words from §222.[14]

[14] Section 222 states: "It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or ***unlawfully*** or ***with intent to defraud*** an employee, a competitor, or any other person, to withhold from said employee ***any part of*** the wage agreed upon." §222 (emphasis added). Thus §222 itself goes beyond merely prohibiting breach of labor contracts. It includes an intent element and specifically mentions fraud. In the context of §224 (specifying three types of authorized deductions applied *expressio unius est exclusio alterius*) and §226 (requiring disclosure of "gross wages earned," "deductions," and "net wages earned") "wage agreed upon" is a synonym for "gross wages earned" in §226, and "withholding" is a synonym for "deduction" in §226.

Kaiser also abandons its opportunity to address Plaintiffs' oft-repeated statement that they "concede that Kaiser paid them exactly what was required by the agreements." AOB 24; see also, ER 56:23-24, 60:11-12, 60:13-14; see also, AOB 3, 4, 6, 12-14, 24, 26-31, 37, 38, 41. Kaiser instead tries to trick this Court into believing that Plaintiffs have ***not*** conceded this point, stating in bold-faced italics in its Statement of Facts: "***Plaintiffs do not concede that the wage rates set forth in the Local Agreement reflect the wages that Kaiser promised to pay its employees.***" AAB 12 (emphasis in original), 1, 33-37. It is important to note that this assertion, upon which Kaiser's legal theory likewise depends, is a ***flat-out misrepresentation***.

Kaiser also refuses to address the difference between complete preemption and defensive preemption, or the impropriety of making a finding on the latter without allowing Plaintiffs even to submit a brief. See, e.g., AOB 7 (fn. 1). Instead Kaiser states: "It is worth noting at this point that ***Plaintiffs declined to amend their complaint*** in response to the ***District Court's invitation that they do so***." AAB 33 (fn. 9) (emphasis added). In truth the District Court ordered Plaintiffs either to "reallege their claims as Section 301 claims" (an impossibility) or have their action dismissed on the merits. ER 18:26-19:1.

And in its Answering Brief, Kaiser makes another attempt to impugn

Plaintiffs themselves.[15] Kaiser states: "Although represented by SEIU-UHW, the named Plaintiffs individually support a rival union." AAB 7 (fn. 3). Given the facts, Plaintiffs obviously seek to remove these union executives as their representatives. And they participate reluctantly but heroically as named parties in this suit, placing their livelihoods at-risk.

II. CONCLUSION

California strictly limits the use of deductions and requires their clear and specific disclosure on employee wage statements. If this Court holds for Kaiser, these protections will be destroyed, not only for the 75,000 union members whose rights are at stake here, but for all current and future California union employees.

It is ironic that Kaiser hopes to escape these California laws requiring clarity and transparency by arguing a lack of clarity as the basis for preemption. By this logic it would follow that the more clever, vague and circuitous the language or mechanisms that one uses to embed a violation of state law in a collective bargaining agreement, the more "interpretation" will be required and the more likely preemption will occur.

Thus, if this Court holds for Kaiser in this case, the key to insuring future

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[15] This effort echoes Kaiser's previous attacks on both Plaintiffs (Docket item 21, Defendants' Opposition to Plaintiffs' Motion to Remand at 3:25-28; Docket item 10, MTD at 4:23-27) and Plaintiffs' counsel (Docket item 10, MTD at 4:26).

extinguishment of state-law claims regarding a collective bargaining agreement or wage statements would be to make the agreement as confusing and manipulative as possible. Honesty and clarity in the drafting of collective bargaining agreements would be discouraged. Dishonesty and confusion would be rewarded.

This Court and the Supreme Court have repeatedly seen through such circularity. "Were we to extend §301 to apply in cases where the very legality of a contract between an employer and a labor organization was at issue, parties would be able to immunize themselves from suit under state-laws of general applicability by simply including their unlawful behavior in a labor contract." *Associated Builders & Contrs.*, at 1357-58.

This Court should respect state standards and not "grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Lueck*, at 211-212. Nor has there ever been any court that we can find – or that Kaiser can find – that has ever removed or preempted on the basis of §301 interpretation when the substance of every individual contract term was undisputed. This case should be remanded to the California courts immediately and summarily.

Respectfully,

Dated: November 2, 2015

/s/ Charles K. Seavey
Charles K. Seavey
Attorney for Appellants

III. CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P., Rule 32(a)(5), (a)(6) and (a)(7)(B)(i) because this brief is prepared in Microsoft Word® using a proportionally spaced type font and contains 6,926 words, excluding those parts of the brief exempted by Fed. R. App. P., Rule 32(a)(7)(B)(iii).

Dated: November 2, 2015

/s/ Charles K. Seavey

Charles K. Seavey
Attorney for Appellants

IV. CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 2, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 2, 2015

/s/ Charles Seavey
Charles K. Seavey
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