No. 15-56352

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN NEWTON,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, INC.

Defendant-Appellee

On Appeal from the United States District Court
Central District of California, No. 2:15-cv-02517-RGK-AGRx
The Honorable R. Gary Klausner

APPELLANT'S REPLY BRIEF

MICHAEL A. STRAUSS, Esq. (SBN 246718)
STRAUSS & STRAUSS, APC
121 N. Fir St., Ste F
Ventura, CA 93001
Telephone: (805) 641-6600
Facsimile: (805) 641-6607

Attorneys for Plaintiff-Appellant
BRIAN NEWTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Federal Regulations

***Local Rule 28-2.7 Addendum**

All applicable, pertinent constitutional provisions, treaties, statutes, ordinances, regulations or rules, etc., are contained in the addendum filed with Appellant's Opening Brief.

I. INTRODUCTION

The Response brief filed by Defendant-Appellee Parker Drilling Management Services, Inc. ("Parker") betrays a fundamental understanding of the Outer Continental Shelf Lands Act (the "OCSLA") and the cases construing it. Parker (and the District Court, which adopted Parker's flawed arguments) relies primarily on dicta in *Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Association*, 417 F.2d 1030 (5th Cir. 1969) ("*Continental Oil*") for the conclusion that state law does not even apply on oil platforms on the Outer Continental Shelf. But such a conclusion is erroneous given the Supreme Court's subsequent mandate in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 485-86 (1981) ("*Gulf Offshore*") that the laws of the state adjacent to the platforms in question apply thereon, subject to a test of whether they are inconsistent with applicable federal law. Moreover, the Fifth Circuit, which issued the *Continental Oil* decision in 1969, later conformed with the *Gulf Offshore* decision and adopted a test that disposes of the stringent "applicability" standard set forth in dicta therein and, instead, primarily gauges whether the state law in question is inconsistent with federal law. *Union Texas Petroleum Corp. v. Union Texas Engineering, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990), *cert. denied*, 498 U.S. 848 (1990) (*"Union Texas*" or, alternatively, "*PLT*").

Parker (and the District Court) also ignores the plain language of the

OCSLA and further Supreme Court precedent holding that the relevant "inconsistency" analysis compares the laws of the adjacent state only to federal *statutes* and *regulations of the Secretary of the Interior*. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104-105 (1971) ("*Huson*"); 43 U.S.C. § 1333(a)(2). Common-law rules enunciated in case law construing federal statutes and non-binding regulations promulgated by federal agencies other than the Secretary of the Interior cannot fill in gaps in federal statutes under OCSLA. Instead, state law must fill in those gaps.

Here, California's wage-and-hour laws, which are the laws of the state adjacent to the oil platforms on which Plaintiff-Appellant Brian Newton ("Newton") worked for Parker, are not inconsistent with the FLSA, because the FLSA is riddled with gaps – such as what constitutes "hours worked" or whether employees must be provided with off-duty meal periods or when the final payment of wages is due – that cannot be filled by federal common law or non-binding regulations issued by the Department of Labor. Such state wage-and-hour laws are also not inconsistent with the FLSA because the FLSA allows states to provide heightened minimum wage and overtime protections to covered employees. 29 U.S.C. § 218(a).

For these reasons, Newton respectfully requests this Court to reverse the decision of the lower court in granting Parker's Motion for Judgment on the

Pleadings.

II. ARGUMENT

A. The *Union Texas* Analysis Certainly Applies to All Recent OCSLA Cases in the Fifth Circuit.

Parker questions whether the three-part analysis from *Union Texas*, 895 F.2d 1043, is widely used by the Fifth Circuit. An analysis of recent Fifth Circuit jurisprudence reveals that, indeed, the *Union Texas* analysis is the rule in OCSLA cases. *See Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 543 F.3d 256, 258 (5th Cir. 2008), *on reh'g en banc*, 589 F.3d 778 (5th Cir. 2009) ("It is well settled that for Louisiana law to apply as surrogate federal law under OCSLA, the three conditions established by this court in [*Union Texas*] must be met."); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1526 (5th Cir. 1996)[1] ("The proper test for deciding whether state law provides the rule of decision in an OCSLA case remains the three-part *PLT* test."); *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 549 (5th Cir. 2002); *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 497 (5th Cir. 2002) ("This court has articulated the rule in a three-part test announced in *Union Texas Petroleum Corp. v. PLT Engineering*"); *ACE Am. Ins. Co. v. M-I, L.L.C.*, 699 F.3d 826, 830 (5th Cir. 2012); *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783 (5th Cir. 2009); *Texaco Expl. & Prod.*,

[1] The *Hodgen*, *Diamond Offshore*, and *Demette* decisions were all overruled on other grounds by *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778.

Inc. v. AmClyde Engineered Prod. Co., 448 F.3d 760, 774 (5th Cir.), *amended on reh'g*, 453 F.3d 652 (5th Cir. 2006); *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010*, 808 F. Supp. 2d 943, 952 (E.D. La. 2011), *aff'd sub nom. In re DEEPWATER HORIZON*, 745 F.3d 157 (5th Cir. 2014) ("since 1990 the Fifth Circuit has employed the '*PLT* test' to determine whether state law may be adopted as surrogate state law under OCSLA").

B. The Supreme Court in *Gulf Offshore* Elevated State Law so that it Applies by Default under OCSLA; Rather than Whether State Law is Applicable, the Question Is Whether Such State Law Is Inconsistent with Potentially Applicable Federal Law.

Parker disagrees with the default application of state law under OCSLA, but such was a key holding by the Supreme Court in *Gulf Offshore*, 453 U.S. at 484-488. At issue in *Gulf Offshore* was whether a state jury instruction should have been given in an OCSLA case. Nothing in *Gulf Offshore* mentions the question of *which* state's laws will apply on an OCSLA situs (i.e., either Texas or Louisiana, as Parker suggests); indeed, there was no dispute that Louisiana was the adjacent state whose laws would apply. *Id*. at 486. The *Gulf Offshore* Court stated the rule that, once the applicable state law is determined (i.e., by looking at which state is adjacent to the waters near the OCSLA situs), "[t]o apply the statutory directive a court must consider the content of both potentially applicable federal and state law" on the OCSLA situs. *Id*. At that point, the court assesses whether the state and federal laws are inconsistent. *Id*. at 486-487. Hence, state law does in fact

apply by default under the Supreme Court precedent in *Gulf Offshore*, but it is still subject to the inconsistency analysis.

The *Gulf Offshore* standard set by the Supreme Court in 1981, to the extent that it differs with the standard articulated in 1969 by the Fifth Circuit in *Continental Oil*, 417 F.2d 1030, is binding precedent in the Ninth Circuit. Therefore, unlike in *Continental Oil*, where the Fifth Circuit noted in dicta that "applicable" "must [be] read in terms of necessity – necessity to fill a significant void or gap," *Continental Oil*, 417 F.2d at 1036, a state law is applicable by default under OCSLA so long as it is adjacent to the waters where the OCSLA situs sits. *Gulf Offshore*, 453 U.S. at 486.

C. The Cases Interpreting the FLSA Comprise a Body of "Federal Common Law" that May Not Fill in Gaps in the FLSA under OCSLA.

Parker's argument regarding the binding nature of judicial law interpreting the FLSA misses its target. The Supreme Court in *Huson* articulated a rule whereby federal common law is trumped by state law under the OCSLA. *Huson*, 404 U.S. at 104-105. This raises a question as to what is federal common law.

"Federal common law" is defined as "[t]he body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law." COMMON LAW, Black's Law Dictionary (10th ed. 2014).

Parker argues that there is no such thing as federal common law, but the opposite is certainly true. For example, the Supreme Court in *Huson* dealt with a federal common law that provided the statute of limitations for personal injury damages, and the Court held that such federal common law cannot apply on an OCSLA situs when there is a counterpoint under state law. *Huson*, 404 U.S. at 104-105.

This Court itself has fashioned federal common law rules due to gaps in federal statutes. The Ninth Circuit's decision in *United States v. Northrop Corp.*, 59 F.3d 953, 962 (9th Cir. 1995) ("*Northrop*") highlights Newton's point that federal courts create common law when a federal statute has a "gap" in its coverage. At issue in *Northrop* was whether, under the False Claims Act, 31 U.S.C. §§ 3729 *et seq*. ("FCA"), the release of a *qui tam* claim, when entered into without the United States' knowledge or consent, and prior to the filing of an action based on that claim, is enforceable. *Northrup*, 59 F.3d at 956. The FCA sets forth many procedural rules governing *qui tam* actions, including the requirement of court approval of any settlement, but it is silent on the release issue. *Id*. at 959. The Ninth Circuit, identifying such a "gap" in the statutory scheme, noted, "Congress's silence on the matter of prefiling releases could reflect just as reasonably its failure to contemplate the issue, its desire to leave resolution of the issue to the courts, its approval of such prefiling releases, or its determination that

government consent is required." *Id*. at 960. In such a situation, a federal common law rule was warranted. *Id*. Consequently, the Ninth Circuit in *Northrup* formulated a federal common law rule to fill in the gap in the FCA.

A similar issue unfolded in *Gulf Offshore*, 453 U.S. 473, where the Supreme Court was tasked with deciding whether the rule it had previously articulated in *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490 (1980) ("*Liepelt*") was applicable in an OCSLA case. *Liepelt* held that a defendant in a case brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, is entitled to an instruction that damages awards are not subject to federal income taxation. *Gulf Offshore*, 453 U.S. at 486. The Court noted, "As FELA afforded no guidance on this issue, *the [Liepelt] holding articulated a federal common-law rule*." *Id*. (emphasis added). The question was whether, under OCSLA, such a federal common-law rule would trump an inconsistent Louisiana law on similar jury instructions. *Id*. at 487-488. The *Gulf Offshore* Court noted that it was faced with an analogous situation as that in *Huson*: "[D]oes the incorporation of state law preclude a court from finding that state law is 'inconsistent' with a federal common-law rule generally applicable to federal damages actions?" *Id*. at 488. Ultimately, the Court declined to answer that question, choosing instead to remand the action back to the Texas Court of Civil Appeals for a determination of "whether Louisiana law requires the instruction and, if it does not, whether *Liepelt*

displaces the state rule in an OCSLA case." *Id*. at 488.

Thus, under Supreme Court OCSLA precedent, when federal courts create rules that do not exist in statutes, in order to fill in "gaps" in their coverage, they are creating federal common law. Such common law must give way to state law under the OCSLA. *Huson*, 404 U.S. at 104-105.

D. The Regulations Interpreting the FLSA Comprise a Body of "Federal Common Law" that May Not Fill in Gaps in the FLSA under OCSLA.

Parker counters by arguing that certain federal *regulations* are "Federal law" within the meaning of 43 U.S.C. § 1333(a)(2)(A). Parker, however, ignores two important points. First, section 1333(a)(2)(A) specifically mentions "Federal laws and *regulations of the Secretary* [of the Interior]…," and omits regulations promulgated by other departments. 43 U.S.C. § 1333(a)(2)(A). If Congress had meant to include regulations promulgated by other regulations, such as the Wage and Hour Division of the Department of Labor ("DOL"), it would have done so. *See Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000) ("The incorporation of one statutory provision to the exclusion of another must be presumed intentional under the statutory canon of *expressio unius*.") (emphasis in original); *United States v. Bert*, 292 F.3d 649, 652 (9th Cir. 2002).

Second, the regulations at issue here do not have binding authority. Such regulations "have the power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). They do not have the force of binding law.

Shaw v. Prentice Hall Computer Publishing, Inc., 151 F.3d 640, 642 (7th Cir. 1998). These DOL regulations address gaps in the FLSA. For example, the FLSA does not require that employees be provided off-duty meal periods. *Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 531 (9th Cir. 2013). A DOL regulation, 29 C.F.R. § 785.19, fills in some gaps in the FLSA as it pertains to meal periods by setting some guidelines for whether meal periods must be compensated. However, Courts of Appeal throughout the nation have rejected the standards articulated by that same regulation. *Havrilla v. United States*, 125 Fed. Cl. 454, 464 (2016) (listing such appellate court decisions). It follows that, if a federal court relies on persuasive authority such as a non-binding regulation, or establishes a wholly different rule from the regulation, the federal court is creating the law – federal common law. *See* 29 C.F.R. § 785.2 ("The ultimate decisions on interpretations of the [FLSA] are made by the courts.") Again, such federal common law cannot apply to the exclusion of competing state law under the OCSLA.

E. Federal Preemption Principles Apply to Determine Whether State Law Is Inconsistent with Federal Law under OCSLA.

Parker wrongly asserts that the FLSA's savings clause is irrelevant here. Assuming that the FLSA applies on the oil platforms here, federal preemption principles are relevant to the determination of whether state wage-and-hour laws may also be enforced thereon. In *In re DEEPWATER HORIZON*, 745 F.3d 157, 166 (5th Cir.), *cert. denied sub nom. Louisiana ex rel. Ballay v. BP Expl. & Prod.*,

Inc., 135 S. Ct. 401, 190 L. Ed. 2d 307 (2014) ("*DEEPWATER HORIZON*"), the issue before the Fifth Circuit was whether certain parishes along the Louisiana coast could pursue state claims under the Louisiana Wildlife Protection Statute ("Wildlife Statute"), La. R.S. 56:40.1, for the pollution-related loss of aquatic life and wildlife resulting from an oil spill from an OCSLA situs. The court held that the OCSLA choice-of-law analysis controlled and, under said analysis, federal law governed the controversy. *Id*. at 166.

The *DEEPWATER HORIZON* court then analyzed two overlapping federal laws, the Clean Water Act ("CWA"), 33 U.S.C. § 1251-1376, and the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2701-62, to determine whether the remedies of the Louisiana Wildlife Statute were preempted by the CWA and/or OPA. *DEEPWATER HORIZON*, 745 F.3d at 169 ("Even assuming the Parishes have some residual police power to apply local law to this OCSLA-originated discharge, however, they must overcome federal preemption."). The court noted that both the CWA and OPA "contain provisions that save state law causes of action, including penalty claims, under certain circumstances." *Id*. at 168. The court then analyzed each savings clause in detail to see if the penalty provisions in the state Wildlife Statute survived federal preemption. *Id*. at 171-174. The court concluded that, because the two savings clauses, when read together and narrowly, limited the preservation of state laws to situations where the point source of pollution is *within*

a state, state laws are not preserved when the point source is outside of a state (as on an OCSLA situs in federal waters). *Id*. at 174. Consequently, due to preemption principles, the court held that the state Wildlife Statute could not be used to impose penalties over and above those allowed by the CWA and OPA on an OCSLA situs. *Id*.

DEEPWATER HORIZON, therefore, supports Newton's position here. Even if the FLSA applies on the oil platforms in question, its savings clause preserves state overtime and minimum wage laws. The FLSA savings clause, unlike those in the CWA and OPA, does not limit the application of state overtime and minimum wage laws to employment within a state. Rather, it applies to employment conditions inside and outside the states, including in the federal waters off their coasts. *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1420 (9th Cir. 1990) ("*Aubry*"). This Court held in *Aubry* that California's overtime laws fall squarely within the FLSA's savings clause and apply over and above the FLSA's minimum standards. Thus, California's overtime laws (and minimum wage laws, by extension, because they are also within the ambit of the savings clause) are not preempted by the FLSA and should apply on the oil platforms here, despite the OCSLA's choice-of-law provisions.

Parker's reliance on *Mersnick v. USProtect Corp.*, 2006 WL 3734396 (N.D. Cal. 2006) ("*Mersnick*") on this point is inapposite. *Mersnick* did not apply or

address the OCSLA. Rather, *Mersnick* was a federal enclave decision. The putative class of plaintiffs were private security officers working for USProtect Corporation, which provided security and investigation services primarily to government agencies. *Id*. at *1. The plaintiff worked at Vandenberg Air Force Base as a full-time security officer. *Id*. He alleged class-wide claims for violations of the California Labor Code and the FLSA. *Id*.

The *Mersnick* court dismissed many of the plaintiff's Labor Code claims under the federal enclave doctrine, which provides that state laws existing at the time the United States accepts jurisdiction of a federal enclave remain enforceable unless "abrogated" by federal law. *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99 (1940) ("*Stewart*"). Of the plaintiff's Labor Code claims, only those brought under sections 201 through 204 were enacted prior to the date that Vandenberg Air Force Base was ceded to the federal government; the other claims were not enforceable on the enclave. *Mersnick*, 2006 WL 3734396, *7. The court held that the plaintiff's claims under sections 201 through 203 were barred because the plaintiff lacked standing to bring them (since he did not allege that he had been discharged or had resigned, and these three statutes are predicated on the untimely failure to pay final wages). *Id*. at *8.

As for the remaining claim under section 204, the plaintiff alleged that his employer violated said statute by failing to compensate its employees for missed

meal periods and for time worked "off the clock" generally for "arriving early for a shift for weapon issuance, briefings, transport to posts, or for other reasons" and "remaining after the end of a shift for weapons turn-in, briefings, transport to posts, or for other reasons." *Id.* The court held that the section 204 claim was barred under the federal enclave doctrine "because the FLSA (and federal law interpreting the FLSA) specifically provides for when such preliminary and postliminary activities may be compensable." *Id.*

Mersnick is factually and legally distinguishable here. Unlike in *Mersnick*, Newton and his co-workers were not federal contractors performing military functions on a military base. Rather, they were workers on oil platforms, where the federal government's expressed interests have nothing to do with the hours of work performed by Newton, and were directed in large part toward controlling the revenue from the extraction of natural resources. *See* 43 U.S.C. § 1332 ("The Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."); 43 U.S.C. §§ 1331-1356b (mainly addressing laws for leasing, extraction, safety, and taxation of resources extracted from the Outer Continental Shelf). Rather, on the Outer Continental Shelf, Congress specifically expressed that states have rights to

"preserve and protect their marine, human, and coastal environments," 43 U.S.C. § 1332(5), and it defined "human environment" as including "the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, *employment*, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf," 43 U.S.C § 1331(a) (emphasis added). "Congress also recognized that the 'special relationship between the men working on these artificial islands and the adjacent shore to which they commute' favored application of state law with which these men and their attorneys would be familiar." *Huson*, 404 U.S. at 103.

These policies underlying the enactment of OCSLA stand in stark contrast to the federal government's "uniquely federal interests" in regulating military personnel on military bases, like the security guards in *Mersnick*. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 (1988) (uniquely federal interest exists in regulating government contractor performing its obligation under a procurement contract for the federal government; state law claims against contractor preempted by federal claims). Thus, the roles played by the plaintiff in *Mersnick* and Newton and where they performed them differed in these important ways.

Finally, *Mersnick* stands in stark contrast to the decision in *Korndobler v. DNC Parks & Resorts at Sequoia*, 2015 WL 3797625 (E.D. Cal. June 18, 2015)

("*Korndobler*"), which held that California's wage-and-hour laws apply on federal enclaves. As explained fully hereinbelow, the *Korndobler* court applied the FLSA's savings clause in a preemption analysis to find that California's minimum wage laws were not in conflict with the FLSA's minimum wage laws and, therefore, the California laws apply on federal enclaves. *Id*. at *6.

F. California's Wage-and-Hour Laws Have Been Held to Apply on Federal Enclaves.

By relying on *Mersnick*, Parker takes the position that the OCSLA choice-of-law analysis is identical to the federal enclave choice-of-law analysis. It is not, because, contrary to OCSLA authority, there is no mandate under the federal enclave doctrine that state laws become federal laws only when they are not inconsistent with federal laws and regulations of the Secretary of the Interior. However, to the extent that this Court adopts Parker's argument that federal enclave cases are analogous to and/or controlling in OCSLA cases, it must be stressed that *Mersnick* is not persuasive and, indeed, at least one other reported decision, *Korndobler*, 2015 WL 3797625, has held that the California Labor Code does indeed apply on federal enclaves.

The plaintiffs in *Korndobler* performed maintenance work in Sequoia National Park ("SNP"); their duties included maintaining and repairing facilities and snow removal. *Id*. at *1. The plaintiffs brought various claims against their employer, a concessionaire, under the California Labor Code, including for the

failure to pay minimum and overtime wages for on-call work, as well as a claim under California's Unfair Competition Law ("UCL") that was predicated on the minimum wage and overtime violations, and sought remedies that included liquidated damages under Labor Code section 1194.2. *Id.* The defendant brought a Rule 12(b)(6) motion to dismiss the state law claims under the federal enclave doctrine. *Id.* at *2. The *Korndobler* court dismissed the state law claims that post-dated the 1920 transfer of jurisdiction of SNP to the federal government, including the UCL claim and the claim for liquidated damages. *Id.* at *4.

As for the Labor Code provisions that pre-dated the 1920 transfer of jurisdiction, the *Korndobler* court analyzed them to determine whether they were inconsistent with federal law. Specifically, the *Korndobler* court, relying on *Aubry*, held that the California Labor Code sections in question were not in conflict with the FLSA's minimum wage provisions. *Id.* Specifically, *Korndobler* reasoned:

> In light of the Ninth Circuit's recognition [in *Aubry*] of FLSA as providing a 'floor rather than a ceiling' on minimum and overtime wage issues and Congress's clear statement the FLSA shall not 'excuse noncompliance with any ... State law ... establishing a minimum wage higher than the [federal] minimum wage,' this Court cannot see how requiring concessionaires to comply with California's minimum wage laws conflicts with FLSA.

Id., quoting *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 760 (9th Cir. 2010), *judgment vacated on other grounds*, 132 S. Ct. 74, 181 L. Ed. 2d 1 (2011), and 29

U.S.C. § 218(a). The *Korndobler* court thus held that California's minimum wage provisions applied on a federal enclave.

Applying the same reasoning from *Korndobler* here results in the conclusion that California's minimum wage and overtime provisions are not inconsistent with the FLSA. While *Korndobler* specifically analyzed California's minimum wage provisions, the statutes and other authority upon which the court relied apply with equal force to a state claim for overtime. That is, under *Aubry*, the FLSA is a *floor* for minimum wage *and* overtime wage issues, and the savings clause allows states to establish higher standards on minimum wage *and* overtime protections. *Aubry*, 918 F.2d at 1425; 29 U.S.C. § 218(a). Had *Korndobler* specifically analyzed the application of California's overtime provisions, it would have come to the same conclusion, finding that California's overtime laws apply on federal enclaves.

As here, the defendant in *Korndobler* argued that, under *Mersnick*, 2006 WL 3734396, the plaintiffs' Labor Code claims were barred under the federal enclave doctrine. The *Korndobler* court rejected this argument, noting that the *Mersnick* court only addressed claims brought under Labor Code sections 201, 202, 203, and 204. *Korndobler*, 2015 WL 3797625, *6. These Labor Code provisions each deal with the timing of the payment of wages, not minimum or overtime wage protections. *See* Lab. Code §§ 201 (requiring the final payment of wages upon termination), 202 (requiring the final payment of wages with 72 hours of

resignation), 203 (penalizing non-compliance with sections 201 and 202), and 204 (requiring the payment of wages no less frequently than twice a month).

The *Korndobler* court noted that none of these statutes fall within the FLSA's savings clause – i.e., "any federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter." *Korndobler*, 2015 WL 3797625, *6, quoting 29 U.S.C. § 218(a). *Mersnick*, therefore, does not address the application of California's minimum wage or overtime laws on federal enclaves. The only reported case discussing the application of such laws on federal enclaves with any detail is *Korndobler*.

It is important to note that *Korndobler* does not apply the FLSA's savings clause as part of a preemption analysis. *Korndobler*, 2015 WL 3797525, *6. Rather, the FLSA's Savings Clause is evidence of Congress's intent to allow the simultaneous enforcement of state and federal minimum wage and overtime laws. The savings clause shows that such state laws are not inconsistent with their federal counterparts. The Ninth Circuit recognized as much in *Aubry*, finding that "*California's more protective overtime provisions are compatible with, rather than conflict with, the [FLSA].*" *Aubry*, 918 F.2d at 1424 (emphasis added).

Mersnick is also distinguishable with the present case in that the Labor Code

claims asserted in *Mersnick* are not the same as those asserted in the within action. The *Mersnick* court only analyzed whether Labor Code sections 201-204 conflict with the FLSA. Here, of those Labor Code sections analyzed by the *Mersnick* court, Newton only seeks relief under Labor Code section 203. *Mersnick*, therefore, is not controlling or persuasive as to any of Newton's other claims. (As explained thoroughly in Newton's Opening Brief, his section 203 claim is not inconsistent with the FLSA and should apply to his employment.)

Parker also relies on *George v. UXB Int'l Inc.*, 1996 WL 241624 (N.D. Cal 1996) ("*George*") in support of its position that California overtime laws do not apply on a federal enclave. However, *George*'s analysis is limited because the statutes and Wage Order in question post-dated the federal government's acquisition of the enclave. *George* also failed to analyze the effect of the FLSA's savings clause on California overtime law in the context of a federal enclave. *George* likewise failed to apply the Supreme Court's federal enclave doctrine test set forth in *Stewart*, 309 U.S. 94 (i.e., whether the state overtime law "interfere[s] with the carrying out of a national purpose" or the "enforcement of the state law would handicap efforts to carry out the plans of the United States"). In light of the FLSA's savings clause, state overtime laws do not interfere with any national purpose or handicap efforts to carry out the plans of the United States.

Also, *George*, like *Mersnick*, involved military-type activities on a military

base. The defendant-employer was a government contractor engaged in the business of unexploded ordnance remediation, while the plaintiffs-employees "were employed to locate, clean-up, demolish and dispose of unexploded military ordnance and debris" on behalf of their employer. *George*, 1996 WL 241624 at *1. So, just as in *Mersnick*, uniquely federal interests would preclude the application of state law to the activities of such individuals. For these reasons, *George* is poorly reasoned and of limited value.

Finally, *Korndobler* is distinguishable from *Mersnick* and *George* because the work performed by the employees in *Korndobler* was non-military in character and did not take place on a military base. Thus, there are no unique federal interests at play that would limit the application of federal law. In that respect, *Korndobler* is more akin to the situation here, where Newton and his co-workers did not perform work that implicates uniquely federal interests.

In light of the aforementioned principles, none of the California statutes at issue here are inconsistent with the FLSA, and such California statutes should apply to the oil platforms in question under OCSLA.

G. Parker Does Not Address California's Strong Interest in Regulating the Hours and Working Conditions of Newton and his Coworkers on the Outer Continental Shelf.

Parker has not attempted to show how or why California does *not* have an interest in regulating the hours of work of employees on the Outer Continental

Shelf. California has expressed such an interest. *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 565 (1996); *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1203 (2011); *Aubry*, 918 F.2d at 1420. California should thus be able to regulate the wage-and-hour conditions of its residents as they perform work just a few miles off its shore.

Importantly, in enacting OCSLA, Congress envisioned such an application of state laws. "Congress specifically rejected national uniformity and specifically provided for the application of state remedies...." *Huson*, 404 U.S. at 104. The Supreme Court has recognized that state law must be applied in such situations. "For … when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Justice Blackmun, in a concurring opinion in *Gulf Offshore* understood this important point:

> As I understand OCSLA, the purpose of incorporating state law was to permit actions arising on these federal lands to be determined by rules essentially the same as those applicable to actions arising on the bordering state lands. Congress apparently intended to provide a kind of local uniformity of result, regardless of whether the action arose on shelf lands or on neighboring state lands. I would read the statute, thus, to encourage use of state law….

Gulf Offshore, 453 U.S. at 489 (Blackmun, J, concurring). For these reasons, applying the California Labor Code to work performed on the Outer Continental

Shelf would be in the interests of the state of California and within the spirit and purpose of the OCSLA and longstanding federal precedent.

H. Newton Did Not Waive his Argument Concerning the Application of California Law to the Periods Spent on Land and in California Waters.

Newton did not waive his argument concerning whether at least part of his hitch was covered by California law because arguments may not be waived. "[W]e do not require a party to file comprehensive trial briefs on every argument that might support a position on an issue." *Western Watersheds Project v. United States Dept. of Interior*, 677 F.3d 922, 925 (9th Cir. 2012); *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments"). The waiver doctrine does not apply to new or additional authority cited on appeal in support of arguments or claims made below. *Elder v. Holloway*, 510 U.S. 510, 515-516 (1994); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004) ("Where, as here, the question presented is one of law, we consider it in light of all relevant authority, regardless of whether such authority was properly presented in the district court") (internal quotes omitted); *Puerta v. United States*, 121 F.3d 1338, 1341-1342 (9th Cir. 1997) ("An argument is typically elaborated … , with more extensive authorities, on appeal … and there is nothing wrong with that").

Here, the primary issue before the Court is whether California law applies to

Newton's claims, and the resolution of that issue may depend on where the work was performed. Said work was performed during 14-day hitches on oil platforms off the California coast, so the beginning and end of those hitches necessarily took place on California soil and in its coastal waters. In his opening brief, Newton argues that California law applies during those first and last workdays of his hitches.[2] This argument is directly on point with the primary issue before the Court. That is, assuming only federal law applies on the federal platforms in question, where does California law end and federal law begin? Is it when Newton's foot touched down on a federal platform? If so, did California law apply for that part of his workday when he was traveling to or from that platform? Newton argues that indeed California law did apply to at least that portion of his hitches. He did not waive this *argument* by not raising it in the trial court.

Issues, on the other hand, may sometimes be waived. However, the Ninth Circuit does not impose a bright-line rule that issues may not be raised for the first time on appeal. "The rule of waiver is one of discretion rather than appellate jurisdiction, and this Circuit recognizes an exception under which an appellate court will review an issue not previously raised in the district court." *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980). This is

---

[2] Newton's overtime and minimum wage claims allege that Parker failed to pay Newton and his co-workers for all hours worked each *workday*. ER 25, 32.

especially true where, as here, the issue is one of law. In *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978), the Court noted that when "the issue conceded or neglected in the trial court is purely one of law and either does not affect or rely upon the factual record developed by the parties, (citations omitted), ... the court of appeals may consent to consider it."

Even if the Court were to consider Newton's argument vis-a-vis the application of California law on California soil and in its coastal waters to be an issue, rather than an argument, Newton respectfully requests the Court to exercise its discretion to consider it. The resolution of the question of when California law ceases to apply to Newton's first and final workdays of his hitches does not affect or rely upon the factual record developed by the parties. Instead, it is a purely legal question that may and should be considered by the Court. Alternatively, Newton requests this Court to issue an order remanding the case to the District Court for the purpose of permitting Newton to assert this issue.

I. Newton Did Not Waive his Argument Regarding Leave to Amend

Newton requested leave to amend his complaint in his Opposition to Parker's Motion for Judgment on the Pleadings. He renewed that request in his Opening Brief. Thus, he has not waived the request or any arguments related thereto. Should the Court affirm the District Court's decision, in whole or in part, Newton can amend his complaint to add a claim for overtime under the Labor

Code for the first and last days of his hitch and a claim for overtime and minimum wage violations under the FLSA.

III. CONCLUSION AND SUMMARY OF REQUESTED RELIEF

For the reasons stated above, Plaintiff Newton respectfully requests that this Court vacate the judgment as to each of his claims for relief or, in the alternative, to direct to the District Court to permit Newton to amend his First Amended Complaint.

RESPECTFULLY SUBMITTED this 18th day of October, 2016,

STRAUSS & STRAUSS
A Professional Corporation

By: /s/ *Michael A. Strauss*
Michael A. Strauss
Attorneys for Plaintiff-Appellant

IV. CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that the attached Appellant's Brief is proportionately spaced in 14-point Times New Roman typeface and contains 6,023 words (as calculated by Microsoft Word for Mac), excluding this Certificate of Compliance.

STRAUSS & STRAUSS
A Professional Corporation

By: /s/ *Michael A. Strauss*
Michael A. Strauss
Attorneys for Plaintiff-Appellant

9th Circuit Case Number(s) 15-56352

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 10/18/16 .

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

Signature (use "s/" format) s/ Michael A. Strauss

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)