

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

AMERICAN TRUCKING)
ASSOCIATIONS, INC.)

Case No. CV 08-04920 CAS (CTx)

Plaintiff,)

ORDER DENYING PLAINTIFF'S)
MOTION FOR PRELIMINARY)
INJUNCTION)

vs.)

THE CITY OF LOS ANGELES, et al.)

Defendants)
_____)

I. INTRODUCTION AND BACKGROUND

Defendant City of Los Angeles owns and operates the Port of Los Angeles. Compl. ¶ 12; Opp'n at 4. Defendant City of Long Beach owns and operates the Port of Long Beach. Compl. ¶ 12; Opp'n at 4. The Port of Los Angeles and the Port of Long Beach ("the Ports") form a single contiguous port area along San Pedro Bay in Los Angeles County. Mot. at 4; Opp'n at 2. Authority to manage the assets of the port and craft rules governing port-related activities in each city is invested in defendants Board of Harbor Commissioners of the City of Los Angeles and Board of Harbor Commissioners of the City of Long Beach. Opp'n ¶ 4; Compl. ¶ 8.

1 Cargo is carried to and from the Ports through a process of “drayage,” whereby
2 cargo containers are unloaded from ships and loaded onto truck trailers, from which
3 they are “drayed” by motor carriers to customers, off-dock terminals, or railheads.
4 Compl. ¶ 14. Motor carriers provide these drayage services through contracts with end
5 users of the cargo, or through contracts with ocean carriers. Compl. ¶ 14.

6 Plaintiff American Trucking Associations, Inc. (“ATA”) is the non-profit
7 national trade association for the trucking industry. Compl. ¶ 7. Intermodal Motor
8 Carriers Conference (“IMCC”) is an affiliated conference of the ATA, and counts
9 among its members several motor carriers who provide drayage services to the Ports of
10 Los Angeles and Long Beach. Compl. ¶ 7.

11 On December 7, 2007, the California Air Resources Board (“CARB”) adopted
12 rules to limit the emissions from diesel trucks providing drayage services at California
13 ports. Compl. ¶ 26. Around this same time, the Ports developed a Clean Air Action
14 Plan (“CAAP”). Opp’n at 3. Included in the CAAP was the Clean Trucks Program, a
15 multi-faceted program designed to reduce the emissions of trucks providing drayage
16 services to the Ports. Opp’n at 3.

17 Under the auspices of the Clean Trucks Program, the Ports adopted tariff
18 amendments mandating that all drayage trucks that service the Ports must meet the
19 Environmental Protection Agency (“EPA”) 2007 truck emissions standards by 2012.
20 Opp’n at 6. The Ports also adopted tariff amendments instituting a “Clean Truck Fee,”
21 to be paid by the beneficial cargo owner of merchandise leaving the ports, proceeds
22 from which would be used to help finance the retrofits and truck replacements
23 necessitated by the truck ban. Opp’n at 7.

24 On March 20, 2008, defendant Los Angeles Harbor Board adopted an order
25 which provides that “beginning October 1, 2008, at 8:00 am, no Terminal Operator
26 shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck
27 unless such Drayage Truck is registered under a Concession from the Port of Los
28 Angeles . . .” Compl. ¶ 19. On February 19, 2008, defendant Long Beach Harbor Board

1 similarly mandated that drayage trucks would be required to hold a concession
2 agreement with the City of Long Beach in order to enter the Port of Long Beach
3 beginning on October 1, 2008. Compl. ¶ 22.

4 The Los Angeles and Long Beach concession agreements contain many of the
5 same requirements. Specifically, each concession agreement dictates that motor carriers
6 accessing the Port must (1) remain licensed and in good standing; (2) enter, verify, and
7 update identifying information into the Port's Drayage Truck Registry ("Registry") for
8 each truck and for each driver accessing the Port; (3) be responsible for the compliance
9 and performance of their drivers who access the Port; (4) cause all trucks to comply
10 with the Clean Trucks Program; (5) comply with parking restrictions and submit for
11 approval a parking plan for trucks accessing the Port; (6) submit a truck maintenance
12 plan; (7) comply with truck safety and operations regulations, and make available all
13 records required for compliance with existing regulatory programs, including
14 documents on driver qualifications; (8) ensure that each of its drivers has a valid
15 Transportation Worker Identification Card ("TWIC"); (9) ensure that each of its trucks
16 has a Radio Frequency Identification Device ("RFID") connected to the Registry so that
17 the relevant information is available when the truck enters the Port; (10) ensure that all
18 trucks comply with security laws and regulations; (11) ensure that all trucks post
19 placards providing a phone number to allow the public to report emissions and safety
20 concerns; (12) implement necessary technology required by the concession or the Clean
21 Trucks Program; and (13) ensure that they have the financial capability to execute the
22 concession agreements. Los Angeles Concession Agreement (LACA) at 2-4; Long
23 Beach Concession Agreement (LBCA) at 2-3.

24 In addition, the Los Angeles concession agreement requires that motor carriers
25 fully transition away from independent contractor drivers, mandating that by December
26 31, 2013, all of the drivers accessing the port must be employees of the motor carrier
27 rather than independent contractors. LACA at 2. To accomplish this, the concession
28 agreement provides for a gradual phase-in period, with a first benchmark provision

1 requiring that, by December 21, 2009, 20 percent of drivers used by any motor carrier
2 signing a concession agreement be employees rather than independent contractors.
3 LACA at 2-3. The Long Beach concession agreement, by contrast, does not require a
4 transition away from independent contractor drivers, but does require that motor
5 carriers give hiring preference to drivers with a history of providing drayage services to
6 the Port. LBCA at 2.

7 Under the Los Angeles concession agreement, motor carriers must also pay an
8 initial \$2500 refundable fee, with a \$100 non-refundable annual administrative fee per
9 truck. LACA at 9. Under the Long Beach plan, motor carriers must pay an initial \$250
10 application fee and a \$100 annual administrative fee per truck. LBCA at 7. The two
11 plans also require that motor carriers carry and provide to their drivers varying forms of
12 insurance. Opp'n at 9.

13 On July 28, 2008, plaintiff American Trucking Association, Inc. ("ATA") filed
14 the complaint in this action against defendants City of Los Angeles, Harbor Department
15 of the City of Los Angeles, Board of Harbor Commissioners of the City of Los Angeles,
16 City of Long Beach, Harbor Department of the City of Long Beach, and Board of
17 Harbor Commissioners of the City of Long Beach. The first and second claims of the
18 complaint allege that the Los Angeles and Long Beach concession agreements violate
19 the Supremacy Clause and the Federal Aviation Administration Authorization Act of
20 1994 ("the FAAA"). The third claim alleges that the concession agreements place an
21 undue burden on and discriminate against the right of plaintiff motor carriers to engage
22 in interstate commerce.

23 On July 30, 2008, plaintiff filed a motion for preliminary injunction on counts
24 one and two of plaintiff's complaint. On August 20, 2008, defendants filed their
25 opposition. A reply was filed on August 29, 2008. A hearing was held on September 8,
26 2008. After carefully considering the arguments set forth by the parties, the Court finds
27 and concludes as follows.
28

1 II. LEGAL STANDARD

2 A preliminary injunction is appropriate when the moving party shows either (1) a
3 combination of probable success on the merits and the possibility of irreparable harm,
4 or (2) the existence of serious questions going to the merits and that the balance of
5 hardships tips sharply in the moving party's favor. See Rodeo Collection, Ltd. v. West
6 Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). These are not two distinct tests, but
7 rather "the opposite ends of a single 'continuum in which the required showing of harm
8 varies inversely with the required showing of meritoriousness.'" Id. A "serious
9 question" is one on which the movant "has a fair chance of success on the merits."
10 Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

11 III. DISCUSSION

12 A. LIKELIHOOD OF SUCCESS ON THE MERITS

13 Plaintiff argues for a preliminary injunction on the basis that the concession
14 agreements are preempted by the FAAA.

15 1. STATUTORY BASIS FOR PREEMPTION

16 "Federal preemption occurs when: (1) Congress enacts a statute that explicitly
17 preempts state law; (2) state law actually conflicts with federal law; or (3) federal law
18 occupies a legislative field to such an extent that it is reasonable to conclude the
19 Congress left no room for state regulation in that field." Tocher v. City of Santa Ana,
20 219 F.3d 1040, 1045-46 (9th Cir. 2000), abrogated on other grounds, Tillison v. City of
21 San Diego, 406 F.3d 1126, 1127 (9th Cir. 2005). When a statute provides a reliable
22 indication that Congress intended to preempt state and local regulation, "the scope of
23 federal preemption is determined by the statute." Id. at 1046.

24 Congress enacted the FAAA to achieve deregulation of the motor carrier
25 industry, and therefore, included a "broad preemption statute." Id. The statute provides
26 that, with regard to motor carriers, "a State, political subdivision of a State, or political
27 authority of two or more States may not enact or enforce a law, regulation, or other
28 provision having the force and effect of law related to a price, route, or service of any

1 motor carrier.” 49 U.S.C. § 14501(c)(1).

2 Therefore, for a state regulation to be preempted under 49 U.S.C. § 14501(c)(1),
3 the regulation must be “related to the price, route, or service of a motor carrier that
4 transports property.” Toucher, 219 F.3d at 1047. Relation to price, route, or service is
5 found where “the regulation has more than an indirect, remote, or tenuous effect on the
6 motor carrier’s prices, routes, or services.” Id.

7 In Rowe v. N.H. Motor Transp. Ass’n, 128 S.Ct. 989, 995 (2008), the Court held
8 that a Maine statute dealing with carrier services was preempted under the FAAA. The
9 statute at issue mandated that tobacco retailers could only use carriers for their products
10 who followed certain specific “recipient verification” procedures, for example,
11 procedures to ensure that the person receiving the shipment was of legal age to purchase
12 tobacco. Id. The Court held that the statute was preempted because it “related to the
13 price, route, or service” of the carriers. Id. Specifically, the Court held that the law, in
14 requiring carriers to provide recipient verification services that they would not
15 otherwise provide, contravened the purpose of the federal law, because it allowed the
16 state, rather than the market, to determine what services motor carriers would provide.
17 Id.

18 The Court in Rowe further held that the regulation was not too “tenuous” or
19 “indirect” for preemption to apply, even though the law at issue did not directly regulate
20 the carriers, but instead only regulated the tobacco retailers with regard to which
21 carriers they could employ. Id. at 996; See Toucher, 219 F.3d at 1047. Because the
22 *effect* of the regulation would be that carriers would have to offer different services than
23 what the market would otherwise dictate, the law had a sufficient effect on carrier
24 services for preemption to apply. Rowe, 128 S.Ct. at 996.

25 In the instant case, plaintiff argues that, like the statute in Rowe, the concession
26 agreements are sufficiently related to the “price, route, or service” of motor carriers, and
27 that they are therefore preempted. See id. at 995. Unlike the statute in Rowe, the
28 concession agreements here do not require that the motor carriers provide a specific

1 service to customers that they would not otherwise provide. See id. at 995.
2 Nevertheless, as plaintiff notes, the concession agreements do “establish requirements
3 for motor carriers’ hiring decisions, truck routes, parking restrictions, truck
4 maintenance, truck safety, operations regulations, driver health insurance, driver
5 credentials, compliance tags, security, placards posted on trucks, technology, and
6 financial capability.” Mot. at 9. Failure to comply with the concession agreements
7 would seemingly have a direct effect on what services the motor carriers could provide,
8 because they would be banned from the Ports, and therefore could not provide drayage
9 services to clients there. See Mot. at 15. By contrast, if motor carriers do comply with
10 these requirements, such compliance, which would presumably be costly, would at least
11 likely have an effect on the price of services that the motor carriers charge their
12 customers, and might, as plaintiff argues, have an effect on the services and routes of
13 the motor carriers as well. See Mot. at 15. Thus, like the statute in Rowe, the
14 concession agreements may force motor carriers to change their prices, routes, or
15 services in a way that the market would not otherwise dictate. See 128 S.Ct. at 996.

16 Furthermore, unlike the statute in Rowe, which regulated carriers only indirectly,
17 but was nevertheless preempted, the concession agreements here directly regulate the
18 carriers themselves, at least to the extent that they wish to access the Ports. See id.
19 Therefore, the effect of the concession agreements on “price, route, or service,” would
20 likely be sufficiently non-tenuous and direct to warrant preemption. See Toucher, 219
21 F.3d at 1047.

22 As a result, there is a significant likelihood that plaintiff will succeed in showing
23 that the concession agreements fall within the preemption provision of the FAAA.
24 Indeed, defendants do not seem to dispute this, but instead argue, as discussed below,
25 that they are exempted from preemption.¹

27 ¹Both plaintiff’s complaint and *amicus curiae* submitted by the NRF propose 49
28 (continued...)

1
2 For the foregoing reasons, that Court finds that plaintiff has demonstrated a
3 likelihood of success in showing that 49 U.S.C. § 14501(c)(1) preempts the
4 concession agreements. However, in order for plaintiff to succeed on the merits, the
5 concession agreements must also fall outside the relevant exceptions to preemption.

6 **2. EXCEPTIONS TO PREEMPTION**

7 Defendants argue that the concession agreements are not preempted by the
8 FAAA for three reasons, each of which would be sufficient to defeat preemption.
9 First, defendants argue that the concession agreements are not preempted because
10 the Ports reside on sovereign tidelands, and Congress has not evinced an intent to
11 deprive the states of their sovereignty over these lands. Second, they argue that the
12 concession agreements are not preempted by reason of the market participant
13 exception to preemption. Third, defendants posit that the concession agreements
14 are exempt from preemption under the FAAA's statutory safety exception.
15 Although the Court finds that the concession agreements likely fall outside of the
16 first two exceptions, plaintiff is not likely to succeed in showing that the concession
17 agreements are not exempted from preemption under the safety exception.

18 **a. SOVEREIGN TIDELANDS**

19 Defendants argue that because the port terminals are "located on sovereign

20 _____
21 ¹(...continued)

22 U.S.C. § 14504a(c) as an additional basis for statutory preemption of the concession
23 agreements. This statute, added to the FAAA in 2005, states "[I]t shall be considered an
24 unreasonable burden upon interstate commerce for any State or any political subdivision
25 of a State . . . to enact, impose, or enforce any requirement or standards with respect to .
26 . . any motor carrier or motor private carrier . . . in connection with . . . (D) the annual
27 renewal of the intrastate authority, or the insurance filings, of the motor carrier or private
28 motor carrier, or other intrastate filing requirement necessary to operate within the state."
49 U.S.C. § 14504a(c). However, neither plaintiff nor amicus movant provide any caselaw
interpreting this provision. Although plaintiff and NRF's argument may have some merit,
the Court is not convinced that this statute provides an independent basis for preemption
of the concession agreements.

1 tidelands, granted to the Ports by the State of California,” the concession
2 agreements are saved from preemption. Opp’n at 11-12. As part of their sovereign
3 rights over the tidelands, defendants argue, the Ports have “plenary ‘management
4 and control’ of the property.” Opp’n at 13 (quoting Ill. C.R. Co. v. Illinois, 146
5 U.S. 387, 452-53 (1892). The “‘power to control, regulate and utilize [navigable
6 waterways and the lands beneath them] is absolute,’ except as limited by the federal
7 government’s power over navigable waters.” Opp’n at 13 (quoting Colberg, Inc. v.
8 State, 67 Cal. 2d 408 (1967)). Defendants argue that these sovereign rights prevent
9 preemption, because “if Congress intends to take away core incidents of state
10 sovereignty, it must make ‘unmistakably clear’ that it intends to alter the normal
11 federal-state balance with respect to ‘historic powers of the States.’” Opp’n at 15,
12 citing Gregory v. Ashcroft, 501 U.S. 452, 461 (1991); Solid Waste Agency v. U.S.
13 Army Corps of Eng’rs, 531 U.S. 159, 174 (2001) ; Montana v. United States 450
14 U.S. 544, 551-52 (1981). Section 14501, they argue, does not contain an expression
15 of an “unmistakably clear” intent by Congress to diminish the state’s authority over
16 its tidelands. Opp’n at 16.

17 The Court is not convinced that the fact that the Ports rest on sovereign
18 tidelands renders them immune from preemption under the FAAA. First, as
19 plaintiff notes, the Supreme Court has held that the “State’s power over the beds of
20 navigable waters remains subject to only one limitation: the paramount power of the
21 United States to ensure that such waters remain free to interstate and foreign
22 commerce.” Montana v. United States, 450 U.S. 544, 551 (1981); Reply at 3.
23 Thus, even though the state may have management and control over the lands on
24 which the Ports rest, this right is not absolute. See Reply at 3. Congress’s power to
25 regulate interstate commerce over navigable waterways supercedes the state’s
26 plenary control.

27 Second, none of the cases cited by defendants regarding the “unmistakable
28 intent” requirement is completely analogous to the instant case. For example, the

1 holding requiring an unmistakable intent in Montana v. United States dealt
2 specifically with a question of whether the United States could *convey* sovereign
3 land. 450 U.S. 544, 551 (1981) (holding that “deciding a question of title to the bed
4 of a navigable water must, therefore, begin with a strong presumption against
5 *conveyance* by the United States, and must not infer such a conveyance ‘unless the
6 intention was definitely declared or otherwise made very plain.’” (emphasis added).
7 Gregory dealt with a factual situation that did not in any way involve sovereign
8 rights to tidelands. 501 U.S. 452, 461 (1991). In Solid Waste Agency, the Court
9 required a clear intent, in part because there was a significant constitutional question
10 raised as to whether the administrative interpretation of a federal statute at issue
11 would violate the Commerce Clause. 531 U.S. 159, 174 (2001).

12 In addition, defendants’ argument is weakened by the holding in Western Oil
13 & Gas v. Cary, 726 F. 2d 1340, 1343 (9th Cir. 1984), in which the Court held that
14 the Commerce Clause preempted regulations by a state regarding leasing of its
15 sovereign tidelands.

16 For the foregoing reasons, the Court finds that plaintiff would have a
17 significant likelihood of success in showing that the fact that the Ports sit on
18 sovereign tidelands does not exempt them from preemption under the FAAA.

19 **b. MARKET PARTICIPANT EXCEPTION**

20 In cases of statutory preemption, “the market participant doctrine is based on
21 the proposition that ‘pre-emption doctrines apply only to state *regulation*.’” Engine
22 Mfrs. Ass’n v. South Coast Air Quality Management Dist., 498 F.3d 1031, 1040
23 (9th Cir. 2007) (emphasis added). Therefore, if state action is *proprietary*, rather
24 than regulatory, such action is not generally subject to statutory preemption. Id.
25 Although the scope of the doctrine may vary depending on the federal statute at
26 issue, “the Court will not “infer” preemption of proprietary action unless Congress
27 “‘indicat[es] ... that a State may not manage its own property when it pursues its
28 purely proprietary interests.” Id. at 1044.

1 The Ninth Circuit has held that state action qualifies as proprietary in either
2 of two circumstances. “First, state action is proprietary if it ‘essentially reflect[s]
3 the [governmental] entity's own interest in its efficient procurement of needed goods
4 and services, as measured by comparison with the typical behavior of private parties
5 in similar circumstances.’” Engine Mfrs., 498 F.3d at 1041. Proprietary state action
6 can be saved from preemption if it satisfies this test, even if it is a “comprehensive”
7 policy with “wide application.” Id. Second, “state action is proprietary if ‘the
8 narrow scope of the challenged action defeat[s] an inference that its primary goal
9 was to encourage a general policy rather than address a specific proprietary
10 problem.’” Id. This test “protects narrow spending decisions that do not
11 necessarily reflect a state's interest in the efficient procurement of goods or services,
12 but that also lack the effect of broader social regulation.” Id.

13 **i. “EFFICIENT PROCUREMENT” TEST**

14 Plaintiff’s ability to rely upon the market participant exception to preemption
15 depends on the likelihood that the concession agreements could be deemed to reflect
16 the Ports’ interest in “efficient procurement.” See id.

17 In Engine Manufacturers, the state required governmental entities “to
18 purchase, procure, lease, or contract for use of vehicles meeting specified air
19 pollution criteria.” Id. at 1045. The court held that these provisions were not
20 preempted by the Clean Air Act, because they involved “efficient procurement.” Id.
21 at 1047, 1050. In interpreting the term “efficient procurement,” the court noted that
22 “[e]fficient’ does not merely mean ‘cheap.’ In context, ‘efficient procurement’
23 means procurement that serves the state's purposes which may include purposes
24 other than saving money – just as private entities serve their purposes by taking into
25 account factors other than price in their procurement decisions.” Id. at 1047. It is
26 therefore immaterial if the state or local entity has “policy goals that it seeks to
27 further through its participation in the market . . . so long as the action in question is
28 the state’s own market participation.” Opp’n at 27.

1 Defendants argue that the concession agreements reflect the Ports' interests in
2 "efficient procurement" of drayage services, which serve the critical operational
3 needs of the Ports. Opp'n at 26. The efficiency provided by these agreements,
4 defendants argue, stems from a "recognition that in order to grow and to continue to
5 compete successfully in the market, [the Ports] need to address major environmental
6 and security issues." Opp'n at 22. The concession agreements, therefore, "reflect
7 the Ports' efforts to secure trucking services – services critical to their commercial
8 operation – in a way that will further those objectives." Id.

9 Plaintiff and NRF argue, however, that the Ports are not market participants,
10 because they do not participate in any market relevant to the concession agreements.
11 Reply at 8; Br. for NRF at 12. In other words, the Ports themselves are not
12 procurers of motor carrier services. Instead, the services of motor carriers are
13 procured by end users of the cargo drayed or by ocean carriers, each of whom
14 contract with the motor carriers directly. Compl.¶ 14. Therefore, the concession
15 agreements cannot reflect the Ports' interest in "efficient procurement" of motor
16 carrier services.

17 Essentially, the question as to whether defendants are acting to "procure"
18 motor carrier services for the Ports, and therefore whether they are exempt under the
19 market participation doctrine, depends on the definition of "the market." If
20 defendants are indeed participants in the market for port services, including the
21 services of motor carriers, then the concession agreements could be seen as an effort
22 to efficiently procure those services, and therefore the exception would apply.
23 However, if the defendants are not participants in the market for the services of
24 motor carriers, then the exception will not apply. Although case law provides some
25 conflicting indications, the Court finds that, on balance, plaintiff has a significant
26 likelihood of showing that defendants are not participants in the relevant market.

27 First, it is noteworthy that the Court has stated that for purposes of the
28 market participation doctrine, the "market" should be "relatively narrowly defined."

1 South Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 98 (1984).

2 “The limit of the market-participant doctrine must be that it allows a State to impose
3 burdens on commerce within the market in which it is a participant, but allows it to
4 go no further.” Id. at 97.

5 In one particularly persuasive case, Aeroground, Inc. v. City and County of
6 San Francisco, 170 F.Supp 2d 950, 959 (N.D. Cal. 2001), the court held that
7 defendant airport’s requirement that employers of cargo handlers use a card check
8 rule (a specific way for employees to designate their preferred union representative)
9 had a high probability of being preempted and that, therefore, a preliminary
10 injunction was warranted. In finding that the airport’s market participant argument
11 did not defeat the request for injunctive relief, the court noted that “the card check
12 rule is not an effort by the airport to contract directly with Aeroground, or other
13 employers, for goods or services.” Id. at 957. In other words, the airport’s actions
14 could not be said to be a form of “efficient procurement,” because the airport was
15 not in the market for cargo-handling services. Id. It would be a different case, the
16 court noted, if defendants themselves purchased Aeroground’s cargo-handling
17 services. Id. at 958. Because the airlines, not defendant airport, purchased
18 Aeroground’s services, however, the card check regulation was more akin to a
19 licensing scheme, which controlled the way in which employers of cargo handlers
20 could contract with the various airlines at the airport. Id.

21 The court in Aeroground noted the factual similarities of its case to Golden
22 State Transit Corp v. City of Los Angeles. Id. at 957; See Golden State, 475 U.S.
23 608 (1986). In Golden State, the Court similarly held that a city requirement
24 conditioning the renewal of taxicab franchises on the settlement of a labor dispute
25 was preempted. Id. at 614. In a subsequent Supreme Court case, the Court,
26 commenting on Golden State, indicated that the market participant doctrine would
27 likely have applied in Golden State if the city had “purchased taxi services from
28 Golden State in order to transport city employees,” and, through this procurement

1 activity, had imposed the labor dispute requirement. Bldg. and Constr. Trades
2 Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 227-228
3 (hereinafter “Boston Harbor”).

4 Furthermore, in Aeroground, the court noted that it was insufficient that the
5 genesis of the regulation there at issue was occasioned by the airport’s desire to
6 increase efficiency. 170 F.Supp 2d at 958. “The issue is not whether the
7 government entity operates a business, but whether the law at issue enables the city
8 or state entity to procure goods or services in order to operate as a business.” Id. at
9 958. Therefore, even if the rule were intended only “as a device for increasing the
10 airport’s revenues,” not for any substantive policy reasons, the market participant
11 exception would not necessarily apply, as “simply addressing the financial interests
12 of a public entity does not make such efforts those of a market participant.” 170
13 F.Supp. 2d at 958.

14 Therefore, Aeroground suggests that plaintiff in the instant action has a
15 significant likelihood of showing that the market participant exception does not
16 apply to the concession agreements. Like the airport and the cargo handlers in
17 Aeroground, the ports and motor carriers do not contract directly for the provision
18 of motor carrier services. See id. at 957. Instead, the concession agreements, like
19 the regulations in Aeroground, are akin to a licensing scheme, whereby the Ports
20 license the motor carriers to do business at the ports, provided that they follow
21 certain regulations. See id. at 958.² Under Aeroground, such a system would fall
22

23 ² It is true that a few Commerce Clause preemption cases suggest that an entity does
24 participate in the market when it provides facilities to entities, who in turn provide their
25 services to others. See, e.g., Transport Limousine of Long Island, Inc. v. Port Auth. of
26 N.Y. and N.J., 571 F.Supp 576, 581 (E.D.N.Y. 1983) (Port Authority’s imposition of fees
27 on limousine services in exchange for counter space did not conflict with the Commerce
28 Clause, because Port Authority was acting as a “participant in the market for ground
transportation services because it provided facilities to limousine services.”); Four T’s, Inc
(continued...)

1 outside of the scope of the “efficient procurement” test for the market participation
2 exception.

3 Defendants attempt to distinguish Aeroground on the ground that the policies
4 at issue there were imposed by the airport through a rule, rather than an agreement
5 between the parties. Opp’n at 28. Therefore, they argue, the behavior at issue in
6 Aeroground was on its face more akin to a regulation than market participation.
7 Opp’n at 28. However, there is no indication that the Aeroground court found the
8 context in which the condition was issued to be dispositive of the analysis.
9 Furthermore, defendants’ argument is weakened by the fact that in Golden State, the
10 preempted action was a refusal by defendant city to issue a franchise renewal, rather
11 than a regulation promulgated by the city. 475 U.S. 608, 609.

12 Defendants also argue that Aeroground was wrongly decided to the extent
13 that it held that conduct that does not involve “procurement” is outside of the
14 market participant exception. Opp’n at 28. For example, defendants cite Reeves,
15 Inc. v. Stake, 447 U.S. 429, 437 (1980), in which the Court determined that the
16 market participant exception applied to discriminatory practices by the state
17 regarding the *sale* (rather than procurement) of cement. Defendants also cite dicta
18 in Boston Harbor, where the Court stated that “when a State owns and manages
19 property, for example, it must interact with private participants in the marketplace,”
20 and in doing so, its behavior cannot be deemed to be “regulation” subject to
21 preemption. 507 U.S. 218, 227 (1993). Finally, defendants point out that the
22 Supreme Court has stated that the market participation exception “does not require
23 the city to stop at the boundary of formal privity of contract.” White v. Mass.

24
25 ²(...continued)

26 v. Little Rock Mun. Airport Com’n, 108 F.3d 909, 913 (8th Cir. 1997) (airport’s fee
27 schedule for car rental companies operating in the terminal did not violate the Commerce
28 Clause, because the airports, in providing facilities to the rental companies, were
“participating in the rental car market.”) However, these cases do not persuade the Court
that the concession agreements are subject to the market participant exception.

1 Council of Constr. Empls., 460 U.S. 204, 211 (1983).

2 However, at issue in Boston Harbor was a contract between a government
3 agency charged with providing certain water-supply services and individual
4 contractors who supplied those water supply services. Id. at 231. The agency,
5 therefore, was acting as a “purchaser” in the market for contractors. Id. White
6 involved requirements imposed by the City of Boston on the hiring practices of
7 construction contractors with whom it contracted. 460 U.S. at 206. When the Court
8 held that the market participant exception extends beyond “privity of contract,” it
9 was referring to the effect of the requirements on the employees of the public
10 contractors, contractors from whom the City procured services. See id. at 211.
11 Neither Reeves, nor Boston Harbor, nor White dealt with a situation presented by
12 the instant case, where the defendant is not acting as a direct buyer or seller in the
13 market at issue.

14 Furthermore, a recent decision from the Southern District of Florida with
15 similar facts to the instant action provides a persuasive argument in favor of
16 plaintiff’s contentions herein. In Florida Transportation Service, Inc. v. Miami-
17 Dade County, 543 F. Supp. 2d 1315, 1327 (S.D. Fla. 2008), plaintiffs brought a
18 Commerce Clause challenge to the Port of Miami’s limitations on the number of
19 permits that would be given to stevedores to work the port. The court held that the
20 market participant exception did not apply, because the county was “not a
21 ‘participant’ in the stevedore market.” Id. at 1332. The court found that although
22 the county managed the Port, it did not offer stevedore services or hire stevedores.
23 Id. Furthermore, although the Ports competed with other ports, the market at issue
24 was not the market for port services, but rather the market for stevedores. Id.

25 ii. “NARROW SCOPE” TEST

26 Under the second market participant test employed by the Ninth Circuit,
27 “state action is proprietary if ‘the narrow scope of the challenged action defeat[s] an
28 inference that its primary goal was to encourage a general policy rather than address

1 a specific proprietary problem.” Engine Mfrs., 498 F.3d at 1041. This test
2 “protects narrow spending decisions . . . that lack the effect of broader social
3 regulation.” Id.

4 Defendants argue that the Ports’ concession agreements are applicable only in
5 narrow circumstances. Specifically, the concession agreements apply only to
6 drayage services on Port land “for purposes directly related to the Ports’ commercial
7 operations on the land.” Opp’n at 29. The “specific proprietary problem” faced by
8 the Ports is “how to make the Ports more competitive in the future while ensuring
9 that environmental and safety/security concerns raised by drayage trucks are
10 effectively addressed so that the Ports’ neighbors do not impede efforts to maximize
11 the Ports’ commercial success.” Opp’n at 30.

12 Although the concession agreements do address specific proprietary problems
13 faced by the Ports, it is questionable whether the concession agreements would fall
14 under the “narrow scope” test. See Engine Mfrs., 498 F.3d at 1041. First, the test
15 was designed to protect “narrow spending decisions,” which the concession
16 agreements almost certainly are not. Second, the agreements may not be
17 sufficiently “narrow,” as they contain numerous provisions regulating different
18 aspects of the motor carriers’ services, and apply to all motor carriers wishing to
19 access the Ports.

20 Given the problems associated with characterizing the concession agreements
21 as “efficient procurement” or “narrow” in scope, there is a significant likelihood
22 that plaintiff will succeed in showing that the market participant exception to
23 preemption does not apply in this case.

24 **c. THE “SAFETY EXCEPTION”**

25 The provision of the FAAA preempting state regulation “related to the price,
26 route, or service of a motor carrier that transports property,” contains an express
27 exception to preemption. See 49 U.S.C. § 145019(c). Specifically, this section
28 holds that the preemption provision “shall not restrict the safety regulatory authority

1 of a State with respect to motor vehicles . . .” 49 U.S.C. § 14501(c)(2)(A).

2 “There is little case law interpreting the limits of the safety exception on
3 federal preemption.” Tillison, 406 F.3d at 1129. However, the United States
4 Supreme Court has specified that, in order to fall within the safety exception, a
5 statute, regulation, or provision must be genuinely responsive to public safety
6 concerns. City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S.
7 424, 426 (2002). A regulation does not fall under the safety exception if it is an
8 economic regulation under the guise of a public safety regulation. Id. Therefore,
9 the Tillison court held “our focus in a preemption case like this one is whether the
10 purpose and intent of the body passing the law at issue, whether state or
11 municipality, was truly safety.” 406 F.3d at 1129.

12 However, the Supreme Court has also held that the “narrowest possible
13 construction of the exception” is “surely resistible,” because the FAAA preemption
14 rule and the safety exception “do not necessarily conflict.” Ours Garage, 536 U.S.
15 at 441. Instead, the safety exception “seeks to save from preemption state power ‘in
16 a field which the States have traditionally occupied.’” Id.

17 Defendants argue that the safety exception applies to the concession
18 agreements, because the agreements were “intended in some substantial measure to
19 achieve enhanced Port safety and to address gaps in Port security.” Opp’n at 38.
20 According to defendants, the concession agreements address some “traditional”
21 safety concerns, such as “concerns that older trucks may pose road hazards that
22 newer trucks do not pose” as well as concerns related to “Port security.” Opp’n at
23 38. For example, defendants state that they currently lack any information or
24 records about motor carriers entering the Port, and that the concession agreements
25 address this security concern by allowing the Ports to track the identity of drivers
26 and by holding the drivers accountable to the Ports’ rules. Declaration of Dr.
27 Geraldine Knatz ¶ 36-38.

28 There does not appear to be any case law addressing the question of whether

1 security concerns analogous to the concerns identified by the Ports fall within the
2 safety exception. Some of the cases involving towing have, however, indicated that
3 the safety exception does cover regulations that address safety concerns beyond
4 pure motor vehicle operation safety. For example, the regulations on towing
5 companies upheld in Tillison improved safety by reducing “dangerous
6 confrontations” that might result from towing mistakes and “protect[ed] the vehicle
7 owner from being stranded at a dangerous time and location.” 424 F.3d at 1104.

8 Plaintiff contends that the safety exception does not apply to the concession
9 agreements. First, plaintiff argues that the “Department of the California Highway
10 Patrol has exclusive jurisdiction for the regulation of safety of operation of motor
11 carriers of property,” and therefore the Ports and the cities of Los Angeles and Long
12 Beach lack authority to impose motor carrier regulations. Mot. at 18; Cal. Vehicle
13 Code § 34623(a). This argument is unconvincing, as the safety regulations at issue
14 are not purely related to the “safety of *operation* of motor carriers of property,” but
15 rather address broader concerns more tangentially related to the operation of motor
16 carriers and not under the authority of the California Highway Patrol, such as the
17 security of the Ports. See Cal. Vehicle Code § 34623(a) (emphasis added).
18 Furthermore, defendants point out that the Ports have independent authority to
19 address safety and security issues, granted by both of the city charters, which give
20 them the authority to make and enforce necessary rules and regulations governing
21 the Ports. Opp’n at 42. Moreover, defendants argue that the California Highway
22 Patrol’s “‘exclusive authority’ as a general matter over truck safety cannot
23 reasonably be construed to prohibit a landowner, whether private or public, from
24 adopting safety-related rules for vehicles seeking entry onto their property.” Opp’n
25 at 43.

26 Plaintiff next argues that the Supreme Court’s holding in Castle v. Hayes
27 Freight Lines, Inc., 349 U.S. 61 (1954), precludes the application of the safety
28 exception in this case. In Castle, the Court held that under the Federal Motor

1 Carrier Act, a state could not punish a motor carrier for repeated violations of safety
2 standards by suspending the motor carrier's right to engage in interstate commerce
3 over the state's roads. *Id.* at 63-64. However, this case was decided forty years
4 before the passage of the FAAA and the safety exception, and involved a
5 significantly different factual scenario than the one at issue.

6 In addition, plaintiff contends that the concession agreements do not fall
7 within the safety exception, because "the Ports concede that the Plans go beyond
8 safety and security to environmental regulation – a matter well outside the purview
9 of the claimed exception." Reply at 16. However, case law examining the safety
10 exception does not indicate that regulations have to have been passed for the
11 exclusive purpose of promoting safety. As long as the "purpose and intent . . . was
12 truly safety," the safety exception may apply. *See Tillison*, 406 F.3d at 1129.

13 Plaintiff also contends that the concession agreements do not fall within the
14 safety exception, because certain security measures, namely the Registry and the
15 Federal Transportation Worker Identification Credential ("TWIC") Program, will be
16 implemented regardless of whether or not the concession agreements are enjoined.
17 Reply at 18. However, this assertion is not sufficient to show that the concession
18 agreements could not fall within the safety exception. Defendants have indicated
19 that "the security measures that are integrated into the concession contracts cannot
20 be implemented independently of the concession program" and that delays in
21 implementation of the concession contracts "will result in further delay in the Port's
22 ability to implement security measures protecting the Port and will make it
23 impossible to rapidly and effectively mitigate a known security vulnerability."
24 *Opp'n* at 48; Declaration of John R. Holmes ¶ 44.

25 Finally, plaintiff's argument that the Ports' security regulations are preempted
26 by regulations of port security contained in § 102 of the Maritime Transportation
27 Security Act (codified at 46 U.S.C. §§ 70107-17) and the Security and
28 Accountability for Every Port Act of 2006 (Pub. L. No. 109-347) is not persuasive.

1 Plaintiff argues that these regulations occupy the entire field of port security, but yet
2 plaintiff only identifies one provision covering port trucking, which merely directs
3 the Secretary of Homeland Security to implement a threat assessment screening
4 device for drivers accessing ports. See 6 U.S.C. § 924. Although the legislative
5 history shows some intent to preempt state regulations that *conflict* with these
6 federal regulations, it does not evince any intent to preempt all state regulations not
7 inconsistent with the regulations in the field of port trucking. See Fed. Reg. 60448,
8 60468 (Oct. 22, 2003). (“We have determined that it would be inconsistent with the
9 federalism principles stated in the Executive Order to construe the MTSA as not
10 preempting State regulations that conflict with the regulations in this final rule.”)

11 Based on the foregoing, the Court finds that the defendants have shown that
12 there is a significant probability that the concession agreements fall under the safety
13 exception to the FAAA, and that they may therefore be saved from preemption. As
14 a result, the Court finds that plaintiff has failed to show any, and certainly not a
15 substantial, likelihood of success on the merits.

16 **B. IRREPARABLE HARM**

17 Plaintiff argues that its members will suffer irreparable injury if the
18 concession agreements are not enjoined. Much of the harm that plaintiff alleges
19 stems from the costs in complying with the concession agreements. For example,
20 plaintiff alleges that ATA members who sign the concession agreements will have
21 to incur the costs needed to “prepare parking and maintenance plans, purchase
22 placards and identification technology, and undertake administrative tasks relating
23 to truck maintenance, truck safety and operations, driver health insurance, driver
24 credentials, and financial capability.” Mot. at 27. Furthermore, they claim that
25 “ATA members that refuse to sign the Concession Agreements will suffer
26 immediate direct financial loss.” Mot. at 25. However, although plaintiff might
27 incur various forms of costs from the implementation of the concession agreements,
28 “monetary injury is not normally considered irreparable.” L.A. Mem'l Coliseum

1 Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir.1980). Therefore,
2 to make a showing of irreparable harm, plaintiff will need to show harm beyond
3 monetary injuries.³

4 Plaintiff alleges that two types of non-monetary harm will result if the
5 injunction is not granted. First, plaintiff alleges that if an ATA member chooses not
6 to sign the concession agreement, its subsequent inability to access the ports will
7 cause their ongoing relationship with their customers to suffer, and as a result, they
8 will lose goodwill and the reputation they have built up with their clients. Mot. at
9 26. The Ninth Circuit has held that injury to goodwill and reputation can indeed
10 constitute irreparable harm. Rent-A-Center Inc. v. Canyon Tele. & Appliance
11 Rental, Inc. 944 F.2d 597, 603 (9th Cir. 1991); Citicorp Services, Inc. v. Gillespie,
12 712 F. Supp. 749, 754 (C.D. Cal. 1989).

13 However, in this case, although there is some chance that ATA members
14 could experience a loss of goodwill, the possibility is speculative and not sufficient,
15 alone, to constitute irreparable injury. First, it is significant to note that the loss of
16 goodwill plaintiff alleges will occur only if an ATA member chooses not to sign the
17 concession agreement. Thus the loss of goodwill is avoidable if ATA members
18 choose to sign the agreement, knowing that, if plaintiff's action is ultimately
19 successful, they may receive financial compensation for the injuries incurred. C.f.
20 Citicorp Services, Inc. v. Gillespie, 712 F. Supp. 749, 754 (C.D. Cal. 1989)
21 (plaintiff would suffer irreparable injury from loss of goodwill from being *barred*,

22
23 ³ Plaintiff argues that, because defendants "threaten to foreclose such relief by
24 invoking their Eleventh Amendment rights as to tidelands trustees for California," ATA
25 members may not be able to recover monetary damages. Reply at 24. Because the Court
26 has herein found that defendants are not likely to succeed on the tidelands trust argument,
27 the Court finds that damages for monetary injury are unlikely to be foreclosed. Plaintiff
28 also argues that "immediate financial harms would be irreparable" because Supremacy
Clause actions only bring injunctive and declaratory relief. Mot. at 28. However, plaintiff
does not provide any support for this proposition, and the Court believes that monetary
relief will be available to ATA members under some theory.

1 *by statute*, from entering the escrow transactions market in California). It is not
2 clear how many ATA members would actually choose to not sign the concession
3 agreements. Plaintiff has only submitted one declaration from a motor carrier
4 executive evincing any intent to forgo signing a concession agreement; however, the
5 declarant only “tentatively” intends to forgo signing the Los Angeles concession
6 agreement, and not the Long Beach concession agreement, due to the Los Angeles
7 concession agreement’s requirement that motor carriers transition to an all-
8 employee workforce. Declaration of Gregory L. Owen ¶ 32. This particular
9 provision does not take effect fully until December 2013, with the first incremental
10 step (20 percent employee workforce) not implemented until December 2009. See
11 LACA at 3. Because this provision is significantly delayed in taking effect, and
12 motor carriers can make their decision on whether to sign the concession
13 agreements in the interim, plaintiff’s argument that loss of goodwill will result from
14 failure to immediately enjoin the agreement is too speculative to justify immediate
15 injunctive relief.

16 Likewise, plaintiff’s second argument for non-monetary injury – that motor
17 carriers might be driven out of business if they choose to sign only the Long Beach
18 agreement, but not the Los Angeles agreement – is also insufficient, because the
19 only reason cited for this potential outcome is the Los Angeles independent
20 contractor phase-out. See LACA at 3; Reply at 23-24. Again, because this does not
21 begin to take effect for another year, plaintiff has not shown that a preliminary
22 injunction is necessary to prevent motor carriers from suffering irreparable harm
23 caused by going out of business.

24 Plaintiff also argues that because the concession agreements violate the
25 Supremacy Clause of the Constitution, harm should be presumed. The Ninth
26 Circuit has indeed stated that “unlike monetary injuries, constitutional violations
27 cannot be adequately remedied through damages and therefore generally constitute
28 irreparable harm.” Nelson v. Nat Aeronautics & Space Admin, 530 F.3d 865, 882

1 (9th Cir. 2008). However, the court has indicated that this presumption is not
2 automatic. See, e.g., Associated Gen. Contractors, Inc. v. Coalition for Economic
3 Equity, 950 F.2d 1401, 1412 (9th Cir. 1991) (indicating that it is the court's role to
4 determine whether a party alleging a constitutional infringement "is entitled to such
5 a presumption of harm"); Monterey Mech. Co. v. Wilson, 125 F.3d 702 ("We have
6 stated that an alleged constitutional infringement will *often* alone constitute
7 irreparable harm.") (emphasis added). In the case of Supremacy Clause violations,
8 such a presumption is not necessarily warranted. For example, in Golden Gate
9 Restaurant Ass'n v. San Francisco, in which plaintiffs challenged a municipal
10 ordinance on the grounds that it was preempted by the federal Employee Retirement
11 Income Security Act, the Court did not presume irreparable injury and instead held
12 that plaintiff's injury was "entirely economic." 512 F.3d 1112 (9th Cir. 2008).

13
14 Courts have generally held that a presumption of harm is warranted in cases
15 where there was also an actual harmful effect. For example, in Nelson, the Court
16 held that harm should be presumed. In that case, plaintiffs faced a choice of either
17 losing their jobs, or keeping their jobs and being forced to submit to a potentially
18 unconstitutional background check, both of which, the court concluded, constituted
19 actual irreparable harm. 530 F.3d at 882. Likewise, in Citicorp, the Court stated
20 that a presumption of irreparable harm was "warranted" in part because the plaintiff
21 had shown actual irreparable harm. 712 F.Supp. at 753-54. Because plaintiff has
22 not shown sufficient irreparable harm in this case, a presumption of irreparable
23 harm is not warranted.

24 C. BALANCE OF HARDSHIPS

25 The balance of hardships in this case weighs in favor of defendants. The
26 Ninth Circuit has indicated that injuries involving "preventable human suffering"
27 outweigh those that are entirely economic. See Golden Gate Restaurant, 512 F.3d at
28 1125. As discussed herein, plaintiff has shown what is principally monetary harm

1 that will probably result from implementation of the concession agreements.

2 Defendants, by contrast, could stand to incur significant non-monetary
3 irreparable harm if the concession agreements, and the safety and environmental
4 protection measures they contain, are enjoined. For example, although plaintiff
5 argues that certain security-related provisions, such as the TWIC and the Registry,
6 will be implemented regardless of whether the concession agreements are enjoined,
7 the Ports nevertheless may experience significant hardships without the agreements,
8 because the agreements allow the Ports to directly enforce the various security
9 provisions against individual motor carriers, and to hold motor carriers responsible
10 for the actions of their drivers. See, e.g., Holmes Decl. ¶ 42-43. Furthermore,
11 enjoining the concession agreements may hinder the ability of the Ports to hold
12 motor carriers responsible for failure to comply with the Clean Trucks Program.
13 See, e.g., Knatz Decl. ¶ 31. Because a compromise in Port security and in the
14 ability to enforce the Clean Trucks Program could both potentially lead to
15 “preventable human suffering,” the Court concludes that the balance of hardship
16 tips in favor of defendants. See Golden Gate, 512 F.3d at 1125.

17 **D. PUBLIC INTEREST**

18 Here, the public interest, like the balance of hardships, weighs in favor of
19 denying an injunction. The public has a significant interest in ensuring that the
20 Ports are safe from security concerns. Enjoining the concession agreements would
21 have the potential to compromise security measures contained therein, which could
22 significantly harm the public interest in secure ports. Furthermore, the public also
23 has an important interest in ensuring that the environmental benefits from the Clean
24 Trucks Program are implemented, and enjoining the concession agreements could
25 limit defendants’ ability to enforce provisions of the program. See Opp’n at 49.
26 Granting an injunction, by contrast, would not serve the public interest in any
27 significant way.

28 **IV. CONCLUSION**

1 Plaintiff has not demonstrated a likelihood of success in showing that there is
2 not an exception to preemption under the FAAA by reason of the safety exception.
3 Furthermore, plaintiff has not demonstrated that failure to grant the injunction will
4 result in irreparable injury. Finally, the balance of hardships and the public interest
5 tip decidedly in favor of denying the injunction. For the foregoing reasons, the
6 Court DENIES plaintiff's motion for preliminary injunction.

7 IT IS SO ORDERED.

8
9
10 Dated: September 9, 2008


CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE