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7 8	Attorneys for Defendant ConocoPhillips Company	
9	UNITED STAT	ES DISTRICT COURT
10	CENTRAL DIST	TRICT OF CALIFORNIA
11	WESTERN DIVISION	I - ROYBAL FEDERAL BLDG
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13 14 15 16 17 18 19 20 21 22 23 24 25	UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf its members employed by defendants, and RAUDEL COVARRUBIAS, DAVID SIMMONS AND STEPHEN S. SWADER, SR., individually and on behalf of all similarly situated current and former employees,  Plaintiffs,  v.  CONOCOPHILLIPS COMPANY and DOES 1 through 10, inclusive,  Defendants.	Case No. CV08-2068 PSG (FFMx)  DEFENDANT CONOCOPHILLIPS COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS RAUDEL COVARRUBIAS AND DAVID SIMMONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF  Date: February 9, 2009 Time: 1:30 p.m. Ctrm: 790 Judge: Hon. Phillip S. Gutierrez  Date Action Filed: February 15, 2008 Date Removed: March 27, 2008
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#### TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 9, 2009, at 1:30 p.m. in Courtroom 790 of the above-entitled Court, located at 255 East Temple Street, Los Angeles, California, 90012, defendant ConocoPhillips Company ("ConocoPhillips") will and does hereby move for summary judgment as to the claims of plaintiffs Raudel Covarrubias and David Simmons ("Plaintiffs").

This motion will be made pursuant to Federal Rule of Civil Procedure 56 on the ground that there is no triable issue of material fact as to any of the causes of action alleged in Plaintiffs' Complaint and that ConocoPhillips is entitled to summary judgment as a matter of law as to the following issues:

- ConocoPhillips is entitled to judgment as a matter of law with respect to 1. Plaintiffs' claim for allegedly "failing to allow meal periods" because the undisputed evidence establishes that Plaintiffs never missed any meal periods, and thus Plaintiffs cannot create a genuine issue of material fact as to an essential element of their meal break claim.
- 2. ConocoPhillips is entitled to judgment as a matter of law with respect to Plaintiffs' claim for allegedly "failing to allow meal periods" because Plaintiffs cannot establish a genuine issue of material fact as to whether ConocoPhillips failed to provide Plaintiffs with meal periods as required under California law.
- 3. ConocoPhillips is entitled to judgment as a matter of law with respect to Plaintiffs' claim under California's unfair competition law because Plaintiffs cannot establish a genuine issue of material fact with respect to their meal break claim, upon which their unfair competition claim is based.

This motion will be based on this Notice of Motion, ConocoPhillips' Memorandum of Points and Authorities in Support of its Motion for Summary Judgment as to Plaintiffs Raudel Covarrubias and David Simmons, the Declaration of Anastasia Boles in Support of ConocoPhillips' motion and the documents and records

# Case 2:08-cv-02068-PSG-FFM Document 46 Filed 01/07/09 Page 3 of 32 attached thereto, any oral argument that may be presented at the hearing on this motion, and any other matter that the Court deems appropriate. This motion is made following the conference of counsel pursuant to Local Rule 7-3 which first took place on December 3, 2008. Dated: January 7, 2009 AKIN GUMP STRAUSS HAUER & FELD LLP Catherine A. Conway Anastasia M. Boles Jeremy F. Bollinger /s/ Catherine A. Conway Catherine A. Conway Attorneys for Defendant CONOCOPHILLIPS COMPANY

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### **MEMORANDUM OF POINTS AND AUTHORITIES**

### I. <u>INTRODUCTION</u>

Plaintiffs Raudel Covarrubias ("Covarrubias") and David Simmons ("Simmons") (collectively "Plaintiffs") work for ConocoPhillips as Operators at the company's refinery in Wilmington, California. Their schedule is governed by a 12-Hour Shift Agreement proposed by their union, and agreed to by ConocoPhillips, in 1997. Under this agreement, Plaintiffs work "12 consecutive hours *exclusive of meal period*," which means they get paid for the entire 12-hour shift and still get meal breaks. (emphasis added). Plaintiffs testified at deposition that they take as many meal breaks as they want, for as long as they want – and get paid for that time. Indeed, their meal breaks sometimes last 45 minutes to an hour in length. The undisputed evidence demonstrates that these two Plaintiffs had ample time for many private pursuits during their shifts, including preparing large group meals, socializing with other Operators, taking personal calls, and smoking several cigars. And, despite their positions as local union leaders, neither ever complained to management or brought a grievance about missed or interrupted meal periods.

Despite having conceded to having extraordinary freedom to take whatever meal breaks they wanted pursuant to the union-negotiated agreement, Plaintiffs have nonetheless filed this putative class action lawsuit alleging they were denied meal breaks in violation of the California Labor Code. The undisputed evidence dooms their claims. Their own deposition testimony proves that they cannot establish any genuine issue of material fact as to essential elements of their claims. Thus, ConocoPhillips is entitled to summary judgment on Plaintiffs' first claim for the following two reasons.

<sup>&</sup>lt;sup>1</sup> Although Plaintiffs bring this lawsuit along with Stephen Swader, another individual plaintiff, and the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC ("USW"), given the disparate deposition testimony, ConocoPhillips brings this motion for summary judgment only as to Covarrubias and Simmons.

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First, neither Covarrubias or Simmons can establish that they ever missed a meal period or had one interrupted. On the contrary, the undisputed evidence shows that Plaintiffs regularly took uninterrupted meals, some of which lasted up to an hour. Both testified that the timing and length of their meal breaks was completely within their discretion as Operators. Further, despite being union representatives, neither Plaintiff complained about not receiving meal breaks to management. Because Plaintiffs cannot offer evidence to support their claims, summary judgment is warranted.

Second, ConocoPhillips is entitled to judgment as a matter of law on Plaintiffs' meal break claims because, even if Plaintiffs had decided to forego a meal, neither Covarrubias or Simmons can prove that ConocoPhillips forced them to forego meal periods in violation of California Labor Code §§ 226.7 and 512. Under California law, an employer is obligated only to provide meal breaks – not police employees to force them to take breaks that are available. Because Plaintiffs can offer no evidence that they were forced into skipping meal periods, their claims are legally deficient.

Covarrubias and Simmons cannot evade this fatal defect by arguing that the available breaks were insufficient because they were required to stay at the refinery during their meal period and their meal period is *subject to interruption* – though neither offered evidence that their meal periods actually were interrupted. Plaintiffs' theory of what California law requires is misplaced. California courts have long recognized that on-site meal periods are proper as long as the employees are paid for that time. Moreover, Plaintiffs and the USW affirmatively agreed to a policy that provided for paid meal periods. Plaintiffs, therefore, cannot establish any defect in the meal period policy.

Finally, Plaintiffs' second claim – for a representative action under California's Unfair Competition Law ("UCL") – is based entirely on their meal claims. Because those underlying claims fail as a matter of law, so do the derivative UCL claims.

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# II. STATEMENT OF FACTS

## A. Background Of ConocoPhillips' Refineries And The Union Agreement.

ConocoPhillips operates four refineries in California – Los Angeles ("LAR") (comprised of two separate facilities, Carson and Wilmington), Rodeo and Santa Maria. (Statement of Uncontroverted Facts ("UF") No. 1.) Plaintiff USW is the collective bargaining representative of the putative class members at each of these facilities and a collective bargaining agreement ("CBA") between ConocoPhillips and the USW sets forth the wages, hours and working conditions of the employees. (UF No. 2.)

The 12-hour shift worked by Covarrubias and Simmons is pursuant to a USW-proposed and negotiated "12-Hour Shift Agreement" which is meant to "provide[] guidelines for use in administering a 12-hour shift schedule." (UF No. 3.) This agreement was proposed by the USW in 1997 and then renegotiated in 2002. (UF No. 4.) It has remained unchanged since 2002 although the CBA was extended in 2006. (UF No. 5.) The "12-Hour Shift Agreement" provides that "12-hour shift employees" work a schedule consisting of "12 consecutive hours *exclusive of meal period*." (UF No. 6) (emphasis added).

Pursuant to the 12-Hour Shift Agreement, Operators generally work a rotating 12-hour shift, and are paid for the entire 12 hours of their shift, in addition to any overtime. (UF No. 7.) The 12-hour shifts typically run from 6:00 a.m. to 6:00 p.m. and from 6:00 p.m. to 6:00 a.m. the following day, although shift schedules for the various units are adjusted based upon the desires of the unit employees. (UF No. 8.) Most employees rotate shifts from a day schedule to a night schedule. (UF No. 9.)

In negotiating the 12-Hour Shift Agreement, the union and company understood that Operators have broad discretion and flexibility to take as many paid meal periods as they wish. As Stephen Swader, chair of the union negotiating committee for the 1997 negotiations, testified:

Q: But my example of someone taking an hour meal break and let's say five breaks to smoke, none of those breaks would be deducted. They would be paid for the full 12 hours; is that correct?

A: Yes.

(UF No. 10.) See also (UF No. 11) (Patrick Prosser testimony that "[I]t is also contemplated that operators on that 12-hour shift schedule will have sufficient time to eat a meal or have opportunities for rest during that 12-hour period."); (UF No. 12) (Prosser testimony that "[O]perators enjoy a great deal of freedom to manage their work during that 12-hour shift period, so they have the flexibility to take breaks and have a meal whenever their work and the timing of their activities permit it."); (UF No. 13) (Prosser testimony: "When we say 'monitoring,' we're not talking about sitting and staring for 12 straight hours at a monitor or device...the operators themselves have a high degree of flexibility to manage the process as best they can in regards to doing it safely, efficiently, and getting things prepared for maintenance and whatnot.").

Plaintiff Covarrubias was a member of the union negotiating committee in 1997 when the USW bargained for and won the 12-hour shift for Operators, as was Plaintiff Stephen Swader. (UF No. 14). Covarrubias, in fact, signed the 2002 CBA. (UF No. 15.)

The CBA also provides that the USW is responsible for helping to ensure a healthy and safe work environment. To that end, the USW agreed that a joint ConocoPhillips-USW committee on health and safety ("Joint Committee") is to address and correct any health and safety issues at the Refineries. (UF No. 16.) This Joint Committee is to meet at least once a month for the "purpose of jointly considering, inspecting, investigating and reviewing health and safety conditions and practices" as well as to make recommendations of implementations of corrective measures to "eliminate unhealthy and unsafe conditions and practices" of the Refineries. (UF No. 17.) Moreover, the CBA provides that USW members can refuse to perform services that are deemed "unsafe" and refusal would lead to an immediate conference

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between the union and the company. (UF No. 18.) In addition, a USW Member (such as Simmons) at each of the facilities is elected to serve as Health & Safety representative and investigate, review and improve the health and safety conditions and practices at the Refineries. (UF Nos. 67-68, 19.) Both Covarrubias and Simmons testified that missed meal breaks for Operators raises a potential health and safety issue. (UF No. 20.)

Finally, the CBA provides for a grievance procedure to address union member concerns about their work conditions. (UF No. 21.) Both Covarrubias and Simmons testified that they, as union leadership, have utilized the grievance procedure to address employee concerns. (UF No. 22.) Further, both testified that non-Operator employees have filed grievances regarding meal periods, none of which were related to the 12-Hour Shift Agreement. (UF No. 23.)

## B. An Operator's Job Duties

There are many different types of Operators at each refinery, who are generally responsible for maintaining the safety of the facility by monitoring the refining process and refining equipment. (UF No. 24.) Two types of Operators are Console (or Inside) Operators, and Field (or Outside) Operators. (UF No. 25.) Although job duties for Console Operators and Field Operators vary by refinery, shift, and unit, as a general matter, Console Operators monitor the refinery equipment and process and give direction to Field Operators, who physically check and maintain the refinery equipment in the field. (UF No. 26.)

Operators have an important role in ensuring the safety of the refinery equipment, which must be constantly monitored to ensure the equipment is functioning properly, temperature levels are appropriate, and materials are being processed efficiently. (UF No. 27); see also (UF No. 28) (the oil refining process must be "monitored continuously."). In the case of an emergency, Operators assist the refinery's fire and safety professionals. (UF No. 29); (UF No. 30) (Prosser testimony that "The way we manage our emergency response is that is a duty of operators, as well.").

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#### C. Raudel Covarrubias

For the last year and a half, Covarrubias has worked exclusively as an Inside Console Operator. (UF No. 31.) Between 1998 and his permanent assignment as Inside Operator, Covarrubias split his time between the Inside Operator and Outside Operator positions. (UF No. 32.)

Since 1997, Covarrubias has been a member of the local union grievance committee and a member of the local negotiating committee, the latter of which he has been chairperson of since 2003. (UF No. 33.) He has also been a union steward since 1997. (UF No. 34.) As a union steward, it is Covarrubias' job to hear complaints from union members and investigate possible grievances. (UF No. 35.)

During his deposition, Covarrubias admitted that he did know how many times he has missed a meal, or had a meal interrupted. (UF No. 36); (UF No. 37) ("Q: You mentioned before our lunch break that you didn't know how many, exactly how many breaks that you've missed. Did you have any quantification of how many breaks you've missed or that were interrupted? A: I don't have a solid number on them."). Although he vaguely recalled missing "a couple" meals in April 2008 during a turnaround because he chose to continue "prepping equipment," Covarrubias never told a manager that he had missed a meal. (UF No. 38.) Other than the April 2008 turnaround, Covarrubias could only specifically recall one situation where he cut his meal break short and "ate real quick" to finish "prepping equipment for maintenance." (UF No. 39.) When this occurred, he did not tell anyone that he had cut his meal period short, nor did his supervisor know that his meal was cut short. (UF No. 40.) Instead, he voluntarily chose not continue his meal break when he was done because he "had work to do." (UF No. 41.)

Similarly, Covarrubias could not recall when he last had an interrupted meal due to an alarm, (UF No. 42), and had "no idea" how many times he had to interrupt a meal at all. (UF No. 43.) He admitted that if his meal was ever interrupted during a shift, he could take a meal break after the interruption, and it was his "preference" to do so. (UF

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No. 44.) In fact, Covarrubias conceded that, a "majority" of the time, his meals went uninterrupted. (UF No. 45) ("Q: So the majority of the time you were not interrupted? A: Yes.").

Importantly, in the last five years, no one at ConocoPhillips has ever told Covarrubias he could not take a meal break. (UF No. 46.) Nor has he ever complained to a supervisor about an interrupted meal, (UF No. 47), or requested a meal break that a manager denied. (UF No. 48.) In his capacity as union steward, he has never received a complaint from an Operator about a missed meal break. (UF No. 49.)

In fact, during his deposition, Covarrubias testified at length that he is able to take meal breaks. (UF No. 50) ("Q: And during that 12-hour shift, you have to take meals; is that correct? A: We have time to eat."). He also admits that he has broad discretion over when to eat his meals, and how long to take for his meal breaks. (UF No. 51.) In fact, Covarrubias sometimes takes as much as 45 minutes to an hour for his meal break. (UF No. 52.)

Covarrubias always had access to kitchen facilities to prepare his meals. (UF No. 53.) He will sometimes ask other Operators to "keep an eye" on his monitor while he takes a meal break, and he will return the favor. (UF No. 54.) Covarrubias often makes himself breakfasts of bacon and eggs, (UF No. 55), and lunches or dinners of macaroni and cheese, hot dogs, and even steak. (UF No. 56.) Or, he and other Operators order take-out meals from a local restaurant. (UF No. 57.) On day shifts, Covarrubias usually eats between 11:00 a.m. and 11:30 a.m., when the maintenance crew takes their lunch. (UF No. 58.) He generally eats his meals with a group of other Operators in the unit, in groups of up to eight Operators. (UF No. 59.) During breakfast on the weekend shifts, it can take over an hour for him to prepare his food, and then sit down and eat it with the four to five other Operators on the shift with him. (UF No. 60) ("Q: Could it take it an hour, sometimes a little longer, and then you sit down have breakfast; is that correct? A: Yes."). He considers these group meals a "social

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gathering." (UF No. 61.) Even during busy times like turnarounds, the Operators sit down together and eat meals. (UF No. 62.)

During his shift, Covarrubias has ample leisure time. He makes several personal cell phone calls of five to ten minutes each throughout the day, often to his children. (UF No. 63.) He has to step outside, away from his console, to use his cell phone because of poor reception inside. (UF No. 64.) Covarrubias has plenty of time during his shift to "talk socially" with other Operators about "politics, personal stuff" and to "joke around with each other." (UF No. 65.) Covarrubias also spends five to ten minutes a day talking with his friend and fellow plaintiff, David Simmons. (UF No. 66.)

#### D. **David Simmons**

Simmons currently is and for a majority of the class period has been a Health and Safety representative. (UF No. 67.) Simmons is the Health & Safety representative for the USW at Wilmington and has held this position for the majority of the last five years - from May 2003 to May 2005, and from January 2007 to the present. (UF No. 68.) From May 2005 to January 2007, Simmons worked as an Outside Field Operator. (UF No. 69.)

Simmons is on the executive board of his local union, has been ConocoPhillips' unit designee since 2006, and attends national bargaining meetings. (UF No. 70.) As the Health & Safety representative, part of his job duties include "act[ing] as a liaison between the union and the company when people have complaints about safe conditions" as well as union member's job conditions. (UF No. 71.)

As the Health & Safety representative, Simmons' regular practice is to take a 30minute break for lunch at his discretion. (UF No. 72.)<sup>2</sup> Whenever he misses a lunch break, Simmons has been paid overtime. (UF No. 74.)

Health & Safety representatives work an eight-hour day shift and receive an unpaid meal break. (UF No. 73.)

<sup>3</sup> Simmons could only recall three times where he missed a meal. (UF No. 76.) All three were prior to 2001 and well before the statute of limitations. *Id.* 

As an Operator, Simmons admitted in his deposition that he can and does take 30-minute uninterrupted meal periods. (UF No. 75) ("Q: When is the last time you didn't eat? A: Well, I'm there 12 hours, I always eat."). He also concedes that it is within his discretion as to when to eat, and how long of a break to take. (UF No. 77) ("Q: So you have discretion during that 12 hours on when to get something to eat, correct? A: I can eat, yes.").

In fact, Simmons could not recall any time during the past five years that he had missed a meal break. (UF No. 78.) Simmons could not recall the last time his meal was even interrupted, (UF No. 79), and could only recall one specific instance when his meal was interrupted because a piece of equipment shut down. (UF No. 80.) Once he finished dealing with the emergency, he was able to take his meal break. (UF No. 81.) Other than that one circumstance, Simmons could not quantify or describe another time when he was not able to take a 30-minute uninterrupted meal period. (UF No. 82) ("Q: So you can't quantify for me how many of your periods to eat were shorter than 30 minutes? A: No, I can't.").

Simmons has never complained about a missed or interrupted meal break. (UF No. 83) ("Q: So you have never told a supervisor if you did not get a chance to eat, correct? A: No."). Nor, in his capacity as union leader or Heath & Safety representative, has he heard a complaint from an Operator about a missed or interrupted meal break. (UF No. 84.) No supervisor has ever told Simmons not to take a meal break. (UF No. 85.) Simmons also admits that he has never been disciplined for taking too long of a break. (UF No. 86.)

As an Operator, Simmons had access to a kitchen in the outside shelter. (UF No. 87.) He would use the kitchen to cook his meals, such as chicken breasts with salad, and sometimes ordered food from local restaurants with other Operators. (UF No. 88.) Although Simmons' practice was to take 20-minute meal breaks, this was his

choice and depended on whether or not he cooked his meal at the shelter or brought food from home – no one instructed him to cut his meal period short. (UF Nos. 89-90.)

As an Operator, Simmons often stepped away from the unit shelter. Once per shift, a Field Operator must take reading sheets (reports that detail readings from the outside equipment) to the Console Operator in the Central Control Room; this requires that Operator to be away from the field unit for at least twenty minutes, while the other Field Operators "monitor" that Operator's units. (UF No. 91.) Simmons also admits there are other times when the Console Operator at the Central Control Room can monitor the alarm board when Simmons is away from the unit. (UF No. 92.)

Simmons also took time away from the unit for personal reasons. For example, Simmons is a cigar smoker, and admits in his deposition that he smokes at least three cigars per shift in a designated outside area. (UF No. 93.) As an Operator, he also spoke to his wife at least once per day on his cell phone for about ten minutes. (UF No. 94.) When shown gate records of his time as an Operator, Simmons admitted there were times when he stepped away from his unit to return to his car and retrieve his keys – a trip that he estimates would take him at least twenty minutes. (UF No. 95.)

# E. The Complaint

Plaintiffs, including Covarrubias and Simmons, filed the complaint in this action on February 15, 2008 alleging two claims: (1) failure to be provided with meal periods, and (2) violation of California's Unfair Competition Law. (UF No. 96.) Both Covarrubias and Simmons testified that their decision to file a lawsuit was prompted by news that employees at another refinery received a substantial settlement for missed meal periods. (UF No. 97.) Additionally, both testified that prior to the news of the settlement, or even after, neither complained to ConocoPhillips management about missed meal periods. (UF No. 98.)

# III. ARGUMENT

Summary judgment is appropriate when the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case,

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and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party cannot rest on "mere allegations" to demonstrate the existence of a genuine issue of material fact. Fed. R. Civ. P. 56(e). Rather, the non-moving party must demonstrate the existence of sufficient facts to create a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

A. ConocoPhillips Is Entitled To Summary Judgment On Covarrubias' and Simmons' Meal Break Claims.

Summary judgment is proper on Plaintiffs' meal period claim because neither Covarrubias nor Simmons can offer evidence that they did not receive meal periods. In fact, both Covarrubias and Simmons testified that they regularly received 30 minutes or more to prepare and eat their meals. Additionally, California law requires an employer to make available a meal period, but it does not require that the employer guarantee that all of its employees actually take a 30-minute break. Because the undisputed evidence demonstrates that ConocoPhillips provided Plaintiffs with meal periods, and that Covarrubias and Simmons actually took meal breaks, Plaintiffs' claims fail as a matter of law.

1. Plaintiffs' Meal Break Claims Fail As A Matter Of Law Because Neither Covarrubias Nor Simmons Can Offer Evidence That They Did Not Take Meal Breaks.

California law requires that employers provide employees with statutorily mandated meal breaks. Cal. Lab. Code §§ 226.7 and 512. No violation of these statutes can occur if employees receive and regularly take meal breaks. Because the undisputed evidence establishes that Covarrubias and Simmons never missed meal periods, they cannot prove an essential element of their meal break claims, and thus summary judgment is warranted. *See Celotex*, 477 U.S. at 322 (in order to survive a motion for summary judgment, a plaintiff must be able to demonstrate the existence of credible evidence that would tend to prove each of the necessary elements of his claims); *Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990) (to

demonstrate a genuine issue of fact, a plaintiff "must produce at least some significant probative evidence tending to support the complaint.").

Neither Covarrubias nor Simmons offered testimony about how many times they had missed meal periods, or had meal periods interrupted. (UF Nos. 36-37, 43, 78, 82.) In fact, the overwhelming evidence demonstrates that Covarrubias and Simmons regularly had and took uninterrupted meal periods, some of which lasted up to an hour. (UF Nos. 45, 50, 52, 55-58, 60, 75.) Further, both testified that when they took meal breaks, how many meal breaks they took during their shift, and even whether they took meal breaks, was completely within their discretion as Operators. (UF Nos. 51, 72, 77, 89.) Neither complained about not receiving meal breaks. (UF Nos. 47-48, 83, 98.) And, both testified that no supervisor ever instructed them to miss a meal period. (UF Nos. 46, 85)

As neither Covarrubias or Simmons can prove they actually missed any meal periods, summary judgment as to both Plaintiffs is proper.

- 2. Even If Plaintiffs Missed Any Meal Periods, Their Meal Break Claims Fail As A Matter Of Law Because ConocoPhillips Satisfied Its Obligations Under The Meal Period Statutes.
- a) ConocoPhillips Provided Meal Periods Required By Statute Even if Covarrubias and Simmons could cite a missed meal break, that would not salvage their claim. The meal break statutes only require the employer to *provide* meal periods; they do not require the employer to police employees and force them to take the meal breaks provided. Because Covarrubias and Simmons have failed to identify a single instance where ConocoPhillips prevented them from taking a meal break, their claims must fail.

Sections 226.7 and 512 of the California Labor Code set forth an employer's duty to provide the opportunity for meal breaks. Section 226.7 provides that an employer's obligation with respect to meal periods is coextensive with its duty to offer paid rest breaks. This provision states that "[n]o employers shall *require* any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare

Commission." Cal. Lab. Code § 226.7(a) (emphasis added). Further, section 226.7 states that "[i]f an employer fails to provide an employee a meal period or rest break in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is *not provided*." *Id*. § 226.7(b) (emphasis added). Similarly, section 512 states that, in general, an employer may not employ an employee for "more than five hours per day without providing the employee with a meal period of not less than 30 minutes" or for "more than 10 hours per day without providing the employee with a second meal period." Id. § 512(a).

The statutory term "provide" demonstrates that the California Legislature intended only for employers to offer meal periods – not to ensure that those periods were actually taken. Under California's rules of statutory construction, the words of a statute must be given their "usual and ordinary meaning." People v. Loeun, 17 Cal. 4th 1, 9 (1997); see also Fed. Sav. & Loan Ins. Corp. v. Butler, 904 F.2d 505, 510 (9th Cir. 1990) (in absence of interpretation by California Supreme Court, federal court applied "settled principles of statutory construction under California law"). "To ascertain the common meaning of a word, a court typically looks to dictionaries." Arocho v. California Fair Plan Ins. Co., 134 Cal. App. 4th 461, 466 (2005). The common meaning of "provide" is "to furnish; supply," or "[t]o make available, afford." American Heritage College Dictionary 1102 (3d ed. 2000).

As this Court recently recognized in Kimoto v. McDonald's Corps., state and federal courts interpreting California law on this point have been in accord. 2008 WL

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Plaintiffs also bring suit under IWC Wage Order No. 1-2001, Cal. Code Regs., tit. 8, § 11010. Compl. ¶ 25. Subdivision 11(a) of Wage Order No. 1 states that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes." This language is similar, but not identical, to the governing statute, section 512, which specifies that the employer must simply "provid[e]" a meal period. Cal. Lab. Code § 512(a). The Wage Order does use the term "providing" when discussing required meal periods during work periods, as here, of more than 10 hours. Cal. Code Regs., tit. 8, § 11010, subd. 11 ("An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes....").

4690536, \*4 – 6 (Aug. 19, 2008) ("If the issue were before it, the California Supreme Court would adopt Defendant's construction of the meal and rest period provisions that [an employer must "make the period available if [the employee] wants to take one, but not [] ensure that such rest periods are taken.") citing Brinker Rest. Corp. v. Super. Ct., 165 Cal. App. 4th 25 (Cal. App., July 22, 2008); White v. Starbucks Corp., 497 F. Supp. 2d 1080, 1086 (N.D. Cal. 2007) ("[T]he court agrees that the words 'authorize' and 'permit' only require that the employer make rest periods available"); Lanzarone v. Guardsmark Holdings, Inc., 2006 WL 4393465, \*6 (C.D. Cal. 2006) ("Under California law, rest periods need only be authorized and permitted, they need not be enforced or actually taken."); Brown v. Federal Express Corp., 249 F.R.D. 580, 585 (C.D. Cal.2008) ("It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time."). See also Perez v. Safety-Kleen Sys., Inc., 253 F.R.D. 508, 515 (N.D. Cal. Jul. 28, 2008) ("Perez II") ("There is no authority for the proposition that an employer is liable for failing to provide meal breaks simply because an employee chooses to forego a meal break in order to complete his or her work, absent evidence of a specific employer policy or practice of discouraging breaks.")<sup>6</sup>

No other interpretation of "provide" can be sustained. Indeed, if the Legislature intended employers to *ensure* that employees took a 30-minute meal period, it would have said so, as it does elsewhere in the Labor Code. *E.g.*, California Labor Code § 7861(c) ("[t]he employer shall ensure that each worker necessary to ensure safe operation of the facility has received and successfully completed training"). It did not. Further, construing "provide" to mean "ensure" would render parts of the Labor Code

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<sup>&</sup>lt;sup>5</sup> The California Supreme Court granted review of the *Brinker* decision on October 22, 2008, thus superseding the Court of Appeal's decision, but has not yet issued an opinion.

<sup>27</sup> 

<sup>&</sup>lt;sup>6</sup> Additionally, the DLSE recently endorsed this plain meaning of the term "provide" by dismissing a meal period claim where the evidence demonstrated that plaintiff was "authorized and permitted" to take meal breaks. *Mahrt v. Home Depot U.S.A., Inc.*, Case No. 08-51109 1 DD, at 4 (Dec. 14, 2006).

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superfluous. In addition to requiring that employers provide meal periods, Labor Code § 226.7 states that an employer may not "require any employee to work during any meal or rest period." California Labor Code § 226.7(a). If the terms "provide" and "providing" are interpreted to mean "ensure" and "ensuring," the prohibition against requiring work would be entirely unnecessary. This strained statutory construction would contravene the California Supreme Court's guidance that "[i]nterpretations that lead to absurd results or render words surplusage are to be avoided." Loeun, 17 Cal.4th at 9 (emphasis added).

The California Court of Appeal's decision in Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949 (2005), is not to the contrary. That court held that the employer could not satisfy its obligation to provide employees with an adequate meal period because employers have "an affirmative obligation to ensure that workers are actually relieved of all duty." Id. at 962-63 (quoting DLSE Op. Letter at 1 (Jan. 28, 2002)). However, the court's exclusive reliance on the DLSE opinion letter was misplaced. The opinion letter interpreted only the rest break and meal period provisions of an IWC Wage Order, not the plain language of sections 226.7 and 512 of the Labor Code. In addition, the DLSE interpreted the Wage Order in a manner that is contrary to the plain language of the applicable statutes, even though the IWC's authority to adopt or amend "working condition orders with respect to . . . meal periods" is expressly limited by the provisions of Section 512. California Labor Code § 516. Because the court did not interpret the California statutes governing meal periods and instead relied solely on the DLSE opinion letter's flawed reasoning, its analysis of California's meal period provisions is not persuasive. Perez II, 253 F.R.D. at 513 (failure of Cicairos court to analyze application of word "provide" under § 512 rendered opinion unpersuasive).

Even if the Court finds Cicairos persuasive, the facts surrounding the meal periods in Cicairos present a far different situation than the one here. In Cicairos, the plaintiff truck drivers delivered goods to grocery stores, and their actions were closely monitored. Cicairos, 133 Cal. App. 4th at 955. Computers on the trucks recorded the

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drivers' speed, starts and stops, and time, and all time had to be recorded under activity codes, though no such code existed for meal breaks. *Id.* at 955-56. Evidence established that management pressured the drivers to make more than one daily trip, which discouraged the drivers from taking meal breaks. *Id.* at 956. Further, the drivers offered evidence that they were not taking meal periods. *Id.* The *Cicairos* court found that, though the employer did not actively prohibit meal breaks, its heavy regulation of the drivers' activity through provided activity codes and the absence of a code for meal breaks, combined with evidence that management discouraged meal breaks by pressuring the drivers to make more than one daily trip, demonstrated a violation of the employer's obligation to provide meal periods. *Id.* at 962-963.

The evidence here is very different. Both Covarrubias and Simmons concede that they regularly take meal breaks, even cooking their own extensive meals, and have ample time to do so. (UF Nos. 45, 50, 52, 55-56, 58, 60, 75, 88.) In addition to meals, both Plaintiffs testified that they have time for other leisure activities during their shift, such as talking on the cell phone, socializing with other Operators, and smoking cigars. (UF No. 63) (Covarrubias testimony that he speaks with his children on his cell phone); (UF No. 65) (Covarrubias testimony that he socializes with other Operators); (UF No. 66) (Covarrubias testimony that he socializes with Simmons); (UF No. 93) (Simmons testimony that he smokes three cigars per shift); (UF No. 94) (Simmons testimony that he speaks on his cell phone with his wife); (UF No. 95) (Simmons testimony that he leaves the unit to retrieve his keys from his car). In contrast to the Cicairos' employer's control over the driver's time, which discouraged breaks, Covarrubias and Simmons testified that they have broad discretion over how to spend their time, including what tasks to perform, when to take meal breaks, and how long to take them. (UF Nos. 51, 77.) Neither can offer evidence of missed or interrupted meal periods. (UF Nos. 36, 43, 78, 82.) Significantly, there is absolutely no evidence that ConocoPhillips management pressured Covarrubias or Simmons to complete their work

duties during meal periods, discouraged either plaintiff from taking their meal periods, or even had knowledge of any missed meal periods. (UF Nos. 46, 85, 98.)

Under California law, ConocoPhillips had a duty to make unpaid meal periods available to Covarrubias and Simmons. That is exactly what it did. Thus, Covarrubias and Simmons cannot establish any violation and their meal break claims must fail as a matter of law.

b) That Covarrubias and Simmons Remained On-Site During Their Meal Breaks Does Not Change The Outcome On Summary Judgment.

ConocoPhillips anticipates that Plaintiffs will argue that the ample meal break opportunities they receive do not satisfy §§ 226.7 and 512 because Plaintiffs were required to remain at the refinery during those breaks and to carry radios in case of emergency. This fact, however, does not change the outcome on summary judgment.

(1) Because Plaintiffs Were Paid For All Time Worked, On-Site Meal Periods Are Lawful.

Any argument that requiring the Operators to remain at the refinery and be potentially subject to having their meal breaks interrupted violates sections 226.7 and 512 misconstrues an employer's obligation under those statutes. Because ConocoPhillips paid Covarrubias and Simmons for all the hours they worked on each 12-hour shift, including all their meal periods, summary judgment is appropriate.

California law has long recognized circumstances under which an employee could be provided a meal period while being required to remain on a job site, or be subject to intermittent interruptions, as long as that employee is paid for the meal period. See, e.g., Bono Enters., Inc. v. Bradshaw, 32 Cal. App. 4th 968 (1995) (workers required to remain at employer's warehouse during meal periods must be paid for that time as "hours worked."); Madera Police Officers Assn. v. City of Madera, 36 Cal.3d 403, 410 (1984) (police officers required to respond to citizen requests and inquiries must be paid for meal periods); see also Morillion v. Royal Packing Co., 22 Cal.4th 575, 587 (2000) (time employees spent traveling on employer-provided bus transportation

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was compensable "hours worked" even though employees were allowed to sleep and read on the bus); Aguilar v. Ass'n for Retarded Citizens, 234 Cal. App. 3d 21, 30 (1991) (all time that personal attendant employees spent on employer's premises was compensable "hours worked," even if the time was spent sleeping). As the evidence demonstrates that Covarrubias and Simmons were paid for and received their meal periods, there is no violation of the wage order.

Any other interpretation would produce an absurd result. The purpose of the meal break provisions of the Labor Code is to address "the most basic demands of an employee's health and welfare." Cal. Mfgs. Assn. v. Indus. Welfare Com., 109 Cal. App. 3d 95, 115 (1980). The purpose is not to provide a windfall to plaintiffs who already receive meal periods by allowing a manipulation of the statute. For example, were Plaintiffs' argument accepted, the employers in Morillion and Aguilar would have to either wake up their sleeping employees for meal periods, or be forced to pay a meal period penalty. See White, 497 F. Supp. 2d at 1089 ("[Under plaintiff's argument,] an employer with no reason to suspect that employees were missing breaks would have to find a way to force employees to take breaks or would have to pay an additional hour of pay every time an employee voluntarily chose to forego a break.').

Moreover, Plaintiff's argument applied here would award Plaintiffs a double recovery under § 226.7 for a meal period they received – resulting in the paid meal period they already receive, and a meal period penalty for the wage order "violation." Had the Legislature intended such a result, it would have said so explicitly.

> **(2)** Plaintiffs' Union Lawfully Agreed That Plaintiffs Would Receive On-Site, Paid Meal Periods

Even if an employer could not unilaterally require paid, on-site meal periods, the meal break statutes permit employees to agree in writing to work paid "on duty" meal periods in which they eat their meals while they work. IWC Wage Order No. 1-2001 § 11(C), Cal. Code Regs., tit. 8, § 11010, subd. 11(C). Even assuming, arguendo, that being subject to a radio call or having to remain on premises converts a meal period to

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27 28 one that is "on duty," Plaintiffs agreed, through their union, to that arrangement. Thus, even if the meal breaks are considered "on duty," there still is no violation of the statutes.

ConocoPhillips has complied with all of the substantive requirements for an onduty meal period, as set forth in Wage Order No. 1-2001. An on-duty meal period is permitted "when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to." Wage Order No. 1-2001 § 11(C). "The written agreement shall state that the employee may, in writing, revoke the agreement at any time." *Id*.

The first requirement for an on-duty meal period is clearly met because the nature of Plaintiffs' work requires them to be on the premises during their meal breaks due to the potential for emergencies to arise. (UF Nos. 26-27) (Operators assist in ensuring the safety of the refinery equipment, which must be constantly monitored to ensure the equipment is functioning properly); (UF No. 28) (the oil refining process must be "monitored continuously."); (UF No. 29) (Operators are part of the refinery's emergency response team). See, e.g., Lanzarone, 2006 WL 4393465, \*2, \*6 (nature of plaintiff's duties as a security officer prevented him from being relieved of all duties during meal periods).

The second requirement is met because ConocoPhillips and the USW agreed that Operators had ample time to eat during their shifts. No violation of the meal break laws occurs when an employee agrees to a paid "on-duty" meal break. Lanzarone, 2006 WL 4393465, \*6 (plaintiff's claim that he was denied an uninterrupted meal break was precluded by his agreement to a paid, on-duty "and therefore interruptible" meal break); McFarland v. Guardsmark, LLC, 538 F. Supp. 2d 1209, 1216 (N.D. Cal. 2008) ("where the employee agrees to take an 'on duty' meal period, and gets paid for working during the time he is eating, there is no 'waiver' of the meal period").

Further, a union, on behalf of its members, can properly negotiate and enter into or revoke an agreement for an on-duty meal period. Porter v. Quillin, 123 Cal. App. 3d

1	869, 872, 874, 876 (1981) (holding that union had authority to provide consent, on a
2	collective basis, for its members to accept meals at employer's establishment as part of
3	their wage); DLSE Opinion Letter No. 2002.12.09-1, p. 4 ("California law has always
4	allowed a union, as the collective bargaining representative, to act on behalf of its
5	members" in accepting an on-duty meal period where nature of the work prevents an
6	off-duty meal break) (citing generally <i>Porter</i> ). The Ninth Circuit's decision in <i>Valles v.</i>
7	Ivy Hill Corp., 410 F.3d 1071,1076 (9th Cir. 2005) does not compel a different result.
8	Valles rejected an employers' argument that a union had completely waived its
9	employees' rights to meal breaks, because the right to a meal break is a "nonnegotiable
10	state right." Id. at 1076. However, Valles did not address whether a union can enter into
11	a collective agreement that the represented employees would receive paid meal breaks.
12	This Court cannot hold that the right to have a meal break unpaid and off-duty is
13	nonnegotiable, because it is expressly permitted under Section 11(C) of the wage order.
14	Indeed, one court has recognized that an agreement to have "on-duty" meal periods is
15	not a "waiver." McFarland v. Guardsmark, LLC, 538 F. Supp. 2d 1209, 1216 (N.D. Cal
16	2008) ("where the employee agrees to take an 'on duty' meal period, and gets paid for
17	working during the time he is eating, there is no 'waiver' of the meal period").
18	The 12-Hour Shift Agreement negotiated and entered into by the union on behalf
19	of its members (including Plaintiffs) constitutes an agreement to have paid "on-duty"

The 12-Hour Shift Agreement negotiated and entered into by the union on behalf of its members (including Plaintiffs) constitutes an agreement to have paid "on-duty" meal periods. The language of that agreement provides that the employees on 12-hour shifts will work 12 consecutive hours "exclusive of meal period," but would be paid for that time. (UF Nos. 6-7.) The parties to the negotiation understood that Operators would receive plenty of time to eat on the premises and be paid for that time. (UF No. 10) (Stephen Swader: "Q: But my example of someone taking an hour meal break and let's say five breaks to smoke, none of those breaks would be deducted. They would be paid for the full 12 hours; is that correct? A: Yes."); (UF No. 11) (Prosser: "[I]t is also contemplated that operators on that 12-hour shift schedule will have sufficient time to eat a meal or have opportunities for rest during that 12-hour period."); (UF

No. 12) (Prosser: "[O]perators enjoy a great deal of freedom to manage their work during that 12-hour shift period, so they have the flexibility to take breaks and have a meal whenever their work and the timing of their activities permit it."); (UF No. 13) (Prosser: "When we say 'monitoring,' we're not talking about sitting and staring for 12 straight hours at a monitor or device...the operators themselves have a high degree of flexibility to manage the process as best they can in regards to doing it safely, efficiently, and getting things prepared for maintenance and whatnot."). Moreover, when the union and ConocoPhillips bargained for this language – and later re-negotiated the language in 2002 – it was with the understanding that Operators were required to remain on-site for their entire shift. Thus, the union, on behalf of its members, agreed to on-site, paid meal periods. And such agreement is permitted under the meal break laws.

Plaintiffs' own involvement with the union and their conduct demonstrates that they fully understood that the 12-Hour Shift Agreement provided for paid, "on-duty" meal periods. Plaintiff Covarrubias, as the local negotiating committee chairperson, was personally involved in negotiating the 12-Hour Shift Agreement. (UF Nos. 14-15, 33.) Plaintiff Simmons is on the executive board of the local union, and is currently a Health and Safety representative. (UF Nos. 67-68, 70.) Given their positions, Plaintiffs could have easily challenged any agreement to a 12-hour, paid shift, including meal periods, at the time of the negotiations.

Any technical deviation from the requirements for an on-duty meal break does not in any way frustrate the purpose of the meal break provisions. *Cal. Mfgs. Assn. v. Indus. Welfare Com.*, 109 Cal. App. 3d 95 (1980) ("The meal break provisions of the Labor Code address 'the most basic demands of an employee's health and welfare."). The undisputed evidence establishes that those demands have been met. Plaintiffs received meal breaks, for which they were paid, and during which they ate. *See* Section III.A.1, *supra*. Further, any additional requirement in the wage order to solidify an agreement between an employee and employer for an on-duty meal break goes well beyond what is required by § 512. To the extent the wage order conflicts with the plain

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language of § 512, it cannot be enforced. Cal. Lab. Code § 516 (the IWC's authority to adopt or amend 'working condition orders with respect to...meal periods' is expressly limited by the provisions of § 512).

Even if ConocoPhillips' alleged conduct amounts to a minor, technical deviation from the literal language of a statute, it is well settled that – in a variety of legal contexts - courts employ the "substantial compliance" doctrine to "avoid the harsh consequences of strict application" of a statute. See Asdourian v. Araj, 38 Cal. 3d 276, 283 (1985) (superseded by statute on other grounds, as stated in Constr. Fin. v. Perlite Plastering Co., 53 Cal. App. 4th 170, 175, 180 (1997)). Under this doctrine, courts will not construe a statute "more broadly than requisite to the achievement of its manifest purpose . . . ." See Asdourian, 38 Cal.3d at 282-83 (citation and internal quotation marks omitted); see also Costa v. Super. Ct., 37 Cal.4th 986, 1019 (2006) (court disregards minor departure from technical election law requirements under the substantial compliance rule "so long as the court [is] able to conclude that the departure in question, as a realistic and practical matter, did not undermine or frustrate the basic purposes served by the statutory requirements"). "Substantial compliance" refers to "actual compliance in respect to the substance essential to every reasonable objective of the statute," and where there is compliance on all matters of substance, "technical deviations are not to be given the stature of noncompliance." Cal-Air Conditioning, Inc. v. Auburn Union Sch. Dist., 21 Cal. App. 4th 655, 668 (1993) ("Substance prevails over form.") (emphasis in original) (citation and internal quotation marks omitted).

At most, Plaintiffs' argument boils down to arguing that ConocoPhillips should have obtained individual agreements for "on-duty" meal periods with its workers instead of relying on the union's collective agreement to such an arrangement. However, both the DLSE and case law establish that unions may enter into such agreements and nowhere mandate individual agreements, so ConocoPhillips had no reason to believe individual agreements were required. Further, neither Plaintiffs nor any other Operators ever complained about the 12-Hour Shift Agreement, being

required to remain on-site during their shifts, or having to wear radios. There is no basis in evidence to suggest that Plaintiffs would have declined to execute individual waivers.

Under the circumstances, even if relying on the union agreement constitutes a technical defect as to the form of the agreement for "on-duty" meal periods, ConocoPhillips substantially complied with the requirements of the statute.

In addition, to the extent Plaintiffs seek to argue that they must be relieved of duty, they are effectively seeking to rewrite the CBA and 12-Hour Shift Agreement. Under the doctrine of preemption, courts cannot interpret collective bargaining agreements. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985) (preemption under § 301 of the Labor Management Relations Act occurs where resolution of the claims, as here, is "substantially dependent upon analysis of the terms of a [collective bargaining agreement]"). One policy behind the "complete preemption" doctrine enunciated by § 301 is "to promote the federal policy favoring arbitration and to prevent litigants from using state law litigation to side-step or alter negotiated provisions of a collective bargaining agreement, including the dispute resolution procedures." Valles, 410 F.3d at 1076 (citations omitted). As previously stated, the 12-Hour Shift Agreement states that employees will work 12 consecutive hours "exclusive of meal period." (UF No. 6.) It also contains other provisions regarding meal periods, including rules governing how meals will be provided during overtime and stand-by time. ConocoPhillips maintains that this agreement, consistent with the practice at the refineries that Operators remain on duty during their entire shift, must be interpreted as an express agreement to on-site meal periods. By seeking to rescind the CBA, Plaintiffs would be asking the Court to step into the shoes of a labor arbitrator. It is simply not the role of the Court to perform this analysis.

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# B. ConocoPhillips Is Entitled To Summary Judgment On Covarrubias and Simmons' Claim Under California's Unfair Competition Law.

Plaintiffs' claim under California's Unfair Competition Law (UCL) is entirely derivative of the meal break claim, and fails for the same reason. The UCL prohibits business practices that are "unlawful, unfair or fraudulent." Cal. Bus. & Prof. Code § 17200. An "unlawful" business practice is one that is "forbidden by law." *State Farm Fire & Cas. Co. v. Super. Ct.*, 45 Cal. App. 4th 1093, 1103 (1996), abrogated on other grounds by *Cel-Tech Comm'n., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). The UCL in effect "borrows" another statute, such that an unlawful practice claim is viable only if the plaintiff can prove a violation of the underlying statute. *See Klein v. Earth Elements, Inc.*, 59 Cal. App. 4th 965, 969 (1997).

Here, the UCL claim is premised on Plaintiffs' claim that ConocoPhillips violated the Labor Code by denying them proper meal breaks. (UF No. 99.) Because, as shown above, Plaintiffs' underlying meal break claims fail as a matter of law, so too does their UCL claim. See Cel-Tech, 20 Cal. 4th at 183; see also Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1203 (9th Cir. 2001) (affirming summary judgment in favor of defendant on UCL claim because UCL "does not give a plaintiff license to 'plead around' the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition") (quoting Cel-Tech, 20 Cal. 4th at 182); People v. Duz-Mor Diagnostic Lab., Inc., 68 Cal. App. 4th 654, 673 (1998).

# IV. CONCLUSION

For the foregoing reasons, ConocoPhillips is entitled to summary judgment on all of Plaintiffs Raudel Covarrubias' and David Simmons' claims.

Dated: January 7, 2009

AKIN GUMP STRAUSS HAUER & FELD LLP Catherine A. Conway Anastasia M. Boles Jeremy F. Bollinger

/s/ Catherine A. Conway
Catherine A. Conway
Attorneys for Defendant
CONOCOPHILLIPS COMPANY

#### 1 PROOF OF SERVICE 2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES 3 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, California 90067. 4 5 On January 7, 2009. I served the foregoing document(s) described as: 6 DEFENDANT CONOCOPHILLIPS COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AS TO 7 PLAINTIFFS RAUDEL COVARRUBIAS AND DAVID SIMMONS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT 8 THEREOF 9 on the interested party(ies) below, using the following means: 10 Robert A. Cantore, Esq. Jay Smith, Esq. Joshua F. Young, Esq. 11 GILBERT & SĂCKMAN 3699 Wilshire Boulevard, Suite 1200 Los Angeles, California 90010-2732 Telephone: 323.938.3000 Facsimile: 323.937.9139 Attorneys for Plaintiffs 12 13 14 15 ⊠ BY ELECTRONIC MAIL OR ELECTRONIC TRANSMISSION. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) 16 to be sent to the respective e-mail address(es) of the party(ies) as stated above. I did not receive, within a reasonable time after the transmission, any electronic message or other 17 indication that the transmission was unsuccessful. 18 (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. 19 Executed on January 7, 2009 at Los Angeles, California. 20 21 Linda Tolkert 22 Linda Tolbert [Print Name of Person Executing Proof] 23 24 25 26 27 28 6322465

PROOF OF SERVICE

CV-08-2068-PSG (FFMx)