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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT CALIFORNIA - EASTERN DIVISION

JOHN JOSEPH SAINT JOHN, JULIO CEASAR FLORES, ANTONIO AGUILAR, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TATITLEK SUPPORT SERVICES, INC., a corporation, TATITLEK TRAINING SERVICES, INC., a corporation, TATITLEK/FORCE PREPAREDNESS TRAINING SERVICES, INC., a corporation, and DOES 2 through 75, inclusive,

Defendants.

Case No. ED-CV08-1909-JZ (RZx)

[Assigned to the Honorable Jack Zouhary]

Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Partial Summary Judgment

Date: To Be Set By Court Order
Time: To Be Set By Court Order
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I. INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs John Saint John, Julio Flores and Antonio Aguilar are three of the hundreds of patriotic American citizens and foreign residents of the United States who since 2006 have worked long, hard hours in the climatic extremes of the California Mojave dessert to help train U.S. Marines before they deploy to Iraq.

The company that hired Plaintiffs to work as Role Players, Defendant Tatitlek Support Services, Inc. and a subsidiary division (collectively "Tatitlek"), had limited experience with role players when it garnered the right in early 2006 to negotiate exclusively with the United States Marines Corps ("USMC") to provide Role Players for its training at the USMC's base in Twentynine Palms, California.

Determined to win a multi-million dollar deal and further grow its new line of business, Tatitlek chose to classify the Role Players as independent contractors. Such a move saved Tatitlek significant expenses like, *inter alia,* payroll taxes and overtime pay and it allowed Tatitlek to avoid administrative obligations like, *inter alia,* preparing itemized wage statements for the Role Players and having their paychecks ready when each mission ended. Tatitlek made this decision without vetting the issue with the U.S. Department of Labor, the California Labor Commissioner, a California employment lawyer or an attorney opinion letter.

Instead, Tatitlek devoted less than an hour to this issue via a telephone call with a non-California lawyer. It also did this despite the fact that the USMC's statement of work, Tatitlek's own proposal to the USMC, and its contract with the USMC referred to "hiring" and "employing" the Role Players.

It was not long (within a year) before the U.S. Department of Labor and the California Labor Commissioner took exception to Tatitlek's pay practices. Tatitlek also learned from the USMC a "small" detail it had not bothered to investigate before it negotiated its contract: the Twentynine Palms military base is not a federal enclave. Rather, it is California land over which California retains sovereignty.

As a result of these developments, Tatitlek changed its policies several times:

First, it re-classified the Role Players as exempt salaried employees in July 2007. Within months, however, Tatitlek re-classified the Role Players as hourly non-exempt employees – and, by January 1, 2008, it began (and continues) to comply with California's wage and hour laws.

Now forced to justify its former actions by this lawsuit, Tatitlek's Motion For Partial Summary Judgment evidences a classic "kitchen sink"/mud defense strategy: assert a barrage of defenses and hope that one "sticks." Analyzing Tatitlek's arguments, however, compels a finding that its defenses lack merit.

First, Tatitlek's Motion rests almost entirely on its legal *argument* that a significant conflict purportedly exists between its ability to comply with California's wage and hour laws and its obligations under its contract with the USMC.[1] The *facts* and the *law*, however, show that no such conflict exists.

The crux of Tatitlek's argument is that the greater expense of paying the Role Players (1) as employees and (2) pursuant to California law somehow conflicts with federal law and the policies and interests of the United States. Tatitlek is wrong. No conflict exists in this sphere (*i.e.*, wages for employees of government contractors) because Congress passed the Service Contract Act ("SCA") precisely to protect such employees – who up to that point often bore the brunt of efforts by contractors to submit lowball bids. Similarly, Congress passed the Contract Work Hours and Safety Standards Act and the FLSA to ensure that employees receive extra pay when they work more than 40 hours in a week (like the Role Players did). These laws set minimum wages; they don't preempt state laws requiring higher wages.

These policies stand in stark contrast to those in the cases Tatitlek cites involving the inter-governmental immunity defense (which rests on the Supremacy

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[1] See, Def's Mem., p., 14, lines 14-15 ("There is an inherent conflict between the federal contract requirements and state law."); Def's Mem., p., 14, lines 4-6 ("TSSI must choose between complying with California law and complying with the terms of its federal Contract."); and Def's Mem., p., 3, lines 7-8 ("If Plaintiffs prevail, TSSI would be forced to violate California law if it follows the Corps' orders.").

Clause of the U.S. Constitution) and government contractor cases, where courts have focused on the United States' interest in minimizing its costs for military equipment or transportation services.

Plus, it is analytically impossible for any such conflict to exist because (1) Tatitlek admits that since January 2008 it has complied with both California law [2] and its contractual obligations to the USMC [3], and (2) the USMC has voiced no objections to Tatitlek's claimed currently lawful pay practices. [4] The absence of any such conflict compels a finding that Tatitlek's invocation of the Supremacy Clause, government contractor, and intergovernmental immunity defenses fail.

Each of these defenses also fails because Congress, by enacting the SCA and the CWHSSA, effectively waived these defenses as to wage claims against federal contractors by making such contractors liable for complying with state wage and hour laws that require the payment of wages and/or benefits that are higher than otherwise required by federal law. That is, the United States could have preempted the field by requiring federal contractors to pay a certain amount – and no more or no less than that amount – to its employees. Instead, Congress chose only to prescribe a floor; not a ceiling.[5]

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[2] Tatitlek admits (*inter alia)* that it now: (1) pays the Role Players daily overtime at the rate of time and a half for hours worked in excess of 8 and double time for hours worked in excess of 12, [See Plaintiff's Additional Disputed Fact ("PADF") 179-180]; (2) pays the Role Players weekly overtime at the rate of time and a half for hours worked in excess of 40, [PADF 178]; (3) pays the Role Players double time for all hours worked on the seventh straight day of work [PADF 181]; (4) pays the Role Players for Day Zero, [PADF 173], (5) provides meal and rest breaks to the Role Players, [PADF 182; 185]; (6) provides Role Players with opportunities to get 5 hours sleep per night [PADF 183]; and (7) provides the Role Players with itemized wage statements, [PADF 184]. See also [PADF 184].

[3] See [PADF 186].

[4] [PADF 134, 156, 158, 186].

[5] The SCA provides that federal contractors are not allowed to pay their employees "less than the minimum wage," 41 U.S.C.A. § 351(b)(1), and the CWHSSA provides that federal

Without its Supremacy Clause, government contractor, and inter-governmental immunity defenses, Tatitlek is left with a single remaining argument: that California law is preempted by the SCA and/or the CWHSSA. This defense fails because – as every court that has examined these statutes has held – these statutes do not preempt state wage and hour laws. Rather, they set only a floor (not a ceiling) for what a federal contractor must pay its employees.

At bottom, Tatitlek is trying to wrap itself in the flag and convince the Court that the "national interests" of the United States somehow should be deemed to preempt California's wage and hour laws. Plaintiffs acknowledge that the United States *could* have preempted California law. But it has not so done. The Executive Branch has not issued either an Executive Order or a regulation exempting Tatitlek from its obligations to comply with California's wage and hour laws. The USMC arguably could have but did not include such a provision in its contract with Tatitlek. Congress could have but did not pass such a law. It is a "cornerstone" of preemption analysis that the historic police powers of the state – such as regulating employer compensation to employees – should not be deemed preempted unless there is a "clear and manifest" intention to do so by the United States. *See, Wyeth v. Levine*, – U.S. –, 129 S.Ct. 1187 (2009)("[i]n all pre-emption cases, and particularly in those in which Congress has `legislated ... in a field which the States have traditionally occupied,' ... [the courts] `start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' ").

Finally, despite notice from both parties and depositions taken of USMC officials, the United States has neither intervened nor filed an *amicus* brief in support of Tatitlek's Motion. Consistent with these facts, the evidence shows that Tatitlek is not exempt from California's wage and hour laws. The USMC contract does not

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contractors must pay their employees "at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of 40 hours in the workweek," 40 U.S.C.A. § 3702(a).

contain a provision exempting it from compliance with California law. [PADF 21-29]. Tatitlek admits that no government agency ever said it does not have to comply with California law. [PADF 53-56, 62, 65, 67, 71, 75, 77, 86, 88, 89-91; 177, 194-196, 209, 212-217]. To the contrary, the USMC contract specifically provides for Tatitlek to hire "employees" (not independent contractors) to work as Role Players [PADF5, 7-10, 13] and it incorporates by reference the SCA. [PADF 17-18] Tatitlek's former Chief Operating Officer and Acting General Counsel (who signed the USMC contract on its behalf) admitted at deposition that he understood that the Service Contract Act set *minimum* wages and that Tatitlek was free to pay the Role Players higher wages. [PADF 19].

Plus, the U.S. Department of Labor investigated Tatitlek's classification of the Role Players as independent contractors and ordered it to reclassify them as hourly, nonexempt employees and pay them overtime. [PADF 138]. Likewise, the California Employment Development Department ("EDD") also investigated Tatitlek and made the same determination. [PADF 162-164].

One of the USMC representatives who has been deposed (Lieutenant Col. Christopher Proudfoot) testified that the Marine Corps expect Tatitlek to comply with the law including the requirement to pay the Role Players overtime.[6] [PADF 153-154]. Another representative designated by the USMC to testify in this case (Major Casey Harmon) testified that paying overtime wages would not hurt in any way the training goals of the Marines. [PADF 146].

For all of these reasons, Plaintiffs respectfully submit that the Court should deny Tatitlek's Motion so that the parties can have a trial on the merits about whether Tatitlek violated California law; and, if so, how much it owes to Plaintiffs and the putative class.

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[6] Tatitlek contends that the testimony of Lieutenant Colonel Proudfoot "is to be given ***considerable weight*** in considering the existence and significance of a federal interest." Def's Mem., p. 17, lines 22 - 23 (Emphasis added).

II. SUMMARY OF FACTS.

A. Tatitlek Entered A Multi-Million Dollar Contract With The USMC To Provide Role Players For Training At The Twentynine Palms Military Base – That Contract Required Tatitlek To Hire Role Players As "Employees".

Tatitlek is a for-profit Alaska Native corporation which qualifies as a Small Business Administration ("SBA") 8(a) Small Disadvantaged Business. [PADF 1]. As such, in late 2005/early 2006, Tatitlek was able to enter into "sole source" or "no bid" contract negotiations with the USMC to supply Role Players for a series of discrete pre-deployment Mission Rehearsal Exercises ("MRX") that were scheduled to take place at the USMC's military base at Twentynine Palms, California on various dates during the April 2006 to March 2007 time period. [PADF 3].

The USMC base there is not a federal enclave. [PADF 46,136,187-189].

As part of these negotiations, Tatitlek submitted a written proposal to the USMC. This proposal specifically indicated that Tatitlek would employ the Role Players as employees [PADF 7-10]; nowhere did the proposal indicate that Tatitlek would treat the Role Players as independent contractors. [PADF 7]. Among other things, Tatitlek's proposal provided that it would interview "applicants for hire" (*i.e.*, the prospective Role Players) and then, "offer[] employment" to those individuals who satisfied Tatitlek's hiring requirements. [PADF 8](Emphasis added). Tatitlek's proposal also specifically stated that Tatitlek would provide "Employee Training" to the Role Players ensuring that each such "employee" would receive not only training in basic first aid but also that each "employee is issued a Role-player/OPFOR handbook." [PADF 9-10](Emphasis added).

Ultimately, the USMC accepted Tatitlek's proposal and, accordingly, on April 3, 2006, Tatitlek and the USMC entered into a "Firm Fixed Price" contract providing that the USMC would pay Tatitlek $27,078,568.00 in exchange for the provision of 375 Role Players at each of the discrete MRXs that were scheduled to take place

between April 2006 and March 2007. [PADF 11].[7]

Just like Tatitlek's proposal, the contract between Tatitlek and the USMC also specifically *required* Tatitlek to *employ* the Role Players as employees. [PADF 13]("This training will *require the employment of Role Players* (RPs) to act as Foreign Language Specialists (FLS) and Civilians On the Battlefield (COBs), insurgents, terrorists, and other personnel encountered in the intended theater of operations.")(Emphasis added). And just like Tatitlek's proposal and the contract between Tatitlek and the USMC, the USMC's Statement of Work specified that the contractor supplying the Role Players would be *required* to *employ* the Role Players as employees. [PADF 5]("This training will *require the employment of Role Players* (RPs) to act as Foreign Language Specialists (FLS) and Civilians On the Battlefield (COBs), insurgents, terrorists, and other personnel encountered in the intended theater of operations.")(Emphasis added).

The contract also incorporated Federal Acquisition Regulation ("FAR") number 52.222.41 regarding the SCA. [PADF 17]. FAR 52.222.41 provides, in pertinent part, that the "*employee[s]* employed in the performance of this contract by the Contractor or any subcontractor *shall be paid not less than* the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor." (Emphasis added). [PADF 18]. Tatitlek understood that although the Service Contract Act set *minimum* wages, the Company was free to pay the Role Players higher wages. [PADF 19].

The contract did <u>not</u> contain any provision placing a cap or maximum on the amount of wages that the Role Players would be paid by Tatitlek. [PADF 20]. Nor did the contract contain any type of provision exempting Tatitlek from having to pay

[7] [PADF 11]("The contractor shall provide the following supplies and services via Firm Fixed Price . . ."). Of course, this provision means that Tatitlek, and not the government, is responsible for Tatitlek's underpayment of wages to the Role Players. <u>See</u> 48 C.F.R. § 16.202-1 ("A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. ").

the Role Players overtime or otherwise excuse Tatitlek's compliance with California's other wage and hour laws. [PADF 21-29].

The contract was amended multiple times (and/or new contracts were entered into) to increase both the length of time Tatitlek would provide Role Players for the USMC (through 2013) and the amount of money to be paid to Tatitlek (approximately $300 Million). [PADF 31]. Each of these amendments/new contracts also not only specifically *required* Tatitlek to *employ* the Role Players but also incorporated FAR 52.222.41. [PADF 32,33]. None of these amendments/new contracts placed a cap or maximum on the amount of wages that the Role Players would be paid by Tatitlek. [PADF 34]. Similarly, none of these amendments/new contracts contained any type of provision exempting Tatitlek from having to pay the Role Players overtime or otherwise excuse Tatitlek's compliance with California's wage and hour laws. [PADF 35, 36].

B. <u>Tatitlek Decided Initially To Classify The Role Players As Independent Contractors – And Consequently Engaged In Multiple Violations of California's Wage And Hour Laws</u>.

Contrary to the contract's requirement that Tatitlek *employ* the Role Players as employees, Tatitlek (and not the USMC) decided to classify the Role Players as independent contractors rather than hourly non-exempt employees. [PADF 39]. No government agency told Tatitlek that it did not have to comply with California's wage and hour laws. [PADF 38]. Nor did any governmental agency require Tatitlek to classify the Role Players as independent contractors. [PADF 54].

Accordingly, based on its independent contractor classification, and as explained in more detail below, Tatitlek did not:

- Pay employer payroll taxes (*i.e.*, 6.2% for Social Security and 1.45% for Medicare); instead, the Role Players were responsible for the taxes.[PADF 59].
- Pay overtime to the Role Players. [PADF 64].
- Pay premium pay (*i.e.,* one hour of pay) each meal and/or rest period that was

missed or interrupted. [PADF 66].

- Pay the Role Players working on "Day Zero" [PADF 61,63]. [8]
- Pay the Role Players when they were not provided with the opportunity to get at least 5 hours of uninterrupted sleep per evening. [PADF 69,70].
- Pay the Role Players immediately upon releasing them after they completed each specific job assignment for which they were hired. [PADF 73].
- Provide the Role Players with itemized wage statements. [PADF 76].
- Reimburse the Role Players for purchasing flashlights or other lighting sources as required by California Labor Code Section 2802. [PADF 82,85].
- Pay the Role Players a waiting time penalty of up to thirty (30) day's pay, pursuant to Labor Code Section 203, for not paying them all wages due upon discharge at the end of each mission. [PADF 207].

C. Neither The Contract Between Tatitlek And The USMC Nor Any Governmental Agency Exempted Tatitlek From Its Obligation To Classify The Role Players As Hourly Employees, Pay Them Overtime Or Otherwise Comply With California's Wage And Hour Laws.

The USMC contract does not contain a provision exempting Tatitlek from complying with California's wage and hour laws. [PADF 21-29]. Likewise, no governmental agency ever informed Tatitlek that it was exempt from having to pay the Role Players overtime or otherwise complying with California's wage and hour laws. [PADF 53-56,62,65,71, 75,77,86, 88-91,177,194-196,209,212-217].

D. Overview Of A Typical Mission.

After Tatitlek hired the Role Players in 2006, it gave them an Employee Handbook and, inconsistently, made them sign paperwork indicating that Tatitlek would treat them as independent contractors. [PADF 58].

[8] By this same conduct, Tatitlek also violated Section 5 of California's IWC Wage Order (i.e., California's reporting time or show up pay law).

Tatitlek then assigned the Role Players to various MRXs such as Mojave Viper and Advisory Training Group ("ATG"). [PADF 92]. Mojave Viper is a ten day MRX broken down into two components: six days of "Lane Training" and then four days of the "Surge" or "Final Exercise" ("FINEX"). Both phases occurred at mock Iraqi towns – Wadi al Sahara and Khalidiyah – set up on the USMC base at Twentynine Palms. [PADF 93].

On "Day Zero," Tatitlek required all of the Role Players scheduled to work during the entire 10 day mission (*i.e.,* the "10 Day Role Players") to report to work at a staging area located outside of the Twentynine Palms military base (at the Smith's Ranch drive-in movie theater) for "in-processing" where the Role Players would fill out paperwork and sit through various training and safety meetings. [PADF 94]. In-processing lasted several hours. [PADF 95]. When "in-processing" ended, Tatitlek would load the Role Players onto buses and transport them to the Forward Operations Base ("FOB") located on the military base. Tatitlek did not pay the Role Players for Day Zero. [PADF 96].

On Day One through Day Six, the Role Players would begin work around 5:30 a.m. when Tatitlek loaded them onto buses and transported them from the FOB to the exercise field located approximately 9 miles away. [PADF 97]. Work in the field would end around 5:30-6:00 p.m. when Tatitlek loaded them back on buses and transported them back to the FOB. [PADF 98]. Upon their return to the FOB, the Role Players would have to attend meetings that last approximately 15 minutes to one hour. [PADF 99].

On Day Six, instead of returning to the FOB at the end of the day, the 10 Day Role Players would remain in the exercise field where they were joined by additional Role Players ("4 Day Role Players") for the "Surge" or FINEX (*i.e.,* Day Seven through Day 10). [PADF 100]. During the FINEX, the exercises occurred continuously 24/7. The Role Players generally worked upwards of 19 hours per day – with some Role Players having to work in the middle of the night when the USMC

burst into their sleeping quarters. [PADF 101-106,109].

Initially, when the Role Players were improperly classified as independent contractors, Tatitlek did not provide the Role Players with time cards. Later, even after Tatitlek reclassified the Role Players from independent contractors to employees, Tatitlek still failed to provide the Role Players with time cards. [PADF 112,117]. Instead, at the very end of each mission, Tatitlek provided a time sheet to the Role Players with pre-printed with times on it. [PADF 112]. Tatitlek strongly discouraged the Role Players from altering the pre-printed time sheet. [PADF 118]. Role Players often worked longer than the pre-printed times. [PADF 115].

E. As A Result Of Investigations By The U.S. Department of Labor, The California Department of Labor, and The California Employment Development Department, Tatitlek Reclassified The Role Players As Employees (Albeit Improperly Labeling Them As Salaried Exempt).

In late 2006/early 2007, the United States Department of Labor ("U.S. DOL"), the California Department of Industrial Relations, Division of Labor Standards Enforcement ("California DOL")), and the California Employment Development Department ("EDD") (the agency responsible for administering unemployment insurance claims) began to investigate Tatitlek's decision to classify the Role Players as independent contractors. [PADF 135].

The California DOL finished its investigation in June 2007 and required Tatitlek to reclassify the Role Players from independent contractor to employee status. [PADF 137] [9]

The U.S. DOL concluded its investigation in July 2007 and, on July 19, 2007, issued a formal written Wage Determination finding not only that the Role Players had to be classified as employees (as opposed to independent contractors) but also that they had to be classified as hourly, non-exempt employees (as opposed to

[9] A June 2, 2007 Memorandum From Tatitlek's Project Manager to Tatitlek's Operations Manager stated "the company will be required by the California Department of Labor to transition all Independent Contractors into Employees." [PADF 137].

salaried exempt). [PADF 138].

In response to the actions of these federal and California state agencies, Tatitlek reclassified the Role Players as employees as of July 2007. But, Tatitlek decided to reclassify the Role Players as salaried exempt employees instead of hourly non-exempt employees. [PADF 139]. Accordingly, Tatitlek continued to:

- Not pay the Role Players for work performed on "Day Zero." [PADF 144].
- Neither pay overtime to the Role Players nor pay premium pay (*i.e.*, one hour of pay) to the Role Players for each meal and/or rest period that was missed or interrupted nor pay the Role Players when they did not get at least 5 hours of uninterrupted sleep per evening, nor pay the Role Players immediately upon releasing them after they completed each specific job assignment for which they were hired, nor provide the Role Players with itemized wage statements, nor reimburse the Role Players for buying flashlights or other lighting sources as required by California Labor Code § 2802. [PADF145,147-150].

F. <u>In January 2008, Tatitlek Properly Reclassified The Role Players As Hourly Non-Exempt Employees And Began To Comply With California's Wage And Hour Laws.</u>

On December 6, 2007, the EDD completed its investigation, found that Tatitlek had misclassified the Role Players as independent contractors and determined that Tatitlek had to reclassify the Role Players as hourly non-exempt employees. Accordingly, the EDD issued a Proposed Notice of Assessment assessing Tatitlek $407,646.38 in back unemployment insurance taxes.[PADF 164].

Two months later, the DOL determined that Tatitlek owed the Role Players $1,915,168.90 in back wage for violations of the Service Contract Act (*i.e.,* for not paying the Role Players federal minimum wages and overtime). [PADF 166]. To date, Tatitlek has not paid these back wages. [PADF 169].

As a result of the determinations by the DOL and EDD, Tatitlek finally, on January 1, 2008, re-classified the Role Players as hourly non-exempt employees.

[PADF 171,172]. As a result, Tatitlek claims that it finally began to fully comply with California's wage and hour laws by, among other things:

- Paying the Role Players daily overtime at time and a half for all hours worked in excess of 8 and double time for all hours worked in excess of 12, [PADF 179,180], and weekly overtime at the rate of time and a half for hours worked in excess of 40. [PADF 178].
- Paying the Role Players double time for all hours worked on the seventh straight day in a row of work [PADF 181].
- Paying the Role Players for "Day Zero" of the training exercises. [PADF 173].
- Providing meal and rest periods to the Role Players. [PADF 182].
- Providing the opportunity for the Role Players get at least 5 hours of uninterrupted sleep per evening.[PADF 183].
- Providing the Role Players with itemized wage statements. [PADF 184].

G. Tatitlek's Compliance With California's Wage & Hour Law Has Not Prevented It From Complying With All Of Its Obligations To The USMC.

Tatitlek's compliance with California law has not kept it from fully performing all of its contractual obligations to the USMC. [PADF 186].

H. The United States Has Neither Intervened In This Case Nor Filed An Amicus Brief In Support Of Tatitlek's Motion.

The parties have placed both the USMC and the U.S. Department of the Navy on written notice as to Plaintiffs' lawsuit and have deposed both civilian and non-civilian employees of the USMC. [PADF 191]. Indeed, although it entered into a "Firm Fixed Price" contract with the USMC, Tatitlek has informed the USMC in writing that it will be seeking indemnification from the USMC should the Plaintiffs prevail in this lawsuit. [PADF 192] Despite the knowledge of both the USMC and the U.S. Department of the Navy about this lawsuit and Tatitlek's threat to sue the USMC should the Plaintiffs prevail in this lawsuit, the United States government

has neither intervened in nor filed an *amicus* brief in support of Tatitlek's motion for partial summary judgment. [PADF 193].

III. THE STANDARD FOR GRANTING SUMMARY JUDGMENT.

It is settled law that "[S]ummary judgment must be denied if, 'viewing the evidence in the light most favorable to the non-moving party,' there are genuine issues of material fact." *Nolan v. Heald College*, 551 F.3d 1148, 1155 (9th Cir. 2009) *quoting Leisek v. Brightwood Corp.,* 278 F.3d 895, 898 (9th Cir. 2002).

As demonstrated by Plaintiffs' Opposing Statement of Genuine Issues, there are numerous genuine issues as to material facts. See Disputed Fact Nos. 7, 9,15-18, 22, 23, 25, 26, 28-30, 32-37, 39, 40, 42, 44, 45,48, 52, 58, 60, and 61. *See also* Plaintiff's Additional Disputed Fact Nos. 1-232. Accordingly, for this reason alone, Tatitlek's motion should be denied.

Summary judgment also must also be denied if the movant is not "clearly entitled to prevail as a matter of law." *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982). That is the case here.

IV. TATITLEK'S PRIMARY ARGUMENTS – THE SUPREMACY CLAUSE, GOVERNMENT CONTRACTOR, AND INTER GOVERNMENTAL IMMUNITY DEFENSES – FAIL BECAUSE NO SUBSTANTIAL CONFLICT EXISTS BETWEEN CALIFORNIA LAW AND EITHER U.S. POLICY OR ITS CONTRACTUAL OBLIGATIONS WITH THE USMC.

A. No Substantial Conflict Exists Between California Law And Federal Policy.

Tatitlek's arguments that the Supremacy Clause, intergovernmental immunity doctrine and government contractor doctrine each bar Plaintiffs claims fail because there is no conflict between California's wage and hour laws and federal law/policy.

The cases on which Tatitlek relies all share the common thread of a federal policy of ensuring the best possible price for the government. *See, e.g., Public*

1 *Utilities Commission of California v U.S.*, 355 U.S. 534 (1958) (involving
2 California's attempt to regulate rates of common carriers transporting goods for the
3 United States); *Paul v United States*, 371 U.S. 245 (1963) (involving attempt by
4 California to regulate price of milk sold on federal enclaves); *Boyle v. United*
5 *Technologies Corp.* 487 U.S. 500 (1988) (upholding government contractor defense
6 in part on policy concern that allowing a military helicopter product liability lawsuit
7 risked either increased cost to the United States or inability to get subject product
8 manufactured).

9 Here, however, no federal policy exists that creates a conflict that would
10 invoke any of these defenses. In fact, the opposite exists: federal policy (*i.e.,*
11 providing minimum wages and allowing states to provide for higher wages) is
12 consistent with Plaintiffs' wage claims.

13 Before the SCA, the United States had been "subsidizing" substandard levels
14 of compensation by awarding contracts to those who were able to bid low by paying
15 less. *See Saavedra v. Donovan,* 700 F.2d 496 (9th Cir. 1983). In response to this
16 problem, Congress passed the Service Contract Act – which sets ***minimum*** wages and
17 fringe benefits – for the express purpose of protecting employees of government
18 contractors even though doing so ultimately would result in greater costs to the
19 United States. *See Amer. Federation of Gov't Employees, Local 1668 v. Dunn,* 561
20 F. 2d 1310, 1312 (9th Cir. 1977) (SCA passed in reaction to Congress' finding that a
21 depressed wage level prevailed in private service employment and to ensure that "the
22 Federal Government shall not be a party to the depressing of labor standards in any
23 area of the nation.")

24 Similarly, Congress intended that workers get certain *minimum* overtime
25 wages – which increase the cost of good and services – when non-exempt employees
26 work more than 40 hours in a week. *Walling v. Youngerman-Reynolds Hardwood*
27 *Co.*, 325 U.S. 427, 437 (1945). Congress also specified that federal law *does not*
28 preempt state laws establishing a higher or more restrictive wage standard. 29 USC

1 § 218(a) [10] ; 29 CFR § 778.5. The courts have consistently applied this decision.
2 *See, e.g., Pacific Merchant Shipping Ass'n v. Aubry*, 918 F. 2d 1409, 1426-1427 (9th
3 Cir. 1990) (applying California overtime pay laws to seamen who are California
4 residents working in California does not conflict with the FLSA; exemption from the
5 FLSA's overtime provisions does not, per se, preempt state overtime laws).[11]

6 Equally important, as a general matter there is no substantial "policy conflict"
7 between the USMC's training objectives and California law because the latter
8 neither "forbids" nor criminalizes the requirement that Role Players work fewer than
9 8 hours in a day or get the opportunity for at least 5 hours of sleep per day. The
10 same holds true for its meal and rest breaks rules. Rather, California provides that if
11 such opportunities are not given, Role Players are entitled to receive from Tatitlek
12 additional compensation that the California Supreme Court has specified is
13 "premium pay." *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094,
14 1102-1101 (2007). [Tatitlek's reference to this extra pay as a "penalty"
15 (Memorandum, p. 10:15-18, including footnote 8) misstates the law.] Such premium
16 pay is consistent with Congress' intent that civilian employees who work more than
17 is conventional in our society (*e.g.*, 40 hours in a week) receive extra wages.

18
19 [10] The statute states in part: No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a
20 minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter. . . No provision of this
21 chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of
22 employment. . . maintained by him which are shorter than the maximum hours applicable under this chapter.
23 [11] *Accord*, *Sewell v. M/V Point Barrow*, 556 F.Supp. 168 (AK 1983) (enforcement of the
24 state wage statute providing remedies not available under federal law was "fully compatible with federal maritime law," and no "feature of federal maritime law ... would be impaired or frustrated by
25 application of the statute"); *Inkrote v. Protection Strategies Inc.*, 2009 WL 3295042 * 7 (N.D.
26 W.Va. 2009) ("Because, as concluded above, the SCA has no preemptive effect, this conflict would have to be found between the FLSA and West Virginia labor laws. However, as also found above,
27 state labor laws may conflict with the FLSA as long as the former are not less generous than the latter. Because the defendants have failed to show this or any other type of conflict between the
28 FLSA and West Virginia labor laws, the second condition of Boyle has not been satisfied.").

B. Tatitlek's Actions Evidence that No Substantial Conflict Exists Between California Law And The Role Player Training For The Marines.

Tatitlek's Supremacy Clause, government contractor, and intergovernmental immunity defenses also lack merit because no significant conflict exists between an identifiable federal policy or interest and the operation of state law. Certainly, Tatitlek has not shown one.

Here, Tatitlek has articulated an identifiable federal interest: training the Marines at the USMC base at Twentynine Palms. But no conflict – much less a "significant conflict" – exists because Tatitlek admits that it now complies with California's wage and hour laws *and has always complied* with its obligations under its contract with the USMC.[12] In order for a true conflict to exist, Tatitlek must show that it is either violating California law or breaching its contractual obligations to the USMC. Because Tatitlek is satisfing both California law and its contractual obligations to the USMC – and it has done for several years – no conflict exists.

Indeed, testimony from the USMC further evidences that there is no conflict. For example, Plaintiffs are seeking damages in the form of unpaid overtime (Tatitlek now pays overtime as required by California law. [PADF 178-181]). USMC designated representative Maj. Casey Harmon testified that Tatitlek's paying overtime to the Role Players would not adversely affect the training of the Marines:

Q. From your perspective, would it impact in any way the goals of Mojave Viper if Tatitlek paid the role players overtime?
A. The only impact the compensation that the role players get from

[12] Tatitlek admits (*inter alia)* that it now: (1) pays the Role Players daily overtime at the rate of time and a half for hours worked in excess of 8 and double time for hours worked in excess of 12, [PADF179-180]; (2) pays the Role Players weekly overtime at the rate of time and a half for hours worked in excess of 40, [PADF 178]; (3) pays the Role Players double time for all hours worked on the seventh straight day of work [PADF 181]; (4) pays the Role Players for Day Zero, [PADF 173], (5) provides meal and rest breaks to the Role Players, [PADF 182; 185]; (6) provide Role Players with opportunities to get 5 hours sleep per night [PADF 183]; and (7) provides the Role Players with itemized wage statements, [PADF 184]. See also [PADF 186 - Tatitlek admits that it is in compliance with USMC Contract].

> Tatitlek has on us is if they feel they are under-compensated and they have bad moral and their performance declines. Otherwise, if they pay them in shekels, I don't care. Does that answer your question?

[PADF 143].

Similarly, Plaintiffs are also seeking damages because Tatitlek misclassified the Role Players as independent contractors rather than hourly, non-exempt employees. Again, USMC designated representative Harmon testified that she was unaware of any interference being caused to the training of the Marines as a result of Tatitlek's decision to reclassify the Role Players from independent contractors to hourly, non-exempt employees. [PADF 143].

Similarly, USMC designated representative Christopher Proudfoot testified that so long as the Role Players are working on Mojave Viper, the USMC is not interested in the "employment paradigm" or terms of employment between Tatitlek and the Role Players so long as Tatitlek is not engaged in any unfair practices. [PADF 156].[13]

An additional example of the lack of conflict between California wage and hour law and the training of the Marines is further corroborated by Tatitlek's highest level human resources official/Person Most Knowledgeable, Mary Tesch. Plaintiffs are seeking damages because Tatitlek failed to pay the Role Players for working on Day Zero. Ms. Tesch testified that, after Tatitlek finally began to pay the Role Players for Day Zero, the USMC neither complained about such payments nor indicated in any way that such payments interfered with its training mission. [PADF

[13] Plaintiffs are also seeking "waiting time" penalties because Tatitlek did not pay them their wages at the time of their discharge as required by California Labor Code Sections 210 and 203. Based on the California Supreme Court's decision in *Smith v. Superior Court*, 39 Cal.4th 77 (2006), Plaintiffs contend that each job or mission performed by the Role Players constituted a separate period of employment. Tatitlek is unable to articulate any reason suggesting that California's law requiring Tatitlek to immediately pay the Role Players upon completion of each mission conflicts with the training of the Marines. Indeed, Tatitlek's explanation for why it did not pay the Role Players in a timely way had nothing to do with the training of the Marines – it was caused by the facts that Tatitlek not only elected to process the Role Players' paychecks in Alaska but also that Tatitlek had only two individuals processing payroll. [PADF 202].

175].[14] These facts further evidence that no "significant conflict" exists between California's wage and hour laws and the training of the Marines – thereby barring any affirmative defense arising from either the Supremacy Clause, the government contractor defense or the intergovernmental immunity doctrine.[15]

C. <u>The Governmental Contractor Defense Is Not Available For More Reasons</u>.

Tatitlek contends that it purportedly "cannot satisfy both" California's wage and hour laws and the terms of its contract with the USMC. Def's Mem., p., 14, lines 4-6 ("TSSI must choose between complying with California law and complying with the terms of its federal Contract.").[16] From that faulty premise, Tatitlek argues that summary judgment is warranted under the "government contractor defense" enunciated in *Boyle v. United Technologies Corp*., *supra,* 487 U.S. 500 (1988).

In *Boyle*, the Supreme Court held that military contractors have an affirmative defense to products liability lawsuits where they can satisfy two prerequisites. First, the contractor must demonstrate that a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law or that the application of state law would "frustrate specific objectives" of federal legislation. *Boyle*, 487 U.S. at 507. Second, assuming the existence of such a "significant conflict," the contractor then must show that "(1) the United States approved

[14] Interestingly, Ms. Tesch is unable to articulate any reason as to why Tatitlek did not pay the Role Players for reporting to work for "in-processing" on Day Zero. [PADF 176].

[15] Of course, even if there Tatitlek's federal contractual obligations were "precisely contrary" to its obligations under California wage and hour, that does not mean that there is necessarily a "significant conflict" between California law and a federal policy or interest. *See "Boyle v. United Technologies Corp*., 487 U.S. 500, 509 (1988)(stating that even where federal contractual and state tort duties were "precisely contrary," "it would be unreasonable to say that there is always a 'significant conflict' between the state law and a federal policy or interest."); *In re Agent Orange Product Liability Litigation*, 517 F.3d 76, 96 (2nd Cir. 2008)(same).

[16] *See also,* Def's Mem., p., 3, lines 7-8 ("If Plaintiffs prevail, TSSI would be forced to violate California law if it follows the Corps; orders.") ; Def's Mem., p., 14, lines 14-15 ("There is an inherent conflict between the federal contract requirements and state law.").

reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle*, 487 U.S. at 512.

Here, the government contractor defense is not available for at least four more reasons. First, this defense is a judicially created doctrine that the courts apply to product liability claims involving physical injuries or death – and not to wage claims.[17] *See, e.g., McKay v. Rockwell International Corporation,* 704 F.2d 444, 448-449 (9th Cir. 1983) (cited in *Boyle)*; *Nielsen v George Diamond Vogel Paint Company*, 892 F.2d 1450, 1452-1454 (9th Cir. 1990); *Bentzlin v Hughes Aircraft Company*, 833 F. Supp. 1486, 1488-14899 (C.D. CA 1993).

Second, even if, *arguendo*, the defense did apply to the wage context, Tatitlek cannot satisfy either of the defense's two prerequisites. As discussed above, *see supra* IV(A) & (B), no "significant conflict" exists between California law and Tatitlek's contractual obligations to the Marines. Indeed, the *Boyle* Court held that if

[17] Tatitlek failed to cite to – and Plaintiffs have been unable to find – even a single case in which a military contractor asserted the government contractor defense to employee wage claims. Plus, it is questionable as to whether the scope of this defense extends beyond the product liability context to service contracts. *See, McMahon v. Presidential Airways Inc.*, 460 F. Supp.2d. 1315, 1331 (M.D.Fla. 2006)("In sum, this Court is skeptical that the combatant activities exception to the FTCA, which preserves the Government's traditional sovereign immunity from liability, has any application to suits against private defense contractors. To the extent that it does apply, however, at most it only shields private defense contractors for products liability claims involving complex, sophisticated equipment used during times of war. It has never been extended to bar suits alleging active negligence by contractors in the provision of services, and it shall not be so extended by this Court.") *affirmed McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007). *See also Fisher v. Halliburton*, 390 F.Supp.2d 610, 615-16 (S.D.Tex.2005)("In both *Boyle* and *Koohi*, the defendant government contractors had supplied equipment to the United States for military use. Defendants herein have cited no case in which the § 2680(j) "combatant activities" exception or any other exception to the FTCA's waiver of sovereign immunity has been held to bar (or, in the *Boyle/Koohi* phraseology, to "preempt") claims against a defense contractor other than in situations in which the contractor has provided allegedly defective products, and this Court's research has found none . . . Plaintiffs' claims in this case do not involve any allegation that Defendants supplied equipment, defective or otherwise, to the United States military. The Court concludes that extension of the government contractor defense beyond its current boundaries is unwarranted").

the "contractor could comply with both its contractual obligations and the state-prescribed duty of care" state law would not be preempted. 487 U.S. at 509.

Third, even if one were to assume *(*again, *arguendo)* that Tatitlek could establish a "significant conflict" between the United States' interest in the training of the Marines and California's wage and hour laws, Tatitlek cannot prove that the United States approved its decision to treat the Role Players as either independent contractors or salaried exempt employees.[18] Nor can Tatitlek show that the United States approved its decisions not to pay the Role Players overtime or otherwise compensate them pursuant to California's wage and hour laws. Indeed, Tatitlek admits that the United States never authorized it to violate California's wage and hour laws. [PADF 53-56,62,65,71,75,77,88-91,177,194-196,209,212-217].

Tatitlek cannot prove that the United States approved such decisions because the contract between it and the USMC specifically calls for it to "employ" the Role Players – not treat them as independent contractors. [PADF 13,14,7-10]. Moreover, by incorporating the Service Contract Act (FAR 52.222.41) into its contract with Tatitlek [PADF 17], the United States necessarily set a floor but not a ceiling for how much Tatitlek was required to pay the Role Players. [19] That is, the contract between Tatitlek and the United States expressly recognizes that Tatitlek might have to pay the Role Players higher wages. Finally, Tatitlek's "approval" argument is completely undermined by the fact that it was the United States who forced Tatitlek to reclassify

[18] Under Boyle, the government must prove much more than that the Government accepted the contractor's specifications; the contractor must prove that the Government conducted a substantive review or evaluation of the specifications. *See Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582 (9th Cir. 1996)("When the Government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion."). *See also McKay v. Rockwell Intern. Corp.*, 704 F.2d 444, 450 (9th Cir. 1983).

[19] FAR 52.222.41 provides, in pertinent part, that the "employee[s] employed in the performance of this contract by the Contractor or any subcontractor shall be paid ***not less than the minimum monetary wages*** and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor.")(Emphasis added). [PADF 18].

the Role Players from independent contractors/exempt salaried employees to hourly non-exempt employees and to pay them overtime. [PADF 138].

Nor is there is any evidence that Tatitlek ever "warned" the United States that it had decided to violate California's wage and hour laws or that classifying the Role Players as independent contractors risked violating federal and California law. [PADF 218]. Absent such a warning, the third element of the 2nd prong is unmet.

Finally, Tatitlek admits that it has competitors and that the role player business is price sensitive. [PADF 210-211] Hence, the economic policy considerations in *Boyle* are missing.

D. <u>No Substantial Conflict Or Supremacy Issue Exists Because California Is Not Trying to Regulate the United States</u>.

Tatitlek's constitutional/preemption defenses also fail because – unlike the circumstances in the cases it cites – California is not trying to regulate either the federal government or actions on federal property.

The Marines have admitted that Twentynine Palms is <u>not</u> a federal enclave, Plaintiffs' own evidence shows the same – as does Tatitlek's separately conducted research. [PADF 187-189]. Indeed, the evidence shows that Tatitlek's executives and managers soon learned that California law governs its employment practices precisely because Twentynine Palms is not a federal enclave. [PADF 46, 50, 136]

For these reasons, none of the cases that Tatitlek cites in support of its pre-emption/intergovernmental immunity/supremacy clause defenses are apposite. California is not trying to regulate conduct on a federal enclave (*cf. Paul v. United States*, 371 U.S. 245 (1963)); it is not trying to dictate the basic (or "rack") price the United States must directly pay for a service such as transporting goods (*cf. Public Utilities Commission of the State of CA v. United States*, 355 U.S. 534 (1958) (subject statute applied specifically to the United States); and it is not trying to regulate the base price the United States must pay for a utility (*cf. United States v. Alaska Public*

Utilities Commission, 23 F.3d. 257 (1994)). Rather, California's wage and hour laws merely build – on its sovereign soil – on the goals and polices that Congress enacted by passing the SCA and the FLSA.

E. <u>Neither The Service Contract Act ("SCA") Nor The Contract Work Hours And Safety Standards Act ("CWHSSA") Bar Plaintiffs' Claims</u>.

1. <u>The SCA and CWHSSA Do Not Preempt California Law</u>.

Tatitlek concedes that the SCA and the CWHSSA prescribe minimum wages and benefits that must be paid to the employees of a federal service contract employer; neither Act prohibits the States from enacting laws that require such employers to pay higher wages and/or benefits. *See* Def. Mem., p. 23, lines 13 - 14 ("the SCA and CWHSSA prescribe minimum prevailing wages, fringe benefits and overtime pay; the states are free to take it further")(Emphasis added). *See also Inkrote v. Protection Strategies Inc*., 2009 WL 3295042 * 7 (N.D. W.Va. 2009)("The SCA, which is designed to protect the rights of private contract employees doing work for the federal government, is also not a statute that completely preempts state law. Instead, this statute clearly implies that state laws conferring benefits on workers will be applicable to employees of private companies working on federal contracts. Specifically, the SCA requires every service contract entered into by the United States, in excess of a certain sum, to include a provision for fringe benefits 'not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.' 41 U.S.C. § 351(a)(2). This language 'manifestly assumes the application of [state and] local laws benefitting workers, and adds other provisions to insure that benefits and protections for contract employees reach a certain minimum.'") *quoting Lebron Diaz v. General Sec. Services Corp.*, 93 F.Supp. 2d 129, 135 (D.Puerto Rico 2000); *Dyad Const., Inc. v. City of Portland*, 765 F.Supp. 653, 655 (D.Or. 1991)(holding that the CWHSSA does not preempt state wage and hour laws because CWHSSA "sets minimum standards" for work done subject to the Act and "[t]here is no language in the Act which states an intent to preempt any stricter

state laws which may also apply to work done subject to the Act.").

Similarly, in *Naranjo v. Spectrum Sec. Services, Inc.*, 172 Cal. App. 4th 654 (2009), the California Court of Appeal held that the SCA did not preempt the very same California wage and hour claims being sought in this case (i.e., the SCA did not preempt the plaintiff's claim for additional compensation for meal and rest break violations, failure to pay full compensation in timely manner after discharge of employee, and failure to provide employees with records of earnings and deductions):

> The key issue is whether the SCA preempts Naranjo's right to pursue additional compensation under the California Labor Code in state court. Spectrum contends that the SCA preempts Naranjo's entitlement to seek redress for any breaches of the pertinent Labor Code provisions in state court. He argues that Naranjo's remedies are found within the SCA administrative process, which constitutes the exclusive forum for his claims. We disagree. As explained below, although the SCA administrative process provides the sole remedies for claims arising under the SCA, the SCA does not preempt Naranjo's suit to recover the additional compensation he seeks under the California Labor Code.

Naranjo, 172 Cal. App.4th at 663.

Other courts have also held that the SCA does not preempt suits for wages, fringe benefits, and other compensation predicated on state or local laws. *See e.g., Dept. of Labor & Indus. v. Lanier Brugh*, 135 Wash.App. 808, 811, 147 P.3d 588, 589-590 (2006); *Butler v. Fidelity Technologies Corp.*, 685 So.2d 676, 677-678 (La.Ct.App.1996).

Accordingly, because neither the SCA nor the CWHSSA preempt Plaintiffs' California state law wage and hour claims, Tatitlek's motion should be denied.

2. <u>Plaintiffs' Are Not Seeking SCA/CWHSSA Wages Or Benefits.</u>

Tatitlek correctly notes that neither the SCA nor the CWHSSA provide for private rights of action.[20] *See* Def. Mem., p. 21, lines 15-17. Tatitlek then argues

[20] In footnote 16, Tatitlek suggests that the Court should also dismiss Plaintiffs' lawsuit because the putative class members will not be deprived of their SCA/CWHSSA wages and benefits as the U.S. Department of Labor is investigating this issue. Putting aside the fact that Plaintiffs' lawsuit does not seek to recover unpaid SCA/CWHSSA wages and benefits

that summary judgment should somehow be granted because Plaintiffs are purportedly seeking SCA and the CWHSSA "prevailing wages and benefits." *See* Def. Mem., p. 22, lines 19-20. Tatitlek is wrong. Plaintiffs do not seek SCA/CWHSSA wages and benefits. To the extent the operative complaint suggests Plaintiffs are seeking SCA/CWHSSA wages and benefits (which Plaintiffs do not believe it does), Plaintiffs are willing to stipulate and/or amend the complaint to make clear that they are not seeking such SCA/CWHSSA wages and benefits. See Friedman Decl., p. 4, ¶ 25, lines 7 to 10.

IV. CONCLUSION

Congress has made clear that government contractors may not garner business (and profits) at the expense of the working men and women they employ.

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny Tatitlek's Motion For Partial Summary Judgment.

Respectfully submitted,

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but rather unpaid California law wages (something the DOL cannot recover), Tatitlek has made the exact opposite argument to the DOL. That is, Tatitlek has argued that the DOL should "stand down" its investigation in deference to this lawsuit. See PADF 168.