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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

LAWRENCE P. MANLAPIT, JR.,  
individually as father of LAWRENCE P.  
MANLAPIT, III, DECEASED,

Plaintiff,

vs.

KRUJEX FREIGHT TRANSPORT CORP.;  
KRUJEX TRANSPORTATION CORP.;  
KRUJEX TRANSPORTATION SYSTEMS,

Lead Case No. CV01-19-06625  
(Consolidated with Case Nos.  
CV01-19-23246, CV01-20-00653,  
CV01-20-02624, CV01-20-07803 and  
CV01-20-08172)

**MEMORANDUM IN SUPPORT OF  
MANLAPIT/JOHNSON PLAINTIFFS'  
JOINT MOTION FOR LEAVE TO  
AMEND COMPLAINTS TO ADD A**

LLC; KRUEX LOGISTICS, INC.; ALBERTSON'S COMPANIES; CORNELIEU VISAN; DANIEL VISAN; LIGRA VISAN; STATE OF IDAHO; STATE OF IDAHO DEPARTMENT OF TRANSPORTATION; IDAHO STATE POLICE; PENHALL COMPANY; PARAMETRIX, INC.; SPECIALTY CONSTRUCTION SUPPLY LLC; and DOES 1 through 150, inclusive,

Defendants.

AND ALL CONSOLIDATED ACTIONS.

**CLAIM FOR PUNITIVE DAMAGES AGAINST DEFENDANTS ALBERTSON'S COMPANIES AND KRUEX FREIGHT TRANSPORT CORPORATION**

COME NOW Plaintiffs Lawrence P. Manlapit, Jr. and Dorine E. Norko, individually and in their capacity as Co-Administrators of the Estate of Lawrence P. Manlapit, III<sup>1</sup> ("Manlapit Plaintiffs"), and Plaintiff Daisy Johnson, and C.J. a minor, by and through their undersigned counsel, and respectfully submit this *Memorandum in Support of Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages Against Defendants Albertson's Companies and Kruex Freight Transport Corporation*. In addition, Plaintiffs Kimberly and Michael Westall, by and through their undersigned counsel, hereby respectfully join this memorandum as it pertains to the arguments against Defendant Kruex Freight Corporation.

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<sup>1</sup> As far as the conflicts of law issue regarding the Estate of Lawrence P. Manlapit, III is concerned, although Connecticut has the predominant interest in having its *compensatory damages* law applied to the Estate's wrongful death claim, the same cannot be said on the issue as it relates to *punitive damages*. On that front, Idaho, rather than Connecticut, possesses the predominant interest in having its punitive damages law applied because such an award is not intended to compensate a plaintiff, but rather to punish and deter a defendant. This concept is articulated in *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010), when the Idaho Supreme Court commented on the purpose of punitive damages: "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" and "detering the defendant and others within the state from engaging in similar wrongful conduct in the future." *Id.* at 333, 233 P.3d at 1255 (emphasis added). Thus, when it comes to punitive damages, Idaho law applies because it has the predominant interest. This conclusion also reinforces why Connecticut law applies to the Estate's compensatory damages—because that state has the "most significant relationship" on the issue in order to further Connecticut's policy of allowing full compensation for its decedents' estates in death cases. See *Toyota Motor Co. v. Cook*, 581 S.W.3d 278, 289-92 (Tx. Ct. App. 2019) (performing conflict of law analysis and applying different law on the issue of compensatory damages (Texas) and punitive damages (Mexico)).

## **I. INTRODUCTION**

The Manlapit/Johnson Plaintiffs are entitled to an order granting their joint motion for leave to amend their complaints to assert claims for punitive damages against Defendant Albertson's Companies ("Albertson's"). The Manlapit/Johnson/Westall Plaintiffs are entitled to an order granting their joint motion for leave to amend their complaints to assert claims for punitive damages against Defendant Krujex Freight Transport Corporation ("KFTC"). Both defendants acted in a manner constituting an extreme deviation from reasonable standards of conduct and showed a complete disregard or indifference towards well-established safety principles and practices designed to ensure the life and/or safety of the general motoring public. In fact, their outrageous conduct outlined herein offers a prime example of the catastrophic death and devastation that can result when a motor carrier and a shipper (who also happens to be a motor carrier) blatantly disregard well-established safety principles and practices designed to ensure the life and/or safety of the general motoring public.

By now the Court is aware of the basic facts surrounding the horrific June 16, 2018, fatal collision that took the lives of United States Air Force Service Members Lawrence Manlapit, III, Karlie Westall, and Carlos Johnson. At approximately 11:32 p.m. on Saturday June 16, 2018, a 2019 Volvo truck-tractor in combination with a refrigerated semi-trailer was traveling eastbound on Interstate 84 in Boise, Ada County, Idaho, near milepost 47. The driver of the 2019 Volvo tractor-trailer combination was Mr. Illya Tsar, an employee<sup>2</sup> of KFTC. Mr. Tsar was transporting a load of apples from Yakima, Washington, in route to Methuen, Massachusetts, on behalf of Albertson's.

At the time of the catastrophic collision, I-84 was reduced from four eastbound lanes to one eastbound lane as a result of an ongoing maintenance project.<sup>3</sup> As a result of the lane

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<sup>2</sup> In an attempt to distance itself from Mr. Tsar, KFTC has taken the position he was not an employee but rather an independent contractor. This attempt has no merit given the definition of "employee" in 49 C.F.R. § 390.5, which eliminates such a distinction and exists for the express purpose of defeating a motor carrier's attempt to do what KFTC is attempting to do here given Mr. Tsar, at a minimum, was operating under KFTC's authority at the time of the fatal collision and qualified as a statutory employee.

<sup>3</sup> See Declaration of Clay Robbins, III in Support of Manlapit/Johnson Plaintiffs' Joint Motion for Leave to Amend Complaints to Add a Claim for Punitive Damages Against Defendants Albertson's Companies and Krujex Freight Transport Corporation ("Robbins Dec."), Ex. 1 (National Transportation Safety Board, Highway Factors Group Chairman's Factual Report, June 16, 2018) filed concurrently herewith. The temporary traffic control plan governing the project required that at least two lanes remain open to traffic during all phases of work. The NTSB Highway Factors Group Chairman issued a Factual Report on the multi-vehicle work zone crash on I-84 in Boise, Idaho, on

reduction, a lengthy traffic queue formed.<sup>4</sup> At the end of the traffic queue, near the Cloverdale overpass, was a 2008 Jeep Wrangler, driven by Carlos Johnson. Ms. Karlie Westall and Mr. Lawrence Manlapit, III were traveling as passengers. Mr. Johnson, Ms. Westall, and Mr. Manlapit were stationed at Mountain Home Air Force Base. Mr. Tsar struck the rear end of the Jeep Wrangler forcing it into the rear end of another Volvo tractor-trailer combination.<sup>5</sup> As a result of the crash between Mr. Tsar's tractor-trailer combination and Mr. Johnson's Jeep Wrangler, both vehicles were consumed by fire, and the three occupants of the Jeep Wrangler suffered fatal injuries as did the driver of the 2019 Volvo tractor-trailer combination, Mr. Tsar.<sup>6</sup>

The Idaho Vehicle Collision Report along with the Driver/Vehicle Examination Report cited Mr. Tsar for inattentive driving.<sup>7</sup> In addition, the post-crash examination indicated a driver out-of-service violation for Mr. Tsar due to his failure to have Federal Motor Carrier Safety Administration ("FMCSA") mandated electronic logbooks ("ELDs"). According to the FMCSA post-crash report, Mr. Tsar had been using paper logs for three weeks prior to the crash since he claimed (inaccurately) that the ELD apparatus on his tractor was malfunctioning.<sup>8</sup>

As established herein, the Manlapit/Johnson Plaintiffs have met their burden of demonstrating at this stage that they have a reasonable likelihood of proving facts at trial that would support an award of punitive damages against Albertson's. The Manlapit/Johnson/Westall Plaintiffs have met their burden of demonstrating at this stage that they have a reasonable likelihood of proving facts at trial that would support an award of punitive damages against KFTC. Consequently, their joint motion should be granted.

## **II. APPLICABLE LEGAL STANDARD**

Under Idaho law, a complaint as originally filed cannot contain a prayer for punitive damages; instead, a party seeking punitive damages may move to amend the pleadings to assert a prayer for punitive damages, which shall be allowed if the plaintiff establishes "a reasonable

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June 16, 2018. The report covers factual findings related to the vehicles involved, motor carrier operations, and Mr. Tsar.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; see also Robbins Dec., Ex. 2 (National Transportation Safety Board, Motor Carrier Factors Group Chairman's Factual Report), Ex. 3 (dashcam from Volvo tractor) and Ex. 4 (Idaho Vehicle Collision Report).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at Ex. 5 (Post-Crash Driver/Vehicle Examination Report prepared by the Idaho State Police/Commercial Vehicle Safety Division (Report No. ID3100006357), Inspection Date 6/19/2018).

<sup>8</sup> *Id.* at Ex. 2 (National Transportation Safety Board, Motor Carrier Factors Group Chairman's Factual Report).

likelihood of proving facts at trial sufficient to support an award of punitive damages.” Idaho Code § 6-1604(2).

To support an award of punitive damages, “the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.” Idaho Code § 6-1604(1). For purposes of the motion for leave to amend, the party seeking to add a claim for punitive damages does not need to meet the burden of clear and convincing evidence at the motion stage; rather, the party need only show “a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.” *Bryant v. Colonial Sur. Co.*, 2016 WL 707339, at \*3 (D. Idaho Feb. 22, 2016); see Idaho Code § 6-1604(2). Once the plaintiff has established a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages, “[t]he court shall allow the motion to amend the pleadings.” Idaho Code § 6-1604(2) (emphasis added). The trial court is to use its discretion, after weighing the evidence, in determining whether the plaintiff has established a reasonable likelihood of proving a claim for punitive damages. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 423, 95 P.3d 34, 41 (2004).

In *Cheney v. Palos Verdes Inv. Corp.*, the Idaho Supreme Court described the circumstances necessary to justify punitive damages:

An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was “an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.”

104 Idaho 897, 905, 665 P.2d 661, 669 (1983) (internal citations omitted).

Punitive damages may properly be imposed to further a State’s legitimate interest in punishing unlawful conduct and deterring its repetition within its borders. *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 335-36, 233 P.3d 1221, 1256-58 (2010). “Deterrence” refers to discouraging the defendant and others within the state from engaging in similar wrongful conduct in the future. *Id.* The purpose of punitive damages is to punish the defendant and for the added purpose of protecting the public in the state by deterring the defendant and others from doing such wrong in the future. *Id.*

### **III. STATEMENT OF FACTS**

The Manlapit/Johnson/Westall Plaintiffs will be able to establish the following facts at trial:

**Defendant KFTC and its sole owner, Defendant Corneliu Visan**

1. At the time of the June 16, 2018 fatal collision, KFTC was an interstate motor carrier issued U.S. Department of Transportation number 2314662.<sup>9</sup> It began operations in 2012, and was gifted to the current owner, Defendant Corneliu Visan, in 2015 from his brother.<sup>10</sup> Defendant Visan was President, Secretary, and also the sole shareholder of KFTC at the time of the June 16, 2018 fatal collision.<sup>11</sup>

2. Prior to becoming sole owner of KFTC, Defendant Visan served as Vice-President of Krujex Transport Corporation, a different motor carrier also owned by his brother.<sup>12</sup> Krujex Transport Corporation operated under a different USDOT number and was inactive at the time of the June 16, 2018 fatal collision.<sup>13</sup> That entity, however, had undergone six Compliance Reviews of its safety operations by the FMCSA which revealed concerning safety practices.<sup>14</sup> Defendant Visan was Vice-President of Krujex Transport Corporation during the Compliance Reviews performed in January 2011, May 2011, November 2011, and October 2012.<sup>15</sup> Notably, the Compliance Review performed in January 2011 resulted in Krujex Transport Corporation receiving an “Unsatisfactory” Safety Fitness Rating.<sup>16</sup> The Compliance Reviews conducted in May 2011, November 2011, and October 2012 all resulted in Krujex Transport Corporation receiving a “Conditional” Safety Fitness Rating.<sup>17</sup>

3. Defendant Visan was familiar with the Federal Motor Carrier Safety Regulations (“FMCSRs”) as a result of the FMCSA’s Compliance Reviews and investigations into Krujex Transport Corporation’s safety qualifications.<sup>18</sup> Defendant Visan was also familiar with the FMCSRs as a result of participating in KFTC’s safety audit conducted by the FMCSA as part of the New Entrant Assurance Program.<sup>19</sup> Defendant Visan also certified he was “familiar with the Federal Motor Carrier Safety Regulations” when he submitted Form MCS-150 to the FMCSA on

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<sup>9</sup> See Robbins Dec., Ex. 2 at pp. 2-7 (NTSB’s Motor Carrier Factors Group Chairman’s Factual Report).

<sup>10</sup> *Id.*

<sup>11</sup> See Robbins Dec., Ex. 6 at 15:18—16:2.

<sup>12</sup> See Robbins Dec., Ex. 6; Robbins Dec., Ex. 7 (Tab 111 at p. sourced coded 3571).

<sup>13</sup> See Robbins Dec., Ex. 7 (Tab 111 at p. sourced coded 3571).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

behalf of KFTC in April 2017.<sup>20</sup> Defendant Visan also testified he was familiar with the FMCSRs.<sup>21</sup>

4. Since beginning operations and obtaining its USDOT number in 2012, KFTC had not undergone an FMCSA Compliance Review and, thus, did not have a Safety Fitness Rating.<sup>22</sup>

5. The NTSB Motor Carrier Factors Group Chairman’s Factual Report concluded that “based on its roadside inspection data, before the crash, [KFTC’s] driver out-of-service rate was 16.7 percent, which was above the national average of 5.5 percent.”<sup>23</sup> KFTC’s driver out-of-service rate was even higher in 2017; specifically, in late November 2017, KFTC’s driver out-of-service rate was 37.5%—over seven times the national average.<sup>24</sup> KFTC’s driver out-of-service rate continued to far exceed the national average despite the fact the FMCSA sent a “warning letter” to KFTC in December 2016 notifying it of “a trend in the violations identified during roadside inspections” and “significant non-compliance in the area(s) of **Hours-of-Service Compliance**.”<sup>25</sup> The FMCSA expected KFTC to take “corrective action” as a result of KFTC’s safety performance and compliance problems.<sup>26</sup>

6. The FMCSA conducted a Compliance Review of KFTC’s safety operations in the immediate aftermath of the June 16, 2018 fatal collision.<sup>27</sup> The Compliance Review uncovered numerous violations leading KFTC to receive an “Unsatisfactory” Safety Fitness Rating on July 18, 2018.<sup>28</sup> Overall, there were 22 violations.<sup>29</sup> The FMCSA sent a letter to KFTC, dated July 20, 2018, advising of the “Unsatisfactory” safety rating and identifying the violations of the various safety regulations found during the Compliance Review.<sup>30</sup>

7. Among other things, the FMCSA cited KFTC for failing to obtain the driving records of its drivers prior to hiring them (49 C.F.R. Part 391.51(b)(2)).<sup>31</sup> In fact, the Compliance

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<sup>20</sup> See Robbins Dec., Ex. 8 (MCS-150 from April 2017).

<sup>21</sup> See Robbins Dec., Ex. 6 at 29:5-16.

<sup>22</sup> See Robbins Dec., Ex. 2 at pp. 2-7; Robbins Dec., Ex. 6 at 19:8-15.

<sup>23</sup> See Robbins Dec., Ex. 2 at pp. 5-6.

<sup>24</sup> See Robbins Dec., Ex. 9 (see Exhibit E attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020).

<sup>25</sup> See Robbins Dec., Ex. 10 (emphasis in original); Robbins Dec., Ex. 6 at 54:15—56:3.

<sup>26</sup> *Id.*

<sup>27</sup> See Robbins Dec., Ex. 2 at p. 5; Robbins Dec., Ex. 7 (Tab 111; 3552-3575); Robbins Dec., Ex. 6 at 18:4-15.

<sup>28</sup> See Robbins Dec., Ex. 2 at p. 5; Robbins Dec., Ex. 7 (Tab 111; 3552-3575); Robbins Dec., Ex. 6 at 19:21—20:1, 21:3-8.

<sup>29</sup> See Robbins Dec., Ex. 7 (Tab 111; 3552-3575); Robbins Dec., Ex. 6 at 20:2-6.

<sup>30</sup> See Robbins Dec., Ex. 11; Robbins Dec., Ex. 6 at 21:9-21.

<sup>31</sup> See Robbins Dec., Ex. 2; Robbins Dec., Ex. 7 (Tab 111; 3552-3575).

Review found that at the time of the June 16, 2018 fatal collision, Illya D. Tsar, KFTC's driver involved in the June 16, 2018 fatal collision, was within his first 30 days of employment, yet KFTC had not obtained his Motor Vehicle Records.<sup>32</sup> The Compliance Review also cited KFTC for using Mr. Tsar to haul loads despite the fact he had not completed and furnished an employment application (49 C.F.R. Part 391.21(a)). The Compliance Review further cited KFTC for failing to investigate the background of the drivers it hired in a timely manner (49 C.F.R. Part 391.23(a)). This violation covered the specific failure of KFTC to investigate the background of Mr. Tsar.<sup>33</sup>

8. The Compliance Review also found deficiencies in the manner that KFTC managed its driver hours-of-service.<sup>34</sup> Specifically, the Compliance Review found that KFTC failed to require its drivers to record their duty status using ELDs ("Electronic Logging Device") (49 C.F.R. Part 395.8(a)(1)(i)).<sup>35</sup> As of December 18, 2017, the FMCSA required motor carriers to install and maintain an ELD to track the driver's hours of service; an ELD "automatically records a driver's driving time and facilitates the accurate recording of the driver's hours of service."<sup>36</sup> One of the cited drivers was Mr. Tsar, who kept false paper logs since he incorrectly claimed that the ELD on the 2019 Volvo tractor he was operating was not functioning.<sup>37</sup> In addition to failing to require its drivers to use ELDs for recording hours-of-service, the Compliance Review cited KFTC for making, or permitting drivers to make, a false report regarding duty status (49 CFR Part 395.8(e)(1)).<sup>38</sup>

9. The Compliance Review uncovered violations associated with controlled substance and alcohol testing violations, such as KFTC's failure to ensure drivers undergo testing for controlled substances and alcohol; failure to maintain records for 5 years; and failure to provide educational materials explaining the requirements of 49 C.F.R. Part 382.<sup>39</sup> It also uncovered other miscellaneous violations such as KFTC's failure to keep an accident register; using a driver not medically examined; and numerous inspection and maintenance record keeping issues.<sup>40</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Robbins Dec., Ex. 1 at p. 6; Robbins Dec., Ex. 7 (Tab 111; 3552-3575).

<sup>40</sup> *Id.*



10. During the period leading up to the fatal collision on June 16, 2018, it is clear KFTC had major deficiencies in its safety management programs, policies, and driver performance.<sup>41</sup> The FMCSA’s “Recommendations” are vast and reveal the utter failure of KFTC/Defendant Visan to have sufficient safety policies and procedures in place at the time of the fatal collision.<sup>42</sup>

11. The FMCSA also expressed concern over KFTC’s financial stability calling it “questionable” as it “largely leases their vehicles and office space and has no major assets.”<sup>43</sup> Defendant Visan agreed with that finding; in fact, he testified KFTC had no major assets and that he was working out of his home at the time of the June 16, 2018 fatal collision.<sup>44</sup>

12. Regarding the violations identified in paragraphs 6 and 7 above, Defendant Visan admitted to the FMCSA on August 1, 2018, that they were caused by the following:

These violations occurred because [KFTC] did not have a process in place to ensure that all drivers had Driver Qualification files completed and containing the required documentation set forth by the FMCSA, including employment applications and investigations into our drivers’ employment and driving histories. Because we did not have a process in place ensuring completion of driver files, we failed to maintain crucial documents, including record of our drivers’ medical certificates and records of the verification of the National Registry status of each of our drivers’ medical examiner. Further, we did not have a practice in place to conduct annual reviews of driving records to verify that our drivers continued to qualify for safety-sensitive functions.  
and

These violations occurred because [KFTC] did not have Hours of Service policy in place to ensure drivers were held accountable for accurately following the Hours of Service rules as set forth in §395 of the FMCSA guidelines. Our company also did not have a log auditing process in place at the time to ensure drivers were held accountable for accurately following the Hours of Service rules as set forth by section §395 of the FMCSA guidelines. Further, [KFTC] was frequently using rental trucks that had their own ELD systems. Our drivers did not have the proper training to utilize each different type of ELD the rental trucks were offering, and therefore resorted to paper logs when they did not have success with the ELD installed.<sup>45</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> See Robbins Dec., Ex. 7 (Tab 111; 3567-3569); Robbins Dec., Ex. 6 at 21:22—22:22.

<sup>43</sup> See Robbins Dec., Ex. 7 (Tab 111; 3571); Robbins Dec., Ex. 6 at 21:22—22:22.

<sup>44</sup> See Robbins Dec., Ex. 6 at 25:19—26:14.

<sup>45</sup> See Robbins Dec., Ex. 12; Robbins Dec., Ex. 6 at 30:2—35:22.

Defendant Visan confirmed the violations accurately described the manner in which KFTC operated in 2017 and 2018.<sup>46</sup> In summary, prior to the fatal collision, KFTC did not have a process in place to maintain driver qualification files and did not review driving records to assure their drivers qualified for safety sensitive functions; KFTC did not have an hours of service policy in place and did not hold their drivers accountable for following hours of service rules; KFTC also did not audit their drivers' logs to hold their drivers accountable; KFTC did not train their drivers on utilizing the ELD devices on the rental trucks secured by KFTC for use in its business (such as the 2019 Volvo involved in the fatal collision). As a result, KFTC drivers were allowed to falsify their hours of service records.<sup>47</sup>

13. After submitting a corrective action plan to the FMCSA following the fatal collision, KFTC's Safety Fitness Rating was changed to "Conditional" on or about August 21, 2018.<sup>48</sup> Importantly, when advising KFTC of its "Conditional" Safety Fitness Rating in a letter dated August 22, 2018, the FMCSA stated as follows:

This CONDITIONAL rating is the result of a review and evaluation of your safety fitness completed on August 21, 2018. A CONDITIONAL rating indicates that your company does not have adequate safety management controls in place to ensure compliance with the safety fitness standard that could result in occurrences of violations listed in 49 C.F.R. 385.5(a-k).

Immediate action must be taken to correct any deficiencies or violations discovered during the compliance review. Your operation was found to be deficient with respect to the applicable safety regulations in the following areas:

Part 391	QUALIFICATIONS OF DRIVERS
Part 395	HOURS OF SERVICE OF DRIVERS
Part 390	GENERAL REGULATIONS
Part 392	DRIVING OF MOTOR VEHICLES
Part 396	INSPECTION, REPAIR AND MAINTENANCE
Part 382	CONTROLLED SUBSTANCE AND ALCOHOL USE AND TESTING <sup>49</sup>

KFTC remained "Conditional" until it officially ceased business operations in June 2020.<sup>50</sup>

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<sup>46</sup> See Robbins Dec., Ex. 6 at 33:8-11; 35:6-9.

<sup>47</sup> See Robbins Dec., Ex. 1 at p. 7; Robbins Dec., Ex. 7 (at pp. sourced coded 3552-3575).

<sup>48</sup> See Robbins Dec., Ex. 1 at p. 7; Robbins Dec., Ex. 7 (at pp. sourced coded 3552-3575); Robbins Dec., Ex. 13; Robbins Dec., Ex. 6 at 36:7-12.

<sup>49</sup> See Robbins Dec., Ex. 13; Robbins Dec., Ex. 6 at 36:13-21.

<sup>50</sup> See Robbins Dec., Ex. 6 at 36:22—37:1, 37:7-18.

14. Defendant Visan also testified KFTC did not have any training program that it provided to its drivers on ELDs and did nothing to monitor the hour of service compliance for KFTC's drivers in 2017 and 2018 even though that was his responsibility.<sup>51</sup>

**Defendant KFTC hires Illya D. Tsar**

15. The NTSB's Motor Carrier Factual Report has an extensive discussion of Mr. Tsar's commercial driving experience and record of violations along with an assessment of his compliance with hours-of-service regulations through an examination of his paper logbooks.<sup>52</sup>

16. Mr. Tsar's driving record prior to joining KFTC contained numerous convictions and multiple license withdrawals between 2009-2017.<sup>53</sup> A review of Mr. Tsar's driver's record in the Commercial Driver's License Information System (CDLIS) showed numerous convictions for 2009-2016 and several license withdrawals from 2009 to 2017.<sup>54</sup> He had been subject to two license withdrawals from New York: one beginning on February 1, 2017, and the other on April 3, 2017; both were reinstated on August 2, 2017.<sup>55</sup> These withdrawals were for having two and three serious violations within three years, respectively.<sup>56</sup> A copy of Mr. Tsar's driving record from the State of Oregon DMV confirms this observation.<sup>57</sup>

17. Mr. Tsar also operated his own company, TIT Transportation (USDOT number 1725754) from 2008 to 2015.<sup>58</sup> His company, however, was placed out of service by the FMCSA for having an "Unsatisfactory" Safety Fitness Rating.<sup>59</sup> The FMCSA's Compliance Review that led to Mr. Tsar's company being placed out of service revealed numerous violations, including Mr. Tsar operating a commercial motor vehicle with a suspended Oregon license, logbook issues, and numerous record-keeping violations.<sup>60</sup>

18. The record shows KFTC and Defendant Visan did virtually nothing to vet Mr. Tsar before hiring him in May 2018 and allowing him to operate under KFTC's authority. Defendant Visan testified he did not make inquiry of the motor carrier owned by Mr. Tsar (TIT

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<sup>51</sup> *Id.* at 58:24—59:21.

<sup>52</sup> *See* Robbins Dec., Ex. 1 at pp. 9-14.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See* Robbins Dec., Ex. 14.

<sup>58</sup> *See* Robbins Dec., Ex. 1 at pp. 9-14.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Transportation, which had an “Unsatisfactory” Safety Fitness Rating at the time); did not ask Mr. Tsar about his motor vehicle driving record; did not ask Mr. Tsar if he was familiar with ELDs; did not ask him if he was familiar with hours-of-service regulations; and violated the FMCSRs as discussed in the Compliance Review such as failing to investigate Mr. Tsar’s background.<sup>61</sup>

19. While driving a commercial motor vehicle under KFTC’s operating authority (and as discussed above), Mr. Tsar was required to maintain a record of his driving and off-duty status by means of an ELD.<sup>62</sup> Defendant Visan, on behalf of KFTC, informed the NTSB that KFTC did not have an ELD for the 2019 Volvo being operated by Mr. Tsar.<sup>63</sup> Defendant Visan further stated Mr. Tsar was supposed to have supplied his own ELD, but it was not working properly, and thus Mr. Tsar had been utilizing paper logs to track his hours during the time period leading up to and including the June 16, 2018 fatal crash.<sup>64</sup> According to Mr. Tsar’s paper logs, he was off-duty on June 15 until 8:30 p.m., on-duty, but not driving from 8:30 p.m. until 9:00 p.m., and then driving from 9:00 p.m. until midnight.<sup>65</sup>

20. Pursuant to the Motor Carrier Factual Report, the NTSB obtained the ELD from the 2019 Volvo tractor and found that the ELD was, indeed, functional during the relevant time period.<sup>66</sup> Examining the ELD in comparison with Mr. Tsar’s paper logs showed significant disparities. For example, the ELD reflected that Mr. Tsar began driving at 5:54 a.m. (on June 15) and drove for various intervals of time until 1:00 a.m. on June 16. Thus, Mr. Tsar was on-duty throughout the day on June 15 in direct contradiction to his paper logs that showed him to be off-duty during the day on June 15. On June 16, Mr. Tsar’s paper logs stated that he off duty in his sleeper berth from 1:00 a.m. until 2:00 p.m. However, the ELD showed that Mr. Tsar began driving on June 16 at 7:15 a.m., in direct contradiction to his paper logs. He drove a series of relatively short segments (ranging in length from 15 minutes to 3.5 hours) as he headed to Boise, Idaho, on this leg of his cross-country journey to Massachusetts. During the trip on June 16,

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<sup>61</sup> See Robbins Dec., Ex. 6 at 80:17—81:13; Robbins Dec., Ex. 7 (at pp. sourced coded 3552-3575).

<sup>62</sup> See Robbins Dec., Ex. 2 at pp. 6-7; Robbins Dec., Ex. 7 (at pp. sourced coded 3554-3555).

<sup>63</sup> See Robbins Dec., Ex. 2 at p. 7.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at pp. 7-8, 13-14.

<sup>66</sup> *Id.* at pp. 7-8.

Mr. Tsar stopped the vehicle several times, with the ELD recording non-moving periods that were 2.5 hours long or less, and he continued driving until the fatal crash.<sup>67</sup>

21. Defendant Visan testified he never asked Mr. Tsar if he was familiar with utilizing ELDs prior to hiring him in May 2018.<sup>68</sup>

**Defendant Albertson’s Extreme Failures in Meeting Reasonable Standards of Conduct Resulted in Placing a Dangerous Carrier on the Road**

22. Albertson’s had clear knowledge of its obligation to only select partner carriers with evidence of safe and competent operations. The Albertson’s corporate traffic group, however, simply did not know how to implement this knowledge in vetting their “partner carriers.” On July 19, 2017, Albertson’s and KFTC entered into a Master Motor Carrier Transportation Agreement (“Transportation Agreement”) whereby Albertson’s retained the services of KFTC “to transport and deliver certain shipments of general commodities, including, but not limited to, various food products, health and beauty products, medicines, and general merchandise . . .”<sup>69</sup>

23. Pursuant to the Transportation Agreement, Albertson’s required KFTC to “represent[] and warrant[] that it has a ‘satisfactory’ safety rating from the U.S. Department of Transportation (‘DOT’), and will maintain such rating at all times while this Agreement is in effect.”<sup>70</sup> To the extent KFTC was unrated or had not been assigned a safety rating by the USDOT, Albertson’s required KFTC to “warrant[] and represent[] that it has in place safety management controls adequate to meet or exceed the safety fitness standards prescribed in 49 C.F.R. Part 385.”<sup>71</sup>

24. Pursuant to 49 C.F.R. Part 385.5 (“Safety fitness standard”), KFTC, in order to meet the safety fitness standard prescribed in 49 C.F.R. Part 385 and as required by the Transportation Agreement, needed to demonstrate to Albertson’s that it possessed adequate safety

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<sup>67</sup> *Id.* at pp. 13-14.

<sup>68</sup> *See* Robbins Dec., Ex. 6 at 81:7-9.

<sup>69</sup> *See* Robbins Dec., Ex. 9 (*see* Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020).

<sup>70</sup> *Id.* at p. 1.

<sup>71</sup> *Id.*

management controls. Such controls are described in the regulations and those which function to ensure acceptable compliance with applicable safety requirements to reduce risk associated with:

- (a) Commercial driver's license standard violations (part 383 of this chapter),
- (b) Inadequate levels of financial responsibility (part 387 of this chapter),
- (c) The use of unqualified drivers (part 391 of this chapter),
- (d) Improper use and driving of motor vehicles (part 392 of this chapter),
- (e) Unsafe vehicles operating on the highways (part 393 of this chapter),
- (f) Failure to maintain crash registers and copies of crash reports (part 390 of this chapter),
- (g) The use of fatigued drivers (part 395 of this chapter),
- (h) Inadequate inspection, repair, and maintenance of vehicles (part 396 of this chapter),
- (i) Transportation of hazardous materials, driving and parking rule violations (part 397 of this chapter),
- (j) Violation of hazardous materials regulations (parts 170-177 of this title), and
- (k) Motor vehicle crashes and hazardous materials incidents.

In addition, pursuant to 49 C.F.R. Part 385.7, the following are the factors to be considered when determining a motor carrier's safety fitness rating:

- (a) Adequacy of safety management controls. The adequacy of controls may be questioned if their degree of formalization, automation, etc., is found to be substantially below the norm for similar carriers. Violations, crashes or incidents substantially above the norm for similar carriers will be strong evidence that management controls are either inadequate or not functioning properly.
- (b) Frequency and severity of regulatory violations.
- (c) Frequency and severity of driver/vehicle regulatory violations identified during roadside inspections of motor carrier operations in commerce and, if the motor carrier operates in the United States, of operations in Canada and Mexico.
- (d) Number and frequency of out-of-service driver/vehicle violations of motor carrier operations in commerce and, if the motor carrier operates in the United States, of operations in Canada and Mexico.
- (e) Increase or decrease in similar types of regulatory violations discovered during safety or compliance reviews.
- (f) For motor carrier operations in commerce and (if the motor carrier operates in the United States) in Canada and Mexico: Frequency of crashes; hazardous materials incidents; crash rate per million miles; indicators of preventable crashes; and whether such crashes,

hazardous materials incidents, and preventable crash indicators have increased or declined over time.

- (g) Number and severity of violations of CMV and motor carrier safety rules, regulations, standards, and orders that are both issued by a State, Canada, or Mexico and compatible with Federal rules, regulations, standards, and orders.

25. The Transportation Agreement also required KFTC to “immediately notify” Albertson’s if it received a “conditional” or “unsatisfactory” safety rating from the USDOT.<sup>72</sup> Moreover, if KFTC received a “conditional” or “unsatisfactory” safety rating, it was prevented from transporting any shipments unless it received Albertson’s permission.<sup>73</sup>

26. Prior to the June 16, 2018 fatal crash, KFTC had no safety fitness rating as it had never undergone a Compliance Review by the FMCSA.<sup>74</sup> During the period leading up to the June 16, 2018 fatal crash, it is clear KFTC had major deficiencies in its safety management programs/policies and driver performance as described above. At the time the Transportation Agreement was signed on July 19, 2017 and, in fact, until after the June 16, 2018 fatal collision, KFTC had no Safety Fitness Rating. As an unrated motor carrier, according to the terms of the Transportation Agreement, KFTC “further warrants and represents that it has in place safety management controls adequate to meet or exceed the safety fitness standards as prescribed in 49 CFR Part 385.”<sup>75</sup> KFTC admits that it had no such controls in place as discussed above and because Albertson’s corporate traffic group training program was so inadequate, it failed to inquire or investigate whether KFTC had such safety controls in place:

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<sup>72</sup> See Robbins Dec., Ex. 6 at 56:20-24.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See Robbins Dec., Ex. 9 (see Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020, p. 1).

2           **Prior to the signature of this agreement**  
3 **between Krujex and Albertsons, did Albertsons ever**  
4 **make any inquiry as to how it was that Krujex would**  
5 **meet the requirements of 49 CFR, Part 385?**

6           A. No.

7           **Q. Okay. Did they ever ask to see any**  
8 **documentation reflecting the safety management**  
9 **controls that would be compliant with that part**  
10 **number?**

11          A. No.

12          **Q. Did they ever ask to see any**  
13 **documentation that reflected the safety management**  
14 **practices of KFTC at that time?**

15          A. No.

16          **Q. Did they ever ask any questions about**  
17 **how it was KFTC vetted their drivers before hiring**  
18 **them?**

19          A. No.

20          **Q. Did they ever ask to see any**  
21 **documentation that reflected how KFTC monitored**  
22 **their drivers' hour of service compliance?**

23          A. No.

24          **Q. Did they ever ask to see any safety**  
25 **manuals that governed KFTC's operation?**

1          A. No.

2          **Q. Did they ever ask to see any**  
3 **documentation that would reflect training programs**  
4 **that KFTC utilized with regard to its drivers?**

5          A. No.

6          **Q. Did they ever ask to see any training**  
7 **manuals KFTC utilized with respect to its drivers?**

8          A. No.

9          **Q. Did they ask what the practices were of**  
10 **KFTC regarding the review of its driver motor**  
11 **vehicle violations?**

12          A. No.

13          **Q. Did they ever ask to see any driver**  
14 **qualification files?**

15          A. No.

16          **Q. Did they ask to see any procedures**  
17 **governing how driver qualification files were**  
18 **handled at KFTC?**

19          A. No.

20          **Q. Did they ask to see any documentation**  
21 **regarding KFTC's ELD requirements, electronic log**  
22 **device requirements?**

23          A. No.

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<sup>76</sup> See Robbins Dec., Ex. 6 at 57:2—58:23.



27. The Transportation Agreement also required KFTC to follow Albertson's policies and procedures on a variety of matters pertaining to the shipments being transported:

- KFTC “agrees to timely pick up (in accordance with [Albertson’s] procedures . . . accept, and transport goods as to which [KFTC] has committed via [Albertson’s] TMS (currently One Network) . . .”;
- KFTC was required to transport the “Goods” under the Transportation Agreement “on the terms and conditions set forth in the TMS and this Agreement (including the Appendices hereto) . . .”;
- KFTC was required to “comply with [Albertson’s] reporting requirements, and the requirements of any electronic data interchange system(s) utilized by [Albertson’s] . . .”;
- KFTC agreed to follow Albertson’s “applicable equipment cleanliness standards as well as personal hygiene and disease control requirements . . .”;
- KFTC was required to follow any “procedures as [Albertson’s] may promulgate to maintain compliance with laws and regulations, including (but not limited to) [Albertson’s] applicable transportation, operations, and distribution center policies as to which [KFTC] has been advised(‘ Shippers Policies’) . . .”;
- KFTC was required to utilize “Equipment” that met “[Albertson’s] Policies and are of suitable design and manufacture for maintenance, cleaning and use in transport of food . . .”
- KFTC was required to provide “appropriate training to personnel engaged in transportation operations . . .” and was required to “retain[], for a period of at least twenty four months, or so long as such regulations require, records of training . . .”;
- KFTC was required to comply “with all of [Albertson’s] applicable transport sanitation, temperature (including, where required, the pre-cooling phase), segregation, isolation and design specifications . . .”;
- KFTC was required to “comply with [Albertson’s] request to inspect any Equipment . . .”;
- KFTC was required to maintain certain records and to make them available to Albertson’s for inspection upon request;
- KFTC was required to “ensure that temperature control units are properly operating and maintained at all times, that temperature settings are correct and in accordance with [Albertson’s] requirements . . .”;
- One method KFTC could avoid being liable for damage to the goods being transported was if it followed [Albertson’s] rules and procedures for loading, unloading and carriage . . .”<sup>77</sup>

28. Albertson’s provided a copy of its Carrier Handbook to KFTC at the time they entered the Transportation Agreement the purpose of which was to work together to transport and

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<sup>77</sup> See Robbins Dec., Ex. 9 (see Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020).

deliver shipments of general commodities.<sup>78</sup> Albertson's Carrier Handbook purported to remind KFTC that it was required to "adher[e] to [Albertson's] reporting requirements and policies."<sup>79</sup> Albertson's Carrier Handbook also informed KFTC that it included "written descriptions of the steps that you will need to take to perform required tasks."<sup>80</sup> Albertson's 30(b)(6) designee, Matt Geurts, testified Albertson's Carrier Handbook "gets into the nuances [of Albertson's policies] a little more."<sup>81</sup> He further described Albertson's Carrier Handbook as providing "work instructions for [Albertson's] partner carriers."<sup>82</sup>

29. Albertson's Carrier Handbook expressed Albertson's view of its relationship with partner carriers like KFTC:

What you will be doing for Albertson's is very important. You are now part of a team of people who combined efforts provide consumers like yourself the best quality items for the lowest possible cost. Your contribution will be providing transportation of those items by controlling costs, protecting the quality and providing excellent service. This handbook will provide valuable reference information that you will find helpful. Please make the best use of this information that you can.<sup>83</sup>

30. Mr. Geurts confirmed it is important to Albertson's that its goods are transported safely on the nation's highways without endangering the motoring public.<sup>84</sup> He also agreed motor carriers and commercial drivers could be "unsafe."<sup>85</sup>

31. Albertson's retained the right to reject the shipment transported by KFTC if there were issues, which was one method of control utilized by Albertson's to preserve its market standing for providing quality product.<sup>86</sup> Another method of control utilized by Albertson's was

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<sup>78</sup> See Robbins Dec., Ex. 9 (¶ 13 to Melville Declaration); see also Robbins Dec., Ex. 9 (see Exhibit As and I attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020).

<sup>79</sup> See Ex. 9 (see Exhibit I attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, at the page sourced coded as Albertsons00043).

<sup>80</sup> *Id.*

<sup>81</sup> See Robbins Dec., Ex. 15, 253:17-25.

<sup>82</sup> *Id.* at 193:1-4.

<sup>83</sup> See Ex. 9 (see Exhibit I attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, at the page sourced coded as Albertsons00043). Mr. Geurts testified this was Albertson's corporate mind set in 2017 and 2018. See Robbins Dec., Ex. 15, 191:19-25.

<sup>84</sup> See Robbins Dec., Ex. 15, 55:11-14.

<sup>85</sup> *Id.* at 55:7-10.

<sup>86</sup> *Id.* at 98:1-5; 99:6-13.

to include a provision in the Transportation Agreement requiring KFTC “to handle and transport the goods hereunder safely.”<sup>87</sup> Still another method was requiring KFTC to agree that it would not claim a lien on any of the goods it was transporting for Albertson’s.<sup>88</sup>

32. When asked whether Albertson’s would expect that their partner carriers would have adequate safety management controls in place so that Albertson’s reputation is not diminished by an accident because of what is done or not done by an incompetent carrier, Mr. Geurts recognized “that could be a by-product of it.”<sup>89</sup>

33. Albertson’s had the power to terminate the Transportation Agreement for a variety of reasons. These include KFTC’s failure to perform **any** obligation required by the Transportation Agreement, or if KFTC was rated by the USDOT as “Unsatisfactory.”<sup>90</sup> KFTC was rated “Unsatisfactory” in July 2018 as described above.

34. Mr. Geurts, as Albertson’s 30(b)(6) designee, testified his team [Corporate Traffic Group] was responsible for vetting “potential new carriers” and performing “the safety and background checks.”<sup>91</sup> He was personally involved in the process and testified that “everything funnels through me.”<sup>92</sup> Albertson’s employee, Carol Silvers, testified Mr. Geurts approved the decision to allow Krujex to join the team of partner carriers that worked with Albertson’s.<sup>93</sup>

**Albertson’s Failed to Vet KFTC Before or After the June 16, 2018 fatal collision**

35. Mr. Geurts admitted Albertson’s never asked KFTC to provide any documentation or information establishing that it had “safety management controls adequate to meet or exceed the safety fitness standards prescribed in 49 C.F.R. Part 385” as required by the Transportation Agreement; Mr. Geurts testified Albertson’s (1) did not ask KFTC for the driver training documents for its drivers; (2) did not ask KFTC for any documents reflecting regulatory compliance, particularly with hours of service for its drivers; (3) did not ask KFTC for any

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<sup>87</sup> See Robbins Dec., Ex. 9 (see Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020, at p. 2); see also Robbins Dec., Ex. 15, 99:14—100:20.

<sup>88</sup> See Robbins Dec., Ex. 9 (see Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020, at p. 7); see also Robbins Dec., Ex. 15, 214:1—215:1.

<sup>89</sup> See Robbins Dec., Ex. 15, 104:7-14.

<sup>90</sup> See Robbins Dec., Ex. 9 (see Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020, at p. 7).

<sup>91</sup> See Robbins Dec., Ex. 15, 20:25—21:9.

<sup>92</sup> *Id.*

<sup>93</sup> See Robbins Dec., Ex. 16, 42:14-18.

documents reflecting its operating procedures; (4) did not ask KFTC for any documents pertaining to vehicle inspection or maintenance; and (5) did not ask KFTC for any documents to reflect its compliance with the BASIC categories (which Mr. Geurts acknowledged could be used to identify the future crash risk of a carrier).<sup>94</sup>

36. Mr. Geurts, on behalf of Albertson's, testified he did not know what was required to comply with the safety fitness standards prescribed in 49 C.F.R. Part 385.<sup>95</sup> When asked how Albertson's verified a motor carrier it retained, like KFTC, had safety management control adequate to meet or exceed 49 C.F.R. Part 385, he testified Albertson's did not "monitor that directly with the carrier" but rather relied on the "DOT."<sup>96</sup> He admitted Albertson's did nothing to verify whether KFTC had sufficient safety controls in place and claimed it was the responsibility of the USDOT: "I mean, I'll say no. It's because it's the role of the DOT to determine if carriers are safe and abiding by the law."<sup>97</sup> Critically, Mr. Geurts further testified on the subject:

5 Q. Now, what I'm getting at is do you -- does  
6 Albertsons do anything to verify that the carrier does,  
7 in fact, have safety management controls adequate to  
8 meet or exceed the safety fitness standards prescribed  
9 in Part 385?

10 A. Albertsons does not directly go and verify and  
11 review driver records, hours of service or any of those  
12 items, no.

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37. Albertson's has produced very limited documentation regarding any investigation into KFTC's competency as a motor carrier prior to the June 16, 2018, fatal collision.<sup>99</sup> One document, dated November 30, 2017, is a "SAFER Web company snapshot of KFTC which showed KFTC's out-of-service rate for drivers of 37.5%—more than 7 times the national average of 5.3%."<sup>100</sup> There is no record of Albertson's having any communication with KFTC asking for

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<sup>94</sup> See Robbins Dec., Ex. 15, 71:14—73:9.

<sup>95</sup> *Id.* at 74:16-17.

<sup>96</sup> *Id.* at 74:19-25.

<sup>97</sup> *Id.* at 83:8—84:2.

<sup>98</sup> See Robbins Dec., Ex. 15, 75:5-12.

<sup>99</sup> For instance, Spencer Melville, Albertson's Director of Corporate Traffic, testified all information in Albertson's files pertaining to KFTC's Safety Measurement Systems or to SAFER web company snapshots had been produced. See Robbins Dec., Ex. 17, 36:20—37:17 (Melville depo trans.).

<sup>100</sup> See Robbins Dec., Exhibit 22 (see Exhibit F attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020).

an explanation as to the reason for that high figure.<sup>101</sup> While Mr. Geurts acknowledged the 37.5% indicated a “significant out of service percentage,” he stated “if it would have pushed [KFTC] into a conditional rating, it would have been a different conversation . . . .”<sup>102</sup> Tellingly, when KFTC received an “Unsatisfactory” and then “Conditional” rating following the June 16, 2018, fatal collision, there is no record of Albertson’s contacting Krujex to address its safety practices and Defendant Visan testified Albertson’s never made such inquiry.<sup>103</sup>

38. In contrast to the company’s documented behaviors, Mr. Geurts testified he would not have assigned the load in question to KFTC had he known it was not compliant with its obligations under the FMCSA.<sup>104</sup>

39. Albertson’s requested KFTC complete a “Carrier Survey” as part of the onboarding process to become a partner carrier.<sup>105</sup> A member of the Albertson’s Corporate Traffic Group made handwritten notes on the “Carrier Survey” submitted by KFTC that was not attached to the Melville Declaration. It identified the following: “V – 0%/D – 25%/HZMT 0%”.<sup>106</sup> Mr. Geurts testified he did not know what the percentages reflected, but it is clear they referred to KFTC’s out-of-service percentages at the time (Vehicle, Driver & Hazmat) from SAFER. Thus, KFTC was showing a 25% out-of-service rate for drivers—roughly 5 times the national average.<sup>107</sup>

40. Pursuant to the claimed custom and practice of Albertson’s, a 25% out-of-service rate for drivers should have prompted an inquiry of KFTC. Yet Albertson’s has not produced any documentation establishing such an inquiry was made.<sup>108</sup> It was Albertson’s *claimed* custom and practice to follow-up with its partner carriers even if a partner carrier was found to be 1% over the national average.<sup>109</sup> Mr. Geurts also testified the custom and practice of Albertson’s would have been to advise him of the results of such a telephone conversation (if, in fact, that was how the inquiry was made).<sup>110</sup>

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<sup>101</sup> See Robbins Dec., Ex. 15, 152:16—153:14.

<sup>102</sup> *Id.* at 158:6-13.

<sup>103</sup> See Robbins Dec., Ex. 6, 98:2-20; 99:9-25.

<sup>104</sup> See Robbins Dec., Ex. 15, 120:10-16.

<sup>105</sup> See Robbins Dec., Ex. 9, p. 7 (see Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson’s Companies, Inc.’s Motion for Summary Judgment previously filed on December 16, 2020).

<sup>106</sup> See Robbins Dec., Ex. 18.

<sup>107</sup> *Id.*

<sup>108</sup> See Robbins Dec., Ex. 15, 180:17—182:7.

<sup>109</sup> *Id.* at 260:18-22.

<sup>110</sup> *Id.* at 181:15-20.

41. Albertson's Corporate Traffic Group also utilized "CarrierWatch" to help monitor its partner carriers.<sup>111</sup> Albertson's had access to a wide variety of information through CarrierWatch.<sup>112</sup> Albertson's had it set up so CarrierWatch would provide alerts when there was a change in a motor carrier's safety rating (i.e., "satisfactory to conditional or no rating to conditional") or even if there were other status changes relating to out of service or safety.<sup>113</sup> Mr. Geurts testified CarrierWatch monitored its partner carriers on a daily basis and Albertson's would get an alert at the beginning of the day to follow-up on.<sup>114</sup> For instance, if there was an "out of service surge" (meaning above the national average), CarrierWatch would have alerted Albertson's.<sup>115</sup> If that occurred, Mr. Geurts testified the custom and practice of Albertson's would have been to "follow-up with the carriers to get a corrective action plan and have conversations on basically what's different, what happened."<sup>116</sup>

42. As discussed above, KFTC showed an out-of-service rate for drivers of 37.5%—more than 7 times the national average of 5.3%—on November 30, 2017. CarrierWatch would have alerted Albertson's to this significant out-of-service percentage.<sup>117</sup> Per Albertson's custom and practice, KFTC would have been contacted to discuss the issue.<sup>118</sup> However, there is no record of that occurring and Defendant Visan testified Albertson's never contacted him to discuss it.<sup>119</sup>

43. The Albertson's Carrier Handbook purports to establish a practice of performing a business review to be conducted with new partner carriers; it claims the review will be done "in increments of 30, 60, and 90 days to ensure a successful partnership. The agenda will include the Albertson's compliance criteria as well as any obstacles that you may be encountering."<sup>120</sup> Albertson's has not produced any documentation showing these reviews occurred.

44. Albertson's "strongly preferred" KFTC obtain a "Smartway Partner Membership" to show it was a "responsible environmental steward which, at least in part, reflected positively on

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<sup>111</sup> See Robbins Dec., Ex. 15, 63:6-15.

<sup>112</sup> *Id.* at 63:22-25.

<sup>113</sup> *Id.* at 64:1-7.

<sup>114</sup> *Id.* at 66:8-14.

<sup>115</sup> *Id.* at 137:8-21.

<sup>116</sup> *Id.* at 137:22—138:1-7.

<sup>117</sup> See Robbins Dec., Ex. 15, 142:19—143:6.

<sup>118</sup> *Id.* at 142:19—143:6; 180:25—181:5.

<sup>119</sup> See Robbins Dec., Ex. 6, 102:11-15.

<sup>120</sup> See Robbins Dec., Ex. 9 (see Exhibit I attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, source coded Albertsons00023).

Albertson's reputation.<sup>121</sup> In addition, Albertson's preferred KFTC became a member of "Truckers Against Trafficking" to help reduce human trafficking which also reflected positively on Albertson's reputation.<sup>122</sup>

45. KFTC was also required to sign up with Albertson's Transportation Management System ("One Network") in order to be assigned shipments.<sup>123</sup> One Network provided Albertson's "complete visibility of freight movements, from the pickup through the delivery of the freight."<sup>124</sup> KFTC was advised that, pursuant to One Network, "[e]ach shipment will be closely monitored to ensure that all carriers are updating One Network in a timely manner."<sup>125</sup> Albertson's required its partner carriers, like KFTC, to upload or provide information through One Network so every shipment could be tracked.<sup>126</sup> And KFTC was required to make this update to Albertson's each morning a shipment was in transit by 9:00 a.m. MST.<sup>127</sup>

46. Albertson's Carrier Survey also asked KFTC if it had "a satisfactory safety score in the Motor Carrier SMS [Safety Management System]?"<sup>128</sup> KFTC did not answer "yes" or "no"; rather, KFTC responded it had "no [safety] rating."<sup>129</sup>

47. Albertson's Carrier Survey also asked KFTC "Do you intend to comply with the ELD Rule?"<sup>130</sup> KFTC responded "Yes" but also acknowledged 0% of its fleet was currently ELD compliant but it intended to be compliant by December 2017.<sup>131</sup> Mr. Geurts testified this was included as part of the vetting process for partner carriers given the new rule "coming down the

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<sup>121</sup> See Robbins Dec., Ex. 15, 165:11—166:23 (Geurts depo trans.).

<sup>122</sup> *Id.* at 167:3—168:2.

<sup>123</sup> See Robbins Dec., Ex. 9 (see Exhibit A attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, at p. 1); see Robbins Dec., Ex. 15, 193:5-11 (Geurts depo trans.).

<sup>124</sup> See Robbins Dec., Ex. 9 (see Exhibit I attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, source coded Albertsons00034).

<sup>125</sup> *Id.*

<sup>126</sup> See Robbins Dec., Ex. 15, 248:11-18 (Geurts depo trans.).

<sup>127</sup> See Robbins Dec., Ex. 9 (see Exhibit I attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, source coded Albertsons00019).

<sup>128</sup> See Robbins Dec., Ex. 9 (see Exhibit F attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, at p. 2).

<sup>129</sup> *Id.*

<sup>130</sup> See Robbins Dec., Ex. 9 (see Exhibit F attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020, at p. 3).

<sup>131</sup> *Id.*

pipeline” that drivers were required to use electronic logging devices as opposed to “old school logbooks to manually write in their entries.”<sup>132</sup>

48. Mr. Geurts claimed Albertson’s “asked [KFTC] to provide what ELD they were using . . .”<sup>133</sup> In directly contrary testimony, Defendant Visan testified Albertson’s never made such inquiry.<sup>134</sup> There is no extrinsic evidence to support Mr. Geurts’ claim that Albertson’s made inquiry to ensure KFTC was ELD compliant before the June 16, 2018, fatal collision.<sup>135</sup> The reality is KFTC was not ELD compliant as required by the FMCSA at the time of the June 16, 2018 fatal collision. Mr. Geurts admits this fact.<sup>136</sup> So did KFTC through Defendant Visan.

49. When one of Albertson’s partner carriers “goes into a conditional safety rating,” Albertson’s “standard operating procedure” was to “get a corrective action plan from that carrier to address and correct whatever incidents push them into conditional rating.”<sup>137</sup>

50. On August 24, 2018, Defendant Visan/KFTC sent a letter to Albertson’s advising of a “Corrective Action Plan” in light of the FMCSA’s safety audit following the June 16, 2018 fatal collision.<sup>138</sup> This was just a few days after KFTC’s Safety Fitness Rating was changed to “Conditional” as discussed above. Defendant Visan informed Albertson’s the safety audit “brought to light deficiencies in [KFTC’s] hiring process and ongoing driver maintenance.”<sup>139</sup> Defendant Visan further advised Albertson’s that KFTC “must now wait for the DOT to perform another audit in order to upgrade our rating.”<sup>140</sup> He further asked Albertson’s to contact him with any questions, but testified that Albertson’s did not request KFTC provide any information:

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<sup>132</sup> See Robbins Dec., Ex. 15, 174:7-23; 185:23—186:9.

<sup>133</sup> *Id.* at 177:18-24.

<sup>134</sup> See Robbins Dec., Ex. 6, 58:20-23; 66:11-15.

<sup>135</sup> See Robbins Dec., Ex. 15, 177:18—179:16.

<sup>136</sup> See Robbins Dec., Ex. 15, 189:10-15.

<sup>137</sup> *Id.* at 27:23—28:9.

<sup>138</sup> See Robbins Dec., Ex. 19 (Tab 83).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*



9 Q. All right. And as a result of that  
10 correspondence to Albertsons, did Albertsons  
11 request to be provided with any information  
12 concerning the compliance aspects indicated down in  
13 the letter itself concerning driver hiring, driver  
14 file maintenance, or log audit?

15 A. No.

16 Q. Did they ask to see any information  
17 concerning the changes in the processes and  
18 procedures outlined in that letter that you were  
19 telling Albertsons would come into place after the  
20 DOT audit?

21 A. No.

22 Q. Did you have any conversation with  
23 anyone at Albertsons with regard to the content of  
24 that letter at any time after August 24, 2018?

25 A. Not that I remember.

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51. Mr. Geurts testified that Albertson's "put [KFTC] through their – call it their paces, you know to get the information as to what happened with the accident."<sup>142</sup> Mr. Geurts further testified the matter was then passed off to the Albertson's "risk team."<sup>143</sup> Again, this is directly disputed by Defendant Visan who testified that while he told Albertson's about the fatal collision, at no point in time between June 16, 2018 and April 2019 did anyone at Albertson's discuss the cause of the fatal collision or the Corrective Action Plan.<sup>144</sup>

52. Mr. Geurts testified repeatedly on behalf of Albertson's that as a result of the June 16, 2018 fatal collision, Albertson's ceased doing business with KFTC once KFTC provided the Corrective Action Plan in August 2018:

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<sup>141</sup> See Robbins Dec., Ex. 6 at 99:9-25.

<sup>142</sup> See Robbins Dec., Ex. 15, 33:9-24.

<sup>143</sup> *Id.*

<sup>144</sup> See Robbins Dec., Ex. 6 at 98:2-13.

10 Q. All right. And did the risk team from  
11 Albertsons advise that Krujex would remain still a  
12 carrier that Albertsons would be willing to do business  
13 with?

14 A. So, again, we don't do -- we didn't elect to do  
15 business with them. We kept the contract active, but  
16 we -- we -- after the accident, we started backing away  
17 doing business with them to the point where once details  
18 arrived and they -- they provided their corrective  
19 action plan that I mentioned before, at that point, we  
20 removed them from any active business.

\* \* \* \*

12 Q. Okay. But it was ultimately determined that  
13 Albertsons would no longer do business with Krujex; is  
14 that correct?

15 A. Correct.

16 Q. And that was after the review of the corrective  
17 action plan; correct?

18 A. Correct.

\* \* \* \*

5 So in this case, and we'll -- we'll  
6 probably get into this deeper later, their plan, in my  
7 estimation, was, like I said earlier, not adequate to  
8 maintain continue being a partner.

\* \* \* \*

14 A. And this -- I think this reflects in a lot of  
15 those ways, but the point I was getting at is based on  
16 what is in this document, the conversation that Tim and  
17 I had was that this carrier really isn't suitable  
18 anymore where they -- from a safety standpoint. They  
19 violated the contract in terms of not being sufficient  
20 with -- with their safety practices.

\* \* \* \*

3 A. Yeah, I wouldn't say -- yeah, I wouldn't say it  
4 was a suspicion. It simply pointed out in black and  
5 white that there wasn't a sufficient process in place.  
6 And if you recall, I mentioned that this was the primary  
7 reason we moved on, and the communication was -- was  
8 kind of a supplement to that.

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53. Mr. Geurts also testified that once Albertson's received KFTC's Corrective Action Plan: (1) KFTC had been "de-activated in the system"; (2) Albertson's did not award KFTC freight; and (3) in Albertson's "opinion" KFTC "was no longer able to function as a carrier partner, even with the corrective action plan."<sup>146</sup>

54. **Mr. Geurts provided false testimony under oath as Albertson's corporate designee.** As it turns out, Albertson's continued assigning loads to KFTC after receiving the Corrective Action Plan in August 2018 until late April 2019. Defendant Visan testified Albertson's continued assigning KFTC loads under the Transportation Agreement,<sup>147</sup> and his testimony is supported by KFTC's trip report summary which identifies **numerous shipments** being assigned by Albertson's to KFTC after KFTC submitted its Corrective Action Plan in August 2018.<sup>148</sup>

55. Defendant Visan testified Albertson's informed him in **April 2019** that it was terminating the Transportation Agreement because of KFTC's "Conditional Rating."<sup>149</sup> It was pre-text, however, as the record shows Albertson's real motivation for cutting KFTC loose in April 2019 was because that is when it learned it was a named defendant in the first lawsuit filed by Lawrence P. Manlapit, Jr. in this matter. That lawsuit was filed on April 11, 2019. Albertson's reviewed a Safety Measurement System Report for KFTC seven days later on April 18, 2019, which showed, among other things, that KFTC had a "conditional" rating as of August 21, 2018.<sup>150</sup> Mr. Geurts, however, falsely testified **repeatedly** on behalf of Albertson's that it had terminated

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<sup>145</sup> *Id.* at 19:10-20; 37:12-18; 110:5-8; 128:14-20; 129:3-8.

<sup>146</sup> *Id.* at 19:1-11; 19:21-24.

<sup>147</sup> *See* Robbins Dec., Ex. 6 at 86:23—87:2; 88:1-3; 94:25—95:4.

<sup>148</sup> *See* Robbins Dec., Ex. 20.

<sup>149</sup> *See* Robbins Dec., Ex. 6 at 92:20—93:3; 94:20-24.

<sup>150</sup> *See* Robbins Dec., Ex. 9 (*see* Exhibit C attached to the Declaration of Spencer Melville in Support of Defendant Albertson's Companies, Inc.'s Motion for Summary Judgment previously filed on December 16, 2020); Robbins Dec., Ex. 15, 141:15-22.

KFTC long before April 2019 as set forth above. He again testified under oath when discussing the April 18, 2019 SMS Report pulled by Albertson's that KFTC had been "let go" by that date.<sup>151</sup>

56. Mr. Geurts' testimony concerning the timing and reasons for Albertson's terminating KFTC highlights Albertson's knowledge of the risk posed by KFTC as shown by the following purported explanation he offered as to why Albertson's determined in August 2018 that KFTC could no longer act as a "carrier partner":

3 A. Their lack of readiness to correct the  
4 incident. As you mentioned, they were in violation of  
5 the contract, which at that point is already -- you  
6 know, they're in violation of the contract -- of the  
7 contract, and they would -- you know, they would lose  
8 their ability to be a carrier partner with Albertsons at  
9 that time.

10 The second piece being that they would not  
11 meet the expectations to do business based on what they  
12 have in place for communication and managing the  
13 business. They were -- they were going through a  
14 transitional period where we found that it was lacking  
15 from a communication and getting responses from the  
16 carrier standpoint was not sufficient to our  
17 expectations.

18 Q. Okay.

19 A. So there's obviously the safety issue, and  
20 there was also a more -- call it subjective  
21 communication piece of it that was lacking from what we  
22 expect of our carrier partners, which is laid out in the  
23 carrier handbook.

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57. Mr. Geurts also conveyed Albertson's claimed belief that the only time it was required to follow-up with a "partner carrier" to determine whether it possessed safety fitness standards prescribed in 49 C.F.R. Part 385 as required by the Transportation Agreement was after the USDOT changed the safety rating.<sup>153</sup> He testified in that situation "we are responsible to follow-up" and even went so far to testify under oath that "we did."<sup>154</sup> There is no evidence to support Mr. Geurts' claim Albertson's did follow-up. Defendant Visan testified to the exact

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<sup>151</sup> See Robbins Dec., Ex. 15, 142:4-7.

<sup>152</sup> *Id.* at 40:3-23.

<sup>153</sup> See Robbins Dec., Ex. 15, 84:3-21.

<sup>154</sup> *Id.*

opposite—that Albertson’s did not follow-up with him after the fatal collision on the issue of whether KFTC possessed safety fitness standards prescribed in 49 C.F.R. Part 385 as required by the Transportation Agreement.<sup>155</sup>

58. Per Defendant Visan, there were no changes, conditions or limitations placed on KFTC by Albertson’s after he submitted the Corrective Action Plan in August 2018.<sup>156</sup> He further testified he did not discuss the hiring of Glostone Trucking Solutions with Albertson’s as part of KFTC’s Corrective Action Plan; that Albertson’s did not request any additional documentation concerning KFTC’s safety program; that Albertson’s never expressed any criticism of KFTC regarding safety concerns following the June 16, 2018 fatal collision; that Albertson’s did not reprimand KFTC following the June 16, 2018 fatal collision; and Albertson’s never informed KFTC that it no longer wanted to work together as a result of the June 16, 2018 fatal collision.<sup>157</sup>

59. Albertson’s is in fact a sophisticated interstate motor carrier in its own right. It has its own motor carrier operating authority and operates its own private fleet (at least 250 semi-trucks as of December 2020).<sup>158</sup> This provides Albertson’s substantial knowledge of the necessity for and challenges in providing safe and efficient transportation of goods in interstate commerce. This remained true before it signed KFTC as a partner carrier, at all times after it signed KFTC to the date of the fatal collision and thereafter.

#### **IV. OPINIONS OF THOMAS M. CORSI, PH.D.**

Plaintiffs have retained Thomas M. Corsi, Ph.D. to offer opinions in his fields of expertise: interstate transportation logistics and supply chain management; motor carrier safety management policies and practices related to safety and compliance with Federal Motor Carrier Safety Regulations (FMCSRs); and broker/forwarder/third party logistics provider (3PL) and carrier responsibility in motor carrier selection and retention. Dr. Corsi is a Professor of Logistics and Director of the Supply Chain Management Program at the Robert H. Smith School of Business at the University of Maryland where he has worked since 1976. Dr. Corsi is well versed in his fields of expertise having authored over 100 articles and four books on logistics and transportation, has worked as a consultant with the USDOT where he has evaluated safety regulations and safety

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<sup>155</sup> See Robbins Dec., Ex. 6 at 98:14-20.

<sup>156</sup> *Id.* at 101:4-9.

<sup>157</sup> *Id.* at 102:11-20; 125:23—126:3; 126:4-7; 126:8-19.

<sup>158</sup> *Id.* at Ex. 15 at 55:15-17.

performance of motor carriers, has worked with the Volpe National Transportation Center to implement the SafeStat methodology for the evaluation of the safety performance of carriers, and has participated in a task force to evaluate compliance reviews for the FMCSA. He is well-qualified to opine on the relevant and appropriate standards of care applicable to KFTC as a motor carrier and Albertson's as a shipper (who is also an experienced motor carrier). The full scope of his opinions is set forth in his Declaration filed concurrently herewith.

As far as KFTC is concerned, Dr. Corsi opines had it exercised reasonable care, it would not have selected Mr. Tsar to drive the 2019 Volvo tractor-trailer combination, nor would it have retained his services for trips under their contract with Albertson's. KFTC's behavior amounted to a flagrant, egregious, outrageous, and conscious failure to comply with federal regulations and is outlined in the Statement of Facts and also in his Declaration. KFTC, through Defendant Visan, did virtually nothing to vet Mr. Tsar or investigate his background as required by the FMCSRs before hiring him in May 2018 and then allowing him to operate a tractor-trailer under KFTC's authority. Per Dr. Corsi, KFTC's conscious failure to use reasonable care in hiring Mr. Tsar amounted to an extreme deviation from reasonable standards of conduct and evinces a complete disregard or indifference on KFTC's part regarding well-established safety principles and practices in the industry designed to ensure the life and/or safety of the general motoring public.<sup>159</sup>

As far as Albertson's is concerned, Dr. Corsi opines that Albertson's did not come close to meeting the industry standard of care applicable to it and violated its own policies in both selecting KFTC and its continued use of that carrier's services to deliver product to Albertson's stores through the date of the fatal crash on June 16, 2018, and thereafter. He opines that the Albertson's employees who reviewed KFTC's application to become a "partner carrier" were not adequately trained in and/or informed about how to determine the competency of a motor carrier and/or its drivers, and further did not have any understanding for or appreciate of the indicia of motor carrier FMCSA regulatory compliance. Per Dr. Corsi, the Albertson's corporate traffic group was not trained in and so did not appreciate the significance of KFTC's persistently high driver "out of service" scores or the fact that KFTC was not ELD compliant. Because they were not adequately trained, they never undertook any meaningful inquiry into the safety management practices or

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<sup>159</sup> See Declaration of Thomas M. Corsi, Ph.D. in Support of Manlapit Plaintiffs' Joint Motion for Leave to Amend Complaints to Add Prayer for Punitive Damages ("Corsi Dec.") at ¶ 30.

procedures of KFTC, even though they were aware of these shortcomings. Albertson's corporate policy was, "If a carrier has a DOT certificate to transport goods, no further inquiry need be made" and per Dr. Corsi, this myopic and, frankly, dangerous approach to the selection of a motor carrier resulted in the absence of appropriate training for the corporate traffic group and directly resulted in the hiring of an incompetent carrier and driver to transport Albertson's product on our nation's highways. The fact that the Albertson's corporate traffic group knew that KFTC had not been assigned a safety rating by the FMCSA was a clear indication that it was entirely incumbent upon the Albertson's corporate traffic group to undertake the vetting that otherwise would have been done by the FMCSA. However, the Albertson's corporate traffic group was not trained in and obviously did not understand the significance of a carrier not having a safety rating or their responsibility in hiring a carrier to be sure that such a carrier had adequate safety management programs and/or procedures in place so as to be certain that Albertson's was not contributing to placing an unsafe motor carrier and driver on the nation's highways. In Dr. Corsi's opinion, these deviations are so dangerous in nature as to be fairly characterized as egregious and outrageous. Dr. Corsi opines Albertson's conscious failure to use reasonable care in the selection and retention of KFTC amounted to an extreme deviation from reasonable standards of conduct, its own policies and evinces a complete disregard or indifference on Albertson's part regarding well-established safety principles and practices in the industry designed to ensure the life and/or safety of the general motoring public.<sup>160</sup>

Pursuant to Dr. Corsi, it is evident that when Albertson's signed its Transportation Agreement with KFTC, an unrated motor carrier, in June of 2017, it made no effort to ascertain whether KFTC had any safety management controls in place to comply with the carrier safety fitness standards outlined in 49 C.F.R. Part 385. (KFTC, through Defendant Visan, has admitted it had none.) It did not even do so after the fatal collision. The only reason Albertson's can claim it did not know about KFTC's lack of safety programs and policies is that Albertson's made no effort to inquire about them due to a failure to adequately train its corporate traffic group as to how a motor carrier should be vetted. Albertson's failed to do so even knowing that the carrier had not received a safety fitness rating. Thus, despite contract requirements that show it knows the importance of such a rating and therefore required KFTC to meet or exceed safety standards set

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<sup>160</sup> *Id.* at ¶ 31.

forth in 49 C.F.R. Part 385, the evidence shows Albertson's turned a blind eye to whether KFTC met those standards. As a result, Albertson's assigned loads to KFTC despite its violations of Part 385, in conscious disregard for the safety of the traveling public. Indeed, Albertson's continued to assign loads to KFTC even after the fatal collision, long after KFTC had been assigned an "unsatisfactory" rating, and long after Albertson's had reviewed what it had described as KFTC's inadequate Corrective Action Plan.<sup>161</sup>

Furthermore, Dr. Corsi finds it significant that Albertson's made no effort to inform itself of KFTC's safety programs at any time throughout its relationship with KFTC, up to the fatal crash on June 16, 2018, and even thereafter. Albertson's also did not review and/or act upon data available from its data provider, Carrier Watch, about KFTC's above average driver out-of-service rate along with its pattern of non-compliance with the Hours-of-Service BASIC. In Dr. Corsi's opinion, Albertson's actions in failing to vet KFTC and still retaining KFTC as its carrier partner fell well below the applicable standard of care for a shipper. Indeed, the information regarding KFTC's above threshold HOS BASIC history and its above average driver out-of-service rate provided direct evidence that the carrier had significant deficiencies in its ability to meet safety performance standards as required in its Transportation Agreement with Albertson's and was significantly more likely to have future crashes than carriers who complied with the HOS BASIC. Moreover, as noted above, had Albertson's made such inquiry of KFTC, they would have been told that KFTC had *no* safety management policies or procedures in place, and as such its drivers were routinely allowed to violate hours of service rules.<sup>162</sup>

Dr. Corsi's Declaration addresses information available to Albertson's that, if accessed and considered (as required by the applicable standard of care), would have led a responsible shipper to conclude KFTC did not have adequate safety management controls in place. Pursuant to Dr. Corsi, Albertson's indifference to KFTC's safety management profile at the time the Agreement was signed, and during the subsequent time period prior to the crash evinces a conscious disregard or indifference for the enhanced crash risk posed by KFTC and its drivers.<sup>163</sup>

In Dr. Corsi's opinion, through Albertson's failure to act on and apparent willful disregard of KFTC's pattern of regulatory non-compliance with hours-of-service regulations, Albertson's

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<sup>161</sup> *Id.* at ¶¶ 71-72.

<sup>162</sup> *Id.* at ¶¶ 79-84.

<sup>163</sup> *Id.* at ¶ 70.



consciously allowed KFTC to continue operating on Albertson's behalf despite KFTC's quantifiable enhanced likelihood of involvement in a future crash.<sup>164</sup>

Overall, Dr. Corsi opines that Albertson's engagement of and continued use of KFTC as its transportation provider represents an extreme deviation from reasonable standards of conduct for a responsible shipper (who is also a motor carrier) and conscious disregard of the enhanced risk posed by a carrier with a compromised safety performance record and a lack of safety management programs and policies to ensure its overall compliance with the FMCSRs. The fact Albertson's is also a motor carrier and as such holding even greater knowledge of what safety requires makes these deviations even more egregious and outrageous. The acts, errors, and/or omissions of Albertson's, in Dr. Corsi's opinion, show the repeated, persistent, and extreme deviation from reasonable standards of conduct and were acts performed by Albertson's through its managing officers, directors and/or employees, that were performed with an understanding of and a complete disregard for the likely consequences of allowing an incompetent carrier to transport Albertson's goods upon the highways of our nation, to wit: a serious trucking accident on an interstate highway that caused and/or contributed to the loss of life. Albertson's utterly failed to ever review (even after the accident) this critical aspect of KFTC's operations. As such, its action/inaction exhibits an extreme deviation from accepted standards by a sophisticated shipper/carrier and, as such, shows a conscious disregard for the enhanced risk to which the motoring public was exposed by its action/inaction.<sup>165</sup>

As a sophisticated interstate motor carrier, Albertson's is and was aware of the challenges in providing safe and efficient transportation. The company has knowledge of the need for a strong set of safety management programs and policies with respect to driver vetting, hiring, training, and supervision. This experience with its own trucking operation makes an even more compelling case for demonstrating that Albertson's failure to apply its own policies and standards for conducting truck operations to the policies and standards of carriers it contracts with demonstrates Albertson's conscious disregard for the dangers caused by selecting carriers (like KFTC) who have no safety standards or policies.<sup>166</sup>

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<sup>164</sup> *Id.* at ¶ 80.

<sup>165</sup> *See* Corsi Declaration at ¶¶ 85, 95.

<sup>166</sup> *Id.* at ¶ 87.

## V. OPINIONS OF V. PAUL HERBERT

Plaintiffs have also retained V. Paul Herbert, a commercial motor carrier and industry safety standards expert, to opine on, among other things, the standard of care with respect to commercial trucking operations, motor carrier safety management policies and practices related to safety and compliance with FMCSRs, carrier responsibility in driver selection and retention, the standard of care for a commercial driver and the standard of care for a shipper before retaining the transportation services of an unrated motor carrier. Mr. Herbert has worked in the trucking industry in various capacities since the mid 1970's, including as a truck driver, owner-operator, truck driver-training instructor, truck driver training program director, and as a consultant for motor carriers and truck driving schools. He is currently licensed and certified as a commercial driver. Consequently, he is well-qualified to opine on the relevant and appropriate standards of care applicable to Mr. Tsar as a commercial driver, KFTC as a motor carrier and Albertson's as a shipper (who is also an experienced motor carrier). The full scope of his opinions is set forth in his Declaration filed concurrently herewith.

Mr. Herbert opines KFTC acted in a manner constituting an extreme deviation from the recognized and accepted standards of care in the industry by not having a process in place to maintain driver qualification files; not reviewing driving records to assure its drivers qualified for safety sensitive functions; not having an hours of service policy in place; not holding its drivers accountable for following hours of service rules; not auditing its drivers' logs to hold its drivers accountable; not having any training programs in place; not training its drivers on how to utilize the ELD devices on the rental trucks used by KFTC in its business (such as the 2019 Volvo involved in the fatal collision), which, in turn, allowed KFTC drivers to falsify their hours of service records.<sup>167</sup>

Pursuant to Mr. Herbert, the motor fleet safety management program of KFTC was grossly inadequate and amounted to an extreme deviation from applicable industry standards as outlined in his Declaration.<sup>168</sup> KFTC blatantly and knowingly failed to "qualify" Mr. Tsar pursuant to the FMCSR's despite his background containing many "red flags," including suspensions and moving

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<sup>167</sup> See Declaration of V. Paul Herbert in Support of Manlapit Plaintiffs' Joint Motion for Leave to Amend Complaints to Add Prayer for Punitive Damages ("Herbert Dec.") at ¶¶ 51, 64.

<sup>168</sup> *Id.*

violations in the fairly recent past.<sup>169</sup> KFTC hired Mr. Tsar and entrusted him with one of KFTC's big rigs without conducting an adequate "background investigation" and blatantly and knowingly failed to assure that he met the minimum "Qualifications of Drivers" requirement. In Mr. Herbert's opinion, KFTC's failures evidence a conscious disregard of or indifference to the enhanced crash risk posed by KFTC operations and its drivers, specifically, Mr. Tsar; such failures are outrageous in nature and constitute extreme deviations from applicable standards.<sup>170</sup>

As far as Albertson's is concerned, Mr. Herbert opines Albertson's conduct was egregious and extreme in its deviation from its duty to the motoring public who would be sharing the roadways with the trucks that were hauling its loads, and that it evidenced a conscious disregard of the enhanced safety risk posed by a motor carrier with a compromised safety record and a lack of an adequate safety program. Pursuant to Mr. Herbert, Albertson's had a responsibility under the industry standard of care to properly "vet" KFTC as one of Albertson's contracted motor carriers. Had Albertson's simply performed even a very cursory search of the FMCSA's SMS database, it would have discovered the fact that KFTC was not safety rated and, as an "unknown commodity," should have been more thoroughly "vetted" as is indicated in section 1 of the Transportation Agreement. Despite contract requirements that show it knows the importance of such a rating and therefore require KFTC to meet or exceed safety standards set in Part 385, the evidence shows Albertson's turned a blind eye to whether KFTC met those standards.<sup>171</sup>

Pursuant to Mr. Herbert, Albertson's is a "sophisticated shipper" when it comes to its safety oversight responsibility for the motor carriers who they contract with. Albertson's operates a fleet of approximately 250 power units (reported to FMCSA through biennial MCS-150 filings). It is a large motor carrier with "For Hire" authority and, as such, has an added measure of knowledge and sophistication when it comes to the FMCSRs and motor fleet safety management standards, policies, practices and procedures. Had Albertson's at any time prior to this horrific crash simply made an online inquiry into the safety fitness standings of KFTC, Albertson's would have discovered that, not only was KFTC an unrated carrier, but that its driver out-of-service rates were through the proverbial roof. A maximum of five minutes spent by somebody in Albertson's

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at ¶ 64.

transportation department would have disclosed the fact that KFTC was woefully deficient in its safety management controls pertaining to the supervision of its drivers.<sup>172</sup>

As a large motor carrier and a sophisticated shipper, Albertson's should have worked with its contracted motor carrier, KFTC, towards meeting a common goal to bring a greater and deeper element of compliance and safety management controls into existence within the smaller motor carrier, or, at a minimum, terminated their contract. Their failure to do so in a timely manner during and immediately following their hiring of the transportation services of KFTC was a very large factor in the occurrence of the terrible crash and demonstrates an extreme deviation from the standards of care. Had Albertson's performed its due diligence under the industry standard of care and properly "vetted" KFTC, it would have discovered that KFTC had little to no "Safety Management Controls" in place and would not have contracted with them. Albertson's willingness to use KFTC for transportation purposes in light of the knowledge of the risk KFTC presented is a factor that led to the collision in this case. Albertson's failure to utilize the available safety information and demonstrated indifference to KFTC's safety management profile at the time the Transportation Agreement was signed, and during the subsequent time period prior to the crash, is strong evidence of a conscious disregard of or indifference to the enhanced crash risk posed by KFTC and its drivers. In Mr. Herbert's opinion, such failures are outrageous in nature.<sup>173</sup>

Albertson's assigned repeated loads to KFTC despite its violations of Part 385. This evidences a conscious disregard for the safety of the traveling public. Indeed, Albertson's continued to assign loads to KFTC even after the collision, long after KFTC had been assigned an "unsatisfactory" rating, and long after Albertson's had reviewed what it had described as KFTC's inadequate Corrective Action Plan. Pursuant to Mr. Herbert, these post-collision assignments powerfully refute Albertson's claims to have been concerned about the safety of its transportation partners prior to the collision.<sup>174</sup> Overall, in Mr. Herbert's opinion, Albertson's engagement and continued use of KFTC as its transportation provider represents an extreme deviation from reasonable standards of conduct for a responsible shipper and conscious disregard of the enhanced risk posed by a carrier with a compromised safety performance record and a lack of safety

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

management programs and policies to ensure its overall compliance with the FMCSRs.<sup>175</sup> The fact Albertson's is also a motor carrier and as such holding even greater knowledge of what safety requires makes these deviations even more egregious and outrageous.<sup>176</sup>

## VI. ARGUMENT AND ANALYSIS

### A. The Actions, or Lack Thereof, by Defendant KFTC Constitute an Extreme Deviation From the Federal Motor Carrier Safety Regulations and Reasonable Conduct and With an Understanding of or Disregard for the Likely Consequences.

In *Davis v. Nevarez*, 2009 WL 1532270 (D. Idaho May 29, 2009), the federal district court granted the plaintiff's motion to amend the complaint to add a claim for punitive damages under comparable circumstances. In that case, a truck driver with mental health conditions was hired by a trucking company even though he lied on his employment application and had also been involved in five preventable accidents during a four-year period. *Id.* at \*4. The trucking company had appointed a driver-manager for the truck driver but failed to provide him with key information about the truck driver so that he could be monitored properly, in direct contradiction to company policy. *Id.* at \*5-6. Roughly a month after the trucking company hired the truck driver, he took a turn while going 15 miles per hour over the speed limit, crossed into oncoming traffic, and caused two vehicles to go off the road and land in a river below, injuring the occupants. *Id.* at \*3.

Applying Idaho state law, including I.C. § 6-1604, the district court granted the plaintiff's motion to amend the complaint to add punitive damages claims against the trucking company for negligently hiring and supervising the truck driver. *Id.* at \*11-12. The evidence, including the plaintiff's expert witness opinions, established that the trucking company "could fall so below the industry standard of care in an area not dictated by a specific rule so as to constitute gross negligence and outrageous conduct." *Id.* at \*9. "A reasonable conclusion under these facts is that so long as [the trucking company] was complying with the letter of the regulations, it approved a driver's application regardless of the many warning signals and common sense risks attendant to the application." *Id.* "It is difficult to imagine, for the purposes of allowing an amendment to allege punitive damages, an applicant with more warning signs of a safety risk than those raised by [the truck driver's] application." *Id.* Therefore, the federal district court concluded that the "[p]laintiff has provided sufficient evidence . . . for the purposes of allowing an amendment, that

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

he could meet his burden in establishing that [the trucking company's] action in hiring [the truck driver] was outrageous and grossly negligent.” *Id.*; see also *Christensen v. Lemaster*, 2006 WL 753227, at \*1-3 (D. Idaho Mar. 21, 2006) (same).

Based on the factual record, there is a reasonable likelihood of establishing facts at trial to support a claim of punitive damages against KFTC based on its actions, or lack thereof, which reflect an extreme departure from the federal guidelines in choosing to hire an unsafe, incompetent driver and allowing him to operate under its motor carrier operating authority. Further, KFTC's actions, or lack thereof, were done with a clear understanding, or disregard of, the likely consequences. Much of the foundation for Plaintiffs' position is based on admitted testimony from KFTC's owner. Collectively, it shows KFTC, through Defendant Visan, demonstrated a deliberate and flagrant disregard for the safety of the motoring public.

As a motor carrier, KFTC had duties to the motoring public to make sure that only competent drivers operate commercial motor vehicles under KFTC's operating authority. In fact, when establishing the FMCSA, Congress specified that it “shall consider the assignment and maintenance of **safety as the highest priority**, recognizing the clear intent, encouragement, and dedication of Congress **to the furtherance of the highest degree of safety in motor carrier transportation**.” 49 U.S.C. § 113(b) (emphasis added). The primary purpose of the FMCSA, therefore, is to “reduce crashes, injuries and fatalities involving large trucks and buses.” (<https://www.fmcsa.dot.gov/mission> - last visited June 7, 2021). Likewise, the “primary purpose of the FMCSRs is to “promote the safe operation of commercial motor vehicles” and “prevent accidents and injury to the public on the highway.” 49 U.S.C. § 31131(a)(1); *AmeriGas Propane, LP v. Landstar Ranger, Inc.*, 230 Cal.App.4th 1153, 1171 (2014). To protect the public against unsafe drivers and motor carriers, the FMCSRs, among other things, describe the “knowledge and skills” that the FMCSA has determined are “necessary to operate a CMV safely,” 49 C.F.R. § 383.110, and they require motor carriers to require knowledge of, observance of and compliance with the FMCSRs. 49 C.F.R. §§ 390.3(e)(1); 390.11 (“Every employer shall be knowledgeable of and comply with all regulations contained in this subchapter which are applicable to that motor carrier's operations”). The FMCSRs are comprised of stringent safety requirements both as to equipment and competence of drivers, and set forth mandatory requirements a motor carrier like KFTC is required to follow when hiring a driver, like Mr. Tsar. See generally 49 C.F.R. Parts 385, 390, 391, 392, 395, and 396.

The sheer devastation that can result when a motor carrier ignores its obligations imposed by the FMCSRs was on full display on June 16, 2018. KFTC, through Defendant Visan, was aware of the FMCSRs, yet deliberately chose to disregard them when hiring Mr. Tsar in May 2018. KFTC, through Defendant Visan, did virtually nothing to vet Mr. Tsar or investigate his background as required by the FMCSRs before hiring him in May 2018 and then allowing him to operate a tractor-trailer under KFTC's authority. KFTC, through Defendant Visan, failed to follow FMCSA guidelines by hiring and retaining Mr. Tsar without first obtaining a completed employment application, vetting his driver's background, or obtaining his driver's Motor Vehicle Record. Had KFTC, through Defendant Visan, followed the FMCSRs, it would have learned that Mr. Tsar had an abysmal driving record containing numerous convictions and multiple license withdrawals. KFTC, through Defendant Visan, would have also learned that Mr. Tsar's own motor carrier company, TIT Transportation, had been placed out of service by the FMCSA for having an "Unsatisfactory" Safety Fitness Rating. The FMCSA's Compliance Review which led to Mr. Tsar's company being placed out of service revealed numerous violations, including Mr. Tsar operating a commercial motor vehicle with a suspended Oregon license, logbook issues, and numerous record-keeping violations. KFTC and Defendant Visan had no business hiring Mr. Tsar as evidenced by the catastrophic collision that occurred less than a month into his employment.

During the period leading up to the fatal collision on June 16, 2018, the overwhelming evidence shows that KFTC had major, persistent deficiencies in its safety management programs/policies and driver performance. Some of these deficiencies involved its failure to have an hours-of-service policy in place and any training program for its drivers on how to utilize mandatory ELDs. At the time of the fatal collision, the FMCSA mandated that motor carriers, like KFTC, install and maintain an ELD to track the driver's hours of service. Yet, KFTC allowed Mr. Tsar to utilize paper logs that showed significant discrepancies with the tractor's ELD that KFTC did not realize even was installed and operational. The record further shows KFTC's failure to abide by the FMCSA guidelines with respect to hours-of-service regulations resulted in numerous logbook violations by its drivers, including Mr. Tsar. This is highly relevant and probative of issues in this case given Mr. Tsar's failure to respond to the lengthy traffic queue that had formed in the advance warning area of the construction zone.

Plaintiffs will put on expert testimony that supports the finding that KFTC, in hiring Mr. Tsar, exhibited an extreme departure from the federal guidelines and, that as a consequence of

its egregious, outrageous, and conscious failure to comply, knowingly placed the motoring public in great danger when it handed the keys to a commercial motor vehicle to Mr. Tsar. (*See Corsi Dec. and Herbert Dec.*) Pursuant to Dr. Corsi and Mr. Herbert, KFTC's conscious failure to use reasonable care in hiring Mr. Tsar amounted to an extreme deviation from reasonable standards of conduct and evinces a complete disregard or indifference on KFTC's part regarding well-established safety principles and practices in the industry designed to ensure the life and/or safety of the general motoring public. (*See Corsi Dec.*, ¶ 30; *Herbert Dec.*, ¶ 64.) The opinions of Dr. Corsi and Mr. Herbert alone are sufficient to support amending the complaint to add punitive damages. *See Vendelin*, 140 Idaho at 424, 95 P.3d at 42; *see also Davis*, 2009 WL 1532270, at \*5; *Christensen*, 2006 WL 753227, at \*3.

**B. The Actions, or Lack Thereof, by Defendant Albertson's Constitute an Extreme Deviation From Reasonable Standards of Conduct, Its Own Procedures, the Transportation Agreement and the Federal Regulations and With an Understanding of or Disregard for the Likely Consequences.**

Based on the factual record, the Manlapit/Johnson Plaintiffs' argument against Albertson's is really quite simple. Albertson's actions, or lack thereof, in this case reflect an extreme departure from reasonable standards of conduct governing the industry, its own stated procedures, the Transportation Agreement and the federal regulations when it decided to hire an unsafe, incompetent motor carrier to transport product to its stores. Further, its actions were done with a clear understanding, or disregard of, the likely consequences. Albertson's decision to continue assigning shipments to KFTC following the fatal collision without conducting any investigation even at that point about KFTC's safety practices further constitutes an extreme deviation from reasonable standards of conduct by a sophisticated shipper/carrier and, as such, shows a conscious disregard for the enhanced risk to which the motoring public was exposed by Albertson's action/inaction. The amendment against Albertson's is further warranted due to the repeated false testimony under oath provided by Matt Geurts as Albertson's corporate designee claiming Albertson's terminated KFTC soon after the fatal collision when, in fact, that was not the case.

The record speaks for itself. Albertson's did virtually nothing to investigate KFTC's safety competency as a motor carrier: (1) before allowing it to be one of its "partner carriers" and "part of the team"; (2) while KFTC was "part of the team" prior to the fatal collision; or (3) even after the fatal collision when it continued assigning shipments to it. Albertson's failure to investigate KFTC is even more egregious and inexcusable given Albertson's is a sophisticated motor carrier



operating a large fleet of tractor-trailers in interstate commerce and thus understands the unique challenges of providing for the safe and efficient transportation of goods.

Albertson's decided to allow KFTC, an unrated motor carrier, to become one of its partner carriers and team members. Despite being aware KFTC had no safety rating, Albertson's took no effort to ascertain whether KFTC had safety management controls in place to either meet or exceed the standards set forth in 49 C.F.R. Part 385 as the basis for determining a carrier's safety fitness. Albertson's indifference to KFTC's safety management profile at the time the Transportation Agreement was signed, and during the subsequent time period prior to the fatal collision, not to mention after, evinces a conscious disregard or indifference for the enhanced crash risk posed by KFTC and its drivers. The only reason Albertson's did not know about KFTC's lack of safety programs and policies is that Albertson's made no effort to inquire about them due to a failure to adequately train its corporate traffic group as to how a motor carrier should be vetted, even knowing that KFTC had not received a safety fitness rating from FMCSA. Thus, despite the Transportation Agreement requiring KFTC to meet or exceed safety standards set in 49 C.F.R. Part 385, Albertson's completely ignored whether KFTC met those standards.

The record shows Albertson's turned a blind eye to other information available to it demonstrating KFTC's incompetency as a carrier, including information via the Safety Measurement System and CarrierWatch. Albertson's knew KFTC had a driver out-of-service rate of 33.3%—nearly 7 times above the national average—yet did nothing to address this glaring red flag. Furthermore, in May 2018, KFTC was assigned an above threshold percentile score in the hours-of-service compliance BASIC. This data was available to Albertson's (through Carrier Watch), but not reviewed or acted upon prior to the fatal collision. The information regarding KFTC's pattern of noncompliance provided direct evidence that it had significant deficiencies in its ability to meet safety performance standards as required by the Transportation Agreement and was significantly more likely to have future crashes than carriers who complied. (*See Corsi Dec.*, ¶ 76.) Thus, Albertson's consciously disregarded available evidence showing KFTC's pattern of regulatory non-compliance with the FMCSRs related to hours-of-service compliance.

Albertson's failure to investigate KFTC's fitness as a motor carrier is even more stunning here given that Albertson's custom and practice was to follow-up with its partner carriers even if a partner carrier was found to be 1% over the national average or percentile score. (Statement of Facts, ¶ 40.) However, the record shows Albertson's never made any inquiries of KFTC. Of

course, had Albertson's made such inquiry of KFTC, Albertson's would have learned that KFTC had **no** safety management policies or procedures in place, and as such its drivers were routinely allowed to violate hours of service rules.

Because the Albertson's corporate traffic group was not adequately trained, Albertson's never undertook any meaningful inquiry into the safety management practices or procedures of KFTC, even though Albertson's were aware of these shortcomings. It is clear that Albertson's corporate policy was, "If a carrier has a DOT certificate to transport goods, no further inquiry need be made." Pursuant to Dr. Corsi, this myopic and, frankly, dangerous approach to the selection of a motor carrier resulted in the absence of appropriate training for the corporate traffic group and directly resulted in the hiring of an incompetent carrier and driver to transport Albertson's product on our nation's highways. In Dr. Corsi's opinion, it amounted to an extreme deviation from standards of reasonable conduct. (*See Corsi Dec.*, ¶ 31.)

In *Vendelin, supra*, the plaintiff filed a motion to add a punitive damages claim under Idaho Code § 6-1604. Plaintiff supported her motion with an expert opinion that "Costco's failure to train its employees in proper display techniques constituted an extreme deviation from industry practice." 140 Idaho at 424, 95 P.3d at 42. When granting the motion, the district court stated:

Vendelin has established a "reasonable likelihood" of proving facts at trial sufficient to support a punitive damages award. Vendelin's expert believes that Costco's lack of adequate training programs constituted an extreme deviation from the industry standard of care. That evidence is sufficient to demonstrate a reasonable likelihood of proving at least a disregard for likely consequences.

*Id.* Similarly, the Manlapit/Johnson Plaintiffs' have supported their joint motion to amend with the expert opinions of Dr. Corsi on multiple extreme deviations on the part of Albertson's, including a similar opinion on the lack of training front. In *Vendelin*, the Idaho Supreme Court stated "[t]he establishment of adequate employee training procedures is ultimately the responsibility of Costco's corporate management. Under the circumstances, Costco, as a corporation, was either aware or should have been aware that it lacked adequate training procedures and that this deficiency increased the likelihood that Costco customers would be injured by falling merchandise." *Id.* at 431, 95 P.3d at 49.

The same analysis applies here. Similar to *Vendelin*, there is substantial evidence that the Albertson's corporate traffic group was improperly trained, or not trained at all, in proper procedures on how to properly vet a motor carrier leading to Albertson's hiring and retaining a

woefully inadequate motor carrier. And the factual record here is far more egregious than in the *Vendelin*. The extreme deviation on the lack of training front is in addition to other extreme deviations identified by Dr. Corsi.

Albertson's conscious disregard for the life and safety of the motoring public is further illustrated by its outrageous decision to continue assigning shipments to KFTC following the fatal collision that took the lives of three innocent people. The Manlapit/Johnson Plaintiffs will be able to show Albertson's did not believe it was necessary or important to investigate the cause of the horrific collision or to inquire about KFTC's safety practices, or lack thereof, following this horrific event. Any reasonable shipper would have known KFTC would have been interviewed by the NTSB and the FMCSA following the fatal collision and obviously had critical information bearing on its fitness to operate as a motor carrier.

Albertson's post-collision conduct is a continuation of the conscious disregard for the life and safety of the motoring public it exhibited prior to the fatal collision and sheds further light on its bad state of mind relevant to the issue of punitive damages. *See, e.g., Peshlakai v. Ruiz*, 39 F. Supp. 3d 1264 (D.N.M. 2014) (stating post-accident evidence is relevant "because it shows [defendant's] state of mind for purposes of punitive damages . . ."); *Hoppe v. G.D. Searle & Co.*, 779 F. Supp. 1413, 1424 (S.D.N.Y. 1991) (post-injury conduct of a defendant is admissible on the issue of punitive damages).

This is true even after Albertson's learned KFTC received an "Unsatisfactory" Safety Fitness Rating in July 2018. This is true even after KFTC was upgraded to "Conditional" in August 2018. KFTC, through Defendant Visan, provided a "Corrective Action Plan" alerting Albertson's to the fact that the FMCSA's safety audit "brought to light deficiencies in [KFTC's] hiring process and ongoing driver maintenance." Even at that point, Albertson's did not believe it was necessary or important to inquire or investigate even though the information available—had Albertson's inquired—firmly established KFTC's unfitness as a motor carrier. In fact, Albertson's needed to look no further than the FMCSA's letter to KFTC in August 2018 where it stated "A CONDITIONAL rating indicates that your company does not have adequate safety management controls in place . . ." (Statement of Facts, ¶ 13.) Pursuant to Albertson's procedures, it was required to communicate with a partner carrier if "pushed into a 'Conditional' rating"—yet inexplicably no such inquiry was made even at that point in time.

What is further troubling about Albertson's conduct is the fact its corporate designee, Matt Geurts, provided **false testimony under oath** when stating repeatedly that Albertson's essentially terminated KFTC in **August 2018** upon receiving the Corrective Action Plan. (Statement of Facts, ¶ 52.) In truth, Albertson's continued assigning shipments to KFTC through **April 2019** despite KFTC having a "Conditional" Safety Fitness Rating. There can be no question Albertson's decision to terminate KFTC came about solely as a result of Albertson's learning it was a named defendant in the first lawsuit filed by Lawrence P. Manlapit, Jr. on April 11, 2019. Notably, Albertson's reviewed a Safety Measurement System Report for KFTC seven days later (April 18, 2019) and no doubt the decision to terminate at that time was motivated purely by Albertson's desire to distance itself from KFTC. By that time, however, it was too late and is further evidence of Albertson's egregious and outrageous behavior.

What is further troubling is the fact Albertson's 30(b)(6) deposition is not the first time questionable testimony was provided on its behalf in this matter. Spencer Melville, Albertson's Director of Corporate Traffic, provided a sworn declaration in support of Albertson's motion for summary judgment. There were several exhibits attached to Mr. Melville's Declaration wherein he testified they were true and correct copies of what he purported them to be. However, upon closer inspection, the Declaration contained clear errors that were addressed during his deposition.

For instance, Mr. Melville testified in his Declaration that Exhibit I was "a true and correct copy of Albertsons Companies' Carrier Handbook for years 2017 and 2018 that was provided to Krujex . . .," yet certain documents contained therein are dated "June 2019" which is after the fatal collision, obviously did not exist in 2017 or 2018 and, as it turns out, were generated a few months after Albertson's finally decided to terminate KFTC after learning it had been sued.<sup>177</sup> Mr. Melville also testified Exhibit J was a true and correct copy of the invoice associated with the shipments of apples being transported at the time of the fatal collision, but it is clear that document had nothing to do with the shipment KFTC was transporting on behalf of Albertson's at the time of the fatal collision.<sup>178</sup>

Regardless, the inaccuracy of testimony being advanced on Albertson's behalf concerning the timing and reasons for Albertson's terminating KFTC is further highlighted when Mr. Geurts

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<sup>177</sup> See Robbins Dec., Ex. 17, 25:1—27:25.

<sup>178</sup> *Id.* at 33:5-13.

explained why Albertson’s determined in August 2018 that KFTC could no longer act as a “carrier partner”—because of safety concerns, KFTC’s lack of readiness to correct the incident, that KFTC’s communication was lacking and did not meet Albertson’s expectations. (Statement of Facts, ¶ 56.) Albertson’s explanation might be viable if, indeed, Albertson’s terminated KFTC in August 2018; however, that was not the case. But while Mr. Geurts’s testimony might be false and inaccurate as to timing, he unwittingly admitted the proper course Albertson’s **should** have taken in August 2018—immediately terminate its relationship with KFTC because of safety concerns. And the testimony supports the point being made through this motion—that Albertson’s action/inaction exhibits an extreme deviation from reasonable standards by a sophisticated shipper/carrier and, as such, shows a conscious disregard for the enhanced risk to which the motoring public was exposed by Albertson’s indifference towards safety. Lastly, similar to KFTC, the Manlapit/Johnson Plaintiffs will put on expert testimony that supports such a finding. (*See Corsi Dec. and Herbert Dec.*)

**C. Albertson’s Ratified or Sanctioned the Conduct of KFTC and Its Driver and is Responsible for Any Punitive Damage Award That May Ultimately Be Assessed Against KFTC.**

Finally, and as a separate and distinct theory from that set forth in Section B, above, the Manlapit/Johnson Plaintiffs maintain Albertson’s ratified or sanctioned the conduct of KFTC and its driver (Mr. Tsar) by choosing to continue doing business with it after the horrific events of June 16, 2018. Consequently, Albertson’s, as the principal, is responsible for any punitive damage award that may ultimately be assessed against its agent, KFTC.

The Transportation Agreement and Albertson’s Carrier Handbook granted Albertson’s authority over KFTC and established an agency relationship between the two entities. The level of control exerted by Albertson’s over KFTC pursuant to the Transportation Agreement and Albertson’s Carrier Handbook is enormous. *See Forbush v. Sagecrest Multi Family Prop. Owners’ Ass’n, Inc.*, 162 Idaho 317, 331, 396 P.3d 1199, 1213 (2017) (stating “We have long instructed that the “important factor is the control or right of control reserved by the [principal] over the functions and duties of the agent.”) (citation omitted). The Transportation Agreement required KFTC to abide by a host of Albertson’s policies and procedures (Statement of Facts, ¶ 27) and the Albertson’s Carrier Handbook reminded KFTC that it was required to “adher[e] to [Albertson’s] reporting requirements and policies” (*Id.* at ¶ 28). Albertson’s Carrier Handbook

contained written descriptions of the steps it needed to take to perform “required tasks” and Mr. Geurts described it as providing “work instructions for [Albertson’s] partner carriers.” (*Id.*) It expressed Albertson’s view of the relationship as being “part of a team of people” and Albertson’s did not want its reputation to be diminished by poor safety practices of a partner carrier like KFTC. (*Id.* at ¶¶ 23, 26.) Albertson’s required KFTC to sign up with its transportation management system, One Network to be assigned shipments; One Network allowed Albertson’s to closely monitor each shipment being transported by a partner carrier and each shipment was tracked. (*Id.* at ¶ 39.) Albertson’s also purports to have contacted KFTC to make sure it was ELD compliant, even though Defendant Visan testified Albertson’s never made such inquiry. (*Id.* at ¶ 42.)

Albertson’s will likely argue the Transportation Agreement contained a provision referring to KFTC as having “Independent Carrier Status.” (*See* Ex. A to Melville Declaration at p. 9.) Idaho law, however, is clear the legal statuses of an “independent contractor” and “agent” are not mutually exclusive and can overlap, i.e., “an independent contractor may or may not be an agent.” *See Nelson v. Kaufman*, 166 Idaho 270, \_\_\_, 458 P.3d 139, 146 (2020) (citing Restatement (Second) of Agency). Thus, Idaho law is clear that simply saying one is an independent contractor does not necessarily make it so.

Here, the Manlapit/Johnson Plaintiffs maintain Albertson’s, as the principal, ratified or sanctioned the conduct of its agent, KFTC and its driver (Mr. Tsar). In Idaho, a principal may be liable for punitive damages based on the acts of its agent if the principal authorized or ratified the agent’s conduct. *Openshaw v. Oregon Auto. Ins. Co.*, 94 Idaho 335, 487 P.2d 929 (1971); *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551 (1969); *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948). “[A] principal may ratify the unauthorized act of his agent, if, at the time of such ratification, he has knowledge of all the material facts connected with the transaction, and the ratification may be either by words or by conduct indicating an intention on the part of the principal to adopt the act as his own, and such intention may be implied from an acceptance of the benefits of the unauthorized act.” *T.W. & L.O. Naylor Co. v. Bowman*, 39 Idaho 764, 230 P. 347 (1924). The essence of ratification is a manifestation of intent to approve or sanction an act of an agent by a principal operating with knowledge of all material facts. *Id.* Although the effect of a ratified act is essentially the same as an act that was authorized, the distinguishing element is that ratification takes place after the act has occurred while authorization

must occur before the conduct arises. *See Carpenter v. Payette Valley CO-OP*, 99 Idaho 143, 578 P.2d 1074 (1978) (citation omitted).

Here, Albertson's has ratified or sanctioned the conduct of KFTC and its driver by choosing to continue doing business with it after the horrific events of June 16, 2018. Contrary to Mr. Geurts' false testimony, the record shows Albertson's continued assigning loads to KFTC even after the fatal collision, long after KFTC had been assigned an "Unsatisfactory" safety fitness rating, long after KFTC had been assigned a "Conditional" safety fitness rating and long after Albertson's had reviewed what it had described as KFTC's inadequate Corrective Action Plan. Although Mr. Geurts' testimony on when Albertson's was terminated was false, his explanation as to why Albertson's determined in August 2018 that KFTC could no longer act as a "partner carrier" is also strong evidence of ratification. Again, Mr. Geurts testified Albertson's terminated KFTC in August 2018 after receiving the "Corrective Action Plan" because of safety concerns, KFTC's lack of readiness to correct the incident, and that KFTC's communication was lacking and did not meet Albertson's expectations. (Statement of Facts, ¶ 56.) Mr. Geurts essentially admitted what Albertson's should have done in August 2018—immediately terminate its relationship with KFTC because of safety concerns. Yet, Albertson's did not. And in failing to do so, Albertson's not only ratified the conduct of KFTC and its driver, but also continued its own conduct of disregarding public safety. Albertson's egregious failures on these fronts are even more outrageous given it is a sophisticated interstate motor carrier and understands the unique challenges in providing safe and efficient transportation of goods. The fact that Albertson's would continue to do business with KFTC and release loads to it well after the crash, until learning Albertson's was named in a lawsuit serves only to highlight Albertson's ratification under the circumstances and its desire to continue accepting benefits offered by KFTC under the Transportation Agreement and Albertson's Carrier Handbook.

The record shows there were no changes, conditions or limitations placed on KFTC by Albertson's after KFTC submitted the Corrective Action Plan in August 2018. According to Defendant Visan, Albertson's did not discuss with him the hiring of Glostone Trucking Solutions as part of KFTC's Corrective Action Plan; Albertson's did not request any additional documentation concerning KFTC's safety program; Albertson's never expressed any criticism of KFTC regarding safety concerns following the June 16, 2018 fatal collision; Albertson's did not reprimand KFTC following the June 16, 2018 fatal collision; and Albertson's never informed

KFTC that it no longer wanted to work together as a result of the June 16, 2018 fatal collision. (Statement of Facts, ¶ 58.) Albertson's did virtually nothing to make sure the horrific events of June 16, 2018, would not be repeated. It was business as usual between Albertson's and KFTC. It only changed once Albertson's learned it was a named defendant. An outrageous result that serves only to highlight the need to hold Albertson's accountable.

## **VII. CONCLUSION**

Based on the foregoing, the Manlapit/Johnson Plaintiffs respectfully request that the Court allow them to amend their Complaints to add a claim for punitive damages against Defendant Albertson's. The Manlapit/Johnson/Westall Plaintiffs further respectfully request that the Court allow them to amend their Complaints to add a claim for punitive damages against Defendant KFTC. Defendant KFTC should be held accountable for its actions in allowing an unsafe, incompetent driver to operate a semi-truck on the public highway systems, putting the motoring public in great danger. Defendant Albertson's should be held accountable for hiring an unsafe, incompetent motor carrier, and then continuing to do business with it after the horrific events of June 16, 2018. Finally, because Albertson's ratified or sanctioned the conduct of its agent, KFTC, the Court should also allow the Manlapit/Johnson Plaintiffs to amend their complaints to allege Albertson's is responsible for any punitive damage awards that may ultimately be assessed against KFTC. Allowing punitive damages to be claimed against these two defendants is an appropriate legal avenue to punish, and hopefully deter, a repeat of the events that led to this senseless crash that took the lives of three innocent young people and devastated each of their families.

DATED this 6th day of July, 2021.

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